Reconstruction through Accountability

Anja Seibert-Fohr[*]

In post-conflict situations the question regularly comes up as to whether the call for criminal prosecution may be compromised in the interest of reconstruction. Justice and reconciliation are often considered as competing concepts. The author argues that there is not necessarily such a dichotomy. Whether there is, in fact, a duty to prosecute should be answered on the basis of international human rights law. The question ultimately depends on how human rights can be effectively guaranteed in the long run. A survey of contemporary jurisprudence and international practice shows that prosecution is increasingly viewed as an indispensable measure of human rights protection. But criminal justice is not to be achieved at all costs. Mixed forms of accountability are a potential model for the future including that of Iraq.

---

[*] This article is an amended version of an article published in the Michigan State Journal of International Law 2005, 13 Mich. St. J. Int'l L. 179 (2005), and is reproduced here by kind permission of the publisher.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 9, 2005, p. 555-577.

I. Introduction

Confronting serious human rights violations in the aftermath of armed conflict has been the subject of intense discussion for several decades. The allies of WW II, with the establishment of the Nuremberg and Tokyo Tribunals, opted for a system of criminal prosecution. This idea was adopted by the Genocide Convention of 1948, which relied on both international and domestic prosecution.[1] The UN Torture Convention also requires criminal prosecution and further incorporates the principle of *aut dedere aut judicare*.[2]

However, when it came to the question of how to deal with South American dictatorship, the question arose as to whether there were alternative modes which could foster a process of reconciliation after extended periods of civil unrest.[3] It has been argued that there was a need to abstain from criminal prosecution for the sake of re-establishing peace. For example, the government of Uruguay argued before the UN Human Rights Committee in 1994 "that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions."[4] It elaborated that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups. This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions."[5] Similarly, El Salvador maintained before the Inter-American Commission on Human Rights that the release, under the Law on General Amnesty for the Consolidation of Peace, of those responsible for

---

1 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 6, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

2 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention].

3 For this issue see e.g. Leila Nadya Sadat, *International Criminal Law and Alternative Modes of Redress*, *in* INTERNATIONAL CRIMINAL LAW AND THE CURRENT DEVELOPMENT OF PUBLIC INTERNATIONAL LAW, 159 (Andreas Zimmermann ed. 2001).

4 Rodríguez v. Uruguay, Communication No. 322/1988, U.N. GAOR, Hum. Rts. Comm., 51st Sess., para. 8.3, UN Doc. CCPR/C/51/D/322/1988 (1994).

5 *Id*. para. 8.5.

serious human rights violations was the only way to ensure the new democratic state and to safeguard human rights.[6]

In this process, truth commissions were established as alternative measures, at times with the aid of the United Nations.[7] The idea was to shed light onto past atrocities in order to serve the interests of the victims and to prevent recurrence. The interest in criminal punishment was compromised in order to facilitate peace agreements and to foster reconciliation. While the models adopted in South and Central America, such as the blanket amnesty of El Salvador, do not serve as good examples for the return to peace and the rule of law, the South African Truth and Reconciliation Commission process can indeed be characterized as a good faith effort in this regard.[8]

The past decade has witnessed a revival of the idea of international criminal prosecution due to the establishment of the *ad hoc* criminal tribunals for the former Yugoslavia[9] and Rwanda,[10] as well as the formation of the International Criminal Court.[11] The underlying idea is that the most serious human rights violations should not go unpunished

---

6 Case 11.481, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev. 671, para 3 (1999), *available at* http://www.cidh.org/casos/99.eng.htm.

7 *See generally* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497 (1994) (Discussing the UN Truth Commission for El Salvador. This Commission had the primary task of investigating and elaborating a public report. The decision whether to prosecute was left to the State).

8 *See generally* Promotion of National Unity and Reconciliation Act, No. 34 (July 26, 1995), *available at* http://www.doj.gov.za/trc/legal/act9534.htm (calling for the establishment of the South African Truth and Reconciliation Commission). *See also* Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective,* 63 MOD. L. REV. 1 (2000); John Dugard, *Reconciliation and Justice: The South African Experience, in* THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 399 (Burns H. Weston & Stephen P. Marks eds. 1999); Lyn Graybill, *To Punish or Pardon: A Comparison of the International Criminal Tribunal for Rwanda and the South African Truth and Reconciliation Commission*, HUM. RTS. REV., July-Sept. 2001, at 3; Gerhard Werle, *Without Truth, No Reconciliation: The South African Rechtsstaat and the Apartheid Past*, 29 VERFASSUNG UND RECHT IN ÜBERSEE 58 (1996).

9 *See* S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993).

10 *See* S.C. Res. 955, U.N. SCOR, U.N. Doc. S/Res/955 (1994).

11 *See Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 (1998).

and that the international community should step in where domestic prosecution fails.

Nonetheless, the question whether and how criminal justice is to be served in post-conflict situations is far from resolved. The drafters of the Rome Statute, for example, could not agree on a provision dealing with amnesties.[12] The United States government argued that a democratic decision between prosecution and national reconciliation should be respected and not made by the ICC.[13] Just recently, the question of how to deal with human rights violations during and after times of civil unrest has come up with respect to Haiti.[14] Is there an absolute duty to prosecute, or can it be compromised in the interest of reconciliation?

