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A Conceptual Framework for Dealing with the Past

Holism in Principle and Practice

Dealing with the Past Background Paper

swisspeace

swisspeace is an action-oriented peace research institute with headquarters in Bern, Switzerland. It aims to prevent the outbreak of violent conflicts and to enable sustainable conflict transformation.

swisspeace sees itself as a center of excellence and an information platform in the areas of conflict analysis and peacebuilding. We conduct research on the causes of war and violent conflict, develop tools for early recognition of tensions, and formulate conflict mitigation and peacebuilding strategies. **swisspeace** contributes to information exchange and networking on current issues of peace and security policy through its analyses and reports as well as meetings and conferences.

swisspeace was founded in 1988 as the "Swiss Peace Foundation" with the goal of promoting independent peace research in Switzerland. Today **swisspeace** engages about 40 staff members. Its most important clients include the Swiss Federal Department of Foreign Affairs (FDFA) and the Swiss National Science Foundation. Its activities are further assisted by contributions from its Support Association. The supreme **swisspeace** body is the Foundation Council, which is comprised of representatives from politics, science, and the government.

The Dealing with the Past Program of **swisspeace**

supports governmental and non-governmental actors in the design, implementation, monitoring and evaluation of DwP activities. The program provides a wide range of training opportunities including introductory courses and courses on more specific aspects of Dealing with the Past and contributes to the research-policy nexus at **swisspeace** through its research projects, research events, conferences, publications and teaching.

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Abstract/Zusammenfassung/Résumé

Dealing with a legacy of gross human rights violations is one of the major challenges facing societies in the aftermath of violent conflict or authoritarian rule. Experience suggests that there is a relationship between the ability to address this legacy in a comprehensive and inclusive manner and the potential to develop sustainable peace. swisspeace uses the term Dealing with the Past to underline that this is a long-term process that involves a wide range of activities, including initiatives that address the root causes of conflict.

swisspeace promotes a holistic approach to Dealing with the Past that aims at developing a culture of accountability, strengthening the rule of law and fostering reconciliation. This background paper introduces the essential elements of such an approach. It proposes a conceptual framework, suggests how it can be applied in practice, raises some of the key challenges of operationalization and highlights other swisspeace resources for further information.

Die Aufarbeitung von Menschenrechtsverletzungen nach einem gewaltsamen Konflikt oder einer autoritären Herrschaft stellt Gesellschaften vor eine der anspruchsvollsten Herausforderungen. Die Erfahrungen zeigen, dass ein Zusammenhang zwischen der Fähigkeit besteht, dieses Erbe ganzheitlich anzugehen, und dem Potential für nachhaltigen Frieden. swisspeace verwendet den Begriff Vergangenheitsarbeit (Dealing with the Past), um zu unterstreichen, dass es sich um einen lang andauernden Prozess handelt. Dieser bedarf einer grossen Bandbreite an Massnahmen, einschliesslich Initiativen, die Konfliktursachen angehen.

swisspeace vertritt einen holistischen Ansatz der Vergangenheitsarbeit, der auf eine Rechenschaftskultur abzielt, Rechtsstaatlichkeit stärkt und Versöhnung fördert. Dieses Backgroundpaper behandelt die zentralen Aspekte dieses Ansatzes. Es präsentiert einen konzeptuellen Rahmen, schlägt vor, wie dieser in der Praxis umzusetzen ist, führt einige zentrale Herausforderungen bei der Umsetzung aus und weist auf weiterführendes Informationsmaterial von swisspeace hin.

Le traitement de violations des droits humains représente un défi majeur auquel sont confrontées les sociétés au lendemain de conflits armés ou d'un régime autoritaire. L'expérience montre qu'il existe un lien entre la capacité de gérer cet héritage de manière inclusive et conséquente et le potentiel d'établir une paix durable. swisspeace utilise le terme traitement du passé (Dealing with the Past) afin de souligner qu'il s'agit d'un processus à long terme qui inclut un éventail d'activités dont des initiatives qui s'attaquent aux causes des conflits.

