

# Making reconciliation work: the role of parliaments



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## **Acknowledgements**

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A number of parliaments of countries that, in one way or another, have had to address issues relevant to the subject of the handbook also provided valuable inputs. Additional editing and comments were provided by the Inter-Parliamentary Union and the International Institute for Democracy and Electoral Assistance.

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## Foreword

An effective parliament is vital to the success of any transition from conflict to peace. Yet in many post-conflict situations, parliament no longer exists or has only recently been restored. In the latter case, its capacity to respond to the daunting challenges of reconciliation is often limited. A parliament which is truly representative of all components of society and which offers a national platform for a free and open exchange of views, is in itself an important sign that reconciliation is under way. It is also an important factor in consolidating the reconciliation process.

The Inter-Parliamentary Union (IPU) and the International Institute for Democracy and Electoral Assistance (International IDEA) have decided to publish a concise guide to provide some insights into the particular role played by parliaments in countries which have experienced or are going through transition from conflict, and to highlight the pitfalls to be avoided on the road to reconciliation.

While periods of transition are often characterised by a wide array of economic, social and political challenges, one challenge in particular appears to have an unrivalled impact on the success or failure of reconciliation: How does a nation deal with a legacy of extensive human rights abuse. The Handbook seeks to provide some responses to this question. It does so by setting out the moral, legal and political dilemmas most commonly associated with democratic and post-conflict transitions, by exploring the meaning of reconciliation and by highlighting the use of transitional justice mechanisms. Most importantly, it examines ways in which parliaments can foster reconciliation in their own countries in times of transition, and highlights what other parliaments can do to contribute to reconciliation.

We would like to express our sincere gratitude to Mr. Mark Freeman, the author of the Handbook, for producing such a clear account of the challenges inherent in reconciliation. We also wish to thank the parliaments that submitted valuable comments and suggestions throughout the drafting process. These contributions enriched the text considerably and made it possible to reflect the diversity of experiences.

We trust that parliaments and other stakeholders will find this Handbook useful in their noble efforts to promote reconciliation processes and contribute to harmony and peaceful coexistence within countries. We hope that it will stimulate decisive action and further reflection on how to ensure that the wounds of the past can be addressed and healed, rather than being denied or concealed. Only then can a viable future take root.



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# I. Dilemmas of transition

## A. Types of transition

This handbook examines the issue of reconciliation in two contexts: transitions from authoritarian rule to democracy, and transitions from war to peace. Since the early 1970s, the world has witnessed a series of transitions to democracy - predominantly in southern Europe in the 1970s, in Latin America in the 1980s and in Africa and Eastern Europe in the 1990s. During the same period, the world has also seen many countries pass through periods of civil war.

In some cases, the return to democracy or peace has been rapid and unconstrained. For example, this was the case when Greece returned to democratic rule in the 1970s. There, the former military rulers had lost the public's confidence, and the successor government had a history of democratic governance to fall back on. Other democratic and post-conflict transitions have been slower and more partial. For instance, the return to democratic rule in Chile in the 1990s included the election of a civilian president, but left intact a powerful military structure, including General Augusto Pinochet, who had led the country during the period of undemocratic rule.

The pace and depth of a transition often reflects its proximate cause. In some cases, transitions have been catalyzed by external intervention (for example, in Iraq). In others, they have been effected by way of negotiation - sometimes with the formal participation of international bodies such as the United Nations (as in Guatemala), and without it (as in Ghana), and sometimes with the concession of a broad amnesty (Sierra Leone) and other times without one (Portugal). In still other cases, transitions have been primarily initiated or prompted by, *inter alia*, an armed rebellion (South Africa), a referendum (Chile), a scandal (Peru) or an ordinary election (Serbia and Montenegro).

The path of each transition - whether as a result of intervention, negotiation or armed rebellion, etc. - determines to a large extent the prospect of consolidating democracy or peace and, in turn, the likelihood of advancing reconciliation. Yet it would be irresponsible to make broad generalisations. Each transition, like each country, is unique.

## B. Common dilemmas and responses

Despite their differences, successor governments in democratic and post-conflict transitions often grapple with a similar set of moral, legal and political challenges. Foremost among these is the question of 'what to do about the past'.

Countries emerging from periods of armed conflict or authoritarian rule have typically suffered significant violations of human rights and humanitarian norms. Sometimes the scale of the abuse has been massive (e.g. Cambodia), in other places less so (e.g. Panama). Sometimes the duration of war or tyranny has been long (e.g. Sri Lanka), other times not (e.g. Madagascar). Sometimes the worst violations have occurred long before the formal transition (e.g. Spain), in other cases they have continued right up to the moment of transition (Timor-Leste). Sometimes the lion's share of violations have been committed by state actors (El Salvador), in other cases by non-state actors (Sierra Leone),

and in still other cases more or less equally by both sides (Mozambique). But in all instances, successor governments face the dilemma of what to do about the legacy of violations.

«Transitional justice» is the field that has developed as a response to this dilemma. The aim of transitional justice is to confront legacies of abuse in a broad and holistic manner, encompassing criminal justice, restorative justice, social justice and economic justice. It recognises that a responsible justice policy must include measures that seek to achieve both accountability for past crimes and prevention of new crimes. It also recognises that the demand for criminal justice is not absolute, but instead must be balanced with the need for peace, democracy, equitable development and the rule of law.

