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Briefing Paper

Transitional Justice: Key Concepts, Processes and Challenges

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This briefing paper focuses on transitional justice as one of the key steps in peacebuilding that needs to be taken to secure a stable democratic future. It provides key stakeholders with an overview of transitional justice and its different components, while examining key challenges faced by those working in this area. The paper focuses on key concepts of transitional justice before addressing its traditional components: justice, reparation, truth and institutional reform. The paper concludes with some remarks that challenge the traditional concept of transitional justice and its processes in order to initiate important debate on where future work in this field is needed.

1. Introduction and background

Armed conflicts and repressive regimes constitute a potential threat to the international community since they have spill-over effects, such as massive atrocities, migration of people, the expansion of terrorism, arms production and proliferation, drugs proliferation, organised crime, environmental damage, poverty, and lack of development, all of which have widespread effect. This threat makes it imperative to help states in such situations to undergo important political and social change so that they can build systems where the rule of law, democracy, and human rights protection can flourish. The achievement of these aims can also help to protect international peace and security. In such contexts, peacebuilding measures are necessary to achieve a lasting transformation, to avoid a relapse into conflict and repression. Without peacebuilding measures, states tend to relapse into conflict within five years of the signing of a peace agreement (Collier and Hoeffer, 2004). Peacebuilding encompasses peacekeeping –maintaining or enforcing peace, transitional justice, and other measures to prevent conflict and to provide security, stability, and prosperity (High-Level Panel on Threats, Challenges and Change, 2004).

This briefing paper focuses on transitional justice as one of the peacebuilding steps that needs to be taken to secure a stable democratic future. It aims to provide key stakeholders with an overview of transitional justice and its different components, while noting some of the key challenges faced by those working in this area. Since the field of transitional justice is very broad and complex, this paper focuses on its key concepts before addressing the main issues concerning its traditional components: justice, reparation, truth and institutional reform. The paper concludes with some remarks that challenge the traditional concept of transitional justice and its processes in order to initiate important debate on where future work in this field is needed.

2. Key issues and problem areas

Defining transitional justice

The term transitional justice was coined in 1995, as a result of the publication of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, edited by Kritz. Today, almost two decades later, the concept of transitional justice has influenced the legal, social and political discourse of societies undergoing fundamental social change, and that of the international community. The key assumption in such periods of change is that any state where mass atrocities have taken place should engage in processes (judicial and

non-judicial) that will achieve justice for past crimes, peace, a democratic society and an established rule of law. This assumption underpins the United Nations (UN) working definition of transitional justice. For the UN, transitional justice refers to "the full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation" (Annan, 2004, p. 4).

This definition, all-encompassing as it seems, leaves important issues unresolved, such as the relationship between international law and transitional justice; whether countries that move from authoritarian regimes towards democracy, but where gross human rights violations did not take place, should also engage with transitional justice processes; whether a transition can only take place in countries where conflict or oppression has ceased to exist; how to come to terms with large-scale past abuse; and what mechanisms should be used. Other definitions of transitional justice complement and enrich the UN one. Roht-Arriaza, for example, defines transitional justice as the "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law" (2006, p. 2). According to this concept, transitions can only take place when conflict or repression has ended and should include all human rights, not only civil and political rights. This concept is not broadly supported by stakeholders, some of whom prefer to limit it to serious and systematic violations of civil and political rights. Remarkably, however, the UN has moved towards recognising that to properly deal with the root causes of conflict it is also necessary to address violations of economic, social and cultural rights (OHCHR, 2009).

There are yet other definitions that prefer to focus on the set of actors behind such processes, rather than on the substance of transitional justice. Arthur, for example, prefers to define transitional justice as a "field" constituted by "an international web of individuals and institutions, whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy" (2009, p. 324), most of which are articulated as a result of the need to resist and respond to mass atrocities in contexts of significant political change. In contrast, others, like Bell, challenge the idea that transitional justice is a "field", and prefer to think of it as a "label or cloak that aims to rationalize a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the quite different normative, moral and political implications of the bargains" (2009, p. 6). For her, understanding transitional justice as a field denies its very nature as a legal enterprise that began as a response by human rights law to secure accountability for past crimes.

