

## Chapter 10

# Promoting Transitional Justice in Post-Conflict Societies

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### Introduction

Transitional Justice embodies an attempt to build a sustainable peace after conflict, mass violence or systemic human rights abuse. Transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming abusive institutions and promoting reconciliation. This requires a comprehensive set of strategies that must deal with the events of the past but also look to the future in order to prevent a recurrence of conflict and abuse. Because transitional justice strategies are often crafted in situations where peace is fragile or perpetrators retain real power, they must carefully balance the demands of justice with the realities of what can be achieved in the short, medium and long term.

Over the past decade, the field of transitional justice has expanded and evolved in two important respects. First, the elements of transitional justice have moved from being aspirational to embodying binding legal obligations. International law – particularly as articulated by bodies such as the European Court on Human Rights, the Inter-American Court on Human Rights and the Human Rights Committee – has evolved over the past 20 years to the point where there are clear standards regarding state obligations in dealing with human rights abuse and correspondingly clear prohibitions regarding, for example, blanket amnesties for international crimes. This has been supported by the ratification of the International Criminal Court (ICC) by over 100 countries which has both reinforced existing obligations and created new standards, by requiring each signatory to respond appropriately to human rights abuse or face action by the court. A further important development occurred in October 2004, when the UN Secretary General submitted a report to the Security Council setting out for the first time the UN's approach to transitional justice issues. This is an extremely important development in both operational and normative terms. Second, the deepening of democracy in many parts of the world – particularly Latin America, Asia, and Africa – and the emergence of increasingly sophisticated civil society organisations with expertise in this area has contributed to creating both the institutions and political will required to deal with a legacy of human rights abuse and helped translate policy into action.

This increased attention and commitment to transitional justice issues has been mirrored by the allocation of greater resources and international attention to post-conflict peacebuilding. This requires sustained interventions by both national and international actors on several different levels. Each element has to be carefully coordinated and integrated and matched with appropriate political, operational and financial support from a range of stakeholders. Transitional justice strategies should be understood as an important component of peacebuilding in so far as they address the needs and grievances of victims, promote reconciliation, reform state institutions and reestablish the rule of law.

This chapter will explore in greater detail the many ways in which transitional justice can contribute towards post-conflict peacebuilding. It will start by outlining the key elements of transitional justice and discussing their purpose and impact. It will then outline the ways in which transitional justice can contribute towards peacebuilding. It should be noted that although

transitional justice strategies will almost always significantly impact on such efforts, the relationship between these two endeavours both in theory and practice is surprisingly under-researched. This chapter cannot deal with all of these issues in any depth but will point to a number of ways in which post-conflict peacebuilding and transitional justice are interrelated, in the hope of setting an agenda for future research. Finally, the chapter will articulate important lessons from various practical examples where transitional justice strategies have been implemented and on this basis set out several recommendations for policymakers as to how to develop more effective transitional justice policies that in turn will make a constructive contribution to post-conflict peace building.

### **The Key Elements of Transitional Justice**

As stated above transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming abusive institutions and promoting reconciliation.<sup>1</sup> This section will discuss each element in greater detail.

#### *Prosecution*

The prosecution of perpetrators who have committed gross violations of human rights is a critically important component of any efforts to deal with a legacy of abuse. Prosecutions can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions.<sup>2</sup> It is important however to recognise that criminal justice systems are designed for societies in which the violation of the law is the exception and not the rule. When violations are widespread and systematic, involving tens or hundreds of thousands of crimes, criminal justice systems simply cannot cope. This is because the criminal justice process ought to demonstrate a scrupulous commitment to fairness and due process and this necessarily entails a significant commitment of time and resources.<sup>3</sup>

It is important to emphasise that recognising criminal justice systems' structural inability to cope with mass atrocity, should not be construed as a delegitimisation of the role of prosecution or punishment in dealing with past crimes. Notwithstanding their high costs and slow progress the two ad hoc tribunals for the former Yugoslavia and Rwanda have made important contributions to the progressive development of international criminal law and the establishment of the International Criminal Court (ICC) would have been extremely difficult, if not impossible, without them.<sup>4</sup> The importance of the Nuremberg trials or the prosecution of Slobodan Milosevic should not be diminished solely on the basis that they represent only a tiny fraction of the total number of criminally responsible individuals. Trials should not be viewed only as expressions of a societal desire for retribution, they also play a vital expressive function in publicly reaffirming essential norms and values that when violated should give rise to sanctions. Trials can also help to reestablish trust between citizens and the state by demonstrating to those whose rights have been violated that state institutions will seek to protect rather than violate their rights. This may help to restore the dignity of victims and reduce their sense of anger, marginalisation and grievance.

It is nevertheless important to recognise and accept the fact that prosecution can only ever be a partial response to dealing with systematic human rights abuse. The overwhelming majority of victims and perpetrators of mass crimes will never encounter justice in a court of law, and it is therefore necessary to supplement prosecutions with other complementary strategies.

#### *Truth Seeking*

It is important not only to establish widespread knowledge that human rights abuse has occurred, but also for governments, citizens and perpetrators to acknowledge the wrongfulness of this abuse. Establishing an official truth about a brutal past can help inoculate future generations against revisionism and empower citizens to recognise and resist a return to abusive practices.