The reality is that countries recovering from periods of mass abuse face the almost certain prospect of «flawed justice». In a significant number of cases, transitional governments are effectively forced to choose between justice and the continuation of peace, or justice and the maintenance of democracy. Even where such threats are less prominent, the massive scale of past abuse, the weakness of the local justice system, the adoption of amnesty laws, and severe limitations in relation to human and financial resources often make ordinary justice impossible: invention and compromise become dual imperatives. For the fact is that justice systems are designed for crime as an exception, not as a rule. If crime becomes the rule, no system is robust enough to cope. Consequently, in most, if not all, transitional justice contexts, other accountability tools will be required, going well beyond the courts.

In theory and in practice, transitional justice focuses on four main instruments or mechanisms: trials (whether civil or criminal, national or international, domestic or foreign); fact-finding bodies (including truth commissions and similar national and international bodies); reparations (whether compensatory, symbolic, restitutive, or rehabilitative in nature); and justice reforms (including reforms of laws, institutions and personnel). Transitional justice also encompasses other topics, including those related to amnesty, corruption, disarmament, and, of especial importance to this handbook, reconciliation. All of these mechanisms and subjects are examined below with specific reference to the role of parliaments.

## **C. Key lessons learned**

Because successor governments in democratic and post-conflict transitions confront such a broad array of challenges, the pursuit of justice for past crimes may appear to be a luxury or even a danger. Indeed, there is a great temptation to focus on immediate economic and social needs and to sidestep the course of justice.

A key lesson learned from past experiences, however, is that in most cases the pursuit of transitional justice is highly beneficial. With rare exception, the most «successful» democratic and post-conflict transitions have been those in which successor governments have, at some risk, and against the odds, made a genuine attempt to confront past abuses. One thinks, above all, of places such as Argentina, Chile, Germany, Greece, Peru and South Africa. Admittedly, transitional justice measures in these nations have been, as much by necessity as by design, partial and incomplete. Yet the fact that governments in these countries did not completely disregard the worst injustices of their past has arguably helped rather than hurt them.

In examining these cases, as well as history's more «unsuccessful» examples, a number of important lessons become apparent.

#### ❖ **Make the most of «transitional moments»**

First, successor governments should generally endeavour to make the most of «transitional moments», when significant international resources are targeted at, and attention is focused on, the country (for example while a United Nations peace-building mission is present) and when political support and social backing for transitional justice measures are often at their height. This does not mean, for instance, that trials and truth commissions must commence immediately. Indeed, gradualist approaches to transitional justice generally fare best. What it does mean, though, is that successor governments ought to begin to deal with the legacy of abuse that they inherited as soon as practicable.

#### ❖ **Ensure real justice**

Second, successor governments should not put expediency ahead of principle in addressing past crimes. If there is to be a true break with the past, justice must be meted out differently - and must be seen to be meted out differently. In many Eastern European countries in the 1990s, suspected members of the old communist order were frequently purged (or «lustrated») from public positions without due process being observed. The measures unnecessarily damaged the moral legitimacy of the new governments, both at home and abroad.

#### ❖ **Create realistic expectations**

Third, successor governments should generally endeavour to keep public expectations in check. In democratic and post-conflict transitions, much can go wrong - important trials can be lost, truth commission recommendations can be ignored, victim compensation can be unaffordable and reconciliation can be slow or superficial. Successor governments should therefore be careful in what they promise. Public support can quickly turn to disillusionment in the earliest stages of a transition.

#### ❖ **Ensure an effective package of transitional justice mechanisms**

Fourth, successor governments should not lose sight of the complex relationships existing among transitional justice mechanisms. For instance, it may or may not be desirable: to allow sharing of information between courts and truth commissions; to commence trials before a disarmament, demobilisation and reintegration process has concluded; or to empower a truth commission to grant an amnesty or to provide compensation. These and other issues deserve careful consideration from the outset so as to ensure complementary rather than conflicting relationships between mechanisms and to guard against public confusion over their purpose and operation.

Ultimately, however, the best and perhaps only prescription that can be given to successor governments is to pursue as much transitional justice as possible - but only as much as is prudent. Although this will sometimes involve deferring or sacrificing the rights of individual victims in favour of collective goals such as peace, economic development and democratic consolidation, the paramount concern of successor governments must be to avoid a return to the past. For there is no way to get around the fact that without peace and democracy, most of the fundamental goals of transitional justice - reconciliation included - cannot begin to be attained.



## II. Approaches to reconciliation

### A. What reconciliation is and what it is not

Invariably, the term reconciliation arises in public discourse during periods of democratic and post-conflict transition.

In discussing the meaning of reconciliation, the most common distinction made is between «interpersonal» (or individual) reconciliation and «communal» (or national) reconciliation. Interpersonal reconciliation is perhaps the most profound form of reconciliation. Where successful, it can have an emotionally or spiritually healing effect on both the victim and the victimiser. On the whole, though, it is relatively rare. Communal reconciliation - whether between neighbouring communities or opposing ethnic, religious or political groups - is a more abstract concept. Indeed, phrases like «national reconciliation» can at times appear excessively vague. But there can be no doubt that both kinds of reconciliation periodically occur.

There is broad agreement that the pursuit of reconciliation is a long-term process. Depending on the particular context and one's place within it, the process can begin at different points. For some, reconciliation may start at the negotiation table; for others, when perpetrators are tried and convicted; or when compensation is paid; or when an apology is offered. But if there are many starting points, there is no clear ending point. The process is ongoing, especially in countries where the effects of war or state terror have been deep and lasting.

