

Transitional Justice, Peacebuilding and Development A quick overview of the Field

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I

In some ways transitional justice is a young field and it therefore enjoys many of the virtues of youth; it is intellectually fascinating, not obsessed with doctrine but with resolving problems, and it is full of energy and promise—as its rapid expansion illustrate. However, without having to agree completely with George Bernard Shaw’s famous complaint that it is a shame that youth is wasted on the young, we must also say that the fact that the field is still young generates some burdens. In my opinion the field continues to be undertheorized, its boundaries more porous than the normally contested borders of all normatively-based policy interventions, the expectations that it generates sometimes overstrip its potential, and, most relevantly for our discussion, its relationships with other fields of intervention (such as peacebuilding and development) remain to be fully articulated.

The organizers gave me a particular set of questions and I would like in this brief talk to provide some answers to them, although, for the sake of interest I will not necessarily do it *seriatim*, one by one, not the least because I think that the questions are interrelated.

Let me start with the most generic definition of the term ‘transitional justice’. At the highest level of generality transitional justice refers to the set of policies that have been implemented by different countries in order to deal with the legacies of massive human rights abuses. Although, as I mentioned before, the field—as all young ones—is characterized by plenty of ‘boundary discussions,’ there seems to be consensus (illustrated by plenty of international documents) that the following elements constitute the ‘core’ of comprehensive TJ policies: criminal prosecutions, truth-telling efforts, reparations programs for victims, and some efforts at institutional reform (particularly of those institutions most involved in either perpetrating or allowing the violations, typically security forces and the judiciary). There are of course many different ways of implementing these measures, and around this core other measures plausibly also form a part of a TJ policy, including memorialisation and the use of traditional or local justice initiatives. Thus, in speaking about the ‘core’ elements of a comprehensive transitional justice policy I do not mean to suggest that they exhaust what such a policy would contain.

Now, it is not just the relative youth of the field that explains why the links between TJ and other policy fields have not been articulated yet. Transitional Justice is a field that developed out of practice and that remains hugely under-theorized (true of many other policy areas as well). But it must be acknowledged that the practice of TJ started and took shape in contexts that were neither those of conflict or ones facing severe development challenges; the Latin American countries of the Southern Cone, the Eastern and Central European contexts, and then South Africa. None of these were post-conflict contexts in the typical sense and the most salient challenges in none of them was

development (again in the standard sense although all of them, particularly South Africa faced sectoral challenges).

Now, of course, the origins of an idea do not determine its future application. So, besides history there is another factor that explains why the relationship between the traditional paradigm of transitional justice and fields such as development and peacebuilding had not been an obvious topic of research until recently, namely, *function*: with the possible exception of truth commissions, (which of course also have precedents in commissions of inquiry), transitional justice relies on measures that strictly speaking do not constitute an invention: criminal prosecutions, reparations, and institutional reforms are instruments of redress with a long history. (The great conceptual innovation of TJ does not lie in the creation of new measures but in the coordinated deployment of familiar ones in contexts in which each of the familiar measures would have had both unlikely application and uncertain outcomes, a topic to which I shall return). But the truth is that none of these measures was functionally designed for purposes of peacebuilding, social restructuring, or development in mind. They were meant to strengthen systems of rights that were for the most part thought to have suffered either an interruption (as in the cases of Chile and Argentina), or a sort of ‘arrested’ development (as in South Africa).

Now, just as the genesis of an idea does not determine its future implementation, neither, as a consequence, does an account of its functional design (although I think it would be naïve to ignore either, a topic to which I will also return).

A good part of my work on TJ has dealt with the articulation of links between the different elements of a comprehensive TJ policy (that is, with trying to justify the claim that transitional justice should be conceived ‘holistically,’ or to put it in simpler terms, with the effort to answer the question ‘What keeps, or should keep the different elements of transitional justice together?’) and with the articulation of the links between transitional justice and other areas of policy intervention. Here, for reasons of both time and relevance I will not recapitulate that work, but only stipulate positions that I have developed at length elsewhere. There are two arguments to explain why the different elements of a transitional justice policy should be thought of in relationship with one another, that is, as parts of a whole, rather than as isolated initiatives. The first argument has a pragmatic beginning but a conceptual end. Each of the measures that compose a comprehensive transitional justice policy (i.e., criminal prosecutions, truth-telling, reparations, and institutional reform) is weak, particularly in the face of the violations they are supposed to redress. The point, as important as this might be, is not only that designing the measures in relationship with one another helps them ‘make up’ for each other weaknesses, but that doing so provides reasons to victims and others to understand these measures as responses to *justice claims* and not merely as instruments of expediency.

