

Dealing with a Past and Transitional Justice

Dealing with a legacy of gross human rights violations is one of the greatest challenges facing societies in the aftermath of violent conflict - there is a relationship between the ability to address this legacy in a comprehensive and inclusive manner and the potential to develop sustainable peace.

Pristina, Kosovo

I Addressing the Legacy of Violent Conflict

I. The Human Rights Legacy of Violent Conflict

II. A Holistic Approach to Dealing with the Past:

The Principles against Impunity

III. Dealing with the Past and the Case of Kosovo

IV. Towards Reconciliation: The Role of Dialogue

To this end there is a need to:

- To acknowledge publicly the abuses that have taken place
- To hold those responsible who have planned, ordered, and committed such violations
- To rehabilitate and compensate victims
- To reform institutions and replace public officials associated with past abuses

This process is known as Dealing with the Past

II A Holistic Approach to Dealing with the Past

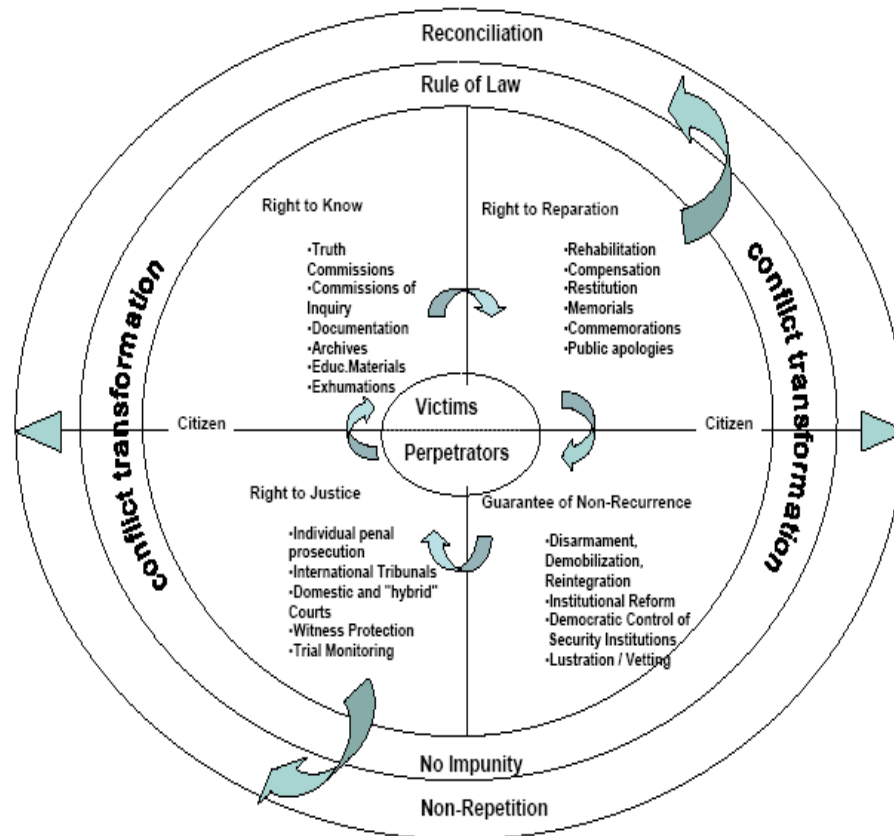
There is no standard model for Dealing with the Past

The so-called ‘Joinet/Orentlicher’ principles, developed by the UN Human Rights Council to address the issue of impunity, provide a useful framework to conceptualize four areas of activity central to this approach

The Principles against Impunity

- The Right to Know
- The Right to Justice
- The Right to Reparation
- Guarantees of Non-Recurrence

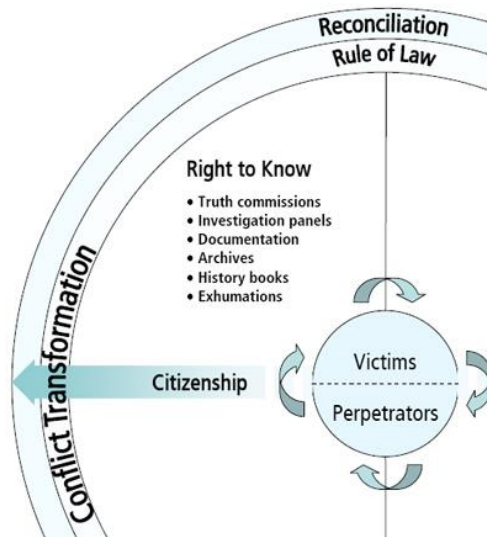
A Conceptual Framework for Dealing with the Past