A publication produced by the International Institute for Democracy and Electoral Assistance (International IDEA) entitled *Reconciliation After Violent Conflict: A Handbook*, describes the most important lessons pertaining to the subject of reconciliation. It recognises that there is no single route to reconciliation, that one cannot judge an entire reconciliation process as a «success» or «failure», and that reconciliation needs to be grounded in the local context and driven by local actors. It also notes that there are three key phases in a reconciliation process: the removal of fear, the building of confidence and trust, and the creation of empathy.

### B. Reconciliation and transitional justice

The term reconciliation is closely associated with the field of transitional justice. Yet the relationship between reconciliation and transitional justice is complex and often tense.

Consider the relationship between prosecutions and reconciliation. There is some evidence to suggest that victims are less prone to reconcile in the absence of some effort to hold perpetrators accountable for their crimes. Prosecutions may help to individualise guilt, thereby reducing stereotyping and guilt by association of members of a group. Prosecutions can also help to dispel harmful myths and historical distortions which may generate resentment on the part of the victim and form the basis of future conflicts. For example, statements by nationalist Serb leaders belatedly acknowledging the massacres at Srebrenica have been partly attributed to the work of the International Criminal Tribunal for the former Yugoslavia. Under certain circumstances, however, prosecutions can complicate important disarmament, demobilisation and reintegration programmes by causing

the leaders of rebel or insurgent forces to resist the dismantling of their armies. Similarly, efforts to end ongoing conflicts or to persuade powerful undemocratic regimes to relinquish power (thereby creating the possibility for some form of reconciliation) may in some cases be complicated by an absolute insistence on prosecution. Prosecutions embarked on for expedient political purposes can also be perceived as unjust, vengeful and one-sided, thereby reinforcing animosities and resentment.

Consider also the relationship between truth and reconciliation. Many assert that it is necessary to know the truth in order to advance reconciliation. Indeed, the reason many truth commissions have been entitled «truth and reconciliation» commissions partly stems from the notion that uncovering the truth will lead to reconciliation. But the experience in most if not all places is that the work of truth commissions, no matter how laudable, does not have this effect. Far from being a guarantor of reconciliation, truth is only one possible ingredient in advancing reconciliation. In fact, to promote the idea that truth-telling and truth commissions automatically generate reconciliation is likely both to deceive the public and create the appearance of a failed commission.

The relationship between reparation measures and reconciliation is equally complex. The vast majority of transitional justice contexts are characterised by conditions of severe poverty. If in these contexts compensation is allocated on an unprincipled basis or used as a form of political patronage, it can produce division and conflict, for example by excluding obviously eligible classes of victims. Indeed, such exclusion can serve to complicate reconciliation efforts and lead to a sense of historical grievance. Similarly, if reparation payments fall under a certain level or are based on overly restrictive terms and conditions, victims may view them as unsatisfactory, or worse, as «blood money», thus undermining the very purpose of reconciliation. Such unwanted consequences can, however, be mitigated by presenting compensation as a gesture of recognition of harm endured, and not as a form of full reimbursement for such harm. Victim satisfaction can also be improved by adopting a more comprehensive approach that includes not only diverse reparation measures (such as official apologies and public monuments) but also parallel demonstrations of concern for victims (for example the establishment of criminal trials and truth commissions).

As for the relationship between justice reforms and reconciliation, there is evidence that an absence of real reform may deepen distrust of government institutions and call into question the commitment of the authorities to deal with the underlying causes of past conflict or repression. For example, in cases of horizontal conflict, where the state itself fuelled and facilitated abuse, an absence of reform may limit the extent to which a group that has borne the brunt of state-sponsored violence is prepared to disarm, demobilise and reintegrate. Real reform builds trust, and trust is an indispensable part of reconciliation.

In summary, it is fair to say that transitional justice measures, if prudently and fairly conceived and executed, generally facilitate the process of reconciliation. It is true that reconciliation might depend as much or more on other factors, such as an improved economy, fresh elections, the passage of time, or the influence of local healing customs and rituals. At the same time, though, this should not diminish the resolve of successor governments to confront the causes and consequences of past violations. For the fact is that when perpetrators are held to account, when facts are openly investigated, when apologies are made and compensation is paid, and when abusive institutions are reformed, reconciliation stands a better chance of success.

## III. How parliaments can contribute to reconciliation in their countries

### A. General role of parliaments

A primary role of the parliament in any country is, of course, to enact legislation. But the role of the parliament extends well beyond that: parliaments also serve as a check on the executive branch, and are responsible for the adoption of the state budget. Moreover, the institution and functioning of parliament itself has special importance in a reconciliation process, for the following reasons:

Firstly, the parliament is the national debating chamber where different views, interests and concerns can find expression and be steered towards solutions for the common good. This is a two-way street: the people relay their wishes and opinions to their representatives, who in turn seek to share with and explain to those they represent the outcome of the parliamentary debate. As part of this interaction, parliamentarians fulfil a role as opinion leaders who can initiate and steer a public debate on pressing issues and can play an effective role in the promotion of tolerance and reconciliation.

Of course, all of this may not be realistic in the early aftermath of a conflict. In such cases, a parliament may no longer exist or, if one is still in place, it may be seriously weakened and limited in its capacity to respond to the challenges of reconciliation. Ensuring the presence of an effective parliament is clearly a challenge in most, if not all, transitions, and highly relevant to any reconciliation process. In this regard, making the parliament into the national platform for a free and open exchange of views is in itself an important sign that reconciliation is under way, along with being an important element in consolidating the reconciliation process.