The second argument to justify thinking about the internal relationship between the different TJ measures is more conceptual in nature, and again I can do nothing more than sketching it; it turns out that by abstracting from immediate applications, it is plausible to argue that the different TJ measures share certain aims or goals. These goals can be distinguished in terms of the causal sufficiency or insufficiency of the measures to bring them about, but in short, it can be said that all TJ measures aim at providing

recognition to victims (as victims, but primarily as *rights bearers*) and at making a modest contribution to *civic trust*, primarily to the trustworthiness of institutions. More remotely, it is arguable that all TJ measures aim at making a contribution to social *reconciliation* and to the strengthening of the *democratic rule of law*. Two points of this normative account of transitional justice deserve to be highlighted: first, what gives the different transitional justice measures the potential to contribute to the achievement of these various goals is their *norm-affirming* function. Second, (although for reasons of time I will not deal with this topic here, there is a relationship between the relevant types of norms).

The fact that the different measures share some ends also helps to understand why it is important to think about them in relationship to one another. The complicated conceptual interrelations between these different ends makes the connections between the measures even tighter. One of the practical consequences of these two arguments is that it helps to explain and to justify a presumption against something which governments are often tempted to do, namely, to trade-off one measure against others, by saying, for example, ‘since we will be generous with reparations, we can be weak on prosecutions.’ The two arguments above help us understand why this is unlikely to work or to satisfy the justice claims of victims and others.

II

My interest here in offering this (very rough) sketch of a normative conception of TJ and its background is not mainly to make up for the theoretical deficit that afflicts the field, but to suggest how further theorizing helps to resolve the question that is at the core of this meeting, namely the relationship between TJ and other fields, in particular peacebuilding and development. The organizers asked me to react to three hypothesis, which I will now summarize: (1) that TJ is part of peacebuilding processes and that as a consequence TJ should be part of development work. (2) that economic, social and cultural injustices have to be part of Transitional Justice processes, and (3) that linking mechanisms and actors (TJ, peacebuilding and development) is important. I want to offer strong endorsement to the three hypothesis, but with some qualifications. The qualifications are not meant to weaken my support to the general thrust of any of them but to clarify the grounds on which I think they deserve to be supported and in two cases, to clarify the hypotheses themselves.

1. The relationship between TJ, peacebuilding, and development.

Now, although I started working on this normative conception of TJ long before I started thinking about its links with peacebuilding and development, thinking about TJ in this way helps to clarify the relevant connections; again, I can only sketch the argument here. It has become a common place in the development literature to describe developmental blockages in terms of the effects that the lack of proper recognition has on marginalized populations (diminished expectations), or of lack of trust or poor social capital, or weak institutions (increased transaction costs). Similarly, the peacebuilding literature is full of references to lack of confidence and trust as an important explanatory factor in, the difficulties of reaching and maintaining peace agreements.

Now, if this literature is correct in identifying the mechanisms that generate the peace and development costs of poverty and exclusion, there is every reason to believe that these same mechanisms will apply –perhaps with a vengeance—to victims of

massive human rights violations; the social fragmentation left in the wake of massive human rights abuses is similarly a common place in the transitional literature.

So although at the operational level there has been almost total disconnect in the design and implementation of transitional justice measures on the one hand and peacebuilding and development interventions on the other, the account of TJ offered here should help us see some conceptual links: in a sense, transitional justice is an instrument of social integration: it not only aims to recognize victims as victims, but to strengthen citizenship regimes, make institutions minimally trustworthy, to reconstruct the framework in which the replenishment of social capital is possible. Of course, nothing in this conceptual analysis determines how policy or operational coherence are to be achieved, precisely, nor preclude temporary conflicts between the TJ, peacebuilding, and development agendas, as we have seen in many different parts of the world.

So, to summarize my attitude towards the first hypothesis ('TJ is part of peacebuilding processes and as a consequence TJ should be part of development work'), I agree with its general thrust but I am interested in making a broader argument, namely one that gives reasons to development actors for being interested in TJ not merely in virtue of TJ's contribution to peacebuilding; in fact, whatever TJ can contribute to peacebuilding it does so in virtue of the same norm-affirming, institution-building potential that would make TJ relevant to development in any case (A reminder that TJ is not seen in all cases by all parties as an instrument of peace, and that in some cases some of its instruments can be used, indeed, as political and even as conflict instruments is, I am sure unnecessary).