In the following discussion I will argue that human rights law, properly interpreted, provides for adequate answers to the problem of post-conflict justice. In the first part I will outline what I call the multiple relevance of human rights law for post-conflict justice. I will explain the role that prosecution plays in the protection of human rights and identify the relevant issues for the determination of post-conflict measures. In the second part, a short overview will be given to illustrate how the different human rights treaty bodies have dealt with this matter, highlighting the most recent jurisprudential developments. I will conclude with an evaluation of the Iraqi model as the latest example of transitional justice and a consideration of the future of accountability in post-conflict situations.

---

12 A proposal to include a provision on amnesties was not adopted. *See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court,* U.N. GAOR, 50th Sess., Supp. No. 22, at 9, U.N. Doc. A/50/22 (1995); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 37, 40, U.N. Doc. A/51/22 (1996).

13 *See* Under Secretary for Political Affairs Marc Grossman, Remarks to the Center for Strategic and International Studies (May 6, 2002) (stating the reasons the U.S. decided not to become a party to the Rome Statute), *available at* http://www.state.gov/p/9949.htm. *See generally* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary General (May 6, 2002) (containing the U.S. rejection of the Rome Statute), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

14 S.C. Res. 1529, U.N. SCOR, 59th Sess., 4919th mtg., U.N. Doc. S/RES/1529 (2004).

II. The Multiple Relevance of Human Rights Law

It is important to note that human rights are relevant in post-conflict situations in more than one way. First, there is the question of how past human rights violations should be remedied. The right to an effective remedy has found entry into the various regional and international human rights instruments.[15] In order to provide victims of serious human rights violations with such a remedy, one has to look back. There is a need to at least investigate in order to establish which violations have taken place.[16]

But it is not enough to look back. The model chosen to deal with past human rights violations has implications for present and future human rights protection. Confronting past human rights violations is necessary not only in furthering the interests of victims, but also in preventing future atrocities. There is a need to look into the past in order to learn for the future. If serious human rights violations go unanswered, there is a risk that they will recur in the future. The duty to "protect and ensure" human rights, which is part of all major human rights treaties, therefore entails the obligation to hold perpetrators of human rights violations somehow accountable.[17] Justice thus may fig-

---

15 International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, art. 2(3), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; American Convention on Human Rights, Nov. 22, 1969, art. 25, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. C.H.R., OEA/Ser.L.V/II.82, doc.6 rev.1, at 25 (1992); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 13, 213 U.N.T.S. 222, as amended by Protocol Nos. 3, 5, 8, and 11.

16 *See* Bleier v. Uruguay, Communication No. R.7/30, U.N. GAOR, Hum. Rts. Comm., Supp. No. 40, at 130, para. 15, U.N. Doc. A/37/40 (1982); Barbato v. Uruguay, Communication No. 84/1981, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, at 112, para. 11 (1990); Quinteros v. Uruguay, Communication No. 107/1981, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, at 143, para. 15 (1983); Laureano Atachahua v. Peru, Communication No. 540/1993, UN Doc. CCPR/C/56/D/540/1993, para 10 (1996).

17 *See* U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1365th mtg. at 12, para. 54, U.N. Doc. CCPR/C/SR.1365 (1994); U.N. GAOR, Hum. Rts. Comm., 57th Sess. at 5, para. 32, U.N. Doc. CCPR/C/79/Add.65 (1996). *See also* Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); Anja Seibert-Fohr, *The Fight against Impunity under the Interna-*

ure as an important element of prevention considering its deterrent potential. As indicated above, a number of human rights conventions, such as the Torture Convention,[18] the Genocide Convention,[19] and the Apartheid Convention,[20] provide for an explicit duty to prosecute. Whether there is an implicit duty to prosecute under the International Covenant on Civil and Political Rights and the regional comprehensive human rights treaties which apply to a broad range of human rights violations will be analyzed in the following section on the basis of international jurisprudence.

While there is much to be said for the assertion that criminal justice is an important element of effective human rights protection,[21] there is,

---

tional Covenant on Civil and Political Rights, 6 MAX PLANCK Y.B. U.N. L. 301, 325 (2002).

18 Torture Convention, *supra* note 2, art. 4.

19 Genocide Covention, *supra* note 1, art 1.

20 International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. 4, 1015 U.N.T.S. 243.

21 *See* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995). For the issue whether amnesties are admissible under international law, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991); REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE, 17-21 SEPTEMBER 1998 (Christopher C. Joyner ed., 1998); Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability,* LAW & CONTEMP. PROBS., Autumn 1996, at 29; Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes,* LAW & CONTEMP. PROBS., Autumn 1996, at 41; Richard J. Goldstone, *Advancing the Cause of Human Rights: The Need for Justice and Accountability*, *in* REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 195 (Samantha Power & Graham Allison eds., 2000); ANGELIKA SCHLUNCK, AMNESTY VERSUS ACCOUNTABILITY: THIRD PARTY INTERVENTION DEALING WITH GROSS HUMAN RIGHTS VIOLATIONS IN INTERNAL AND INTERNATIONAL CONFLICTS (2000); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation,* 42 HARV. INT'L L.J. 467 (2001); John Dugard, *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?,* 12 LEIDEN J. INT'L L. 1001 (1999); Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT'L & COMP. L.Q. 91 (2002); ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE (2002).

on the other hand, the risk that uncompromising insistence on criminal prosecution may have adverse implications on the protection of human rights. It has been argued that under certain circumstances, the return to peace necessitates compromises in order to facilitate peace agreements, and, consequently, the end of human rights atrocities.[22] Furthermore, the notion of reconciliation comes into play. There is a need for reconciliation in order to provide for lasting peace and the protection of human rights. As indicated above, in a number of post-conflict situations, states have claimed that the need for reconciliation requires that the demand for criminal justice be compromised.[23] How to deal with this seeming contradiction between justice on the one hand, and the need for reconciliation on the other hand, will be evaluated below.[24]