Secondly, if the parliament's membership is truly reflective of society, the parliamentary debate and its outcome will stand the best chance of being endorsed by the people. This means first of all that men and women should have an equal say in the management of the country's future. Often this point may require special action so as to ensure that women's chances of obtaining a position in parliament are enhanced and to guarantee that in parliament responsibilities are shared equally between men and women. Moreover, an all-inclusive reconciliation process means that all sectors of society, in particular those most affected by the conflict, but also those which may have been at fault, have an opportunity to take part in the decision-making process.

### B. Specific opportunities for national parliaments

In democratic and post-conflict transitions alike, parliaments have a very significant part to play in advancing reconciliation. This section of the handbook examines some of the most important opportunities for national parliaments during such periods.

#### *Truth commissions and similar bodies*

The mechanism most closely associated with transitional justice is the truth commission. Truth commissions are temporary non-judicial fact-finding bodies, and usually operate for periods of one

year. Typically, they are established and empowered by the State, usually in times of democratic or post-conflict transition. Truth commissions focus on the investigation of patterns as well as specific instances of human rights abuse committed during a defined period. They operate in a victim-centred fashion, and usually conclude their work by delivering a final report containing conclusions and recommendations. More than two dozen truth commissions have been established around the world since 1974, although they have gone by many different names. The most prominent and influential commissions have been those of Argentina, Chile, Guatemala, South Africa and, most recently, Peru.

While truth commissions may not be appropriate in every context, they have the potential to assist societies in transition. Under optimal conditions they may help to establish the truth about the nature and scale of past violations of human rights and humanitarian law, and serve as a guard against nationalist or revisionist accounts of the past. They may foster the accountability of perpetrators by collecting and preserving evidence and publicly identifying those responsible. They may recommend detailed victim reparation programmes and necessary legal and institutional reforms. Truth commissions can also provide a public platform for victims to address the nation directly with their personal accounts. They can inform and catalyse public debate on how to deal with the past and how to ensure a better future. And they can cultivate reconciliation and tolerance at the individual and national levels. At the same time, there are many external factors that can limit the attainment of these potential benefits, including a weak civil society, political instability, victim and witness fears about testifying, a fragile or corrupt justice system and the distraction of ongoing violations.

Parliaments can play many key roles in relation to truth commissions. They can enact legislation establishing the commission, participate in the appointment of individual commissioners, provide financial support during the commission's operational phase, and implement the recommendations contained in its final report.

Only a small number of truth commissions have been directly established by parliaments, namely those of Uruguay (1985), Germany (1992), South Africa (1995), Sierra Leone (2000, in accordance with the 1999 Lome Peace Accord), Ghana (2002) and Paraguay (2003). But this list conceals as much as it reveals. In fact, in a number of cases, commissions have been created by the executive branch - but pursuant to a Commonwealth-style «commission of inquiry» statute previously enacted by the national parliament. The truth commissions of Uganda (1986), Nepal (1990) and Nigeria (1999), for example, were created in this manner. Thus, parliaments have played a much more significant role in establishing truth commissions than is often appreciated. Still, because stark divisions within parliament are common in transitional contexts, parliaments may not always be an available or appropriate sponsor of truth commission legislation. The advantage of parliament's role, however, is that, in some countries, it may be able to authorise important investigative powers (such as search and seizure powers and subpoena powers) that are outside the constitutional jurisdiction of the executive branch.

Perhaps more than any other factor, the choice of the persons appointed as commissioners of a truth commission determines its ultimate success or failure. The key lesson from past commissions has been that an inclusive and consultative selection process is essential in order to achieve domestic and international support.

## **Box 1:**

### **An inclusive and consultative approach to commissioner selection**

In order to select the members of the South African Truth and Reconciliation Commission (TRC), a selection committee was formed that included representatives of non-governmental organisations and members of the political parties represented in the parliament. The committee called for nominations from the public, and ultimately received some 300, which it then trimmed down to 50 for interviews. These interviews took place in public session, and were closely followed by the press. The selection committee eventually established a list of 25 candidates, which it sent to President Nelson Mandela for final selection. Similarly, consultative procedures involving parliamentarians were used to appoint commissioners to the truth commissions of Sierra Leone and Timor-Leste.

Although important, a good mandate and appointment process may not ensure the success of a truth commission if it lacks adequate funding. On average, truth commissions cost anywhere from US\$ 3 to 10 million. Especially in cases where a truth commission has been established by the legislature, the bulk of funding for the commission generally comes from parliament. But in many cases, resources may also be obtained from donor States and private foundations.

Often, the defining moment for a truth commission is the completion and publication of its final report. In addition to findings of fact, final reports include detailed recommendations aimed at providing assistance or redress to victims and introducing legal and institutional reforms to prevent future relapses into war or authoritarian rule. Many commissions recommend victim reparation programmes, the removal of abusers from the police and military and amendments to the criminal codes to bar the use in courtrooms of confessions obtained through torture. In implementing recommendations such as these, parliaments have a key legislative role to play. Unfortunately, the record on implementation of recommendations is discouraging, even in instances where there has been a legal obligation to do so. One of the main causes of non-implementation appears to be a lack of political will. But even when sufficient political will exists, there may not be enough institutional capacity or funds. One strategy that has been adopted to ensure better implementation of recommendations is the establishment of an official follow-up body after the dissolution of the truth commission.