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The Right to Know

THE KNOWLEDGE OF THE TRUTH AND THE DUTY TO REMEMBER



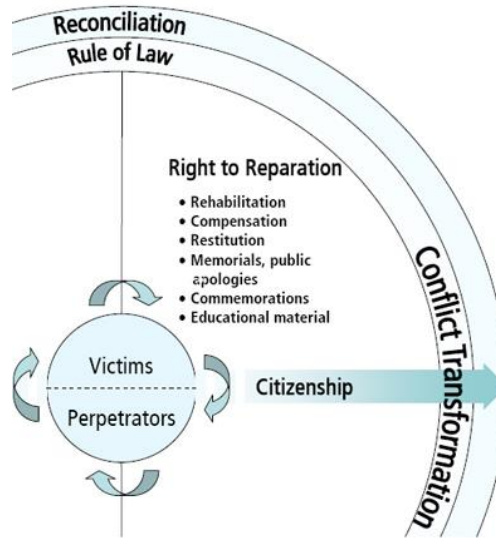
The right to know involves both an individual right on the part of the victims and their families to learn the truth about what happened to their loved ones and a collective right on the part of society to know the truth about past events and circumstances which led to gross human rights violations in order to prevent their recurrence in the future. In addition, it involves an obligation on the part of the State to undertake measures to preserve collective memory from extinction and so to guard against the development of revisionist arguments.

The establishment, in principle, of extra-judicial commissions of inquiry (in practice, often called "truth" or "truth and reconciliation" commissions) ensures this right. The commissions themselves serve a twofold purpose:

- 1) to dismantle the administrative machinery which has led to aberrant behavior in the past, in order to ensure that it does not recur; and
- 2) to preserve evidence for the judiciary. The second measure often entails the preservation of archives relating to human rights violations.

The Right to Reparation

PROVISION OF REPARATIONS ON AN INDIVIDUAL LEVEL AND COLLECTIVE FORMS OF REPARATION



The right to reparation entails individual measures for victims, including relatives or dependents, such as:

Restitution, i.e. seeking to restore the victim in his or her previous situation;

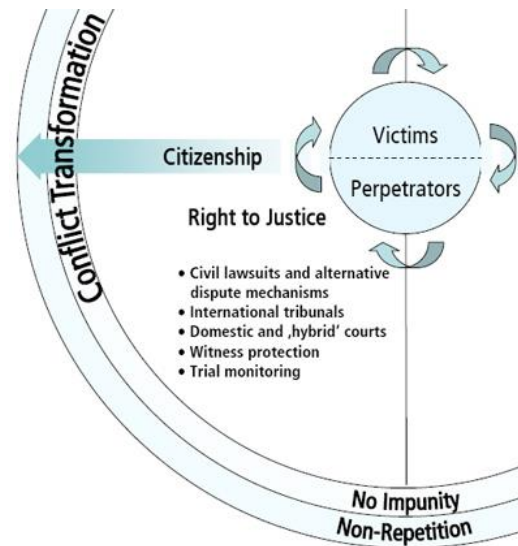
Compensation, i.e. for physical or mental injury, including lost opportunities, physical damage, defamation, and legal aid costs;

Rehabilitation, i.e. medical care, including psychological and psychiatric treatment.

In addition to individual measures, collective forms of reparation involve symbolic acts such as the annual homage to the victims or public recognition by the State of its responsibility, which help to discharge the duty of remembrance and help to restore victims' dignity.