Whether a field or not, and despite important differences among these concepts, they all highlight the fact that transitional justice implies a particular set of approaches to deal with the legacy of gross human rights violations and international crimes. Some of these approaches are driven by the international law paradigm, meaning international human rights law, international humanitarian law, international criminal law, and international refugee law, which becomes "the normative foundation" of transitional justice (OHCHR, 2009, and Annan, 2004, p. 5). Nevertheless, approaches to transitional justice do not always follow this normative basis, as Bell clearly highlights, some maintain different normative approaches to some of the most important transitional justice questions, as will be illustrated below.

The Processes of Transitional Justice

Four processes are believed to constitute the core of transitional justice, even if there is disagreement about what each of them entails and the relationship that should exist between them. Usually, a transition encompasses a *justice process*, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a *reparation process*, to redress victims of atrocities for the harm suffered; a *truth process*, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an *institutional reform* process, to ensure that such atrocities do not happen again (OHCHR, 2009). In addition to these core processes, others have become part of the transitional justice agenda: primarily, *national consultations*, which have been strongly recommended by the Office of the High Commissioner for Human Rights (OHCHR) and the Peacebuilding Commission, which emphasise that "meaningful public participation" is essential for the success of any transition (A/HRC/12/18, 2009, and

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A/63/881-S/2009/304, 2009). National consultations should take place in relation to different aspects of transitional justice. Finally, *Disarmament, demobilisation and reintegration* (DDR), which usually take place in parallel rather than as part of the transitional justice processes, actively interact with and complement transitional justice mechanisms and policies. DDR focuses on helping ex-combatants to stop fighting and to reintegrate into society (Waldorf, 2009). While all these processes are important, this report focuses on the core processes of transitional justice, namely: justice, reparation, truth and institutional reform.

The Justice Process

A key belief of transitional justice is that alleged perpetrators of genocide, crimes against humanity, and war crimes should be prosecuted, tried and, if found guilty, punished for the atrocities they committed. This approach is supported by three main arguments: a) that the international law paradigm obliges states to investigate, prosecute and punish such crimes; b) that adequate reparation under international law includes bringing perpetrators to account; and c) that accountability for past crimes is crucial to prevent such atrocities in the future.

Important developments, both at the domestic and international level, and under International law strengthen legal arguments a) and b). Indeed, domestic trials are taking place in countries such as Argentina, Colombia and Chile, both as a response to victims' demands and in order to protect and enforce their rights, but also to comply with what the justice sector in these countries considers to be binding international obligations. For example, article IV of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide and article 4 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establish an international obligation in relation to genocide and torture, respectively. This obligation is claimed to have the status of customary international law in relation to such crimes

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Equally, although human rights treaties, such as the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, do not expressly incorporate such an obligation, all of them do expressly include the right to a remedy, which has been understood by their respective monitoring bodies to raise an obligation in relation to human rights violations, such as disappearances, torture and arbitrary killings (Orentlicher, 1991). The key legal precedent for this approach is the judgment in *Velázquez Rodriguez v. Honduras* (1988), where the Inter-American Court on Human Rights considered that "States must prevent, investigate and punish any violation of the rights recognized by the [American] Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation" (para. 166). Most of the treaties mentioned are also understood to require states to investigate crimes against humanity.