## **Box 2:**

### **Sierra Leone's follow-up to truth commission recommendations**

The Parliament of Sierra Leone had the foresight to require the establishment of an official follow-up body in the legislation creating the truth commission in that country. Its responsibility will be «to monitor the implementation of the recommendations of the Commission and to facilitate their implementation». The Government will be required to provide quarterly reports to the body, summarising the steps that it has taken to implement the recommendations. For its part, the follow-up committee will be required to publish the reports of the Government and to submit quarterly reports to the public evaluating the efforts of the Government in regard to implementation.

In addition to truth commissions, there are other fact-finding mechanisms that in some transitional contexts may constitute the only available or most appropriate mechanism for inquiry. Mention has already been made of Commonwealth-style commissions or tribunals of inquiry. They generally possess subpoena powers and the authority to conduct public and in camera hearings. Although established at the impetus of governments, commissions of inquiry are intended to be independent. For this reason, they are often presided over by acting or former judges. The essence of these commissions is their mandate to inquire into and to report on events or issues of public importance, often in response to proven or alleged human rights abuses.

Parliaments may also establish their own inquiries. Typically, such inquiries comprise members from a cross-section of political parties, and have broad investigative powers.

Lastly, parliaments may create and fund other investigative bodies, ranging from national human rights commissions, to ombudsmen's offices to victims' commissioners to coroners. Such bodies may make significant contributions to truth and reconciliation in transitional contexts.

## **What you can do as a parliamentarian**

### **Truth commissions**

- Make sure that there is a parliamentary debate on the desirability and feasibility of establishing a truth commission;
- Ensure that, when it is decided to create a truth commission, any legislation to this effect clearly sets out:
  - its mandate and objectives.
  - its powers and rules of procedure;
  - an inclusive and consultative selection process for the commissioners;
  - a timeframe for completing its work;
  - adequate funding;
  - working relationships with other institutions and (transitional) mechanisms;
  - a follow-up mechanism to ensure the implementation of the commission's recommendations;

It is absolutely essential that both men and women play an equal part in the parliamentary debate, the selection of the commissioners, the work of the truth commission and any follow-up action.

### **Other initiatives**

- Should the establishment of a truth commission be considered inappropriate or unfeasible, ensure that there is a parliamentary debate on other options such as «commissions of inquiry» or parliamentary inquiries, ensure that any legislation in this regard is clearly defined (see essential elements under «truth commissions», above);
- Ensure the creation and funding of other investigative bodies (such as national human rights commissions, ombudsmen or victims' commissioners).

## Reparation

In the face of widespread violations of human rights and humanitarian law, States have the obligation not only to act against perpetrators but also to act on behalf of victims. Given the unlikelihood of mass prosecutions in transitional contexts, a complementary way to address victims' claims for justice without endangering the transition is to try to repair some of the harm suffered directly. The motivations for reparation measures, whether they are material or symbolic, are many. Reparation measures provide recognition to victims, both collectively and individually. They can foster a collective memory of past abuse and social solidarity with victims. They can provide a concrete response to calls for remedy and help to promote reconciliation by restoring victims' confidence in the State.

### **Box 3:**

#### **Reparation efforts in Argentina and Chile**

A first Argentine reparation law was enacted by the legislature in 1991, largely in response to litigation brought by former political prisoners before the Inter-American Court of Human Rights.

The programme provided benefits to approximately 10,000 former prisoners and an estimated 1,000 individuals who had been forced into exile. Payments were calculated based on the highest daily salary in the Argentine civil service, at a rate of US\$ 74 for each day in exile or prison and up to a maximum of US\$ 220,000. In 1994, the legislature enacted another law, partly in response to large damage awards being made by domestic courts. The new law extended reparations to families of the disappeared, including those named in the Argentine truth commission's final report and any others able to prove their entitlement.

Approximately 15,000 families were entitled to receive a lump sum payment of US\$ 220,000, or the equivalent of 100 months' salary of the highest paid civil servant. The payment was made in the form of state bonds, which were often immediately cashed for less than face value. Children of the disappeared received their monthly pension of US\$ 140 until the age of 21.

In Chile reparation focused on the families of the disappeared and killed. The Chilean legislature's reparation law went beyond cash payments, to include medical benefits for families, free tuition for children of those who disappeared or were killed, renunciation of mandatory military service, reinstatement of retirement pensions and the waiving of certain taxes.

Material forms of reparation present particularly difficult moral, legal and political challenges - especially when State-sponsored victim compensation programmes with massive coverage are involved. Such programmes involve complex questions of design. Decisions are required about who the victim or beneficiary class will be, and whether to award compensation to individuals for personal suffering or to groups for collective harm endured. Decisions must also be taken on whether to structure material reparation as service packages (for example by providing special medical, educational or housing benefits), cash payments or a combination of both, and what kinds of harm to cover, whether economic, physical or emotional. Whether compensation should be based on harm, need or a mixture of the two must also be decided. Similarly, consideration must be given to how to quantify the harm

(for example, how much should be paid to a victim who has lost an eye as opposed to a rape victim), how much compensation to provide (whether or not the amount should be identical for each beneficiary) and how to distribute compensation (for example, if payment is done in cash should there be one lump sum payment, or multiple periodic payments, and, in either case, by what body). Difficult decisions are also required about how to fund the programme, given that it must often compete with other social programmes under conditions of relative poverty.