Commissions can provide victims with a voice in public discourse and their testimony can help rebut official lies and myths regarding human rights abuse. The testimony of victims in South Africa has made it impossible to deny that torture was officially sanctioned and that it happened in a widespread and systematic fashion. The commissions in Chile and Argentina rebutted the lie that opponents of the military regimes fled these countries or went into hiding. They conclusively established that opponents were “disappeared” and killed by members of the security forces as part of an official policy.<sup>5</sup> Giving victims an official voice can also help to reduce their sense of outrage and anger. While it is important not to overstate the psychological benefits of “speaking out” and it is inaccurate to claim that testifying about abuse is always cathartic, officially acknowledging victims’ suffering will enhance the prospects of dealing constructively with historical grievances.

Truth commissions can also help facilitate and add impetus to the transformation of state institutions. By demonstrating that human rights abuse in the past was not an isolated or atypical phenomenon, commissions can strengthen the hand of those inside and outside a new government who wish to implement real reforms to ensure the promotion and protection of human rights. Conversely, a failure to examine or identify abusive institutions can allow them to continue past practices and in the process entrench their power and deepen distrust and disillusionment amongst ordinary citizens.

### *Reparation*

States bear an obligation under international law to provide reparation to victims of gross violations of human rights. This reparation can take many forms including material assistance (e.g. compensation payments, pensions, bursaries and scholarships), psychological assistance (e.g. trauma counseling) and symbolic measures (e.g. monuments, memorials and national days of remembrance). The formulation of a comprehensive reparation policy is often both technically complex and politically delicate. Those charged with formulating a just and equitable reparation policy will have to decide whether to differentiate between different categories of victims and amongst victims in each category. For example, they will have to decide whether it is possible or desirable to provide different forms and quantities of reparation to victims who have experienced different types and degrees of torture and whether to use means testing to differentiate between wealthy and poor victims. Each decision has significant moral, political and financial implications.<sup>6</sup>

A central question in the provision of reparation is the definition of victimhood. It is necessary to decide whether reparation should be paid only to victims of gross violations of human rights such as torture, killings and disappearances, or whether also to provide reparation to a broader class of victims, for example those who have suffered systematic racial discrimination or who have lost land or other property. A just and sustainable reparation policy should neither create nor perpetuate divisions amongst different categories of victims, and as well should be feasible and financially realistic.<sup>7</sup>

### *Institutional Reform*

In responding to mass atrocity it is necessary, but not sufficient, to punish perpetrators, establish the truth about violations and provide victims with reparations. It is also necessary to fundamentally change, or in some cases abolish, those institutions responsible for human rights abuse.<sup>8</sup> Newly established governments have primary responsibility in this regard, but truth

commissions can also play an important role. Truth commissions are usually empowered to make recommendations in their final reports regarding legal, administrative and institutional measures that should be taken to prevent the recurrence of human rights abuse.

Governments might also consider adopting vetting programmes, which seek to ensure that persons responsible for human rights abuse are either removed from public service or prevented from being employed in government institutions. The removal of human rights abusers from positions of trust and responsibility is an important part of establishing or restoring the integrity of state institutions. Vetting can also play a role in establishing non-criminal accountability for human rights abuse, particularly in contexts where it is impossible to prosecute all those responsible.<sup>9</sup> Vetting programmes should scrupulously protect the due process rights of persons under scrutiny and be used to target only those responsible for human rights abuse, rather than political opponents of the new regime or those who may hold different views and beliefs.

### *Reconciliation*

Reconciliation is an important concept with a controversial pedigree. In some contexts victims oppose “reconciliation” because they associate the concept with enforced forgiveness, impunity and amnesia. In many countries in Latin America those responsible for human rights abuse, particularly military leaders associated with dictatorial regimes, have cynically invoked the concept of reconciliation in order to avoid responsibility for their crimes. If reconciliation is understood in this way then it should rightly be rejected.

There is however a different conception of reconciliation which is important to consider. Societies that emerge from periods of mass atrocity and widespread conflict often contain deep suspicions, grievances and animosities. These divisions almost always endure post-conflict and create the potential for a return to violence and a recurrence of human rights abuse. This is particularly true when conflicts have assumed an identity dimension in which categories such as religion, language, race or ethnicity have been used to sow division and justify human rights abuse. These divisions will not magically disappear under a new democratic order, nor will they necessarily heal with the passage of time. In some cases the electoral arithmetic of democracy can exacerbate these cleavages by delivering all political power to a majority ethnic group leaving a minority group feeling vulnerable and marginalised. If divisions are to be overcome, it will require a constitutional settlement that offers adequate protections and reassurances to vulnerable groups. Leaders inside and outside government will have to take proactive steps to demonstrate that democracy can serve all citizens that peace can yield substantial dividends for all and that diversity can be a source of strength rather than conflict.<sup>10</sup> If reconciliation is to be accepted it cannot amount to ignoring the past, denying the suffering of victims or subordinating the demand for accountability and redress to an artificial notion of national unity.

### **Transitional Justice in Post-Conflict Peacebuilding**

It is somewhat surprising that so little analysis has been devoted to the intersection between transitional justice and post-conflict peacebuilding. Properly understood and implemented, transitional justice is as much forward-looking as it is backward-looking. One of the critical reasons we deal with past abuse is in order to ensure that it does not reoccur. The title of the Argentinean truth commission’s final report was “Nunca Mas” (Never Again). However, a commitment to prevention is not the only rationale for dealing with the past. Such an instrumental approach to past atrocity would always subordinate the vindication of victims’ rights to an

examination of whether this would jeopardise the prospects of peace. This would not only be indefensible as a matter of law and ethics but as a practical matter it would provide perpetrators and tyrants who seek to avoid accountability with an incentive to hold peace processes hostage until they are provided with the necessary assurances.

