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Beyond justice versus peace: transitional justice and peacebuilding strategies¹

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Introduction

This article seeks to examine the challenging and complex relationship between transitional justice and peacebuilding. Some scholarly analysts, and indeed some policymakers, continue to view “peace” and “justice” as simply in conflict with each other, while their relationship in practice is far more complex.² This article will analyse the relationship between transitional justice and peacebuilding in order to consider how programming and practitioners of each might engage more constructively with each other in pursuit of more just and durable peace.

There is a danger that any account of how transitional justice and accountability can or should be part of peacebuilding strategies could be perceived as naïve, unrealistic or failing to recognize the necessities of peacemaking and peacebuilding following contemporary armed conflicts, and particularly security challenges. However, this article seeks to initiate dialogue for greater mutual understanding between the two fields. Despite the obvious intersection between the two, there has not been a great deal of work on the subject.³ This article identifies a starting point for formulation of strategies for peacebuilding and

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² For discussion on the striking of balances, difficult compromises between peacemaking and accountability in order to ensure a durable peace, please see Chandra Lekha Sriram, *Confronting past human rights violations: justice vs. peace in times of transitions* (London: Frank Cass, 2004) and *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (London: Routledge, 2005).

³ Paul Van Zyl, "Promoting Transitional Justice in Post-Conflict Societies" in Alan Bryden and Heiner Hänggi, *Security governance in post-conflict peacebuilding*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF) 2005), p.212. On the complementarity of 'peace' and 'justice', see the "Nuremberg Declaration on Peace and Justice," included in UN Doc. A/62/885 (19 June 2008). See also Jane Stromseth, David Wippman and Rosa Brooks, "Accountability for Atrocities: Moving Forward by Looking Backward?" in Stromseth, Wippman, and Brooks, (eds), *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006), pp. 249-253; Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice*, vol. 3, no. 1 (2009) pp. 28-48.

transitional justice that might help to elide the supposed peace-justice divide, however acknowledging that new tensions may emerge. Strategies would involve refinement of transitional justice practice (including and beyond accountability mechanisms), with peacebuilding tools such as rule of law promotion and with the tools designed to promote security and stability: disarmament, demobilization, and reintegration of ex-combatants (DDR), and security sector reform (SSR).

Before analysing the possible relationships, we briefly examine the complex context of peacemaking and peacebuilding, and give an overview of processes of transitional justice or accountability to understand how both fields have grown.

Peacebuilding and transitional justice

The expanding mandate of peacebuilding operations

Since the end of the Cold War, activities by the international community in peacemaking, peacekeeping, and peacebuilding have grown rapidly in number, complexity, and sophistication.⁴ UN peace operations have developed from first generation peacekeeping authorised under Chapter VI to the multi-dimensional peacebuilding operations with the broad mandates that we are familiar with today.⁵ The involvement of external actors in the internal or quasi-internal conflicts of states has not only become more frequent, but has also entailed increased levels of coercion, and statebuilding activities that are at odds with traditional concepts of sovereignty. In order to lay the foundations for long-lasting peace, post-conflict peacebuilding is far more invasive than previous peacekeeping mandates with direct engagement in the internal governance of the state. In *An Agenda for Peace*, the UN Secretary-General argued that the purpose of peacebuilding activities is to prevent the recurrence of conflict through the provision of technical assistance to transform national structures and capabilities and strengthen new democratic institutions.⁶ Key activities of peacebuilding include: disarming previously warring parties, restoring security and the rule of law, taking custody of and destroying weapons, repatriating refugees, offering advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening government institutions and promotion of formal and informal process of political participation.⁷ As peacebuilding has evolved, so too has the range of institutions and activities engaged in it. The creation of the United Nations Peacebuilding Commission and Peacebuilding Fund are but two examples of recent institutional innovations.⁸

⁴ For the purposes of this paper, the international community refers to the United Nations, the European Union and other regional organizations, international financial institutions and bilateral donors.

⁵ Michael Doyle and Nicholas Sambanis, *Making War and Building Peace*, (Princeton: Princeton University Press, 2006), pp.11.

⁶ *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping* (17 June 1992) UN Doc. A/47/277 - S/24111, para. 55.

⁷ *Ibid*, para. 59.

⁸ *Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict* UN Doc. A/63/881 and S/2009/304 (11 June 2009). See generally the website of the Peacebuilding Commission at <http://www.un.org/peace/peacebuilding/>.

Key peacebuilding policies and practices

For the purposes of this article, because each of these constitute central elements of peacebuilding and also elements which often interface with transitional justice and demands for accountability, we focus upon three aspects or tools common to peacebuilding.

Rule of law promotion

The promotion of the rule of law has only recently begun to be prioritized at policy level, although concerns about it have been present in peacebuilding activities for longer.⁹ The promotion of rule of law emerged as a key element in peacebuilding strategies when it became apparent that corruption, collapse, or distortion of rule of law, are central factors in the ignition and escalation of conflict. In 2004, following a Security Council open debate on the matter¹⁰, the UN Secretary General issued a landmark report establishing the centrality of rule of law promotion in the UN peacebuilding strategy.¹¹ In it, the UN Secretary General referred to the rule of law as “a concept at the very heart of the Organization’s mission”. It provided the following definition:

“It refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹²

The rule of law has not only become central to policy design of peacebuilding operations in the UN system, but also for other actors, from the World Bank and the EU to bilateral donors.¹³

⁹ The United Nations has been considering the rule of law as an element of human rights protection since the early nineties. Thus, during the 1990s and 2000s several resolutions of the UN General Assembly and reports of the UN Secretary-General focused on prioritizing rule of law as a UN activity. However, such documents tended to limit the understanding of rule of law to the protection of human rights and fundamental freedoms and, therefore primarily a priority for the UN Office of the High Commissioner for Human Rights. Examples are *Strengthening the rule of law: report of the Secretary-General*, UN Doc. A/52/475 (16 October 1997); and *Strengthening the rule of law: report of the Secretary-General*, UN Doc A/55/177 (20 July 2000).