There is yet another aspect of human rights protection which should be taken into account in the search for adequate answers to past human rights violations. International human rights law requires minimum standards for the accomplishment of justice. This is relevant for the prosecution, trial and punishment of alleged criminals. Foremost, there is the right to be free from arbitrary arrest,[25] the right to a fair trial,[26] and the right of detainees to be treated with humanity and dignity.[27] These rights are not only in the interest of the accused, but also generally in the interest of lasting human rights protection.[28] To achieve justice by compromising the rights of the accused would undermine the credibility and the force of human rights law. In post-conflict situations, it is therefore important to build up a functioning and independent judiciary which is capable of guaranteeing the right to a fair trial.

The question as to whether there is a legal obligation to prosecute perpetrators of serious human rights violations thus depends on the an-

---

22 *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249 (1996).

23 This argument was put forward by Peru, but rejected by the Commission. *See* Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 59 rev., para. 230 (2000); s*ee generally* Rodríguez v. Uruguay, *supra* note 4.

24 *See* discussion *infra* Parts II.C, III.

25 ICCPR, *supra* note 15, art. 9.

26 *Id*. art. 14.

27 *Id*. art. 10.

28 Anja Seibert-Fohr, *The Relevance of International Human Rights Standards for Prosecuting Terrorists*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 125, 161-2 (Walter/Vöneky/Röben/Schorkopf eds., 2004).

swer to the following two main questions: First, is prosecution required in order to guarantee lasting human rights protection, taking due account of the particular situation in the country? Second, can justice be achieved in accordance with human rights standards?

III. Current State of International Human Rights Law

Evaluating these questions under the current state of international human rights law yields a number of observations. There has been considerable development with regard to the duty to prosecute over the past decade. This development concerns not only the question of how to deal with serious human rights abuses in the aftermath of armed conflict, but also generally about how such violations need to be responded to in times of peace. Whether there is room for variations due to particular circumstances is a question which will be evaluated in a second step.

A. The Duty to Prosecute Serious Human Rights Violations

The most prominent decision about the duty to prosecute was made by the Inter-American Court of Human Rights. In its judgment in the *Velásquez Rodríguez Case* of 1988, the Court explained that state parties must investigate and punish any violation of the rights recognized by the American Convention on Human Rights.[29] This idea can also be found in a number of pronouncements by the international human rights treaty bodies.[30] It later found entry into the jurisprudence of the

---

[29] Velásquez Rodríguez Case, Inter-Am. Ct. H.R., Ser. C, No. 4, para 166 (1988). For later pronouncements, see Case 11.725, Inter-Am. C.H.R, OEA/ser.L./V./II.106, doc. 3. rev. 494, para 90 (1999); Bámaca Velásquez Case, Inter-Am. Ct. H.R., para. 129 (2000), *available at* http://www.corteidh.or.cr/seriec_ing/index.html.

[30] *See e.g.* Bautista de Arellana v. Colombia, Communication No. 563/1993, U.N. GAOR, Hum. Rts. Comm., 55th Sess., para 8.2, U.N. Doc. CCPR/C/55/D/563/1993 (1995); Arhuacos v. Colombia, U.N. GAOR Hum. Rts. Comm., 52d Sess., Supp. No. 40, at 171, para. 8.2, U.N. Doc. A/52/40 (1999); General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. GAOR, Hum. Rts. Comm., 80th Sess., U.N. Doc. CCPR/C/74/CRP.4/Rev.6, para 18 (2004). *See also* Carla Edelenbos, *Hu-*

European Court of Human Rights, which asks states to criminalize particularly serious abuses and to set up an effective judicial system.[31]

The various human rights institutions have demonstrated a growing willingness to ponder the question as to whether prosecutors have applied an adequate criminal procedure when confronted with human rights violations. While the focus originally was to ensure the *rights* of the accused in criminal proceedings, there has been a trend to ensure that perpetrators of serious human rights abuses are indeed brought to justice. The Inter-American institutions have even gone so far as to assume an individual right to justice by the affected victim.[32]

While there was initially merely a call to have some form of accountability,[33] the current jurisprudence makes clear that there is actually a need for the attainment of criminal justice. How far this call goes is demonstrated by the judgment of the Inter-American Court of Human Rights in the so-called *Street Children Case*, which was decided in 1999.[34] The Court had to deal with serious shortcomings in the criminal prosecution of two police officers who allegedly had brutally tortured and murdered five street children in Guatemala. Though the case had been investigated, Guatemalan courts ordered the release of the two policemen for lack of evidence.

The Inter-American Court held that Guatemala had violated the American Convention because it had not identified and punished those

---

man Rights Violations: A Duty to Prosecute?, LEIDEN J. INT'L L., No. 2, at 5 (1994).

31 *See* Calvelli v. Italy, App. No. 32967/96, para. 51 (2002), *available at* http://www.echr.coe.int/; Kiliç v. Turkey, App. No. 22492/93, para. 62 (2000), *available at* http://www.echr.coe.int/; M.C. v. Bulgaria, App. No. 39272/98, para. 150 (2004), *available at* http://www.echr.coe.int/; VO v. France, App. No. 53924/00, para 90 (2004), *available at* http://www.echr.coe.int/; Öneryildiz v. Turkey, App. No. 48939/99, paras. 91-95 (2004), *available at* http://www.echr.coe.int/

32 *See e.g.* Case 11.725, *supra* note 29, para. 90; Case 10.480, Inter-Am. C.H.R., OEA/Ser.L./V/II.95 doc. 7 rev. 531, para. 119 (1999).