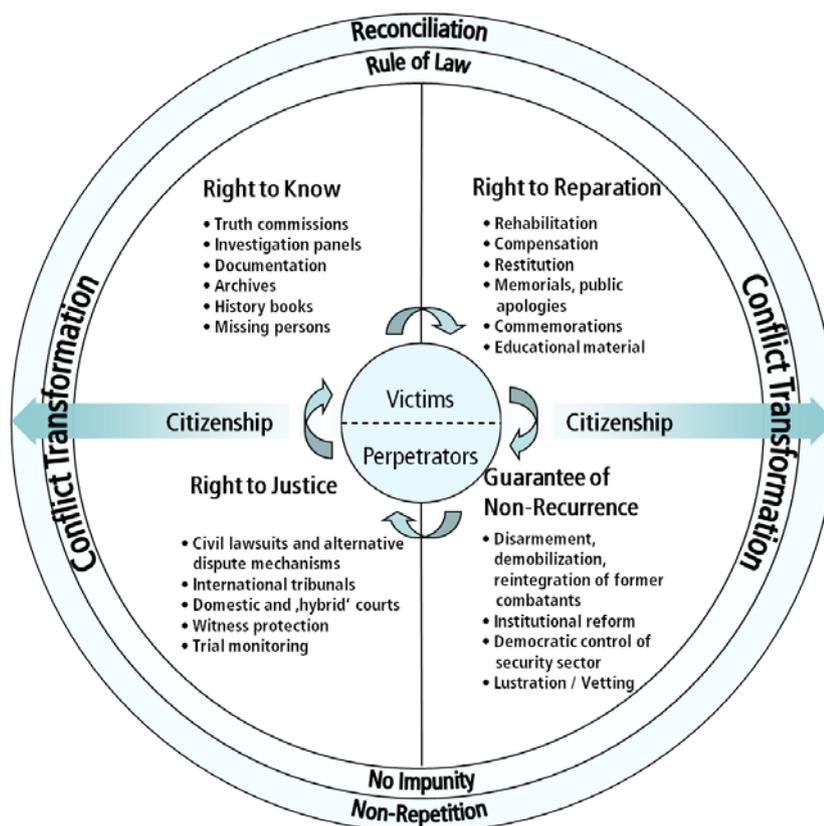
swisspeace promeut une approche holistique au traitement du passé qui vise à développer une culture de la responsabilité, à renforcer l'état de droit et à favoriser la réconciliation. Ce *background paper* traite les aspects centraux de cette approche. Il fournit un cadre conceptuel, propose des solutions pour la mise en œuvre pratique, aborde quelques uns des défis principaux quant à l'opérationnalisation et attire l'attention sur du matériel d'information supplémentaire de swisspeace.

1 An Holistic Approach to Dealing with the Past

In 1997, the UN Human Rights Commission approved of a set of principles that were recommended by the UN Special Rapporteur Louis Joinet in his report on the question of the impunity of perpetrators of human rights violations.¹ These principles call for efforts in four areas that subsequently became recognized as the main pillars of an holistic approach to dealing with the past:

- the right to know
- the right to justice
- the right to reparations
- the guarantee of non-recurrence.

The *Conceptual Framework on Dealing with the Past*, developed by swisspeace and the Swiss Federal Department of Foreign Affairs, is based on these principles and subsequent recommendations.² It captures the four main areas and mechanisms of an holistic Dealing with the Past approach, indicating that all areas mutually influence and depend on each other. The central focus is on victims and perpetrators and their transformation into citizens with equal rights. The diagram further suggests that Dealing with the Past is a long-term process that aims at establishing a culture of accountability, the rule of law and reconciliation.



© FDFA/swisspeace 2006, inspired by the Joinet/Orentlicher Principles

¹ <http://www.unhcr.ch/huridocda/huridocda.nsf/%28Symbol%29/E.CN.4.sub.2.1997.20.Rev.1.En>

² UN Document E/CN.4/2005/102/Add.1, Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity (<http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2005/102/Add.1&Lang=E>)

2 The Four Pillars of an Holistic Approach to Dealing with the Past

Each of the four rights which form the core of an holistic approach to Dealing with the Past entail three key elements:

- An *individual right* on the part of the victim and his/her family
- A *collective right* on the part of society
- An *obligation* on the part of the state to ensure that such rights are enabled and actualised

2.1 The Right to Know

The right to know refers to the importance of individual and collective knowledge regarding the causes, experiences and legacies of human rights violations. The acquisition of such knowledge is not a simple fact-finding exercise and there are a variety of mechanisms which may be employed in order to contribute to a longer term process of decision making regarding the different needs of individuals and societies in constructing knowledge and truths about the past. In doing so, it is hoped that memories can be preserved, documentation secured and history protected from revisionist arguments.