It is important to accept that tensions exist between peace and justice in the short-term and that in some hard cases it is prudent and defensible to delay justice claims in order to achieve an end to hostilities or a transition to a democratic order. Nevertheless, justice claims should not be deferred indefinitely, not just because of the likely corrosive effect on efforts to build a sustainable peace, but because to do so would be to compound a grave injustice that victims have already suffered. Transitional justice strategies should be an integral part of any effort to build a sustainable peace, but in some circumstances peace and justice may not be completely compatible in the short-term. If justice is deferred, then every effort should be made to ensure that the prospect of achieving accountability in the medium- to long-term are preserved and that as much of the transitional justice agenda as can be achieved in the short-term is implemented.

The following section sets out a number of ways in which the fields of transitional justice and post-conflict peacebuilding intersect. It focuses on ways in which transitional justice strategies can reinforce peacebuilding efforts recognising that in some circumstances these efforts are not perfectly complementary.

### *Diagnosing the Problem*

The development of a post-conflict peacebuilding strategy must be based on a rigorous examination of the causes, nature and effect of the prior conflict. Truth commissions are often well-placed to undertake this form of examination particularly because they pay special attention both to the testimony and present circumstances of victims of abuse but also because they scrutinise the individuals and institutions responsible for human rights violations. Most commissions gather extensive evidence from thousands of different sources and on this basis are able to generate a comprehensive account of human rights abuse during the period they are mandated to review. Truth commissions also examine the social, structural and institutional causes of conflict and human rights abuse and are able to clarify not only what happened in individual cases but also the broader context which enabled the violations to occur. This diagnostic function can help identify the root causes of conflict and examine the role that external actors and non-state actors have played in fuelling and sustaining conflict. On this basis they can make more effective and informed recommendations as to measures that can be taken to deal with these root causes or reduce the capacity of disruptive actors to perpetuate conflict. The recommendations can be extraordinarily helpful to those involved in developing and executing post-conflict peacebuilding strategies.

### *State-Building and Institutional Reform*

Conflicts have devastating effects on state institutions and a careful process of rebuilding and reform is necessary once hostilities have drawn to a close. Truth commissions and vetting programmes can make an important contribution to state-building and institutional reform by recommending the following measures:

- Identifying institutions that should be reformed or eliminated;
- Making proposals to ensure that the mandate, training, staffing and operations of specific institutions are reformed to ensure that they function effectively as well as promote and protect human rights;
- Removing persons responsible for corruption or human rights abuse from state institutions.

Through their public hearings, truth commissions can also focus governmental and public attention on particular institutions such as the media, prisons, health care institutions and the judiciary thereby catalysing a public debate about the role they played in the past and the measures that should be taken in the future to enhance their effectiveness and their capacity to promote and protect human rights.

#### *Removing Rights Abusers From Political Office*

Transitional justice efforts allow citizens to better understand the causes, nature and effects of human rights abuse. They also illuminate and clarify responsibility for this abuse. A strong predictor for renewed or ongoing conflict is the presence of persons in high government positions who are either directly or indirectly responsible for widespread or systematic human rights abuse. Conversely the removal of such persons can make a vital contribution to post-conflict peacebuilding. In Afghanistan, a report issued by the Afghan Independent Human Rights Commission entitled, 'A Call for Justice' that was based on the views of over 6000 Afghans, both inside the country and in refugee communities, identified the fact that perpetrators of serious human rights violations continue to occupy important positions in regional and central government as a major threat to the promotion and protection of human rights.<sup>11</sup> The report has led to calls for an initiative to screen key Presidential appointees in order to assess both their competence and integrity. Integrity screening would determine whether a potential appointee has been responsible for either corruption or human rights abuse. While it is too early to tell whether this effort will succeed it would not have even been on the agenda had there not been a process of polling individuals regarding their attitudes to past human rights abuse. A transitional justice initiative put questions of political reform on the national agenda in way that increased the possibilities of successful post-conflict peacebuilding.

#### *Dealing with Individual Victim Grievances and Forging Reconciliation*

According to Bigombe, Collier and Sambanis,<sup>12</sup> war-induced grievances are a significant cause of a return to hostilities in post-conflict societies. Peacebuilding strategies should therefore seek to implement a set of policies immediately after conflict that attempt to address and reduce this sense of anger and grievance. Prosecuting those responsible for human rights abuse can reduce victims' desire for revenge – providing it is even-handed and complies with international standards. Truth commissions can provide victims with a safe space to articulate their anger while at the same time offering them an official acknowledgement of their suffering.<sup>13</sup> Reparation programmes can provide much-needed resources and services to victims who have experienced direct and indirect loss as a result of conflict and human rights abuse. The combination of these policies can help offset the sense of anger, neglect and marginalisation experienced by victims and the communities in which they live.

