

## **WHAT IS TRANSITIONAL JUSTICE?**

### *A Backgrounder*

Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses.

A transitional justice approach thus recognizes that there are two goals in dealing with a legacy of systematic or massive abuse. The first is to gain some level of justice for victims. The second is to reinforce the possibilities for peace, democracy, and reconciliation. To achieve these two ends, transitional justice measures often combine elements of criminal, restorative, and social justice.

Transitional justice is not a special form of justice. It is, rather, justice adapted to the often unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs. In some cases, these transformations will happen suddenly and have obvious and profound consequences. In others, they may take place over many decades.

### **Where Transitional Justice Comes From**

The field first emerged in the late 1980s and early 1990s, mainly in response to the political transitions that took place in Latin America and Eastern Europe—and the claims for justice advanced during those transitions. At the time, human rights activists and others were concerned with the question of how to address effectively the systematic abuses of former regimes but still reinforce—and not derail—the political transformations that were underway. Since these changes were popularly called “transitions to democracy,” people started calling this new multidisciplinary field “transitional justice” or “justice in times of transition.” Transitional justice measures that were adopted included prosecutions, usually of regime leaders; truth-telling initiatives, such as opening up state archives and establishing official truth commissions; the creation of reparations programs for victims; and the vetting of public employees, especially (but not exclusively) members of the security forces.

Transitional justice emerged as part of a recognition that dealing with systematic or massive abuses requires a distinctive approach that is both backward- and forward-looking: transitional justice measures aim not only to dignify victims, but also to help prevent similar victimhood in the future. The long-term goals of transitional justice measures are to promote peace, democracy, and reconciliation, with the idea that these conditions help to prevent the systematic or massive violation of human rights.

### **Transitional Justice Today**

Transitional justice today is a diverse and vibrant field. As it has grown, it has found common ground with social justice movements, as well as the fields of conflict resolution, peacebuilding, and historical memory, to name a few.

As transitional contexts have shifted from the post-authoritarian societies of Argentina and Chile to the post-conflict societies of Bosnia and Herzegovina, Liberia, and the Democratic Republic of the Congo, new practical challenges have forced the field to innovate and expand its boundaries. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities, and the role of justice in peace building—these have all become important new issues for transitional justice practitioners to tackle. The reintegration of ex-combatants, for example, is an important issue for several reasons. First, among the ranks of ex-combatants may be perpetrators or even masterminds of massive human rights violations. Second, in general, ex-combatants often receive money and job training as incentives to disarm, whereas victims typically receive little or nothing at all in order to help rebuild their lives. Such imbalances are morally reprehensible, and also unwise. They may foster resentment, making receiving communities more reluctant to reintegrate ex-combatants, and they may also threaten post-conflict stability.

As transitional contexts have shifted geographically from Latin America and Eastern Europe to Africa and Asia, transitional justice practitioners have also engaged with local—sometimes called “traditional”—justice measures, which can offer an important complement to transitional justice. In some countries, such as Sierra Leone and Uganda, communities may wish to use traditional rituals in order to foster reconciliation of warring parties or reintegrate ex-combatants. In such cases, the role of transitional justice is to ensure that a holistic approach is taken—one that may include the ritual, but that neither excludes the possibility of criminal justice for those most responsible for serious crimes, nor the implementation of other justice measures, such as reparations, to provide additional forms of redress.

Globally, from Australia and the United States to Guatemala and South Africa, social justice movements have adapted transitional justice measures in order to gain redress for legacies of systematic injustice. These movements often focus their efforts on abuses relating to long-term exclusions generated by socio-economic, racial, or gender inequality, instead of the physical abuses, such as murder and forced disappearance, that were at the heart of many early transitional justice efforts.

As the field has expanded and diversified over the past twenty years, it has also developed an important foundation in international law. One part of the legal basis for transitional justice traces its initial inspiration to the 1988 decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez v. Honduras*, in which the Inter-American Court found that all states have four fundamental, or minimal, obligations in the area of human rights. These are:

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations; and
- To ensure reparation for the victims of the violations.

The essence of the decision has been explicitly affirmed by the subsequent jurisprudence of the court, and implicitly affirmed and endorsed in the jurisprudence of the European Court of Human Rights and UN treaty body decisions such as the Human Rights Committee. It has also

been directly incorporated into many important UN documents such as the 1997, 2004, and 2005 reports of UN special rapporteurs on the fight against impunity, and the 2004 report by the Secretary-General on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. The 1988 creation of the International Criminal Court was also significant, as the Court's statute enshrines state obligations of vital importance to the fight against impunity and respect for victims' rights.

### **A Holistic Approach**

Although transitional contexts always involve many moral, legal, and political dilemmas, the challenges of dealing with systematic or massive human rights violations can be among the most politically sensitive and practically difficult. The political balance of power is often delicate, and successor governments may be unwilling to pursue wide-ranging transitional justice initiatives—or they may be unable to do so without putting their own stability at risk.