Missing Persons

The search for missing persons is one of the immediate priorities for relatives and victims and therefore often one of the first Dealing with the Past measures taken. Knowing what happened to missing family members and friends and knowing if they are alive or dead is crucial for relatives. Therefore exhumations and forensic investigations are essential even years after the disappearance of beloved ones. In many cases only the confirmation of the death of a person may allow for the process of mourning to begin.

Example: The International Commission on Missing Persons (ICMP) was established in 1996 to ensure the cooperation of governments in locating and identifying those who have disappeared during the armed conflicts in former Yugoslavia. ICMP has led the way in using DNA as a first step in the identification of large numbers of persons missing from armed conflict and contributes to the development of appropriate expressions of commemoration and tribute to the missing: <http://www.ic-mp.org/about-icmp/>.

Truth Commissions

During the last 30 years, many truth (and reconciliation) commissions have been established. Their mandates and impacts, however, have varied. In some countries the final reports of the commissions have not been published, while in other countries the commission's work has been extensively documented and made accessible to the public.

Examples: South Africa: <http://www.justice.gov.za/trc/>; Argentina: <http://www.memoriaabierta.org.ar/>.

Commissions of Inquiry

The United Nations increasingly uses the instrument of international commissions of inquiry, especially in situations where states are unable or unwilling to lead inquiries themselves.

Examples: In 2009 a fact-finding commission led by Judge Richard Goldstone investigated the events during the Gaza War, in 2010 the UN Secretary appointed a Panel of Experts on Accountability in Sri Lanka, in 2011 the Human Rights Council established an independent international commission of inquiry to investigate alleged violations of human rights in the Syrian Arab Republic since March 2011: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>.

Archives

Rendering archives accessible for the public is crucial for truth finding. For this reason archives are often at risk of being destroyed during coup d'états and revolutions.

Example: In Guatemala the entire police archives are currently being digitised and made accessible to the general public through a national initiative. The Swiss Federal Archive through swisspeace supports this initiative by holding security copies of all digitized records and providing training to archival staff: <http://archivesproject.swisspeace.ch/>.

2.2 The Right to Justice

The right to justice entails the duty of the state to hold accountable those who are responsible for human rights violations. International human rights and humanitarian law prescribe this duty and ensure that blanket amnesties for torture, crimes of genocide, war crimes and crimes against humanity are no longer possible. Fair and transparent trials are seen as the primary mechanism for ensuring legitimate accountability which can challenge cultures of impunity and ensure that victims have their harm legally recognised. For each society undergoing a Dealing with the Past process decisions need to be made regarding the type of trial best suited to achieving a meaningful and legitimate form of accountability in a given context.

International Tribunals

After the violent conflicts in Ex Yugoslavia and Rwanda the UN Security Council established *ad hoc* tribunals to prosecute those responsible for acts of genocide, war crimes and crimes against humanity committed during the conflicts (cf. ICTY: <http://www.icty.org/>; ICTR: <http://www.unicttr.org/>). Moreover, in 1998 the Rome Statute established the International Criminal Court in The Hague as the first permanent, treaty based international criminal court with a mandate to end impunity for the perpetrators of the most serious crimes of concern to the international community. This statute entered into force in 2002 (www.icc-cpi.int).

Hybrid / mixed tribunals

These tribunals are usually located in the country concerned and the staff recruited from local as well as international pools of experts. Examples include the Special Court for Sierra Leone (<http://www.sc-sl.org>), the Extraordinary Chambers in the Courts of Cambodia (<http://www.eccc.gov.kh>) or the Chamber for War Crimes of the Court of Bosnia and Herzegovina (<http://www.sudbih.gov.ba/?jezik=e>).

National prosecutions

Few states consistently prosecute international crimes committed by their own citizens. Often criminal/penal procedures are prevented because the persons responsible for past human rights violations remained in power or out of fear that prosecutions could lead to renewed violence (e.g. Spain). Sometimes it is a prevailing culture of impunity that has the same effect (e.g. Guatemala, South Africa, El Salvador). The prosecution of crimes committed outside the state's own territory or by foreign nationals is even more difficult. The number of procedures under so called universal jurisdiction³ is so far still very limited.

³ According to the principle of universal jurisdiction, every State has the right to prosecute extra-territorial crimes according to national jurisprudence regardless of the site of the crime or the nationality of the perpetrator or the victim, even when national interests are not affected. In the name of the global community (on a trust basis), a State should punish crimes which are considered to be so serious that they concern and threaten the whole global community (among others genocide, crimes against humanity, war crimes, torture).

Example: Decades after the violent events in several Latin American States (e.g. Argentina, Chile) some of the main perpetrators of crimes during the military dictatorships are now being prosecuted.