Prosecutions and truth commissions can also help dispel dangerous myths that serve to prolong grievances and fuel future conflicts. In many post-conflict situations, unscrupulous leaders attempt to invent and propagate 'victim/perpetrator myths' in which they claim that members of their group (ethnic/linguistic/religious, etc.) are innocent victims and that members of other groups are all culpable perpetrators. These myths are almost always historically inaccurate and serve to perpetuate acrimonious inter-group relationships. Courts can demonstrate for example that not all Serbs were Milosevic supporters or that some Hutus saved Tutsis during the Rwandan genocide. This can help to break down stereotypes that are exploited by ethno-nationalist politicians to gather support and that all too often lead to conflict.

*Dealing with Group Dominance*

A significant risk-factor in predicting the outbreak or resumption of conflict is the extent to which a homogenous group – ethnic, linguistic, religious, etc. – is willing and able to monopolise political and economic power. This may even be exacerbated by certain democratic systems which hand power to majorities without appropriate checks and balances. A successful post-conflict peacebuilding agenda will have to include political, legal and social measures that guard against the exploitation of the minority by the majority.<sup>14</sup> Truth commissions can help generate national awareness of the insecurities, marginalisation and victimisation of minorities as well as offer policy proposals to ensure their rights are appropriately protected. The delivery of reparation to members of minority groups that have experienced human rights abuse can provide reassurance that the majority recognises them as rights-bearing citizens. Similarly, the prosecution of perpetrators responsible for crimes against minorities can help increase trust in state institutions. Proposals for institutional reform made by truth commissions can refer to the importance of adequate minority representation in institutions such as the police, military and judiciary in order to instil minority confidence in these institutions.

*Security Sector Reform*

The combination of targeted prosecutions of those who bear the greatest responsibility for human rights abuse, a carefully crafted vetting programme and a robust truth commission which meticulously documents human rights abuse, can assist enormously in reforming the police, military and intelligence services. The process of security sector reform was greatly enhanced in South Africa by revelations of abuse before the Truth and Reconciliation Commission and by the departure from office of many senior officers whose crimes had been revealed. The exit of these individuals was crucial in transforming the ethos in these institutions and in beginning to restore trust in them. The process of transforming the security sector from a source of oppression and conflict to a set of institutions that protect citizens and uphold rights was given added impetus by transitional justice institutions established after Apartheid.<sup>15</sup>

In stark contrast, the Indonesian military (and to a lesser extent sections of its police) have largely escaped any form of scrutiny or accountability for human rights abuse they have committed, starting in 1965/66 and enduring to this day. The shroud of secrecy that has surrounded the killings of hundreds of thousands of alleged Communists in the 1960's, the absence of any meaningful accountability for the crimes that occurred in East Timor (beginning in 1975 and culminating in 1999), and the ongoing violations elsewhere in Indonesia are all linked to a failure to hold the Indonesian Armed Forces (TNI) accountable for its crimes.<sup>16</sup> Until a genuine process of accountability and truth seeking is undertaken, the TNI will continue to serve as a source of conflict and instability in Indonesia.

In Haiti, a vital component of post-conflict peacebuilding remains the establishment of an effective, credible and legitimate police force. The dissolution of the Haitian military has meant that the police are indispensable to combating crime, the maintenance of public order and the protection of human rights. Unfortunately there are grounds to suspect that former members of the military, many of whom are responsible for corruption and human rights abuse, have infiltrated the Haitian National Police (HNP) and if this situation is not rectified it will undermine the operational efficiency of the force as well as its credibility and legitimacy.<sup>17</sup> The United Nations Mission in Haiti (MINUSTAH) has in its mandate the authority to vet members of the HNP to ensure that those responsible for corruption, human rights abuse and other serious misconduct are removed. However the design of any vetting programme cannot focus solely on how to exclude persons responsible for human rights abuse. Those designing a system to remove individuals from critical institutions also need to consider the optimal mandate, composition and governance structure of that institution. In Haiti this has revealed the fact that there is

considerable uncertainty as to the actual size of the HNP in part because of a failure to properly register and issue official identification to police officers. It has also highlighted the need to establish effective internal codes of conduct and oversight mechanisms. In this sense vetting has served as the leading edge of the institutional reform wedge. An effective vetting process may catalyse a more fundamental set of reforms which do not focus exclusively on the past conduct of current police officers, but also help to ensure that the police make an appropriate contribution to post-conflict peacebuilding.<sup>18</sup>

### *Implementing DDR Programmes*

Disarmament, Demobilisation and Reintegration (DDR) programmes are an essential part of many post-conflict peacebuilding strategies, and transitional justice institutions, particularly courts and vetting schemes, will significantly impact most DDR programmes. If a court with jurisdiction over persons responsible for human rights abuse signals that it intends to prosecute vigorously all perpetrators, including participants in DDR programmes, then it could serve as a significant disincentive for persons contemplating laying down their arms. Conversely, if all participants in DDR programmes are offered full legal immunity then the chances of them participating (all things being equal) will increase. Both of these scenarios are undesirable for different reasons. No court will ever be able to prosecute all persons responsible for widespread human rights abuse and it is therefore unwise to dissuade people from demobilising based on a threat of prosecution that cannot realistically be fulfilled. On the other hand granting blanket amnesty for gross violations of human rights in order to encourage demobilisation is contrary to international law and will generate substantial resentment in victim communities. It will also instill a sense of impunity, which may contribute to a resumption of hostilities.<sup>19</sup> There are of course many more subtle ways to structure the relationship between DDR programmes and courts.