Besides these sources of international human rights law, international criminal law has also developed in important ways to fight impunity. Ad hoc tribunals have been established by the Security Council to deal with the atrocities committed in the former Yugoslavia and Rwanda (the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda). The Rome Statute establishing the International Criminal Court was agreed and entered into force in 2002. To-date, the Statute has 113 ratifications, almost twice what it had in 2002. It grants jurisdiction to the ICC over crimes against humanity, war crimes, genocide, and aggression, also making individuals accountable for such crimes at the international level. Also, Hybrid tribunals have been established, such as the Special Court for Sierra Leone, the Crime Panels of the District Court of Dili in East Timor, the War Crimes Chamber in the State Court of Bosnia and Herzegovina, and the Extraordinary Chambers in the Courts of Cambodia. These developments all show an important domestic and international trend to fight impunity. This means that if states fail to fulfil their international obligation to make the perpetrators of such crimes accountable within their own jurisdictions, the international community can take action to ensure that justice is done.

An important challenge to the justice element of transitional justice is the perception that it can be an

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obstacle to peace, truth and/or reconciliation in the aftermath of conflict or repression. Those who support this view often claim that in such periods of change the international law paradigm is not applicable given the exceptional circumstances faced by states, or that international law does not fully rule out amnesties for past crimes, as is often believed (Mallinder, 2008). For them, peace (or any of the other goals mentioned) has to be sought first, even at the expense of justice. Therefore, amnesties (and also statutes of limitation) are an important necessity to allow a society to move forward, even if they potentially breach the obligation to investigate, prosecute and, if applicable, punish. For example, in the *AZAPO* case (1996), the Constitutional Court of South Africa maintained the constitutionality of the amnesty provision of the Promotion and National Unity and Reconciliation Act 1995, based mainly on the view that the amnesty was essential as an incentive for perpetrators to confess their crimes. More recently, the Supreme Court of Brazil (2010) maintained that the amnesty law was necessary to consolidate peace and was the result of social consensus.

At the international level, the tension between these objectives is also visible. The ICC, for example, is considered by some critics to be an obstacle to peace in countries where it is currently conducting investigations, for instance, in Uganda and Sudan. In Uganda, the ICC has initiated formal investigations of crimes committed by the Lord's Resistance Army in northern Uganda, and has issued arrest warrants. This has been strongly criticised, given the possible damage it could cause to the peace negotiations (Waddell and Clark, 2008). In Sudan, in 2009, the ICC issued an arrest warrant against President Al Bashir, which was perceived as fuelling existing tensions there.

Justice processes face other challenges that need urgent clarification and response. In relation to the existence of an international obligation to investigate, prosecute and, if applicable, punish, the following are pertinent questions in need of answers: assuming that this obligation exists, what is its scope (Mendez, 1997)?; is it sufficient to investigate and prosecute but not to punish?; should punishment be proportional to the gravity of the crimes committed?; how can the compliance of traditional justice mechanisms with international standards be measured?; and is there an international obligation to cooperate with countries undergoing a transition so that they are able to fulfil this international obligation?

In relation to the role of law and social change: should justice be limited to retributive justice, or should it also incorporate issues of distributive justice? and, if so, how can distributive justice best be achieved?

As for the fight against impunity and the delivery justice: how can evidence be secured to facilitate the course of retributive justice?; how can evidence be secured that not only explains the circumstances of the crimes but that also helps to identify the perpetrators?; how can effective victim and witness protection mechanisms be created (OHCHR, 2009)?; how can international cooperation between states be secured, so that the perpetrators of crimes can be prosecuted and punished?; how can the evidence of crimes be preserved and shared? and how can the required expertise and capacity to conduct complex investigations and prosecutions be ensured in fragile countries with fragile institutions?

The majority of these questions are in the process of being addressed, but more comparative, multidisciplinary and interdisciplinary studies are needed to highlight both the problems and the achievements of the domestic and international justice processes that have already been put into motion worldwide.