In the wake of massive violations, interest in criminal justice often takes center stage, both because of the need to hold accountable those responsible for massive violations, and because of the inherent drama of courtroom trials. This was the case in Argentina, where the public was riveted by the trials of the military junta leaders in the early 1980s. But criminal justice can encounter problems as a stand-alone approach to seeking justice. Especially with instances of massive abuse, such as genocide, there may be tens or even hundreds of thousands of victims and perpetrators. How can they all be dealt with fairly through the judicial system, when there is likely to be an acute caseload problem? Plus, the judiciary may be dysfunctional, since the majority of police, prosecutors, and judges may be too weak or corrupt, or too few in number, to be able and willing to act in the public interest and ensure victims' rights to justice.

Aside from the question of whether judicial measures have the capacity to redress systematic or massive violations of human rights, there is the question of whether they are adequate, by themselves, to doing so. Indeed, transitional justice operates on the conviction that they are not. The many problems that flow from past abuses are often too complex to be solved by judicial measures—such as trials—alone. After two decades of practice, experience thus far suggests that, to be effective, transitional justice should be holistic. That is, it should be made up of several initiatives that complement and reinforce each other. The elements of such initiatives often include:

*Criminal prosecutions* are judicial investigations of those responsible for human rights violations. Prosecutions frequently give great weight to investigating those considered most responsible for massive or systematic crimes.

*Truth commissions* are ad hoc commissions of inquiry established in, and authorized by, states for the primary purposes of investigating and reporting on key periods of recent past abuse. They often make recommendations to remedy such abuse and to prevent its recurrence.

*Reparation programs* are state-sponsored initiatives that aim to contribute to repairing, on a massive scale, the material and moral consequences of past abuse experienced by certain classes of victims. They typically distribute some mix of material and symbolic benefits to victims.

*Security system reform* consists of wide-ranging programs to transform the military, police, judiciary, and related state institutions from instruments of repression and corruption into instruments of public service and integrity.

*Memorialization efforts* include museums, memorials, and other means of preserving public memory of the victims and of raising moral consciousness about past abuse, in order to build a bulwark against its recurrence.

### **How Transitional Justice Measures Work Together**

Practically and conceptually, the various measures of transitional justice call for one another. This logic becomes clear when one considers the possible consequences of implementing any one of them in isolation from the others.

Without any truth-telling, institutional reform, or reparation efforts, punishing a very limited number of perpetrators can be viewed as scapegoating or a form of political revenge. Truth-telling, in isolation from efforts to punish abusers, reform institutions, and repair victims, can be viewed as nothing more than words. Memorialization efforts, also, are likely to seem shallow and insincere when not complemented by more robust efforts. Reparation without any links to the other transitional justice measures may be perceived as ‘blood money’ – an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims’ legitimate expectations of justice, truth, and reparation, is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.

Implementing these measures with the appropriate structure and sequence can be a complex challenge. There are a few general rules that bear mention. First, transitional justice measures should be structured in a way that helps to maximize complementarity and that minimize conflict or contradiction. Second, interrelationships among measures should not be too vague or too complex, which may have the counter-productive effect of causing confusion about each measure’s aims and thereby inhibiting public participation and support. And third, the different measures of transitional justice should ideally be sequenced in a manner that helps preserve and enhance the constituent elements of the transition itself—democracy and peace—without which all transitional justice possibilities may diminish in scope and quality.

### **Looking Ahead**

Ultimately, there is no single formula for dealing with a past marked by massive and systematic abuse. Each society should—indeed must—choose its own path.

To date, practice has taught us that a society’s choices are more likely to be effective when they are based on a serious examination of prior national and international experiences. Such examination reduces the likelihood of repeating avoidable errors, which transitional societies can rarely afford to make. Ensuring active consultation of, and participation by, victim groups and the public is another crucial factor. Without such consultation and participation, the prospect of designing and operating credible and effective transitional justice policies is greatly reduced.

Moreover, the potential benefits of transitional justice initiatives will likely affect more people when a gender-mainstreaming approach cuts across all of them. Transitional justice measures that neglect the distinct and complex injuries women have suffered, as well as gendered patterns of abuse that may have affected both women and men in their access to justice, will miss key opportunities to address the gendered legacies of authoritarianism and conflict.

It is also important to ensure ongoing intellectual and practical exchange between transitional justice specialists and those working in other closely related fields such as conflict resolution, democratization, development, peacebuilding, and anti-corruption. This process is essential to creating policies that are both comprehensive and realistic.

Finally, because transitional justice is a relatively new field, there is a need to continuously assess the empirical impact of transitional justice measures. Through assessment, future policies will stand the best chance possible of achieving the immediate goals providing redress for victims, as well as the longer term goals of peace, democratization, and reconciliation.