33 *See e.g.* Barbato v. Uruguay, *supra* note 16; Quinteros v. Uruguay, *supra* note 16; *Concluding Observations of the Human Rights Committee: Suriname*, U.N. GAOR, Hum. Rts. Comm., 80th Sess., U.N. Doc. CCPR/CO/80/SUR (2004); Muiyo v. Zaire, Communication No. 194/1985, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, at 219, para. 11 (1990).

34 Villagran Morales et al. Case, Inter-Am. Ct. H.R. (1999), *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_63_ing.pdf.

responsible for the crime.[35] It went on analyzing in detail the actual criminal proceedings. The Court criticized the incomplete and inadequate autopsies, the fact that the corpses of the victims were not photographed in full length, and that no personal identification of an accused by a witness had been ordered.[36] Important testimonies had been rejected by the criminal court[37] and probative material had been fragmented so that the significance of each evidentiary element that proved the responsibility of the defendants had been weakened.[38] The Inter-American Court further criticized the overall evaluation of evidentiary material against the accused. It concluded that the victims' rights had been violated due to the deficient criminal proceedings. This shows the Court's willingness not only to ask for the initiation of a criminal investigation, but to identify specific requirements for the conduct of criminal proceedings in order to ensure that those responsible for serious human rights violations are in fact brought to justice.

This is only one example, and there are a number of other cases evidencing that the realization of criminal justice plays an increasingly important role in the Inter-American jurisprudence.[39] A review of the international and regional case law shows that all international human rights institutions share the view that there is a duty to prosecute serious abuses.[40] In other words, criminal justice is more and more considered to be an important element of effective human rights protection.

---

35 *Id.* para. 228.

36 *Id.* para 231.

37 *Id.* para. 232.

38 *Id.* para. 233.

39 *See* Blake Case, Inter-Am. Ct. H.R., para. 97 (1998) (recognizing the right of a victim's family members to have the disappearance and death effective investigated by the authorities), *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_36_ing.pdf; Paniagua Morales et al. Case, Inter-Am. Ct. H.R., para. 155 (1998), *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_37_ing.pdf.

40 For example, the Human Rights Committee have made a number of pronouncements. Bautista, *supra* note 30, para 8.6; Vicente v. Colombia, Communication No. 612/1995, U.N. GAOR, Hum. Rts. Comm., para. 8.8, U.N. Doc. CCPR/C/60/D/612/1995 (1997); General Comment No. 31, *supra* note 30. For the recent jurisprudence by the European Court of Human Rights, see M.C. v. Bulgaria, *supra* note 31, para 201; VO v. France, *supra* note 31, para 90; Öneryildiz v. Turkey, *supra* note 31, paras. 91-95.

B. The (In)Dispensability of Criminal Prosecution

The increased emphasis on the duty to prosecute serious human rights violations has evidently had an impact on the issue of post-conflict justice; illustrated by the shift from a somewhat lenient approach towards an increasing limitation of amnesties. This again is evidenced by the pronouncements of the Inter-American human rights institutions. The Commission, in its 1985-86 guidelines, showed an understanding for the interest in national reconciliation and social pacification.[41] It recognized that addressing human rights violations under previous governments was a "sensitive and extremely delicate issue," to which the Commissions could make only minimal contributions.[42] By requiring a democratic decision and an investigation of past human rights violations, the Commission set minimum requirements.

In its eyes, democratically legitimized amnesties, providing for an investigation of past human rights violations, would "bring about justice rather than vengeance," without jeopardizing the need for reconciliation and democratic consolidation.[43] It is noticeable that the Commission talks about justice in the context of amnesties. Justice at this time was not necessarily defined as criminal justice, and could be satisfied merely by investigating crimes. The underlying concept is the one of restorative justice, a concept that has been referred to in the context of the South African Truth and Reconciliation Commission.

The modern approach of the Inter-American human rights institutions is different in that the focus is on criminal justice. In the *Barrios Altos Case*, the Inter-American Court declared that not only self-amnesties, but all amnesties for serious human rights violations, are in-

---

41 Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, doc.8 rev.1, ch. 5 (1986), *available at* http://www.cidh.oas.org/annualrep/85.86eng/toc.htm. For an analysis of the Commission's statements with respect to amnesties, see Juliane Kokott, *No Impunity for Human Rights Violations in the Americas*, 14 HUM. RTS. L.J. 153 (1993); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities,* LAW & CONTEMP. PROBS., Autumn 1996, at 197; Ellen Lutz, *Responses to Amnesties by the Inter-American System for the Protection of Human Rights*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 345 (David J. Harris & Stephen Livingstone eds., 1998).

42 Annual Report, *supra* note 41.

43 *Id*.

admissible under the Inter-American Convention.[44] The underlying rationale is that even in case of public emergency, the right to have serious violations of human rights punished may not be compromised. There is no place for a balancing act. Judge Cancado Trindade described the new legal reasoning regarding amnesties as "a new and great qualitative step forward" in the Court's case-law.[45] It seeks to overcome impunity which, according to him, the international human rights supervisory bodies "have not yet succeeded to surpass ... ."[46]

The UN Human Rights Committee, though stating that amnesties are *generally* incompatible with the International Covenant on Civil and Political Rights,[47] has stopped short of proclaiming an absolute ban on amnesties.[48] The Committee requires that perpetrators of serious human rights violations not be relieved from personal legal responsibility.[49] This obligation is rather vague. Whether there are alternative forms of personal legal responsibility remains open. Arguably, there is still a limited margin as long as there has been a democratic decision; an independent investigation; compensation for victims; an exemption for gross human rights violations, like summary executions, torture and enforced disappearances; and the removal from office of those responsible.[50] That torture may not be amnestied is also the view of the UN

---

44 Barrios Altos Case, Inter-Am. Ct. H.R., paras. 41-44 (2001), *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_75_ing.pdf.