Lastly, but not less importantly, the causal connection claimed to exist between justice and prevention is still to be proven, despite the way this connection (and, specifically, any deterrence effect of justice mechanisms) is asserted by international law in treaties such as the Genocide Convention or the Torture Convention, and by international organisations like the UN. To date, the most prominent quantitative work in this area has been that of Kim and Sikkink (2007), who suggest that, overall, such trials help to improve human rights protection in countries undergoing transitions and even in neighbouring countries. Their research stands in clear contrast with that of others like Snyder and Vinjamuri (2003 and 2004), who maintained that, rather than preventing future violations, such trials can cause further atrocities. Clearly, since transitional justice processes take time, even more than one generation, it is not easy to measure the impact that

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domestic or international trials can have on prevention. Nevertheless, it is important to conduct further research in this area to better ground any justification for retributive justice as a means of preventing further atrocities.

The reparation process

Transitional justice is also based on the assumption that gross human rights violations cause serious harm to its victims and should therefore be redressed. This assumption is widely upheld in relation to state responsibility and in relation to individual criminal responsibility. Firstly, under international law, any state that breaches its international obligations (by action or omission) has the obligation to produce reparation (International Law Commission, 2001). So, for example, when states are involved in the commission of human rights violations (like disappearances or torture), as happened, for example, in Chile and Argentina during their respective dictatorships, the state is liable under international law to produce reparations for its victims if, at the time of the commission of such atrocities, it was bound by international law (treaty and/or custom) not to commit such violations. Secondly, international law also recognises individual criminal responsibility for crimes against humanity, war crimes, genocide and aggression. Perpetrators of such crimes should also repair the harm they caused to their victims (Rome Statute, article 75). These two forms of reparation (state and individual) are well founded in international law.

These scenarios leave unaddressed other actors who in certain cases are also alleged to have participated in the commission of atrocities. The *Khulumani* case is emblematic in this sense. In this case, it is alleged that five corporations aided and abetted in the commission of apartheid in South Africa. The case against the corporations is currently being litigated under the Alien Tort Claims Act in the United States. The problem faced by such litigation is that the international law paradigm, the normative foundation of transitional justice, has not evolved to the point of making transnational corporations or financial institutions accountable for gross human rights violations or international crimes. This, however, does not mean that they are beyond the law, since they might also be liable under the domestic law of the relevant jurisdiction where the crime was committed, or where the company has its headquarters. Nevertheless, there are other legal hurdles that need to be surpassed; for example, the narrow interpretation of "aiding and abetting". This is one of the areas where more research is needed, given that such actors could play an important role in redressing harm and in helping a society to move forward.

It is also common to see states engaging on a reparations process without acknowledging any legal responsibility for the human rights violations or crimes that were committed, but rather appearing to act in order to help their own people or others to move forward. In Colombia, for example, the government established the *Programa de Reparación Individual por Via Administrativa* (Administrative Reparations Programme) so that the state could provide reparations to victims of crimes (such as disappearances, torture, and arbitrary killings) committed by the guerrillas or paramilitary groups (not state forces) before 22 April 2008.

On other occasions, states other than the states where the atrocities were committed also contribute to the reparations process, not because they acknowledge the existence of an international obligation to this end but because they decide to cooperate with such a process. For example, the United States, through USAID, helped to finance the comprehensive health programme created for the victims (Lira, 2005), known as PRAIS (*Programa de Reparación y Ayuda Integral en Salud y Derechos*) in Chile.

Although there is a consensus that there is a legal foundation to claim reparations under international law, both from states and individuals, the standard required is that of "adequate reparation" and this standard is yet to be fleshed out. Clearly, reparations have the primary aim of returning the *status quo ante*. In periods of transitional justice this is almost impossible, given the nature of the violations that have been committed. Equally, reparations should be proportional to the harm suffered. Important guidelines have been agreed by states, such as the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN General-Assembly, 2005), which indicate important principles to regulate reparations by

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the state in such situations. They also list different forms of reparation, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as possible complementary forms of redress. The Rome Statute indicates that the Court should establish the principles of reparations to be applied to the perpetrators of crimes under its jurisdiction, and that they include restitution, compensation and rehabilitation. Nevertheless, how to effectively provide adequate reparation using these forms of redress remains a complex matter, and one to which there is not yet an appropriate answer. Some consensus exists to support the idea that adequate reparation in such situations includes the investigation and prosecution of those who committed the crime(s), but that it should also include a combination of other forms of reparation given the seriousness of the violation, while bearing in mind the particular situation of each victim.

