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“Transitional Justice and Development”

Issue Paper

Prepared for the “New Horizons” Conference hosted by the Working Group on Peace and Development (FriEnt), Berlin, 27-28 January 2010¹

The importance of transitional justice for development co-operation in post-conflict societies

The field of transitional justice has received increasing attention over the past 30 years. Especially over the last decade, it expanded considerably in terms of conceptual development, international recognition, and practical application.

Transitional justice’s conceptual origins as a field have to be understood in the context of democratic transitions (Arthur 2009) where post-authoritarian societies have provided the space to answer calls of victims, survivors and human rights activists to find out the truth and do justice. However, it has become increasingly articulated as one of the measures to help build peace in societies emerging from the devastations of war, with justice and accountability increasingly accepted as an integral part of peacebuilding in post-conflict societies marked by massive human rights violations, including war crimes, crimes against humanity, and genocide. Transitional justice measures have been written as obligations into peace agreements, become objectives to be supported by UN peacekeeping and peacebuilding missions, and changed the way many governments have approached their post-conflict recovery efforts.

Conceptual origins

The United Nations, who became increasingly engaged in supporting peacekeeping and peacebuilding efforts after the end of the Cold War and are a conduit for applying international norms and standards of accountability, have come to define transitional justice as, “ the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a

UN definition of transitional justice

¹ This paper addresses some guiding questions the conference organizers presented to me in my role as a panel member at this conference. It provides a slightly more elaborated sketch of my contribution. This issue paper draws in part on my article, “Roads Less Traveled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice” (2009), in Pablo de Greiff and Roger Duthie (eds.), *Transitional Justice and Development: Making Connections*, New York: Social Science Research Council, pp. 76-109.

combination thereof" (UN 2004).

Meanwhile, international development co-operation has also become increasingly concerned with conflict-affected and fragile countries and the question of how to keep countries from falling into a "conflict trap" (Collier 2003, 2008). Capacities and conditions for peace are a concern for development because without peace, development gains are eroded or impossible to achieve with equity for society at large. Similarly, the development community had to come to terms with the fact that its interventions can do harm and fuel violent conflict if it remains ignorant of conflict dynamics that ultimately exist in every society (Anderson 1996, Uvin 1998, OECD 2010).

*Conflict,
development
co-operation
and
peacebuilding*

At policy and practice levels, development actors therefore have been seeking to adapt their approaches to be more conflict-sensitive. They sought to better understand which capacities, institutions and processes they should seek to strengthen to foster conditions for sustainable peace and development. And they have begun to develop principles for engagement in fragile states (OECD/DAC 2008).

*Conflict-
sensitive
approaches to
development*

Just as transitional justice measures have become integrated into the international peacebuilding lexicon, so has bilateral and multilateral development co-operation become increasingly engaged with this field – with limitations. On one hand, many of the countries having to deal the legacies of massive human rights abuse are developing countries where development actors are operating. Donors are requested to fund transitional justice measures; development agencies with facilities on the ground are asked to help administer aid to transitional justice institutions, and to help build their capacities.

*Transitional
justice and
development*

On the other hand, neither in practice in even less in theory have the fields of development and transitional justice engaged in in-depth discussion and exchange. Questions of objectives, mandate, comparative advantage, complementarity and adequacy of tools and approaches remain to be explored in much more depth.

The UN High Commissioner for Human Rights recently coined the goals of transitional justice as follows, "At its heart, transitional justice seeks to achieve two goals: first, it seeks to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms. Second, it aims at mending the trust between individuals and the State, especially through the respect for the rule of law which is essential for the functioning of a rights-respecting society" (Pillay 2009).

*Convergence
of transitional
justice and
development
goals around
state- and
peacebuilding*

With this goal articulation in mind, transitional justice can clearly be of *instrumental* value to larger development goals in post-authoritarian and post-conflict societies. Development actors involved in supporting processes of state-building and peacebuilding should be concerned with what transitional justice can contribute to these agendas. After all, these are currently top priorities of the international development co-operation

(OECD/DAC 2008, DFID 2009).

Development actors operating in situations where significant parts of the populations have been affected by and possibly even participated in massive human rights violations need to be conscious of the issues with which transitional justice is concerned. Development actors need to understand both the *normative* human rights dimensions at stake and the *intrinsic* worth of transitional justice measures for victims and survivors – and avoid, for example, confusing reparations with development measures. Conversely, the Nuremberg Declaration on Peace and Justice called on national and international development actors to “be sensitive in dealing with the past when designing post-conflict development strategies and take into account relevant recommendations of accountability mechanisms” (2008).