The Right to Justice

THE RIGHT TO A FAIR REMEDY AND THE DUTY TO INVESTIGATE AND TO PROSECUTE

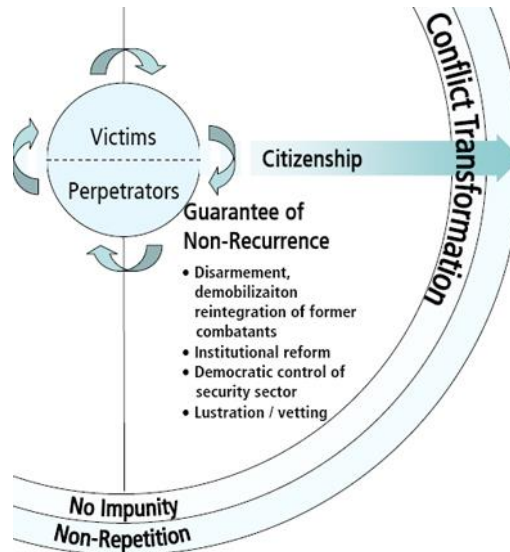


The right to justice implies that any victim can assert his or her rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held accountable by judicial means and that reparations will be forthcoming. It also entails the obligation on the part of the State to investigate violations, to arrest and to prosecute the perpetrators and, if their guilt is established, to punish them.

National, international, and so-called "hybrid" courts and tribunals, involving local and foreign experts, have been established to exercise this right.

The Guarantee of Non-Recurrence

VETTING/LUSTRATION AND INSTITUTIONAL REFORM



The guarantee of non-recurrence emphasizes the need to disband armed groups, to repeal emergency laws and to remove officials from office who are implicated in serious human rights violations according to a fair and transparent procedure. Measures in this regard include a process of disarmament, demobilization, and reintegration for armed groups as well as lustration, vetting, and other administrative procedures for the reform of state institutions in accordance with the norms of good governance and the rule of law.

The Case of Kosovo

1. The Right to Know

Human Losses - An estimated 13'754 persons died or went missing in connection with the 1998 - 1999 war/conflict.

Enforced Disappearance - From an estimated total of some 5'878 persons, currently ca.1'754 persons are still listed as missing.

Witness Protection - Witness testimony is essential for progress in the location of mass graves.

The Case of Kosovo

1. The Right to Know

Non-Judicial Truth–Seeking Mechanisms - Civil society organizations are advocating to establish a regional fact-finding body or ‘truth’ commission (RECOM) concerning the wars in former Yugoslavia.

Archives - A significant amount of human rights documentation is stored in archives outside of Kosovo.

The Case of Kosovo

2. The Right to Justice

War Crimes Prosecution - A majority of the 1'119 war crimes cases that were under investigation by UNMIK will not be brought to trial by EULEX.

Possible amnesty for politically motivated crimes in the past with the exception of war crimes, crimes against humanity, and genocide

The Case of Kosovo

2. The Right to Justice

Witness Protection - Witness and victim protection suffers from the lack of a coherent legal framework.

Archives - Local access to the ICTY public archives after the tribunal loses in 2014 must be guaranteed

The Case of Kosovo

3. The Right to Reparation

Individual Forms of Reparation - Both Kosovo Albanian and

Non-Albanian victims are demanding material compensation for damages suffered.

Programs for psycho-social accompaniment of victims are available, but not at levels commensurate with the problem.

The Case of Kosovo

3. The Right to Reparation

Symbolic Forms of Reparations - Monuments to fallen KLA soldiers contribute to an 'ethnicized' memory of the conflict.

There has been no official apology on the part of the Serbian government for widespread and systematic violations of human rights in the period 1989 – 1999.

The Case of Kosovo

4. Guarantees of Non-Recurrence

Judicial Reform - The vetting and re-appointment of judges and prosecutors has been completed, but has had a negative effect on human Resources.

Recruitment and capacity-building in specialized fields such as war crimes prosecution is necessary.

The Case of Kosovo

4. Guarantees of Non-Recurrence

Vetting - Public officials and persons standing for elective office may need to be screened with regard to their involvement with conflict-related crimes and corruption.

There is a need to screen returning refugees with respect to their possible participation in war crimes or crimes against humanity.

IV Towards Reconciliation: The Role of Dialogue

Addressing the paradoxes of reconciliation:

- Recognition of pain and suffering and the articulation of a common future.
- Concerns for exposing what happened and for letting go in favor of a renewed relationship.
- Redressing wrongs balanced against the need for stability of the status quo.
- The burden of reconciliation is placed on the shoulders of the victims.