However, several complex issues remain to be clarified, such as: how to guarantee that victims receive adequate reparation; how to make the reparation paid by the state and the perpetrator compatible, so that one complements the other; what constitutes adequate compensation for a disappearance, torture or genocide (Sandoval and Duttwiler, 2010); how harm can be quantified in economic terms; the scope of rehabilitation, and whether it only relates to providing the victim with physical and mental care, or whether it goes beyond this to include other services (Sandoval, 2009); what should happen when the perpetrator is indigent; how to enforce and monitor compliance with reparation orders; and how to avoid payments by the state and the perpetrator for reparation causing undue enrichment to the victim.

Intrinsically related to the question of what constitutes adequate reparation under international law is the question of who counts as a victim of such atrocities. Thanks to important changes during recent years, today, there seems to be more recognition that the victims of crimes against humanity, war crimes or genocide, for example, include not only those who are directly attacked (the person who is killed, tortured or disappeared) but others, notably, family members, who can also be harmed in such situations (Sandoval, 2009).

Despite this broad consensus, transitions take place in countries where a significant number of the population has been targeted and has suffered as a result. Consider the case of Rwanda, where 800,000 people (approximately 10% of the total population) were killed within 100 days in 1994 (Commission of Enquiry, 1999). Are the victims only the 800,000 that were killed? Should their surviving family, friends, and the communities they lived in be included? Are those who witnessed the genocide victims? How can all the victims be identified and recognised by the law as entitled to reparations? How can adequate reparations be made when Rwanda was left bankrupt after the genocide? What about reparations for refugees or people who are in exile? Do women and children require special reparation measures? Is it better to provide collective reparations, relying more on rehabilitation, satisfaction measures and guarantees of non-repetition for the communities, than to provide individual compensation and other forms of reparation? How can collective harm and individual harm be best balanced and reparations made accordingly?

An additional challenge when considering reparation relates to who can order reparations and how such systems can be made consistent. Broadly speaking, there are two distinct ways of achieving this: firstly, a judgment by a domestic Court, an international tribunal (human rights tribunal or criminal court, like the ICC or the Extraordinary Chambers in the Courts of Cambodia), or a truth and reconciliation commission –depending on their mandate, and/or, secondly, administrative reparation programmes (Rubio, Sandoval and Diaz, 2009). One does not necessarily exclude the other, but the former aim to deal with reparations for the individual victims in a particular case, while the latter do not consider the individual harm suffered by each victim but rather applies the same treatment to all victims who suffered, for example, torture. These systems can be challenged on grounds of fairness. States create their own administrative reparations programmes to respond to the harm suffered by victims of disappearances, arbitrary killings and torture, for example. These programmes aim to benefit thousands of persons who qualify for reparations. However, is it possible to say that such reparation measures are adequate when they do not take into account the particular characteristics of each victim? Equally complex is the question of how to deal with reparations awarded by the administrative reparations

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programme when, at the same time, some victims also seek judicial protection at the national or international level and, as a result, could end up getting more reparation than other victims who suffered equally.

Reparations to victims have also generated important discussion regarding their transformative potential. Given that victims of heinous crimes are usually discriminated against and poor, reparations can be seen as a means to move towards development and to challenge structures of discrimination that can be left unaltered if the aim of reparation is simply to return the victim to the *status quo ante* (Roht-Arriaza and Orlovsky, 2009). This potential reach of reparations has, as a consequence, helped to challenge the traditional understanding of transitional justice, one that is limited to the achievement of justice – retributive justice- for past atrocities, rather than one that encompasses the achievement of distributive justice. Nevertheless, there is no consensus around the extension of the concept of transitional justice to include tackling the root causes of conflict or repression, or to intrinsically link it with development or with the fulfilment of economic, social and cultural rights.