Do no harm and “transitional justice-sensitive” development

Many transitional justice processes occur in contexts of grave underdevelopment and conflict-related destruction, marked by severe resource and capacity constraints. There is a need to intelligently identify needs and opportunities, to negotiate competing priorities and calibrate sequencing. Development co-operation at its best should be able to advise on institutions and processes feasible in light of existing national capacities and conditions.

“Development-sensitive” transitional justice

Finally, development should be concerned with the structural conditions of inequality and poverty. These are often intricately linked to the histories of violence that peacebuilding and transitional justice try to “deal with”. The High Commissioner for Human Rights and others have argued that transitional justice processes should also address violations of social and economic rights, which are often the causes of conflict. These issues require much further engagement between development and transitional justice actors, as it is important not to overload transitional justice with developmental expectations (de Greiff 2009), while development can no longer ignore dimensions of social justice (Mani 2008).

Addressing causing of conflict and violations of social and economic rights

The state of the arts: what has bilateral and multi-lateral development co-operation been doing/supporting? With what means and instruments?

The UN Charter, together with international human rights law, international humanitarian law, international criminal law and international refugee law provide the normative basis to frame transitional justice initiatives. The rules enshrined there include the duty to undertake effective investigations

International human rights law as the normative framework

² It must be noted however that the transitional justice support captured in the data of that exercise including security sector reform broadly defined which held by far the largest share.

³ For example, DFID was among the first bilaterals to explore the potential impact of transitional justice on poverty reduction (Alexander 2003) and refers to it now in several

and prosecutions of gross violations of human rights and serious violations of international humanitarian law which constitute crimes under international law. International law also recognizes the right of victims to reparations, and their right to know the truth about violations, as well as guarantees of non-recurrence of violations.

There are many lacunae when it comes to understanding the state of the arts. There is no overall policy framework for development assistance to transitional justice (ICTJ/DFID 2007). It is difficult to quantify the volume of ODA and other aid having been provided to transitional justice efforts in a comparative way. One study suggests fluctuating levels of 5-13% of total ODA being dedicated to transitional justice support in a given year over a ten-year period in Rwanda and Guatemala, respectively, but this study is a rare exception (Samset et al. 2007).²

Lack of joint aid policy frameworks and ODA analysis

Transitional justice certainly is not on the top of the development agenda. Nonetheless, over the past years development actors have slowly begun to grapple with the needs, lessons and implications for future work. Some bilaterals, including the UK, Switzerland and Germany, have been particularly active in trying to articulate lessons and policies, including through a string of workshops and conferences.³ Other bilaterals, such as the Netherlands, Belgium, Norway, Sweden, Denmark, Canada and the USA, have all funded transitional justice measures in different countries. At the level of the OECD DAC, this has not been a matter of specific exploration to date (except in its relation to security sector reform).

Bilateral activity

At the multilateral level there is an increasing degree of dedicated capacity and resources being developed, while the normative and conceptual frameworks continue to be developed. Multilaterals, including the EC, are frequently key conduits not only to provide aid but also to provide very substantive support to countries emerging from violent conflict.

Multilateral activity

At the UN, rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, facilitating national consultation processes, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

Following the Secretary-General's 2004 report and his 2008 Guidance Note on Rule of Law, the UN inter-agency Rule of Law Coordination and Resource Group is currently in the process of developing a Guidance Note of the Secretary-General on the UN Approach to Transitional Justice. It will provide system-wide direction on guiding principles, components of

Emergence of UN guidance on transitional justice

policy and practice papers on rule of law, justice and accountability work (DFID 2008, 2007). Switzerland began codifying lessons learned around the same time and has been a strong supporter of further work in this area (Bleeker et al. 2004, FDFA 2006, 2007). German development and political actors have hosted several international conferences and supported important conceptual work (GTZ/FES 2005, de Greiff et al. 2009).

transitional justice programmes, and ways to further strengthen UN transitional justice activities. The UN system's lead agency on transitional justice, the Office of the High Commissioner of Human Rights (OHCHR), has developed a series of rule of law tools for post-conflict states covering a wide range of transitional justice measures (<http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/SpecialIssues.aspx>).

Key entities, such as the Department of Peacekeeping Operations (DPKO), the OHCHR, and the United Nations Development Programme (UNDP) have taken steps to strengthen their capacities in terms of institutional structure, personnel and financial resources to better support rule of law and transitional justice activities, particularly in conflict and post-conflict States. The OHCHR supports transitional justice programmes in more than twenty countries through dedicated programmes developed and carried out both at headquarters and by field staff in stand alone offices and in UN peace operations. UNDP has made support to transitional justice processes one of the five pillars of its Global Programme for Strengthening the Rule of Law in Conflict and Post-Conflict Situations (UNDP 2008) and has supported transitional justice processes in over twenty countries through its network of country offices. Within the Department of Political Affairs (DPA), a standby team of mediation experts — including with expertise on transitional justice — is now rapidly deployable to advise United Nations officials leading mediation and conflict prevention efforts.

