

Justice in Transition: Challenges and Opportunities

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Establishing the rule of law after a period of violent conflict is a crucial but extremely difficult task. In any society, it generally requires years of effort and the direct involvement of a wide range of actors. It is a particularly daunting task if the recently resolved conflict included widespread human rights abuses, violations of humanitarian norms, and generalized impunity, with very few wrongdoers brought to justice.

As the field of human rights as a whole has strengthened over the past decade or more, the most recent years have seen a particular increase in the attention paid to rights concerns during a period of transition (following war, repressive rule, or authoritarian regime). A wide range of initiatives has been put in place to address the accountability challenges that emerge at the point of transition, and the diversity and richness of these initiatives is impressive.

This growing area of developing mechanisms to address past crimes at a point of transition is often referred to as “transitional justice.” There are special challenges that present themselves, and a range of possible interlinked and often complementary responses that comprise this area of work. The field of transitional justice is self-consciously interdisciplinary and nationally driven, while also grounded in comparative international experiences. As these issues gain increasing attention, one can see almost daily new challenges and unique contexts in which justice policies must be crafted, as well as new and creative ideas on how to best respond. Both national and international

civil society organizations, plus the broader international community, have a critical role in advancing these developments.

There is, of course, a clear link between efforts to establish accountability for past crimes and the aim of re-establishing the rule of law for the future. Rights abuses are generally accompanied, or facilitated, by a weakened judiciary. As the courts cease to function in any given society—or cease to be trusted to function in a politically neutral manner—the foundation of rights protections may quickly begin to crumble. The weakened judiciary may result from fear and intimidation of judges, outright political bias on the part of judges or prosecutors, or a lack of resources or know-how to address increasing abuses. The result is that the populace rapidly loses trust that their society is run by rules of law.

The challenge at transition, however, reaches far beyond the difficulties presented in a weakened or politicized judiciary. As a conflict comes to a close, there may be a great number of perpetrators that should rightfully be put on trial, many thousands or tens of thousands of victims, and demands for justice and reparation that would be impossible for even the strongest of judicial systems to address. Despite the overwhelming task at hand, efforts to address these crimes through the court system must be pursued vigorously. Recent efforts in some national courts around the world, such as in Guatemala and Argentina, should be supported and watched with interest. Additionally, the Ad Hoc Tribunals for Rwanda and the former Yugoslavia are important developments, and the newly established International Criminal Court is expected to

make a critical contribution to the prospects for justice, and deserves strong support. Finally, the model of a mixed court, with both national and international judges and prosecutors, as seen in the Special Court for Sierra Leone and as proposed for Cambodia, represents a creative and important response to justice needs in some societies.

But even with the best efforts, it is clear that the concept of “justice” cannot fully be captured simply by identifying the wrongdoers, taking them to court, and sentencing them to serve time in jail. We must ask: what form of justice is due to the victims of the crimes, especially those who suffered severe physical or psychological injury, or whose economic means have been severely disrupted, such as through the loss of a breadwinner? What would be an appropriate form of justice for whole communities that have suffered or been completely destroyed? While criminal justice is critical—and I would like to underline that it should always be considered a vital component—other approaches should also be considered.

In addition to prosecutions in the national or international sphere, transitional justice initiatives may include providing reparations to victims of violence; establishing the truth about what took place in a nonjudicial forum such as a truth commission; reforming institutions such as the police or the courts, to prevent further violations in the future and ensure that they enforce the law; and removing human rights abusers from positions of power.

There is often an inherent interrelationship between these various initiatives. The first challenge to implementing a package of reforms, for example, is to understand the existing system's weaknesses and prescribe the right solutions. One of the important tools used to outline such reforms is a truth commission. A fundamental goal of such a commission is to formally recognize the breadth and nature of abuses of the past, and to shape recommendations to prevent their repetition. Typically, this includes the truth commission taking an honest look at the judicial system itself, which few institutions are in a position to do.

As truth commissions gain currency around the world, their role is becoming better understood. By taking statements from typically thousands of victims, investigating key cases, researching the causes and consequences of the abuses that took place, and writing a public report, a truth commission is able to formally acknowledge what was often before denied, especially those abuses perpetrated by the state; respect and give voice to victims; inform the greater public about the extent of past crimes; and help to give shape to other justice mechanisms that may follow, such as trials or reparations. In the simple "un-silencing" and giving respect to the suffering of the past, a truth commission can help to make the break between a country's past and a more hopeful future.

Truth commissions are gaining considerable interest around the world, and we are likely to see their implementation in many more countries in the future. It is worth noting that to date there have been more than 25 truth commissions around the world, of greater

or lesser degrees of success, including the four very interesting commissions that are now in operation in Peru, East Timor, Sierra Leone, and Ghana.

Despite this growing popularity, no new truth commission should be created without a close consideration of the interests and aims of such an endeavor for that country, and what exact form it should take. Truth commissions should be seen as but one element of a much broader accountability package, and they should never be promoted as an alternative to judicial action, or as a means to escape other obligations of accountability. In addition, it is critical that the expectations of a truth-seeking process be realistic and honestly presented to the public.