The truth process

Transitional justice processes are also built on the belief that individual victims and their societies need to know what happened. As Roht-Arriaza (2006) indicates, since most of the atrocities committed in periods of repression or conflict happen in secrecy or denial, there is an inherent need to clarify what happened and who was responsible. This finds strong support in international law, at least in relation to certain crimes, such as disappearances. For example, Protocol I to the Geneva Conventions indicates, in articles 32, 33 and 34, that families of missing persons have the right to know the fate of their loved ones and it establishes the obligations to be fulfilled by each party to the conflict. Equally, the UN Convention on the Protection of all Persons from Enforced Disappearances, not yet in force, establishes, in article 24, the right of victims to "know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person". The UN Working Group on Disappearances has recently confirmed the existence of this right under international law, and not only in relation to disappearances (General Comment, 2010).

Despite the legal recognition of this right in relation to disappearances, it continues to be disputed in relation to other gross human rights violations since there is no express legal recognition of such right. Nevertheless, it could be argued that important state practice and *opinio juris* exists, so it could be said that there is a customary rule to that effect. Even if it is accepted that the right to know the truth exists under international law, there continues to be a dispute as to who its right-holder is. Is it the victims of gross human rights violations or is it society as a whole, or both of them? Further, what is the scope of such a right? and what are states obliged to do? International tribunals, like the Inter-American Court of Human Rights, have argued that there is no autonomous right to know the truth under the American Convention on Human Rights but, rather, that the right to know the truth is equivalent, or is "subsumed in the right of victims and families to obtain clarification of the facts through judicial investigation and adjudication" (Cassel, 2007, p. 160) in relation to any kind of gross human rights violation. This only reinforces elements of the justice dimension already explained, since the only way to fulfil the right to know the truth is if the state complies with its obligation to investigate, prosecute and, if applicable, punish perpetrators of such atrocious crimes.

Beyond the existing possibility to enforce the right to know the truth before a Court, other mechanisms have been used to this effect, which can achieve a more comprehensive reconstruction of the past than that which can be achieved judicially. The most common way to deal with the truth of past atrocities is through a truth and reconciliation commission (TRC). A TRC is a commission of enquiry created by the state (usually the executive or parliament) to investigate heinous crimes committed during conflict or repression and to produce recommendations for dealing with the consequences (Freeman, 2006). The mandates of TRCs are very diverse. For example, the famous South African TRC had the power to investigate crimes committed during apartheid, including the use of subpoena and seizure powers, to have public hearings, and to recommend the granting of an amnesty for perpetrators in exchange for full disclosure. This commission was also allowed to award interim reparations and to make recommendations in this respect. In contrast, the Argentinean National

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Commission on the Disappeared (CONADEP) was mandated only to investigate the disappearances that took place in the country between 1976 and 1983, without subpoena or seizure powers.

While the three processes described so far (justice, reparation and truth) are clearly connected, there can be tension between them. In Sierra Leone, for example, a TRC and the Special Court for Sierra Leone were established to deal with the legacy of mass atrocities. Tensions between the two bodies were visible, for example, in relation to the amnesty included in the Lomé agreement. The TRC upheld the amnesty, since it was approved by negotiators of the agreement and because it was the only way to stop the conflict. The Special Court, however, which considered the amnesty contrary to international law (Schabas, 2006). A similar problem arose, as Schabas notes, in relation to the exchange of information between the two bodies and the possibility that alleged perpetrators, who were prosecuted by the Special Court, would appear before the TRC at a public hearing. Such tensions call for a more concerted effort towards building transitional mechanisms that operate more harmoniously and that complement each other. They also highlight the need to consider when and in which order it is best to deploy each process, since sequencing them could also be an option (Fletcher et al., 2009). The order of such a sequence remains a question subject to debate.