2.3 The Right to Reparation

The right to reparation refers to restitution, compensation or rehabilitation provided to victims of human rights violations. Such acts are intended to acknowledge harm suffered, promote dignity and support ongoing capacity building.

Restitution of property

The restitution of property after violent conflict is important, but still rather rare.

Example: Based on the Dayton Peace Agreement the commission for Real Property Claims for Bosnia Herzegovina (CRPC) was established in the Former Yugoslavia. The commission dealt with property suits in the context of the return of the more than 2 million people who were either internally displaced or fled as refugees during the 1992-1995 war. Since 2003, the Bosnian authorities have been responsible for the implementation of the decisions by the CRPC.

Compensation

Sometimes victims receive financial compensation in cases where restitution of lost property is not possible.

Example: In 1991 the UN Security Council established the United Nation Compensation Commission (UNCC) with the mandate of dealing with damages that were caused during the Iraqi Invasion of Kuwait. Despite being initially considered controversial the commission's procedures which allowed for individual complaints are now deemed a model for similar compensation programs.

Collective reparation

In cases where there are large numbers of victims programs of collective reparations are often more feasible.

Example: In the context of the Rome Statute of the ICC a trust fund was established to finance activities which address the harm resulting from crimes under the jurisdiction of the ICC. Such projects might work with groups such as internally displaced people, orphans, victims of sexual violence, or disabled persons (<http://www.trustfundforvictims.org/>).

Individual reparations

Reparations can take a variety of forms, for example medical or psychosocial assistance, education or micro credits.

Example: In 2009 the international Organization for Migration (IOM) established a victim assistance program in Sierra Leone. The assistance is tailored to categories with specific needs, for example medical assistance for victims of sexual violence and education opportunities for children (<http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAF/cache/offonce?entryId=27138>).

Symbolic rehabilitation

The large number of memorials, museums (and monuments) worldwide show how important it is for victims and their relatives that past abuses are publicly acknowledged.

Example: Chile opened a “museum of remembrance” which reminds the Chilean people of the injustices suffered under the military regime: <http://www.museodelamemoria.cl/>.

2.4 The Guarantee of Non-Recurrence

Dealing with the Past aims to contribute to the non-recurrence of past human rights violations. ‘Nunca más!’ – ‘Never again!’ was the leading slogan of the human rights movements in Latin America which initiated the examination of the violent past in countries such as Argentina, Chile, Brazil, Peru or Guatemala. The non-recurrence of systematic human rights violations presupposes democratic structures, civilian oversight of security forces, a functioning judicial system and the rule of law. The establishment of such structures is an expensive and complex long-term process. This process often starts with demobilisation and disarmament programs, free and fair elections, followed by reforms of the security sector, constitutional reforms and the construction of a functioning and independent judiciary.

Demobilisation and Reintegration of combatants

In the aftermath of a peace agreement the demobilisation, disarmament and reintegration of rebel groups and the reorganization of an oversized army often constitute important first steps towards the improvement of people’s security.

Example: In Sierra Leone measures for the disarmament and reintegration of former rebels were supervised by the UN mission, UNAMSIL:

<http://www.un.org/en/peacekeeping/missions/past/unamsil/>.

Elections and constitutional reforms

After a civil war or the collapse of an authoritarian regime there are challenges involved and decisions to be made regarding the timing of free and fair elections. In addition, fundamental constitutional reforms are required when establishing a legitimate government. This includes the development of parliamentary oversight, the retrenchment of presidential power and mechanisms to control the security forces.

Example: Tunisia had its first democratic elections after the Arab Spring uprisings in October 2011 with a 90% turnout of voters. The elected Constitutional Assembly is in charge of adopting a new Constitution within one year to be followed by the resignation of the current interim government and the appointment of a new government by the Assembly:

http://www.mpil.de/ww/en/pub/research/details/know_transfer/constitutional_reform_in_arab_tunesien.cfm.

Reform of the security sector

The human rights violations that typically occur under military dictatorships can only be effectively prevented if the security forces, especially the army and the police, are democratically controlled. This requires reorganisation as well as training.

Example: Since 2010 the Guatemalan Commissioner for Police Reform, Helen Mack, has been working towards the full implementation of fundamental police reform which had been first outlined many years earlier in the 1997 peace agreement and started by the International Commission against Impunity in Guatemala (CICIG): <http://cicig.org/>.