Most victim reparation programmes established around the world have been set up by parliaments. These include programmes established in Germany (for Holocaust survivors), Chile (for families of the disappeared and killed), Argentina (for various victims of military repression), Brazil (for families of the disappeared), Malawi (for victims of the regime of President H. Kamuzu Banda), Sri Lanka (for families of the disappeared) and the United States of America and Canada (for Second World War ethnic Japanese internees), to name but a few examples. The mandate, scope and operation of these programmes vary widely.

### **What you can do as a parliamentarian**

- Ensure that there is a parliamentary debate on reparation, and that any such discussion takes direct account of the views of victims;
- Ensure that effective legislation is adopted which provides for the widest possible reparation, including:
  - the compensation of victims of human rights violations;
  - measures providing for the restitution of the rights and rehabilitation of victims;
  - symbolic reparation initiatives.
- Ensure to this effect that any legislation concerning material compensation provides clear answers to or definitions of:
  - the beneficiary class;
  - the kind of harms covered (economic, physical or emotional);
  - whether compensation should be based on harm, need or a combination of both;
  - how to quantify the harm;
  - how much compensation to provide;
  - how it is provided (as service packages, cash payments or a combination of both);
  - how to ensure adequate funding for the reparation efforts and oversight of the spending of the allocated funds.

Notwithstanding the importance of material reparation, there are many other forms of victim reparation that, in some contexts, may have an equal or greater impact on the advance of reconciliation. For instance, in some contexts it may be important for a new government to seek to provide restitution of victims' legal rights or property. Examples of restitution might include: assistance to populations that have been forcibly transferred or have had land stolen; restoration of persons' liberty, social status, or citizenship rights; or reinstatement of persons in former positions of public employment. It may be important in some countries to offer dedicated rehabilitation programmes to victims as well, including emotional counselling, physical therapy or medical assistance. There is also a wide range of symbolic reparation measures that might be considered, both for individual victims (for example, personal



letters of apology from successor governments, or reburial of massacre victims) and for victimised groups (official acknowledgements of past abuse, dedication of public spaces and street names, creation of museums of conscience, or construction of public memorials and monuments etc). Most of these forms of reparation can and have been effected by domestic parliaments.

### **Justice reforms**

Countries emerging from war or state terror often need to adopt institutional, legal and policy reforms to prevent civic or democratic collapse in the future. The range of possible justice reforms is extremely broad.

Often the most immediate and important reform is the removal of corrupt and abusive officials from public sector positions through «vetting» procedures. In its most familiar form, vetting is the practice of removing individuals responsible for serious misconduct from the police and prison services and other public institutions. The vetting process typically involves a thorough background check of multiple sources of information and evidence. Those under investigation are made aware of the allegations against them and given an opportunity to contest the assertions in writing or in person. In this and other respects, vetting may be distinguished from lustration, a term used primarily in Central and Eastern Europe to refer to laws providing for wide-scale dismissal and disqualification based not on individual records, but on party affiliation, political opinion or association with a former secret service. Parliaments have a crucial role to play in ensuring that any vetting or lustration laws they enact avoid meting out punishment on the basis of collective guilt or violating the presumption of innocence. Regrettably, most past efforts by parliaments to introduce vetting or lustration legislation have conflicted with human rights principles, and, as a consequence, constitutional courts have often rejected them (this occurred, for example, in Hungary).

Although important, by itself, vetting is an incomplete solution to either punishing or preventing human rights abuse. Broader systemic reforms in the justice sector need to accompany vetting. For example, new institutions may need to be created, such as civilian oversight bodies to monitor the military, anti-corruption entities, specialised courts, and, as noted earlier, national human rights commissions and ombudsmen's offices. Human rights and anti-corruption training policies and programmes may also need to be established for police officers, soldiers, judges, prosecutors and civil servants in order to transform them from instruments of repression or indifference into instruments of integrity and public service. In addition, there are constitutional, legal and policy reforms that may be important in a wide range of areas, including land tenure, refugee protection, equality of pay, judicial appointment, tenure, promotion and discipline, whistleblower protection, electoral oversight, media independence, freedom of information, affirmative action and criminal law and procedure. Parliament may also have an important role to play in curricular reform, anti-racism training and the adoption of laws and policies to promote official multiculturalism.

In all of these areas, the role of parliament is obviously central. It can and must serve as a vehicle for reforms that will, individually and collectively, advance the causes of democracy, peace and reconciliation. Whether it is preparing an interim Constitution, creating guarantees for female and minority participation in the legislature, ensuring the implementation of treaties in domestic law or enacting hate speech prohibitions, parliament is uniquely placed to chart the proper course for the future.

## **What you can do as a parliamentarian**

- Consider the adoption of vetting or lustration legislation to ensure the removal of abusive or corrupt officials from public institutions, and make sure that such legislation is in line with relevant human rights standards;
- Help ensure the adoption of constitutional and legal reforms to consolidate democracy, human rights and the rule of law, by:
  - ensuring a competent, independent, impartial and effective justice system;
  - ensuring that parliament has all the necessary tools to carry out its essential functions, in particular in relation to the security sector;
  - promoting the creation of anti-corruption entities;
  - promoting the establishment of national human rights commissions and/or ombudsmen's offices;
  - promoting the development of human rights and anti-corruption training policies and programmes for state officials (including police officers, soldiers, judges, prosecutors and civil servants);
  - promoting school curricular reform and anti-racism training and the adoption of laws and policies to promote official multiculturalism;
  - ensuring media independence and freedom of information.