Gradual increase in UN support capacity – political, human rights, peacebuilding and development

The World Bank has asked itself—albeit tentatively—whether the truth commissions can be instrumental, or at least informative, for its work on governance and post-conflict reconstruction (World Bank 2006). More significantly, it is worth noting that the forthcoming World Development Report (WDR) 2011 on conflict, security and development will also reflect on memory and trauma. It will recognize that the psycho-social aspects of violent conflict have been comparatively neglected, and will discuss the impact of trauma on populations living with conflict, and the importance of addressing them as an integral part of conflict resolution and peacebuilding.

World Bank and WDR 2011

There are many lessons emerging from the implementation of transitional justice measures. To name a few by means of example:

Selected lessons

- Victims need to have a central place in transitional justice processes, as does the need to reintegrate victims back into society so that their rights and dignity can be restored. Outreach efforts are essential to ensure that victims, who are often not well organized or vocal, are empowered and have access to information about reparations as well as other transitional justice programmes.
- The legacy of international and hybrid justice mechanisms requires more attention, as does developing national capacities for prosecutions. International justice can often only play a limited role and that other initiatives may be better suited for the achievement of certain goals,

such as community reconciliation in war-torn societies.

- There is a need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. It is also imperative to eschew one-size-fits-all formulas and the imposition of foreign models. International support should be based on national assessments, national participation and national needs and aspirations.
- Effective strategies will seek to support both technical capacity for reform and political will for reform. The international community must therefore support domestic reform constituencies, help build the capacity of national justice sector institutions, facilitate national consultations on justice reform and transitional justice and help fill the rule of law vacuum evident in so many post-conflict societies.

What are the challenges in identifying interfaces between Transitional Justice and Development and in realizing programmes on the side of development co-operation?

The following finding of the 2004 SG report still holds true, “And yet, helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security”.

Developmental conditions for transitional justice in post-conflict societies

The ultimate objectives of transitional justice are not universally agreed on. Development actors may be more interested in its potential *instrumental* value to contribute to lasting peaceful co-existence, rather than *intrinsic* values related to a person’s right to justice, redress, and the truth. There is much debate on the potential trade-offs between peace and justice, with consequences for issues of timing and sequencing of particular measures and processes. There is however a case to be made for peace *and* justice as mutually reinforcing elements for sustainable peaceful co-existence. Capacity and resource constraints as well as timing and sequencing will remain issues that need to be balanced from context to context (see for example Fletcher et al. 2009).

Instrumental and intrinsic values of transitional justice

Calls for expanding transitional justice to address multiple dimensions of justice (legal, rectificatory, distributive) need to be seriously considered without forgetting that transitional justice measures were primarily functionally designed to foster corrective justice. Similarly, the adaptation of transitional justice in post-conflict contexts from its origins in post-

Multiple dimensions of justice

authoritarian contexts may well require further scrutiny and adjustments.

Dealing with the past is an inherently political process. Many conflicting interests are at stake. Development actors are not neutral in this regard. Their choices on what they support, and what they don't, already inform local and national perceptions that are difficult to control and manage. Moreover, transitional justice as a concept argues for a comprehensive and context-specific approach to dealing with the past, guided by international norms. Putting this into practice requires a willingness to take risks (an largely risk-averse international aid system) and good donor co-ordination, amongst themselves and with their national counterparts, to ensure comprehensive and sustainable strategies. Yet effective aid coordination, particularly in the aftermath of conflict, continues to be a major challenge for the international community.

The politics of aid and the politics of dealing with the past

The need for long-term vision and approaches to successfully and sustainably "deal with the past" and help prevent the recurrence of violence is contrary to much shorter-term development project cycles and modus operandi. Although development co-operation should have a long-term vision by its very nature and thus be well placed to provide the staying power and dedicated support for sustained capacity development and societal change, reality tends to be quite different. Are existing development (project) modalities, tools, and systems ultimately adequate to successfully support transitional justice processes?