45 *Id.* para. 4 (Trindade, J., concurring).

46 *Id.*

47 *See* General Comment No. 20 on Article 7 of the Covenant, para 15, *in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, at 33, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

48 Seibert-Fohr, *supra* note 17, at 343.

49 General Comment No. 31, *supra* note 30.

50 *See* Rodríguez v. Uruguay, *supra* note 4, para 6.3; *Concluding Observations of the Human Rights Committee: Argentina*, U.N. GAOR, Hum. Rts. Comm., 70th Sess., para. 9, U.N. Doc. CCPR/CO/70/ARG (2000); *Concluding Observations of the Human Rights Committee: Brazil*, U.N. GAOR, Hum. Rts. Comm., para. 20, U.N. Doc. DDPR/C/79/Add.66 (1996); *Concluding Observations of the Human Rights Committee: Guatemala*, U.N. GAOR, Hum. Rts. Comm., para. 26, U.N. Doc. CCPR/C/79/Add.63 (1996); *Concluding Observations by the Human Rights Committee: Colombia*, U.N. GAOR, Hum. Rts. Comm., para. 32, U.N. Doc. CCPR/C/79/Add.75 (1997); *Comments of the Human Rights*

Torture Committee.[51] According to the Committee, a State party to the Torture Convention must "ensure the investigation and ... prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach."[52]

C. Prosecution as a Potential Element of Reconciliation

Taking these developments into account, the following conclusion characterizing the present state of international human rights law can be made: The current understanding is that there is not necessarily a dichotomy between justice and reconciliation. While originally the focus was on the contradiction between criminal justice and reconciliation, there is a growing conviction in the international setting that reconciliation is to be achieved by prosecuting perpetrators of serious human rights violations. The potential of amnesties to bring about reconciliation, and with it lasting peace, is put into question not only by the Inter-American institutions, but also by the UN Human Rights Committee, given their experience with South American amnesties. As the Committee put it in the context of the Peruvian single sided amnesty, the prevention of the perpetrator's punishment for past human rights violations "undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity ... and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant."[53]

This understanding is also reflected in current state practice. There is a trend away from fully-fledged amnesties, as evidenced by the recent

---

Committee: Haiti, U.N. GAOR, Hum. Rts. Comm., para. 9, U.N. Doc. CCPR/C/79/Add.49 (1995). *See also* Seibert-Fohr, *supra* note 17, at 343-44.

51 *Report of the Committee Against Torture*, U.N. GAOR, 55th Sess., Supp. 44, para. 59(g), U.N. Doc. A/55/44 (2000).

52 *Id.* para. 69 (c) (1999).

53 *Preliminary Observations of the Human Rights Committee: Peru*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., para. 9, U.N. Doc. CCPR/C/79/Add.67 (1996). *See also Comments of the Human Rights Committee: Yemen*, U.N. GAOR, Hum. Rts. Comm., para. 11, U.N. Doc. CCPR/C/79/Add.51 (1995); *Comments of the Human Rights Committee: Paraguay*, U.N. GAOR, Hum. Rts. Comm., para. 9, U.N. Doc. CCPR/C/79/Add.48 (1995).

revocation of the Argentine amnesty law.[54] The power to enact amnesties has also become increasingly limited under domestic law. For example, pursuant to a 1989 Polish law, amnesties shall not be applied with respect to war crimes and crimes against humanity.[55] On the international level, in a number of conflicts the international community has opted for prosecution. This is done in order to bring about reconciliation and lasting peace. For example, the Security Council, when establishing the ICTR in 1994, explained that it was "*[c]onvinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would ... contribute to the process of national reconciliation and to the restoration and maintenance of peace."[56] Similarly, the Special Court for Sierra Leone was intended to contribute to the process of national reconciliation and to the restoration and maintenance of peace.[57]

---

54 For the situation in Argentina and the most recent judicial developments see Maria Fernanda Pérez Solla, *Enforced Disappearances before Argentinean Tribunals: New Developments in an Endless Fight for Justice*, 19 S. AFR. J. HUM. RTS. 691 (2003). Those amnesties enacted are limited in scope providing for an exception depending on the offences at issue. In the case of Guatemala the amnesty called for in the peace agreement and passed in December 1996 contains an exception for very serious crimes. *For this issue see* Juan E. Méndez, *The Right to Truth*, *in* Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998, 255, 273 (Christopher C. Joyner ed., 1998); Christian Tomuschat, *The Duty to Prosecute International Crimes Committed by Individuals*, *in* TRADITION UND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER 315, 346 (Hans-Joachim Cremer, Thomas Giegerich, Dagmar Richter, Andreas Zimmermann eds., 2002).

55 *See Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity: Professor Diane Orentlicher*, U.N. ESCOR, 60th Sess., Agenda Item 17, para. 30, U.N. Doc. E/CN.4/2004/88 (2004). *See also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [Constitution] art. 23 (prohibiting enactment of amnesty legislation or granting pardons for human rights violations).