### **Amnesties**

Amnesties for human rights crimes are inherently controversial and problematic. There are many reasons for this. Amnesties can violate a victim's right to redress. They can subvert the rule of law. They can undermine specific and general deterrence. And, in most cases, they can promote public cynicism and disillusionment. At the same time, amnesties are a reality in the world - often avoidable only at great political and human cost. For instance, amnesties are frequently invoked by violent rebel movements as a precondition for disarmament and demobilisation (Sierra Leone) and by authoritarian or corrupt regimes as a precondition for a peaceful democratic transition (Haiti). Where circumstances of this nature are present, parliaments have a vital part to play. Above all, they can help to ensure that the possibility of an amnesty is considered only after less extreme alternatives have been canvassed, including doing nothing, since amnesty is a proactive step to circumvent the jurisdiction of courts.

Where amnesty cannot be avoided, parliaments still have an important role to play. They can help to guarantee that any amnesty extends only so far as is strictly necessary in the circumstances, meaning that concessions are kept to the bare minimum. In this respect, it is important to appreciate that amnesties can vary in at least five significant ways. They can vary as to: the crimes or acts that are expressly eligible or ineligible for amnesty (for example, the 1995 South African amnesty excluded non-politically motivated offences, crimes motivated by malice and crimes committed for personal gain); the persons who are expressly eligible or ineligible for amnesty (the 1974 Greek amnesty excluded those «chiefly responsible» for political crimes); the express legal consequences of the granting of the amnesty to the beneficiary (the 1996 Guatemalan amnesty conferred immunity

from prosecution, but not from civil suits or non-judicial sanctions); the administrative scheme for individual grants of amnesty (the 2000 Ugandan amnesty created a special commission with the mandate to receive amnesty applications, oversee the disarmament, demobilisation and reintegration process and establish a dialogue on reconciliation); and the conditionalities associated with individual grants of amnesty (the 2001 Timor-Leste amnesty process required applicants to confess, express contrition, appear at a public hearing and perform mandated acts of community service).

What parliaments must scrupulously avoid is the all too common misapplication of Article 6(5) of Protocol II to the 1949 Geneva Conventions. It provides that: «At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained». This provision seeks to encourage amnesty at the conclusion of an internal armed conflict for combat activities that would otherwise be subject to prosecution due to the fact that they violate the criminal laws of the states in which they occur (this includes sedition, treason, and use of an illegal weapon). It was never intended to cover violations of international humanitarian law.

### **What you can do as a parliamentarian**

- Help ensure that an amnesty is considered only after less extreme alternatives;
- Ensure that the scope of any amnesty law accords with international law, including by preventing the misapplication of Article 6(5) of Protocol II to the 1949 Geneva Conventions, and is as restricted as possible with regard to:
  - the crimes or acts which are eligible for amnesty;
  - the persons who are eligible for amnesty;
  - the express legal consequences of the granting of the amnesty to the beneficiary.

### **Trials**

There are many reasons why it is essential to hold criminal trials for serious human rights offences. Criminal trials, particularly those that take place at the domestic level, can contribute to specific and general deterrence and express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators, and justice for victims. Criminal trials can also contribute to greater public confidence in the state's ability and willingness to enforce the law.

Of course, responsibility for criminal trials lies most directly with the judicial, not the legislative branch of State. Yet parliaments have several important roles to play in relation to trials. Through legislation and sound budgeting and appointment procedures, they can help to protect judicial and prosecutorial independence. They can also establish important ad hoc mechanisms, such as the appointment of special prosecutors, to handle particularly sensitive or high-profile cases. Parliaments can also pass laws to reduce delays to, and the costs of, procedures and enforcement, for example by fixing lawyers' fees as a percentage of the value of disputed claims (as was done in Germany) and opening up the legal services market to meaningful competition among qualified paralegals (the Netherlands). In addition, parliaments can introduce victim–offender reconciliation programmes and other «restora-

## **Box 4:**

### **Gacaca trial system in Rwanda**

Perhaps the most relevant and noteworthy example of parliamentary innovation in relation to trials is the gacaca law in Rwanda. Although the law has been criticised for failing to meet minimum fair trial standards, no better or more viable alternative has been suggested. Gacaca is a village-level justice system that is loosely based on an indigenous model of justice in Rwanda. There are over 10,000 gacaca «tribunals» across the country, which are being administered by some 250,000 elected gacaca «judges». The gacaca law claims as its objectives the revelation of truth about the 1994 genocide, the punishment of the perpetrators, the acceleration of prosecutions of those currently accused of genocide, the participation of the population as a means to eradicate the culture of impunity, the development by Rwandan citizens of the tools needed to manage conflict peacefully, and the promotion of national reconciliation. The law is a response to the political impossibility of simply releasing tens of thousands of alleged perpetrators of the genocide, the practical impossibility of trying all those responsible, and the unfairness of keeping people in detention for years without trial.

tive justice» measures. These generally bring offenders face-to-face with the victims of their crimes, usually with the assistance of a trained mediator. Crime is personalised, as offenders learn the true consequences of their actions and, ideally, take responsibility for them by way of a restitution agreement with the victim.

### **What you can do as a parliamentarian**

- Ensure the adoption of legislation and appropriate budgeting to secure judicial and prosecutorial independence;
- Promote, if useful, the establishment of ad hoc mechanisms such as the appointment of special prosecutors;
- Make sure that laws are in place to ensure that justice will be administered effectively, including by reducing delays and the costs of legal procedures and enforcement;
- Introduce victim–offender reconciliation programmes and other «restorative justice» measures.