Reform of the legal system

A functioning legal system can help to prevent human rights violations and the abuse of power, and thus fundamental judicial reforms on all levels are an important condition for the Guarantee of Non-Recurrence.

Example: After the 11 year long civil war in Sierra Leone the poorly functioning judicial system is being rebuilt with international support (www.djis.dk/sw91651.asp).

Lustration/Vetting

In order to consolidate democratic structures, persons who are responsible for human rights violations need to be denied access to official political positions or removed from official posts. The role that public office holders played in the past needs to be examined in order to increase the credibility and legitimacy of the new institutions.

Example: The Polish Institute of National Remembrance operates a vetting office which uses the archives of the former state security service in order to check whether vetting declarations of persons seeking public office or serving in public functions are accurate: (<http://www.ipn.gov.pl/portal.php?serwis=en&dzial=45&id=234>).

3 The Challenges and Opportunities of Holism in Practice

An holistic approach to Dealing with the Past recognises the interdependence of the four key pillars of the right to know, the right to reparation, the right to justice and the guarantee of non recurrence. The conceptual framework presented here can be seen as a starting point for practice and knowledge generation. Practitioners and scholars of Dealing with the Past must also then ask a series of further questions which will shape the type, timing, context and substance of such a process.

3.1 What is the Context?

challenge: to ensure that a Dealing with the Past process is sensitive to conflict dynamics and informed by a nuanced understanding of the social, political, cultural and economic contexts

opportunity: to design a Dealing with the Past process which is conflict sensitive and which is meaningful for, and owned by, those who have been most affected by human rights violations

Dealing with the Past by definition deals with highly sensitive issues that are related to past conflict and carry the risk of leading to new tensions and violence. A conflict sensitive approach is therefore essential when planning and implementing a Dealing with the Past strategy. This involves a careful analysis of the context we operate in as well as an assessment of the potential impact of our interventions on the conflict. Based on such an understanding, there will be a better chance of minimizing unintended negative impacts on tensions and conflict as well as increased opportunities for the building of bridges.

Every context has its own history, culture, religions, languages and traditions which influence the ways a society may choose and is able to deal with the past. Dealing with the Past processes should take these specific conditions into account. They should also make sure to strengthen existing local structures and mechanisms in order to build future capacity for constructively dealing with conflict. Top-down approaches and externally imposed measures will neither receive the needed legitimacy nor build a sustainable process. A Dealing with the Past process should seek to include as active participants those who have been most affected by human rights violations as well as those who have been subject to marginalization due to experiences of violence, social status or geographical position.

The Framework is an ideal mapping tool. It can be used to establish an overview over existing initiatives in a specific context as well as over areas that have been neglected and needs that are not addressed yet. It can also be used to establish existing linkages, synergies and possibilities between different initiatives as well under-exploited areas for Dealing with the Past.

3.2 Who are the Actors?

challenge: to ensure that a Dealing with the Past process is based on knowledge of, and participation by, all relevant actors

opportunity: to design a Dealing with the Past process which is inclusive, relevant and legitimate

With an understanding of the importance of context comes an understanding of the importance of knowledge about, and inclusion of, the relevant actors. This may include governments, civil society groups, affected populations, perpetrators, international organisations, other states as well as donors among others. A Dealing with the Past process needs to ensure that actors' perspectives are heard and incorporated as far as is possible in order to achieve a relevant and legitimate process. The relevant actors may change over time and as the context itself shifts, thus rendering reflexivity and flexibility important characteristics of any dealing with the past process. In addition, a Dealing

with the Past process must be careful not to essentialise the identities of any actors, in particular 'victims' and 'perpetrators'. Strict boundaries between different actors may not be clear or indeed productive.

The Framework provides a systematic lens for the mapping of state and non state, local, regional and international actors. It helps to identify which actors are or should be involved and how roles can be distributed. It also allows for the identification of potential strategic partners.

3.3 How do Mechanisms Connect to Broader Processes?

challenge: to ensure that the mechanisms and measures in a Dealing with the Past process can contribute to conflict transformation, reconciliation and the rule of law

opportunity: to design a Dealing with the Past process which will contribute positively to longer term change and the establishment of a sustainable and just peace

Any Dealing with the Past process must be viewed as one part in a broader set of interconnected transformations. Chosen mechanisms will not necessarily lead to the expected or desired impacts and cannot alone promote the kind of broader transformations which are required for sustainable and just peace. The framework demonstrates how each of the four rights, ensured by different mechanisms and interventions, are integrally connected. Furthermore, it shows how these rights must be seen as part of a transformation of victims and perpetrators into citizens who can play a meaningful role in the establishment of a peaceful and democratic society. In this way it can act as a useful starting point for conceptualising how specific practices or mechanisms may be connected to each other and what broader goals they are working towards.