56 S.C. Res. 955, *supra* note 10 (emphasis added).

57 S.C. Res. 1315, U.N. SCOR, U.N. Doc. S/RES/1315 (2000).

IV. The Emergence of Mixed Systems of Accountability

Recent developments give rise to another observation. While prosecution and truth commissions have traditionally been thought of as mutually exclusive models, there is much to be said for a parallel system.[58] There is an increasing trend not to view prosecution and truth commission mechanisms as alternative measures, but as complementary means in post-conflict justice.[59] While this may be partly due to the new understanding that reconciliation and justice are not necessarily in contradiction, it also stems from the insight that there is a need for practical solutions. Here the second prong of the above outlined test, namely the question whether justice can be achieved, becomes relevant.

Especially in situations where there is no functioning independent judiciary, the prosecution of each crime would overburden and thus jeopardize the establishment of a functioning judiciary. The call for criminal justice in such situations could lead to injustices incompatible with the international human rights standards. Furthermore, after extended periods of civil war, a comprehensive prosecution would probably affect wide parts of the population. This would cause new tensions and prevent a return to normal life for a long period of time.

That an absolute call for justice may be counterproductive was acknowledged by the UN Truth Commission for El Salvador.[60] The Commission, in drafting its recommendations, was faced with the problem that El Salvador had no system for the administration of justice which met the minimum requirements of objectivity and impartiality

---

58 William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1066 (2003). For the different options in times of transition see LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION (2004).

59 Instead of considering truth commissions to be substitutes for the prosecution of human rights offenders, the Inter-American institutions have instead sought to use them in addition to investigations and prosecutions by the judiciary in recent years. *See e.g.* Case 10.488, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 3 rev., paras. 229-32 (1999). Méndez observed that the right to truth and the right to justice are no longer considered to be alternatives. Méndez, *supra* note 17, at 267-69.

60 The Commission on the Truth for El Salvador was established in 1992 pursuant to the Salvadoran Peace Accord. For a detailed account, see Buergenthal, *supra* note 7.

necessary to achieve justice.[61] The Commission feared that justice would not be rendered reliably. A judicial debate in the context of the prevailing situation was described as counterproductive because it could have revived old frustrations and would have impeded the achievement of reconciliation, which was described by the Commission as the "cardinal objective."[62]

How accountability is to be provided while taking due account of the need for reconciliation is illustrated by the envisaged model for Cambodia. The United Nations and Cambodia, in their agreement of 2003, opted for a system of selective prosecution.[63] In order not to jeopardize the process of reconciliation, it envisages only the prosecution of senior leaders and those most responsible for genocide, crimes against humanity, and grave breaches of humanitarian law.[64] A comprehensive prosecution of all crimes, including those bearing less responsibility, was considered a hampering of this process.

A mixed system also emerged in the context of Sierra Leone. The Special Court for Sierra Leone has jurisdiction for those most responsible for serious violations of international humanitarian law.[65] Those crimes which are not subject to the Court's jurisdiction are dealt with

---

61 *Report of the Commission on the Truth for El Salvador: From Madness to Hope*, U.N. SCOR, at 178, U.N. Doc. S/25500 (1993).

62 *Id.* at 178-79.

63 *See* Draft Agreement Between the United Nations and the Royal Government of Cambodia, Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (Mar. 17, 2003), G.A. Res. 57/228, U.N. Doc. A/RES/57/228 B, Annex.
Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the period of Democratic Kampuchea http://www.derechos.org/human-rights/seasia/doc/krlaw.html.

64 *Id.* art. 9. Such a selective approach was also advocated by Orentlicher, *supra* note 21.

65 *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), *reprinted in Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, at 15, U.N. Doc. S/2000/915 (2000); *see also* S.C. Res. 1315, U.N. SCOR, U.N. Doc. S/RES/1315 (2000) (requesting the negotiation of an agreement to establish the Special Court for Sierra Leone).

by the national Truth and Reconciliation Commission.[66] This concerns those who bear a lesser burden of responsibility for the core crimes committed during the civil war in Sierra Leone and those responsible for crimes which do not fall under the Special Court's jurisdiction.

Originally the Lomé Peace Agreement had provided for a general amnesty.[67] The UN Secretary-General, however, appended to his signature of the peace agreement a *proviso* that the amnesty should not apply to the international crime of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.[68] In order to ensure the prosecution of these crimes, the Special Court for Sierra Leone was later established. The Statute of the Special Court explicitly provides that an amnesty granted to a person falling within the Court's jurisdiction shall not be a bar to prosecution by the Court.[69] The Special Court, in a 2004 decision, confirmed that though an amnesty had been proclaimed domestically, such an amnesty could not be a bar to the prosecution of genocide, crimes against humanity, and war crimes before an international court.[70] There is, however, room for a truth commission process with respect to less serious human rights vio-

---

66 *See* Briefing Paper, Office of the Attorney General and Ministry of Justice Special Task Force, Relationship Between the Special Court and the Truth and Reconciliation Commission (Jan. 2002), *available at* http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html.

67 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. 9 (June 3, 1999), *available at* http://www.sierra-leone.org/lomeaccord.html.

68 *See* S.C. Res. 1315, *supra* note 65, at 1. See also M. Goldmann, in this Volume.