Adequacy of development tools and approaches

There is a need to systematically take stock of the global experience to date to inform better policy through practice. Empirical evidence of the impact of transitional justice is scarce and threatens to undermine the credibility of transitional justice assumptions (ICTJ/DFID 2007; Thoms et al. 2008; IJTJ 2010). It is also difficult to measure as much of the desired impact is a matter of long-term societal changes. More long-term research is needed, both in terms of in-depth case studies and in comparative terms. The influence of foreign aid on transitional justice is also still little understood. More attention would need to be paid, for example, to understand the merits and downsides of political conditionalities and of options of "positive support" (where aid is used intentionally to strengthen positive dynamics or "drivers" for peace and to provide disincentives for "spoilers" – see Lenzen 2009, Uvin 1999).

Measuring the impact of transitional justice, and the role of foreign aid

Bibliography

- Alexander, J. (2003). A Scoping Study of Transitional Justice and Poverty Reduction: Final Report. London, DFID.
- Anderson, M. E. (1996). Do No Harm: Supporting Local Capacities for Peace Through Aid. Cambridge, MA, Development for Collaborative Action.
- Arthur, P. (2009). "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice." Human Rights Quarterly **31**(2): 321-367.
- Bleeker, M. and J. Sisson, eds. (2004). Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy. KOFF - Working Paper Series. Bern, Swiss Peace.

- de Greiff, P. (2009). Articulating the Links Between Transitional Justice and Development: Justice and Social Integration. Transitional Justice and Development: Making Connections. P. de Greiff and R. Duthie. New York, Social Science Research Council: 28-75.
- Collier, P. (2008). The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It. Oxford, Oxford University Press.
- Collier, P., V. L. Elliott, et al. (2003). Breaking the Conflict Trap: Civil War and Development Policy. Washington, DC, World Bank and Oxford University Press.
- DFID (2007). Governance, Development, and Democratic Politics: DFID's work in building more effective states. London, DFID.
- DFID (2008). Justice and Accountability: A DFID Practice paper. London, DFID.
- DFID (2009). Building the State and Securing the Peace. Emerging Policy Paper. London, DFID.
- DFID and ICTJ (2007). Donor Strategies for Transitional Justice: Taking Stock and Moving Forward, London, ICTJ/DFID.
- FDFA (2006). Dealing with the Past and Transitional Justice: Creating Conditions for Peace, Human Rights and the Rule of Law. Dealing with the Past - Series. M. Bleeker. Bern, Federal Department of Foreign Affairs (FDFA).
- FDFA (2007). El legado de la verdad: Impacto de la justicia transicional en la construcción de la democracia en América Latina. Dealing with the Past - Series. M. Bleeker. Bern, Federal Department of Foreign Affairs (FDFA).
- Fletcher, L. E. and H. M. Weinstein (2009). "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective." Human Rights Quarterly **31**: 163-220.
- GTZ and FES (2005). From Dealing with the Past to Future Cooperation: Regional and Global Challenges of Reconciliation. General Report. Berlin, Gesellschaft fuer Technische Zusammenarbeit (GTZ) / Friedrich Ebert Stiftung (FES).
- IJTJ (2010). Transitional Justice on Trial: Evaluating its Impact. Special Issue. International Journal for Transitional Justice. Forthcoming.
- Lenzen, M. (2009). Roads Less Traveled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice. Transitional Justice and Development: Making Connections. P. de Greiff and R. Duthie. New York, Social Science Research Council: 76-109.
- Mani, R. (2008). "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development." International Journal of Transitional Justice **2**(3): 253-265.
- OECD (2010). Do No Harm: International Support for Statebuilding. Paris, OECD.
- OECD/DAC (2008). Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience. Paris, OECD.
- Pillay, N. (2009). Address on "UN Approach to Transitional Justice". UN Approach to Transitional Justice: Dialogue with Member States on rule of law at the international level organized by the Rule of Law Unit. New York, UN Headquarters.
- Samset, I., S. Petersen Saether, et al. (2007). Maintaining the Process? Aid to Transitional Justice in Rwanda and Guatemala, 1995-2005. Bonn, Working Group on Development and Peace (FriEnt).
- Thoms, O. N. T., J. Ron, et al. (2008). The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners. CIPS Working Paper. Ottawa, University of Ottawa: Centre for International Studies.
- UN (2004). The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General. New York, United Nations Security Council.
- UN (2008). Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance. New York, United Nations.
- UNDP (2008). Strengthening the Rule of Law in Conflict and Post-Conflict Situations: A Global Programme. New York, UNDP.
- Uvin, P. (1999). The Influence of Aid in Situations of Violent Conflict. Paris, OECD.
- Uvin, P. (1998). Aiding Violence: The Development Enterprise in Rwanda. West Hartford, CT, Kumarian Press.
- World Bank (2006). Gender, Justice, and Truth Commissions. Washington, DC, World Bank.