The work of TRCs faces other important challenges. First, how the truth can best be reconstructed when human and financial resources are limited, and mandates restrict their reach (for example, to clarify only gross human rights violations, but not the root causes of a conflict). Second, as Freeman notes, TRCs also require the adoption of clear legal procedures, to deal with the truth revealed (Freeman, 2006). Third, to be successful TRCs need important outreach policies and structures, so that all victims can tell their stories and participate actively in the process of social change and truth building. Otherwise, TRCs can be criticised for being unable to achieve their goal of truth seeking. Fourth, TRC reports need to be widely disseminated to build a common narrative of what happened and why, and to eradicate inaccurate preconceptions. In this way, TRCs play a crucial role in returning dignity to victims in the eyes of the societies to which they belong. Finally, it is essential that there is implementation of and follow up to the recommendations of TRCs by the government and state authorities to prevent further heinous crimes and to help the state to move towards reconciliation and peace (OHCHR, truth commissions, 2006).

The process of institutional reform

Reforming state institutions involved in, or that failed to prevent, the commission of heinous crimes is an essential element of the transitional justice processes. Without the reform of institutions, transitional justice would be unable to prevent such crimes and human rights violations from occurring again (OHCHR, 2006). Institutional reform is closely linked to guarantees of non-repetition (reparations process), an obligation required from states that have breached international obligations by the international community as an assurance that what happened will not happen again. The key concern of such measures is prevention (International Law Commission, 2001).

In processes of transition, states are dealing with the atrocities that were committed but also with the structures that made them possible. Therefore, in order to prevent their recurrence it is essential to identify and transform such structures. In particular, but not exclusively, the process of institutional reform aims to transform the security sector and the justice sector. Security sector refers to “the structures, institutions and personnel responsible for the management, provision and oversight of security in a country” (UN Secretary-General, A/62/659–S/2008/39, 2008). It includes the police, military personnel, intelligence services, customs, certain segments of the justice sector, and non-state actors with security functions. Since the justice sector is not fully included in this concept, it is also an element of institutional reform that should be at the heart of transitional justice processes. Indeed, one of the key aims of transitional justice, from a human rights perspective, is to bring to account those who are responsible for the atrocities and, to this end, both the security and justice sectors are essential. If they are not up to the challenge, impunity and corruption will prevail. The OECD prefers to refer to “security system” to have a more encompassing concept that integrates the security and justice sectors, but that also includes prison reform,

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democratic oversight and accountability, and civil society, and others (OECD DAC, 2007).

Security sector or system reform happens not only in processes of transition (Mayer-Rieckh and Duthie, 2009). Yet, such reform in a process of transitional justice aims, in particular, to transform the culture and structure that allowed the commission of such atrocious crimes, as well as to (re)build fragile or non-existing institutions. One of the biggest challenges faced in such transitions is the reconstruction of society's trust in the security system. Therefore, different measures are needed that are complex and context dependent. The OECD and the UN consider it essential to carry out a proper assessment of the structures that made such violations possible, in order to identify problems and suitable measures. Besides this, common institutional reforms include vetting, meaning the "processes for assessing an individual's integrity as a means for determining his or her suitability for public employment" (Duthie, 2007). If an individual lacks integrity -lack of respect for human rights- they should be removed from their jobs or not be appointed to any public position. Equally, clear rules should be enacted, from constitutional and legislative norms to the enactment of codes of conduct, to regulate wrongful behaviour. Also, both disciplinary and criminal procedures should be established to deal with irregularities and impunity (Davis, 2009). Furthermore, adequate educational training of security sector and justice sector personnel is essential, to ensure they understand the rights of all individuals, that certain conducts are forbidden, and that a culture of impunity will not be tolerated. Particular attention should be given to generate awareness of the way such crimes affect different members of society and, in particular, women, and of the obligation they have to act in a gender-sensitive way.

ıstitutional reform faces various challenges in processes of transition. Firstly, lack of political will to carry out the political/structural reforms necessary where the reform might also entail accountability. Second, while the international community participates actively in such processes through international cooperation and assistance, it is not always in a consistent and harmonious way, this can reduce the effectiveness of reforms, and opportunities for much-needed reform can be missed. Thirdly, important opportunities for local capacity building, as well as for local ownership of the reform process, can also be missed (OECD DAC, 2007).