69 Statute of the Special Court for Sierra Leone, art. 10, *available at* http://www.sc-sl.org/scsl-statute.html.

70 Special Court for Sierra Leone, Appeals Chamber, Prosecutor v. Kallon and Kamara, Case Nos SCSL-2004-15-AR 72 (E), SCSL-2004-16-AR 72 (E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Decision of 13 March 2004, para. 71, *available* at http://www.sc-sl.org/Documents/SCSL-04-14-PT-035-I.pdf Please note that the Court did not hold that the amnesty was in violation of international law. Instead, it explained that international and foreign domestic courts are not prevented by such amnesties from exercising criminal jurisdiction. Id. paras 71-71. The Court's holding which was based on the concept of universal jurisdiction, however, is not persuasive. See generally Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J Int Criminal Justice 1130 (2004).

lations, especially if this is a necessary measure of reconciliation. Though the Truth Commission was not established to complement the Special Court's jurisdiction, the experience of Sierra Leone may provide a model for mixed forms of accountability in the future.

V. The Role of Criminal Justice Under International Law

That the call for criminal justice has been compromised to some extent in the above given examples is due to the fact that justice in itself is not an absolute principle of international law. Its purpose is to ensure peace, security, and the protection of human rights. Where the international community has opted for criminal prosecution, it has done so in the interest of peace and security, as for example in the case of Yugoslavia and Rwanda.[71] A similar approach was taken by the drafters of the Rome Statute for the International Criminal Court. The preamble declares that the crimes for which the Court has jurisdiction threaten peace, security, and the well-being of the world.[72] This is the reason why the international community asks for criminal justice.

But there is no absolute rule of criminal prosecution. This is evidenced by the fact that the Rome Statute does not incorporate the principle of legality. Though there are various checks by the Pre-Trial Chamber, the prosecutor of the ICC is vested with prosecutorial discretion.[73] Pursuant to article 15 of the Statute, he *may* initiate investigations *proprio motu*, but he is not bound to do so once he receives information about crimes falling under the subject-matter jurisdiction of the Court.[74] Even if a case is referred to the ICC by a State party or the UN Security Council, the prosecutor, despite admissibility, may refrain from prosecution if it would not serve the interest of justice.[75] This de-

---

71 *See* S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (1993); S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994).

72 See *Rome Statute*, *supra* note 11, pmbl.

73 For this issue, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003).

74 For the issue of how the discretion should be exercised in case of an amnesty, see Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. U.N. L. 553, 580-82 (2003).

75 *Rome Statute*, *supra* note 11, art. 53(1)(c).

cision is subject to review by the Pre-Trial Chamber of the Court.[76] In sum, not every international crime must be addressed by the ICC. If there has been a thorough investigation and a good faith effort to come to terms with the past, there is good reason to abstain from international criminal prosecution.[77] After all, criminal justice is not about prosecution at all costs.

This does not only apply to international prosecution, but also to the question whether states are bound to prosecute. Where insistence on prosecution leads to a situation which gives rise to new violations, there can hardly be an argument that it is required by international law. What counts ultimately is the question whether criminal justice in the specific situation at hand is a necessary element of lasting peace and human rights protection.

VI. The Iraqi Model

Though the situation in Iraq is different from the above given examples in that, due to the military intervention by the coalition, there has never been the issue of trading justice for peace in an agreement with the Ba'ath regime, there is still the question of the legal parameters for the prosecution of serious human rights violations. Despite the establishment of the Iraqi Special Tribunal[78] there is reason to doubt whether all

---

76 *Id.* art. 53(3).

77 This follows from the admissibility provision of the Rome Statute. *Id.* art. 17. For a detailed analysis of this issue, see Seibert-Fohr, *supra* note 74. Other authors rely on articles 15 and 53. *See* Dugard, *supra* note 21, at 1014; Naomi Roht-Arriaza, *Amnesty and the International Criminal Court, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, 77, 81 (Dinah Shelton ed. 2000); Richard J. Goldstone & Nicole Fritz, *'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 662 (2000). *See also* Mahnoush H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC. 65 (1999); Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court,* 32 CORNELL INT'L L.J. 507 (1999).

78 Statute of the Iraqi Special Tribunal, *available at* http://www.cpa-iraq.org/human_rights/Statute.htm.See Ilias Bantekas, The Iraqi Special Tribunal for Crimes against Humanity, 54 Int'l & Comp. L. Q. 237-253 (2005).

relevant questions of transitional justice have been adequately addressed.[79] It seems that the implications of this model have not been fully realized.

Comparing the model for Iraq with the above outlined general development characterizing different cases of post-conflict justice, the following can be said: In some regards the Iraqi Special Tribunal is a break in this development. It is a purely domestic institution which does not envisage international participation as the Cambodian Extraordinary Chambers do.[80] The fact that the United States were heavily involved in drawing up the Statute has been criticized as another example of victors' justice and there is no need to explain the pitfalls if this is the perception of the Iraqi population.[81]

It is interesting to note that the crimes under the Tribunal's jurisdiction - genocide, crimes against humanity and war crimes - are copied almost verbatim from the Rome Statute. It incorporates the whole wisdom accrued since the establishment of the ICTY and ICTR. Doubts have been expressed as to whether Iraqi judges are well equipped to deal with this vast body of law.[82] In any case there is a mismatch. While the jurisdictional framework is copied from international tribunals the organizational structure is purely national. This is likely to cause problems in the work of the tribunal.

---

79 For an early critique see e.g. M. Cherif Bassiouni, *Commentary on the Special Tribunal*, Chicago Tribune, 21 December 2003. See also Danilo Zolo, *The Iraqi Special Tribunal- Back to the Nuremberg Paradigm?* 2 Journal of Int'l Crim. Justice 313-318 (2004); Salvatore Zappalà, The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence, 2 Journal of Int'l Crim. Justice 855-865 (2004).