## **IV. How other parliaments can contribute to reconciliation**

### **A. Role of other parliaments**

Since the end of the cold war and the advent of globalisation, the influence of the «international community» has swelled dramatically. Although the exercise of any parliament's powers is primarily

focused on domestic matters, increasingly, parliaments are focusing attention on other States, including nations in democratic or post-conflict transition, and their legacy of abuse.

Other Parliaments have unique contributions to make to the cause of reconciliation in States in democratic or post-conflict transition. They can serve as partners, for example by advising interim or newly elected parliaments. And, just as importantly, they can serve as watchdogs, monitoring human rights situations and criticising uncooperative parties at strategic moments prior to or during a transition.

Whatever the case, three principles should underpin any such parliamentary and inter-parliamentary action: first, the situation in each country should be approached on its own merits, without pre-determined responses; second, any action should aim to increase local empowerment and participation; and third, it should promote compliance with international obligations. Adherence to these principles is in the best interests of all sides. The suggestions made below should be read in this light.

## **B. What suggestions or action you may consider as a member of a third parliament**

### **General recommendations**

- Ensure assistance in helping to determine the desired shape and mix of the four transitional justice mechanisms, and subsequently in their implementation by:
  - serving as mediators and advisors in negotiations preceding a transition;
  - dispatching needs-assessment and capacity-building missions and providing legal and practical documentation in the areas of:
    - truth commissions (e.g. truth commission legislation, selection of commissioners, terms of reference, rules of procedure, public hearing videos and final reports);
    - reparation initiatives (e.g. reparation legislation and pictures of monuments and memorials);
    - justice reforms, particularly on issues that closely touch on democracy, human rights and the rule of law, including matters of constitutional design (for example, regarding the kind of parliamentary system), lawmaking (concerning human rights commissions and anti-corruption measures) and policy (concerning multiculturalism and conflict resolution);
    - trials (on matters such as the exercise of prosecutorial discretion and how to limit the scope of amnesties in accordance with international human rights and humanitarian law, including by providing positive examples of limited amnesties, and how to invoke international criminal law before domestic courts);
    - arranging visits and meetings between high-level experts and local sponsors of, and stakeholders in, the establishment of transitional justice mechanisms;
    - organising local or international conferences on transitional justice mechanism experiences from around the world;
    - providing financial and logistical support for transitional justice initiatives;
- Ensure overall and long-term political support for any genuine attempt at transitional justice, and express concern when such efforts risk being jeopardised (for example by an unprincipled amnesty law);

- Conduct comparative research on lessons learned from existing transitional justice initiatives worldwide.

### **Recommendations regarding multilateral initiatives**

- Call for the ratification of the 1998 Rome Statute of the International Criminal Court;
- Urge United Nations bodies, where particularly needed and useful, to establish ad hoc international war crimes commissions of inquiry or international/hybrid criminal tribunals, and to participate in the selection and appointment of members of these bodies;
- Call for the establishment of ad hoc panels of eminent persons to investigate serious violations of human rights and humanitarian law (for example, the Organization of African Unity (OAU) appointed an International Panel of Eminent Persons to investigate the genocide in Rwanda);
- Urge international bodies to oppose unprincipled amnesties;
- Encourage United Nations and regional human rights treaty bodies and independent experts to conduct fact-finding missions to countries in transition;
- Urge the United Nations Security Council and other United Nations and regional bodies to include justice reform programming and staff in all peacekeeping and peace-building operations;
- Help to create African, Arab and Asia-Pacific equivalents of the Council of Europe's Commission for Democracy through Law (better known as the Venice Commission) and the Organization of American States (OAS)'s Unit for the Promotion of Democracy, in order to provide ongoing and expert technical assistance on justice reform to States in democratic and post-conflict transition.

## V. Further reading

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- \*\* See also the website of the International Center for Transitional Justice (ICTJ) ([www.ictj.org](http://www.ictj.org)).

## ABOUT INTERNATIONAL IDEA

Created in 1995, the International Institute for Democracy and Electoral Assistance (IDEA) is an intergovernmental organization, with member states from all continents, that promotes sustainable democracy worldwide.

### IDEA's current areas of activities include:

- Democracy building and conflict management. IDEA develops processes for building consensus, helps design political institutions and promotes reconciliation and inclusive democracy.
- Electoral processes. IDEA helps adapt electoral systems, improve the level of access and voter turnout, ensure professional management and independence and build public confidence.
- Political parties. IDEA reviews political parties' external regulations, public funding, management and their relations with the public, with the aim to develop the parties into key democratic actors.
- Political equality and participation. IDEA focuses on underrepresented segments of society, including women in politics. IDEA circulates information on how special measures such as gender quotas can bolster inclusive politics.

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## ABOUT THE INTER-PARLIAMENTARY UNION

Created in 1889, the Inter-Parliamentary Union (IPU) is the international organization that brings together the representatives of Parliaments of sovereign States. In June 2005, the Parliaments of 141 countries were represented. The IPU works for peace and co-operation and to strengthen representative institutions.

### IPU's activities include:

- fostering the exchange of experiences among parliaments and parliamentarians worldwide;
- expressing its views on questions of international interest and bringing about parliamentary action;
- working for the defense and promotion of human rights, respect for which is an essential factor of parliamentary democracy and development;
- improving knowledge of representative institutions and strengthening their means of action.

The IPU works in close co-operation with the United Nations, regional inter-parliamentary organizations, and international, intergovernmental and non-governmental organizations which share the same ideals.

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# Making reconciliation work: the role of parliaments



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