The Critical Role of Civil Society

The important role of national civil society both in designing and implementing these various transitional justice initiatives should be underscored. A process of public consultation will result in greater ownership of the product or policy, and thus greater involvement in its implementation and investment in its success. Past experience shows that consultation also results in a far superior outcome than what is obtained through back-room negotiations and decisions made under the pressures of time. In Sierra Leone, for example, the truth commission legislation, which was designed after the Lomé peace accord agreed in principle to a truth inquiry, comes out of a broad process of consultation and thus has considerable support and enthusiasm from a wide audience. In Guatemala, the process of designing recommendations for the truth commission report brought together more than 400 civil society representatives and political leaders for a full-day

brainstorming workshop with the commission. A similar process of consultation and broad public input has been seen in the development of key initiatives in South Africa, Peru, East Timor, and elsewhere.

While I do not have time to explore the details of the role of civil society in many past transitional justice initiatives, such a review does highlight the central place that national nongovernmental organizations have had in initiating, advocating for, and helping to shape some of the strongest and most interesting transitional justice initiatives that have been implemented around the world.

International Involvement

The role of the international community in a transitional country that is seeking to establish justice for past crimes is also critically important. There are, of course, numerous examples where international input has affected or influenced the nature, timing, and style of transition and played a part in setting out the justice agenda. This may be through international nongovernmental organizations, bilateral governmental initiatives, or intergovernmental institutions such as UN agencies.

However, while recognizing the important role of international actors, it must be stressed that national actors should always lead in shaping the transitional justice agenda and preferred policy approaches. The critical questions of whether, when, and exactly how to tackle the very painful and difficult issues of massive crimes of the past should, in most cases, be addressed first and foremost by nationals. The very nature of many of the

mechanisms or policy initiatives that might be considered requires a full sense of national ownership for their successful implementation, and thus the decision and manner of investigating the truth, providing redress for those who suffered, or prosecuting widely must emerge from *within* the country, rather than from the outside. Furthermore, it is now very clear that each transitional situation will differ from those before it, and the needs, circumstances, political culture, and potential opportunities will also vary. Each new country that approaches the challenges of justice in transition is likely to design a unique set of policies or institutional responses that respond appropriately to the national context and, hopefully, that venture as far and as boldly as possible under any given constraints. There is no one right model, nor should it be suggested that any country “import” the exact mechanisms used elsewhere.

This is particularly true in relation to indigenous mechanisms or approaches that may be incorporated into new accountability initiatives. Current developments in East Timor and, soon expected, in Sierra Leone, are intended to combine the best practice from international experience with domestically rooted cleansing or reconciliation ceremonies to facilitate the reintegration of low-level perpetrators into their communities. This may be done through a process of apology and acknowledgement, or through a symbolic or literal repayment or community service. The shape that these initiatives take must be crafted by locals.

International involvement must therefore begin with a presumption that the answers will come from within the country, and thus encourage widespread engagement with the issues at hand while avoiding prescription on any specific policy response.

This is not, however, to downplay the important role that the international community can play, and indeed should generally play in societies in transition. Most important, international expertise can be provided in the form of basic information on past experiences and lessons learned, which can suggest possible paths forward and help the country avoid mistakes made elsewhere. There are numerous examples of this, provided through consultants, workshops, training, and other forms of capacity building.

Second, the international community can assist a country in transition by providing assistance on technical, legal, or other specific matters. For example, international human rights conventions may usefully inform the drafting of legislation that pertains to past crimes. Newly established truth-seeking bodies may need experts in information management and database technology or in forensic sciences, for example, and often this specialized expertise cannot be found domestically.

There are bounds, of course, within which the international community should stand firm. Clear international obligations and standards should be respected, and outsiders may well strongly counsel the national actors as to their obligations. Mechanisms that promote or allow impunity, discrimination, or unfair procedure should, of course, be opposed, and the grounds for this opposition made clear.

However, within the clear bounds established by standards of human rights and democratic principles, there is considerable leeway for national variation. The duties ascribed to states under international law in the realm of accountability—some established more clearly than others—leave considerable room for differences in design, timing, and reach. This must especially be true once existing national limitations are recognized, which may include limited financial and human resources to support the proposed policies, or weak or corrupt national institutions that would not realistically be able to carry out certain policies.

Finally, where there have been lessons learned of a practical nature, there is a clear role for internationals to advise that a chosen path may be ill-advised, and advocate for appropriate changes to a policy or plan. This may be in the arena of psychological support to victims, involvement of the public and media in a truth-seeking exercise, making promises or creating expectations that are unrealistic in the circumstances, or other operational matters.

It is assured that the next few years will witness unexpected and, very probably, fascinating developments in the sphere of accountability for countries emerging from conflict. It should also be expected that the initiatives and institutions put in place tomorrow will be strengthened by the experiences of yesterday and today, due to the efforts of both NGOs and the interested international community, which are so well represented here.