80 For the question of mixed tribunal see Fredrick Egona-Ntende, *Justice after Conflict: Challenges Facing 'Hybrid' Courts: National Tribunals with International Participation*, Journal of International Law of Peace and Armed Conflict 1/2005, 24-29.

81 Michael Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 Journal of Int'l Crim. Justice 330-337 (2004); José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 Journal of Int'l Crim. Justice 319, 326 (2004); Beth K. Dougherty, *Victims' justice, victors' justice- Iraq's flawed tribunal*, 11 Middle East policy 61-74 (2004).

82 Yuval Shany, *Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of Internaitonal Criminal Tribunals*, 2 Journal of Int'l Crim. Justice 338, 341-342 (2004).

In contrast to the model chosen for Sierra Leone and Cambodia there is no limitation in the Statute for the Iraqi Special Tribunal to senior leaders. In practice, the Special Tribunal will deal with the prosecution of the most wanted persons by the US, foremost Saddam Hussein and Ali Hassan who is accused of responsibility for the chemical attacks on the Kurds. But what will happen to the numerous collaborators of the Ba'ath regime who committed numerous and grave human rights violations over a period of almost 35 years? It seems impossible and indeed unfeasible to prosecute all. Such an undertaking would not only overburden the judicial system which had been systematically manipulated by the regime and therefore needs to be rebuilt, it would also take decades. This would not be in line with the exigencies of swift reconstruction which is so essential in Iraq.

While there is a focus on criminal prosecution with respect to about 40 persons, one element of reconstruction has been continuously neglected in the Iraqi model: Reconciliation. Fundamental reconciliation of Iraq's ethnic and religious groups is critical to building peace and democracy. Though the establishment of a truth commission in the case of Iraq is not needed to facilitate a peace agreement, it may provide an option to ensure investigation, accountability and reconciliation - and perhaps even identity building - within an assessable period of time. It is thus worthwhile thinking again about a mixed system of accountability.

Without going further into the shortcomings of the Iraqi model of transitional justice, the following basic requirements should be observed. It will be of utmost importance to build a functioning and independent judiciary which is capable of guaranteeing the right to a fair trial. The trials against the main human rights offenders need to comply with the minimum standards of international human rights law. The population should feel that justice is done on their account and there should be a sincere effort to foster reconciliation.

VII. Conclusion

The experiences gained over the past decades have significantly influenced the current approach towards transitional justice. The present understanding of the international community is that justice and reconciliation are not necessarily in contradiction. In fact, criminal justice may figure as an important element of reconciliation.

This does not mean that reconciliation can only be achieved by means of criminal justice. That there is some room for compromise is demonstrated, for example, by the agreement between the United Nations and Cambodia of 2002, which envisages the prosecution of only senior leaders and those most responsible for the core international crimes. The current trend to develop mixed systems and to pursue selective prosecution thus is informed by a compromise formula which seeks the best attainable result in the interest of both justice and reconciliation.

The above outlined jurisprudential development speaks for a single rule, which notes that there is a rebuttable presumption against amnesties for serious human rights violations. This does not mean that there is an absolute prohibition of amnesties. If there is a showing that lasting peace and protection of human rights cannot be achieved with the insistence on criminal prosecution, there is room for alternative measures of accountability. However, genocide and grave breaches of international humanitarian law may not be amnestied under the Genocide and the four Geneva Conventions.[83] Recent state practice shows a growing conviction that crimes against humanity should also be excluded from the scope of amnesty legislation.[84] In any event, the conduct of an effective investigation is an essential element of reconciliation and therefore has become an indispensable requirement of transitional justice.

As the title of this article indicates, accountability is an important element of reconstruction. It helps a society to come to terms with its past, to pave the way for a new order and to learn for the future. Accountability facilitates a return to the rule of law which is so essential for the effective protection of human rights. Holding perpetrators of the most serious human rights abuses responsible helps to rebuild confidence into the rule of law. The concept of accountability thus is necessarily future-oriented. The above analysis outlines the necessary elements. I consciously use the term accountability to include alternative forms of justice, like for example truth commissions. Reconciliation through accountability is thus multi-factored. It requires the assembly of several complementary measures, including the re-establishment of

---

83 For the question whether genocide may be amnestied, see Tomuschat, *supra* note 54, at 347.

84 For example, the amnesty called for in Guatemala's peace agreement and passed in December 1996 contains an exception for very serious crimes. S*ee* Méndez, *supra* note 54.

an independent and functioning judiciary, prosecution and other forms of investigation.

Though I have tried to elaborate on the necessary parameters which have crystallized in the context of post-conflict justice, the concrete model must be guided by the exigencies of the particular situation. If there is a lesson to be learned from the different instances of post-conflict justice, it is that there is no "one size fits all" model.[85] The choice is also a matter of autonomy. The prerogative should be with the population at large because it is the people who need to build peace in society. They need to find their interests adequately represented in the process of reconstruction and post-conflict justice.

As we have learned from the case studies, there is a need for a concerted program of reconstruction. Accountability is just one element which needs to be complemented by and brought in line with other measures of reconstruction. Though criminal justice is nowadays regarded as an element of reconstruction, the model of transitional justice is likely to compromise the call for absolute criminal justice. It should be ultimately guided by the endeavor to return to peace and respect for human rights. Whatever model we choose for state building and post-conflict justice this is the common denominator of reconstruction. Properly understood justice is not an end in itself. It is rather a means to ensure peace, security and the protection of human rights - the constitutional principles of the international community.

---

85 Shany, *supra* note 82.