For example, the Commission for Reception, Truth and Reconciliation (CRTR) in East Timor utilised a particularly innovative approach to promoting the reintegration of low-level perpetrators by allowing them to come forward, disclose their crimes and agree to undertake an act of reconciliation (which often includes community service) as a precondition to escaping liability for their crimes.<sup>20</sup> By promoting reintegration, the CRTR is not only reducing the likelihood of conflict, it is also saving the new Timorese state the expense and effort of having to prosecute and imprison thousands of low-level offenders. Instead, these individuals are able to remain in their communities and continue to be economically active, and in some cases, are able to help to repair the damage they were responsible for. This DDR programme is explicitly limited to low-level perpetrators – persons responsible for serious crimes such as murder or rape are still liable for prosecution. In this way a balance is struck between encouraging the reintegration of individuals responsible for certain offences and achieving accountability for those bearing the greatest responsibility.

The relationship between the resources provided to demobilising combatants and reparations provided to victims of human rights abuse requires careful consideration. In many instances, former combatants (a percentage of whom may be responsible for human rights abuse) are offered substantially more generous demobilisation packages than victims of human rights abuse are awarded in the form of reparations. This not only produces a morally asymmetrical result but will almost certainly generate a great sense of injustice amongst victims and cause them to be less receptive to the reintegration of former combatants.

Vetting programmes can also intersect with DDR programmes and may produce unintended and counter-productive results. For example, certain DDR programmes offer skills training programmes designed to facilitate the entry into certain kinds of government employment. Vetting programmes may subject these individuals to screening for involvement in abuses and if they are found to be responsible they could be precluded from obtaining a



government job. This raises the prospect of one programme investing scarce resources into the training of an individual for a form of employment that another programme prevents him from accepting.

### *Restoring the Rule of Law and Confronting a Culture of Impunity*

The failure of national authorities in the Federal Republic of Yugoslavia (and until recently its successor state, Serbia and Montenegro) to take responsibility for the human rights violations that occurred during the 1990s has allowed war criminals to wield considerable influence within the country's security services. This allowed forces such as the notorious 'Red Berets' to collude with syndicates responsible for drug-running, human trafficking and organised crime. This network of criminal conduct culminated in the assassination of Serbian Prime Minister Zoran Djindjic – an event that convulsed the entire country. The lesson seems obvious: a failure to confront past abuse allows perpetrators to continue to commit crime thereby creating the prospect of continued conflict and instability. Proactively pursuing accountability and reconciliation will assist in eroding a culture of impunity and sending a signal about the importance of the rule of law.

### *Restoring Trust in State Institutions*

It is vital following a period of widespread conflict and massive abuse that steps are taken to reform state institutions so that the trust of citizens (both in them and government as a whole) is restored. The restoration of trust in government is essential if it is to fulfil many of its functions at optimal levels. Crime cannot be properly addressed if citizens do not trust the police and taxes will not be collected at sufficient levels without some basic trust in the decency and efficiency of government. Similarly, international and domestic capital will not be attracted if investors are not convinced that a new regime is committed to good governance and the rule of law.

### *Consolidating Democracy*

The consolidation of democracy is a vital component of any post-conflict peacebuilding agenda. While the establishment of democratic institutions and the holding of free and fair elections are not guarantees that a country will not slide back into conflict, democracies are better placed to distribute resources and deal with internal grievances in a manner that avoids conflict and human rights abuse.

Truth commissions and courts can play a powerful role in promoting democracy. Commissions can demonstrate the consequences of repressive and undemocratic rule and create an official record of the human cost of dictatorship and war. By exposing hidden abuse and by documenting the full scale of human suffering that occurs during conflict, truth commissions can strengthen public support for democracy. The prosecution of those responsible for genocide, crimes against humanity, war crimes and other systemic violations can help establish not just individual criminal responsibility but also the breakdown of democratic and rights-respecting institutions that enabled this abuse. These processes can reduce support for undemocratic practices and forms of government and provide citizens with early-warning signals that empower them to resist a return to conflict or oppressive rule.

## **Lessons from Transitional Justice Processes**

A number of lessons can be derived from an examination of different transitional justice experiences as well as how they intersect with post-conflict peacebuilding efforts. First, it is vital

that transitional justice strategies emerge from an extensive process of local consultation and that they are based on local conditions. Second, a commitment to establish transitional justice mechanisms should only be incorporated into a peace process if this reflects a bona fide desire to deal with the past on the part of all parties. Peace processes should not overprescribe the exact form and nature of transitional justice processes. Third, transitional justice mechanisms should regard capacity building as a core part of their mandate and an indicator of success should be what they leave behind, not just what they do during their period of operation. Fourth, transitional justice strategies should be as comprehensive as possible and not focus exclusively on only one component of transitional justice such as truth, justice, reparation, institutional reform, or reconciliation. Finally, successor governments should choose their projects wisely, and not pursue projects which they lack the capacity to implement. Each of these lessons are discussed in greater detail below.