Conclusions

Helping a state to deal with the legacy of mass atrocities in a period of change is a complex task. Transitional justice has emerged as a possible response to the difficult dilemmas it generates. It is a way to articulate the different processes considered necessary to help a society move from a period of repression and/or conflict, where mass atrocities took place, to one in which human rights, democracy and the rule of law can prevail. Nevertheless, transitional justice processes have usually dismissed the root causes of conflict making it even harder to achieve its aims.

Furthermore, despite the fast development of transitional justice as a field and of the processes described, such mechanisms are not always based on consistent normative foundations, simply because in periods of radical change different political forces and goals can be incompatible (Bell, 2009). Also, the goals of each individual process (truth, justice, reparations and institutional reform) are not always achievable in parallel.

The paradigm of international law aims to provide some coherence to the delivery of such processes and to reduce the incidence of political tension by dictating what ought to be done. However, as was seen with the right to know the truth, or with the obligation to investigate, prosecute and, if applicable, punish, the status of such rights and their scope continues to be the subject of great debate. Further, international law is not constituted by a set of infallibly clear, consistent and compatible norms of law, adding challenges to the way laws, such as international criminal law, international human rights law, international humanitarian law, and international refugee law, regulate and interact with one another in such periods of transition.

Equally important to note is that transitional justice is a state-centred approach. It is built and constructed around the belief that a consistent response should be articulated in the territory of the state where the atrocities occurred and, also, that the root causes of such atrocities exist within the borders of a particular state. While these assumptions remain true for some aspects of transitional justice, the

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close interaction between states and other important international actors, and between people across borders, calls for a more comprehensive approach to truth, justice, reparations and institutional reform that can transcend state boundaries.

For example, transitional justice processes should include, in a satisfactory manner, people in exile and refugees. Also, other states or non-state actors also responsible for atrocities should recognise their mistakes and assume responsibility for what happened. International justice helps to achieve this aim, although in a limited way. Yet, truth remains a local business when the UN, other states and other actors could play an important role in truth-seeking and truth telling, beyond providing economic or expert support. For instance, the UN report on its independent inquiry into its role during the 1994 genocide in Rwanda is a step in the right direction (Commission of Enquiry, 1999). It also clarifies the role and responsibility that others had during the genocide.

Equally crucial is the recognition that transitional actors go beyond the state, demobilised groups and the military. Indeed, transitional justice processes are conducted by diverse actors that need to figure more openly and visibly in them, such as regional human rights courts (as opposed to criminal tribunals); local or traditional courts, such as the gacaca; international cooperation agencies; non-governmental organisations (local and international); and transnational corporations (Sandoval, 2008).

Transitional justice processes also require significant economic resources. States undergoing transition do not have sufficient resources and, as a result, are highly dependent on contributions from the international community, via the UN or other regional organisations, or on bilateral contributions. Therefore, work between donors and between those providing technical assistance is crucial to enhance the results and possible impact of transitional justice processes. In connection to this, transitional justice should be considered *vis à vis* other peacebuilding and development measures, and economic and human resources should be allocated accordingly. The aims of transitional justice, at least from an international law point of view, cannot be achieved if the different mechanisms explained here are not well resourced and are not treated as priorities in the peacebuilding agenda. Therefore, a more open discussion and an exchange of experiences are required between different peacebuilding initiatives, such as, transitional justice and DDR.

Finally, even though it is premature to assess the degree of success of such processes, it is important to continue to document case-studies (in all relevant areas of transitional justice) in order to gather relevant evidence that could help to adequately answer the many questions identified in this report, which require urgent response. While international law should remain the normative basis of such processes, its success remains highly dependent on the capacity of other disciplines to work with the law to enrich its delivery in relation to justice, truth, reparations and institutional reform.

Notes

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