(2) The second hypothesis to which I was asked to react says that 'economic, social and cultural injustices have to be part of Transitional Justice processes.' The ambiguity of the hypothesis makes it easy to agree with it. There is a sense in which of course economic, social, and cultural injustices have always been a part of transitional justice processes: truth commissions in Guatemala and Peru, for example, delved into the structural and socio-economic dimensions of the violence and gave important recommendations for the reform of various institutions including the judiciary. Some argue for making transitional justice measures more responsible for dealing with economic social and cultural injustices, by broadening their mandates so as to include in their purview violations of economic, social, and cultural rights. My concern is that measures that as I said before were not really designed to redress, say, structural imbalances and economic inequalities even in theory, and that in practice are so often overburdened, underbudgeted, and institutionally weak that they find it difficult to fulfil their mandates –let alone force the implementation of their recommendations—cannot really bear the heavier weight of transformations that (a) require longer term efforts than the typical life-span of transitional justice measures, (b) generate even more complicated political dynamics, (c) depend on legal regimes, norms, and practices that are different than those on which TJ measures have been grounded up to this point, and (d) in the process risk achieving the significant and actually far reaching goals that TJ measures set for themselves.

None of this is an argument for dismissing the contributions, both direct and indirect that TJ measures can make to peacebuilding and development. On the contrary, it is an argument for reevaluating the contribution that these measures can make even without expanding their mandate: in addition to the analysis of the structural and

institutional dimensions of violence that truth commissions often make, truth commissions can become the catalyst of broader reform processes; reparations programs, including restitution programs can have important developmental spill over effects among others by means of titling schemes and opportunities for local participation in the design and implementations of plans; criminal prosecutions, in contexts in which the law has more often than not been an instrument of oppression and one totally devoid of procedural and due process guarantees, can play a very important levelling and exemplary in effect in demonstrating both what due process looks like, and that no one is above the law. In the end, I think that the most promising contributions of TJ to development and peacebuilding will not come in the form of direct effects, through the enlargement of the mandates of transitional justice instruments, but rather from the indirect –although predictable—effects of their application, in short, through their contribution to giving force to the norms on which basic citizenship rights rest.

So, to summarize my reaction to this second hypothesis, here again I have a complicated position; I agree that in the absence of significant improvements in people's lives, over time, the application of transitional justice measures will be seen as a series of more or less inconsequential 'events.' This is neither an argument to keep exploring the potential of expanding the mandate of particular transitional justice measures so as to integrate more directly the violation of social, economic, and cultural rights, although I would like to caution against the overloading these measures with tasks for which they were not primarily designed, and for heeding the very real possibility that they will end up being overloaded and therefore end up not fulfilling either their more proper tasks nor the broader ones, in the process eroding faith in the crucially important tasks of affirming basic norms, improving the trustworthiness of institutions and strengthening citizenship regimes without which ultimately there is no sustainable peace or development.

3. This leads me to close with my reaction to the third hypothesis, which has to do with the importance of drawing links between actors, policies, and programs in the transitional justice, peacebuilding, and development areas.

In the end, I think that this is the crucial recommendation that stems from our research project. The point can be articulated, briefly, by means of two distinctions. Perhaps the very expression 'transitional justice' makes it easy to forget that there is a difference between a '*transition*' in the sense of a regime change with everything that this implies in terms of broader reforms and general changes not just in the political but in the economic and cultural spheres as well, and '*transitional justice*' which in my view is a narrower concept that comprehends, but does not exhaust all the measures and processes that are necessary to complete a successful transition. Transitional justice, I have tried to argue is both an important part of a transition and can make important contributions to the other processes and initiatives that are also part of a complete and successful transition.

The other distinction is between conceptual and programmatic holism. I have argued in my previous work for the importance of thinking about the different transitional justice measures in relation to one another, as parts of a conceptual whole. Expanding the notion of the 'external coherence' which I think is the mark of successful transitional justice policies –that is, the empirically verifiable fact that transitional justice measures that are not designed or implemented in isolation from one another but in close relationship in such a way that they both make up for their inherent weaknesses and also

that helps them pursue the goals that they share—one can argue for an especially broad type of coherence that invites thinking about transitional justice as a whole in relation with other policy initiatives, in the case that worries us here, in relation to peacebuilding and development policies.

But this type of conceptual holism need not lead to *programmatically holism*. Here one can take clues from the lessons taught by systems theory to which so many German intellectuals including Jürgen Habermas, Niklas Luhmann, and Claus Offe, have made important contributions, and remind ourselves of the virtues of divisions of labor that heed the limits of institutional capacities, tries to prevent their overload, and yet, call for the coordination of their different tasks.

A transition, undoubtedly, and as both development and peacebuilding actors are so fond of insisting, are long-term processes. Transitional justice efforts should be important parts of these efforts, not the least because leaving atrocities unaddressed is likely to prevent the achievement of the sort of social integration that are both a precondition and a manifestation of sustainable peace and development. Here, more than thinking that there are measures that constitute ‘silver bullets,’ we need to get to the nitty-gritty work of seeing how we can improve upon mutual learning processes and effective coordination of initiatives that are already quite burdened, but that collectively if well designed, and with a realistic view of both their potential as well as their limitations, can help move the complicated process of achieving justice in a larger sense along.