### *Local Ownership and Consultation*

There can be no doubt that local ownership and consultation are essential if transitional justice institutions are to be effective and lead to sustainable results. The expansion of the field of transitional justice combined with the proliferation of tribunals, Truth commissions and reparations programmes has generated significant opportunities and risks. The most glaring risk is that the establishment of these institutions is regarded as an operational, technocratic endeavour divorced from a careful process of assessing the political climate and consulting with key stakeholders. As a general rule, the most carefully crafted truth commission mandate will not be effective if sufficient political and popular support is not generated prior to its establishment. Likewise, the impact of a well-functioning court that renders fair justice in every case will be significantly reduced if it viewed as an external imposition that does not draw on or respond to national conceptions of justice. The truth commissions established in South Africa and East Timor were the product of extensive local consultation and debate and their structure and mandate were strongly influenced by the views of local stakeholders. While local ownership is not in itself a sufficient condition of success, it provides transitional justice institutions with a vitally important advantage that can be leveraged into real results.

A commitment to local ownership should be distinguished from political or governmental support. The fact that the Cambodian government has belatedly and with considerable ambivalence decided to support the so-called Khmer Rouge Tribunal does not mean that the tribunal was the product of extensive local consultation or that it enjoys popular support. In some cases it may be necessary to circumvent governments with poor human rights track records in establishing transitional justice institutions and instead seek support and legitimacy from other sources such as civil society organisations or victims' groups. The difficulties in establishing transitional justice institutions where the government is either indifferent or hostile should not be underestimated. Nevertheless governments should not in every case be allowed to wield a veto in this regard. The truth commissions established in El Salvador and Guatemala were not the product of extensive local consultation and were also insulated in differing degrees from national ownership and control. Nevertheless they were able to achieve important results because they operated with independence and integrity and because they were able to conduct successful outreach to human rights and victims' groups.

In recent years truth commissions have been established in an increasing number of countries and settings as part of a truth-seeking strategy. While there is much to learn from the experience of other truth commissions, each commission should be based upon thorough local consultation and designed according to local needs. The uncritical transplantation of models from one context to another will simply not work. Truth commissions should also not be established for ulterior motives, such as attempting to discredit political opponents or meet conditionalities imposed on donor support without genuinely attempting to pursue justice or uncover the truth.

Truth commissions should not serve as substitutes for justice or as politically convenient compromises between accountability and impunity.

### *Transitional Justice and Peace Processes*

Peace processes often provide ample opportunities to introduce commitments to pursue transitional justice into the national settlement. This is not true in all cases, particularly when all parties to a conflict and subsequent peace process have been implicated in human rights abuse. In such cases all actors may agree that it serves their purposes not to dwell on past human rights abuse and a peace agreement can result in both amnesia and impunity. In those occasions where parties decide to introduce transitional justice issues into the settlement a number of pitfalls should be avoided.

First, mechanisms such as truth commissions should not be introduced in order to offset decisions to grant amnesty or as efforts to salvage a degree of cosmetic acceptability in an agreement that essentially seeks to bury the past and deny victims their rights to justice, truth and reparation. This was the case in the Lomé Peace Accord that sought to bring an end to the internal armed conflict in Sierra Leone. The fact that the Sierra Leonean truth commission was able to achieve some results was at least partially attributable to the fact that the blanket amnesty contained in the agreement was not respected and the Sierra Leonean Special Court was established to prosecute those bearing the greatest responsibility for human rights abuse. Had this not occurred then the Commission would have operated in a climate of complete impunity and it would have almost certainly been viewed as an inadequate attempt to disguise or compensate for this fact by the signatories to the Lomé Peace Accord.

A second pitfall is attempting to overprescribe the form and nature of a transitional justice institution in the provisions of a peace agreement. In both Liberia and the Democratic Republic of the Congo (DRC) peace agreements provided too much detail regarding the composition of truth commissions to be established in both these countries. The proposed membership of the commissions reflected the composition of the parties to the peace talks thereby subjecting these bodies to a political fragmentation where membership was decided not upon the basis of integrity, independence or a commitment to human rights, but rather loyalty to a particular political party. Peace talks may be essential in bringing a conflict to an end and producing a blueprint for sustainable peace but they are seldom the appropriate forum for deciding on the details of processes to deal with the past – precisely because these processes must not be politicised.

### *Capacity Building*

An effort to develop and implement a transitional justice strategy must place emphasis on building the capacity of local actors and institutions. International donors contributed \$10 million annually for five years (1997-2002) following the genocide in Rwanda in order to support domestic prosecutions. In this period the government conducted almost 7,000 trials.<sup>21</sup> The credibility of these trials has been diminished because of inadequate due process protections, politicisation and poor detention conditions. Some of these problems could have been remedied or alleviated with additional or properly targeted resources. During a similar period the ICTR was given close to \$400 million to conduct its proceedings, which resulted in fewer than 10 final convictions and contributed almost nothing to building judicial and legal capacity in Rwanda.<sup>22</sup>

### *Comprehensive Strategies*

Five years ago there existed a general misconception that only one institutional initiative could or should be generated in response to mass atrocity. It is now almost universally recognised that prosecutions, truth commissions, vetting institutions and reparation programmes are in most cases

complementary and could therefore be established simultaneously. It is therefore important to explore whether and in what ways these institutions should interact. Should truth commissions furnish courts with information to assist prosecutions? Should vetting programmes provide information to truth commissions to allow them to generate an overall picture of the causes, nature and extent of human rights abuse? How should reparation programmes relate to civil suits? This is an extremely important area of study.<sup>23</sup>

### *High Moral Capital, Low Bureaucratic Capacity*

Ackerman has coined the phrase that emerging democracies have ‘high moral capital but low bureaucratic capacity’. By this he means that post-conflict regimes often enjoy a period of high levels of popular support and trust immediately after the transition. This often provides them with sufficient political capital to embark on major initiatives to deal with a legacy of abuse. However, in designing and implementing these strategies, new regimes should keep in mind not only what is desirable, but also what is possible. New regimes may lack the human and financial capacity to translate laudable policy objectives (robust prosecutions, full reparations, rigorous vetting) into reality. Moral capital can quickly evaporate and the old guard can regain the initiative if new regimes promise more than they can deliver.