The holistic approach to Dealing with the Past can contribute to and support conflict transformation and reconciliation. Conflicts are caused by political, social, cultural or economic inequalities and injustice. Dealing with the Past works towards and includes the transformation of norms, structures and power relations which cause such inequalities and injustice. This can be done on an individual level through the recognition and reparation of historical marginalisation or harms suffered and the securing of substantive rights of citizenship for equal access to resources. On a collective level Dealing with the Past can contribute to the reduction of societal attitudes and discourses which promote conflict between individuals and groups, and discrimination against certain sections of society. New relationships can be forged through symbolic acts such as official apologies, commemorations or through institutional reform. On the level of the state Dealing with the Past includes transformations in political structure such as constitutional reform and citizenship laws. These changes can contribute to the transition towards democracy, shared political community and sustainable peace.

The framework reminds practitioners and scholars of dealing with the past that each discrete mechanism is part of a broader whole with a transformative potential. It can provide a basis on which to discuss connections between mechanisms and the formulation of longer term and broader goals to which they may contribute.

3.4 What is Possible?

challenge: to ensure that a Dealing with the Past process does not falsely raise expectations, is able to achieve its goals and can be fully funded by domestic or international actors

opportunity: to design a Dealing with the Past process which is possible in practice and which has legitimacy

After war and dictatorship, a country usually faces enormous costs for reconstruction and economic development. When planning dealing with the past initiatives it is important to work with financial budgets which are realistic, sustainable and to project future needs and costs. This can avoid raising false or unrealistic expectations – in particular amongst victims - and aid the design of an intervention which is possible in practice. In addition, there will be a political context in which any Dealing with the Past process takes place. The political will, political legitimacy and political power of different actors in the government and in opposition will to some extent determine what actions can be taken, decisions made or promises fulfilled. The same can be said of the regional and international context in which a Dealing with the Past process is embedded. International donors, international legal mechanisms and the involvement of neighbouring states will all shape what is possible in any given context at any given time.

The framework illustrates different mechanisms which can be designed in order to advance and support each of the four pillars and rights. This means that in contexts of restricted possibilities the framework can provide the basis for alternative entry points.

4 Selected Resources for Dealing with the Past Scholars and Practitioners

swisspeace Publications and Resources

swisspeace Dealing with the Past <http://www.swisspeace.ch/topics/dealing-with-the-past.html>

Archives and Dealing with the Past <http://archivesproject.swisspeace.ch/>

Dealing with the Past Training Course <http://www.dealingwiththepast.ch/course.html>

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Emotion, Space and Society, 5, pp. 103-112.

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International Journal of Transitional Justice 2012 (6), pp. 126-148.

Jones, Briony (section editor), 2012.

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Intersentia, February 2012.

Rubli, Sandra, 2012.

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In: Transitions Special Issue, From Peace to Shared Political Identities: Exploring Pathways in Contemporary Bosnia-Herzegovina, 51(1-2), pp.171-191.

Rubli, Sandra, 2011.

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Missing Persons: International Norms and Current Challenges
Focus article. KOFF Newsletter n°82, November 2009.

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Peace Mediation Essentials, Mediation Support Project (MSP).

Servaes, Sylvia and Nicole Birtsch, 2008.

Engaging with Victims and Perpetrators in Transitional Justice and Peacebuilding Processes
Workshop report published by Working Group on Development and Peace (FriEnt) and KOFF, October 2008.

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Dealing with the Past in Post-Conflict Societies: Ten Years after the Peace Accords - in Guatemala and Bosnia - Herzegovina
swisspeace Annual Conference Paper, September 2007.

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From 25 - 27 June 2007 in Nuremberg, Germany with a Workshop on "Justice Mechanisms and the Question of Legitimacy - Concepts and Challenges".

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Bleeker, M^o and Jonathan Sisson (eds.), 2004.

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**Schweizerische Friedensstiftung
Fondation suisse pour la paix
Fondazione svizzera per la pace
Swiss Peace Foundation**

**swiss
peace**

Sonnenbergstrasse 17
P.O. Box, CH-3000 Berne 7
Tel +41 (0)31 330 12 12
Fax +41 (0)31 330 12 13
info@swisspeace.ch
www.swisspeace.org