## **Conclusion and Policy Recommendations**

Based on a survey of the field of transitional justice and an examination of its link to post-conflict peacebuilding the following conclusions and policy recommendations can be drawn:

- A number of gaps exist between mechanisms of transitional justice and other aspects of post-conflict peacebuilding. The relationship between DDR programmes and transitional justice requires more rigorous analysis, not least because these programmes have the potential to either complement or undermine each other depending on how they are structured.
- In the past, advocates focused their energies on persuading governments that were not prepared to act to implement transitional justice policies. Today governments are far more likely preempt or respond to pressure by adopting half-measures (such as politicised courts or weak truth commissions) that may appear to be legitimate on the surface but are actually cynical efforts to evade responsibility for dealing with the past. This means that practitioners, governments and donors have to be in a position to provide a meticulous analysis of these efforts and undertake sophisticated advocacy efforts in order to ensure that only genuine efforts are supported or promoted.
- The strengthening of international legal obligations and a growing normative consensus that gross violations of human rights should be remedied has generally shifted the emphasis away from deciding whether to address the past, to questions of how this should be done. This creates extraordinary opportunities to examine the intersection between transitional justice and post-conflict peacebuilding in a number of different contexts and establish good practices based on comparative policy analysis. This process cannot simply transplant a successful model from one context to another but must explore the factors that made that model work and ascertain whether they are applicable in other circumstances.
- Truth commissions should devote more energy to ensuring that their recommendations are as detailed and specific as possible. Too often commission reports include general recommendations, which are so broad and so obvious that they have little practical impact. Commissions should make recommendations that strengthen the link between dealing with

the past and the prospective task of building a sustainable peace. Transitional justice strategies should be designed to provide added impetus and leverage to post-conflict peacebuilding efforts.

- Donors should view transitional justice strategies and post-conflict peacebuilding as complementary efforts. Both will require sustained and coordinated funding. Certain donors view peacebuilding as safer and less controversial than transitional justice initiatives and are therefore less willing to support the latter. This is a counterproductive approach because transitional justice efforts tend to reinforce post-conflict peacebuilding.
- Approaches to both transitional justice and post-conflict peacebuilding should be as holistic and integrated as possible. An overemphasis on, or neglect of, any one aspect of either strategy will render the overall effort less effective.
- Transitional justice mechanisms should only be incorporated into peace agreements if they embody a genuine desire to deal with the past as opposed to a cosmetic effort to avoid accountability. Peace agreements that contain bona fide commitments to deal with the past should strike the right balance between signalling this commitment in the text of the agreement and not overprescribing details that should emerge from a subsequent process of national consultation.

## Notes

- 1 This definition of transitional justice is largely derived from the articulation of a state's legal obligations following gross violations of human rights by the Inter-American Court of Human Rights in the *Velázquez Rodríguez Case*, Inter-American Court Of Human Rights (Series C) (1988). It has largely been endorsed by the Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies (3 August 2004).
- 2 See, for instance, Roht-Arriaza, N. (ed.), *Impunity and Human Rights in International Law and Practice*. (Oxford University Press: Oxford, 1995).
- 3 The International Criminal Tribunal for the Former-Yugoslavia has a staff of over 1,100 persons and has spent more than \$500 million since its establishment in 1991. Since that date it has secured less than 20 final convictions. The International Criminal Tribunal for Rwanda has been in operation for approximately 7 years, has a budget of about \$100 million per annum and has secured less than 10 final convictions. It is unlikely that the Sierra Leone Special Court will be able to convict more than 30 people in its first three years of operations. The Serious Crimes Panels in East Timor have to date convicted 32 individuals (before appeals) and it is not likely that it will be able to more than double that number during its remaining period of operations. See van Zyl, P., 'Unfinished business: South Africa's Truth and Reconciliation Commission', Bassiouni, C. (ed.), *Post-Conflict Justice* (2004).
- 4 See, Dieng, A., 'International criminal justice: from paper to practice - A contribution from the International Criminal Tribunal for Rwanda to the establishment of the International Criminal Court', *Fordham International Law Journal* vol. 25, no. 3 (March 2002), p. 688-707; Hulthuis, H., 'Operational Aspects of Setting Up the International Criminal Court: Building on the Experience of the International Criminal Tribunal for the Former Yugoslavia', *Fordham International Law Journal* vol. 25, no. 3 (March 2002), pp. 708-716.
- 5 CONADEP (National Commission on the Disappearance of Persons), *Nunca Más: Report of the Argentine National Commission on the Disappeared* (Farrar Straus & Giroux: New York, 1986); Report of the Chilean National Commission on Truth and Reconciliation, translated by Berryman, P.E. (University of Notre Dame Press: Notre Dame, 1993).
- 6 See Gibney, M., 'When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice', *Human Rights Quarterly* (2001), p. 1.
- 7 See Pasqualucci, J.M., 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure', *Michigan Journal of International Law* (Fall 1996), pp. 1-58; Roth-Arriaza, N., 'Reparations Decisions and Dilemmas', *Hastings International and Comparative Law Review* vol. 27, no. 2 (Winter 2004), pp. 157-219; , Roth-Arriaza, N., 'Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic', *Human Rights Quarterly* vol. 27, no. 2 (May 2005), pp. 392-435; Mazrui, A.A., 'The Truth Between Reparation and Reconciliation: The Pretoria-Nairobi Axis', *Buffalo Human Rights Law Review* vol. 10 (2004), pp. 3-14; Magarrell, L., 'Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice', *The Windsor Yearbook of Access to Justice* vol. 22 (2003), pp. 85-98.

- 8 Aolain and Campell speak of the need for such institutional change, 'In the post-transition context, human rights violations that were previously denied can now be recognized (a process that can be encouraged if formerly violent nonstate actors acknowledge their culpability). This move can be expressed as an "acknowledgment v. denial" antinomy. Acknowledgment of such failings paves the way for significant or "transformative" institutional change'. Aolain, F.N., Campbell, C., 'The Paradox of Transition in Conflicted Democracies', *Human Rights Quarterly* vol. 27, no. 1 (February 2005), pp. 172-213.
- 9 See Szczerbiak, A., 'Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland', *Europe-Asia Studies* vol. 54, no. 4 (June 2002), pp. 553-572; Flournoy, M.A., 'Dealing with Demons: Justice and Reconciliation', *The Washington Quarterly* vol. 25, no. 4 (Autumn 2002), pp. 111-123. For examples of vetting see, Kritz, N.J., 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', *Law and Contemporary Problems* vol. 59, no. 4 (Autumn, 1996), p. 139.
- 10 See Boraine, A., *A Country Unmasked* (2000), pp. 340-378; Feher, M., 'Terms of Reconciliation', Hesse, C., Post, R. (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999), pp. 325-288; Huyse, L., *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, 2003), pp. 10-33; Huyse, L., 'Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past', *Law & Social Inquiry* no. 20 (1995), pp. 51-78.
- 11 Afghan Independent Human Rights Commission, 'A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan' (2005), URL <www.aihrc.org.af>.
- 12 Bigombe, B., Collier, P., Sambanis, N., 'Policies for Building Post-Conflict Peace', *Journal of African Economies* vol. 9, no. 3, p. 336.
- 13 See Stahn, C., 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth and Commission for East Timor', *American Journal of International Law* (2001), pp. 952-966.
- 14 For an interesting discussion of intercommunal consensus and interethnic relations in the reconstruction of democracies see: Hislope, R., 'Ethnic Conflict and the "Generosity Moment"', *Journal of Democracy* (1998), pp. 140-53. See for instance Horowitz, D.L., *Ethnic Groups in Conflict* (University of California Press: 1985). See also Price, R., 'Race and Reconciliation in the New South Africa', *Politics and Society* (1997), pp. 149-178.
- 15 See for instance Vale, P., *Security and Politics in South Africa. The Regional Dimension* (Lynne Rienner: Boulder, 2002). See also Jackson, T., Kotze, E., 'Management and Change in the South African National Defence Force: A Cross-Cultural Study', *Administration and Society* (2005), pp. 168-198.
- 16 See for instance Honna, J., *Military Politics and Democratization in Indonesia* (Routledge: 2003); Chandra, S., Kammen, D., 'Generating Reforms and Reforming Generations Military Politics in Indonesia's Democratic Transition and Consolidation', *World Politics* (2002), pp. 96-136.
- 17 See Lane, C., 'Cop Land [Haitian Police Remain Vulnerable to Influence of Corrupt Leaders]', *The New Republic* (1997).
- 18 See Ahmed, S., 'No Size Fits All: Lessons in Making Peace and Rebuilding States', *Foreign Affairs* (2005), pp. 162-169; Galleguillos, N., 'Re-establishing Civilian Supremacy Over Police Institutions: An Analysis of Recent Attempted Reforms of the Security Sector in Chile', *Journal of Third World Studies* (2004), pp. 57-77.
- 19 Young, G.K., 'Amnesty and Accountability', *U.C. Davis Law Review* (January, 2002), pp. 427-482.
- 20 See Smith, C., *op. cit.*; Burgess, P., 'Justice and Reconciliation in East Timor. The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts', *Criminal Law Forum* vol. 15, no. 1/2 (2004), pp. 135-58.
- 21 For an account of the preparation and structure of domestic prosecutions in Rwanda see Sennett, P.H. et al, 'Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes', *St. John's Journal of Legal Commentary* vol. 12, no. 2 (Spring 1997), pp. 425-447.
- 22 See Schabas, W.A., 'The Rwanda Case: Sometimes It's Impossible', Bassinouni, M. (ed.), *Post Conflict Justice* (2002), pp. 499-522.
- 23 As mentioned earlier, the relationship between the Truth Commission and the Special Court in Sierra Leone present an interesting case study on the potential friction between a truth commission and other responses to past atrocities. For an interesting discussion on this topic see, Schabas, W.A., 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *U.C. Davis Journal of International Law & Policy* vol. 11, no. 1 (Fall 2004), pp. 145-69; Schabas, W.A., 'A Synergistic Relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone', *Criminal Law Forum* vol. 15, no. 1/2 (2004), pp. 3-54.