¹⁰ The UN Security Council first sought to address the place of the rule of law in post-conflict societies in September 2003, through a ministerial-level meeting, followed by open debate. These discussions coincided with the release of a report designed to address other elements of transitional reform, specifically consolidation of democratic control. See *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies: Report of the Secretary-General* UN Doc. A/58/392 (26 September 2003).

¹¹ *The rule of law and transitional justice in conflict and post-conflict societies*.

¹² *The rule of law and transitional justice in conflict and post-conflict societies*, para 6.

¹³ See for example, for the EU see Council Regulation (EC) No. 975/1999 of 29 April

A number of activities are central to developing the rule of law in post-conflict societies, both for the purposes of developing functional legal systems and to address and limit some underlying causes of conflict in order to prevent its re-emergence. The development of these activities in the field depends on national needs and capacities.¹⁴ According to the UN Secretary General's report, the host of responses required in post-conflict situations range from support to judicial, legislative, and police reform to support for reform of the closely-related security and corrections sectors, but also the support of transitional justice and criminal prosecutions, truth-telling mechanisms such as truth commissions, vetting, and reparations. Most commentators and international programming coincide in this listing of activities as part of the support to rule of law reconstruction.¹⁵

The definition of rule of law promotion is closely linked to transitional justice, in a way that could create some confusion. This may be the case because transitional justice might therefore be understood both as part of rule of law promotion, where its tools are built into strategies of the latter, and as distinct to and in some cases in competition with rule of law programming. We discuss this confusion of terms and concepts in the international literature and policy language further below.

Disarmament, Demobilisation and Reintegration

DDR entails a series of policies and programmes dealing with the disarmament, demobilization, and reintegration of excombatants. It may involve the return of such individuals to civilian life, either in their former communities or in new ones. As such it may involve attempts to reconcile individuals with those they have wronged, or offer incentives for communities to accept them. Not all excombatants are returned to civilian life, however: DDR programmes may lead to the transfer, following vetting and training, of former members of state and non-state armed groups to new military and security/police forces. Such

1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms (OJ L 120, 8.5.1999, p. 1; Regulation (EC) of the same title (OJ L 120, 8.5.1999, p. 8 and European Commission Communication on Conflict Prevention COM(2002) 211 final, 11.04.2001; UK DfID, "Safety, Security and Accessible Justice. Putting policy into practice," (London, July 2002); and for the World Bank's activities on Rule of Law and Development see: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20746116~menuPK:1980723~pagePK:210058~piPK:210062~theSitePK:1974062,00.htm>

¹⁴ *The rule of law and transitional justice in conflict and post-conflict societies* paras. 14-18 and 27-37. The UN Secretary General report emphasizes that in post-conflict situations "legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements, and rarely reflect the requirements of international human rights and criminal law standards." (para. 27).

¹⁵ For example, Louis Aucoin, "Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict," *The Whitehead Journal of Diplomacy and International Relations*, (Winter/Spring 2007), pp. 33-49, p. 34 listed the following: constitution making, judicial reform, law development, democratic policing, establishing accountability/ fighting impunity, fighting corruption and the use of local customary practices in promoting the rule of law.

programmes, and the shape of future security forces, may be mandated in part by peace agreements. They may also be shaped by subsequent legislative and constitutional reform, internal reform to mandates of institutions, and may be affected by more localized initiatives such as “weapons for development” programmes, which may provide communities with development assistance in exchange for the relinquishing of weapons. DDR programming can promote confidence-building by ensuring shared control of these forces and by helping to reassure each party of its own security whilst weapons are surrendered. The substance of DDR programming, and the guarantees it seeks to provide, are essential to ensuring peacebuilding, and in particular functional rule of law and the possibility of effective, transparent and legitimate governance.

Security sector reform

SSR entails a range of policies and programmes that support institutions and individuals responsible for the security of the populace and oversight of security institutions, including not only the police but also judges, prosecutors, corrections personnel and ombudspersons.¹⁶ These policies and programmes may involve direct reform of security forces and changes in their composition, including via restructuring and/or merging existing armed forces, or creating new unified forces. SSR may also provide technical assistance and training for the reform of security forces themselves. In general, SSR seeks to reform security forces, and support institutions to govern and maintain civilian control over these forces. Where non-state providers of security and justice have been dominant, and state provision virtually nonexistent, as is the case in many conflict-affected states, it may be critical to engage such non-state actors, perhaps providing their activities with greater official status, perhaps encouraging reform, and perhaps seeking to reduce their influence.¹⁷

The evolution of transitional justice

Over the last two decades, the field of transitional justice has developed into a cottage industry, with a vast academic literature, a range of NGOs and research centres, and UN and donor-supported programming on the ground.¹⁸

¹⁶ OECD DAC *Handbook on Security System Reform: Supporting security and justice* (2007 edition), at <http://www.oecd.org/dataoecd/43/25/38406485.pdf>; OECD DAC, *Security Sector Reform and Governance DAC Guidelines and Reference Series* (2005), at <http://www.oecd.org/dataoecd/8/39/31785288.pdf>; *Securing peace and development: the role of the United Nations in supporting security sector reform. Report of the Secretary-General* (23 January 2008), UN Doc. A/62/659-S/2008/39.

¹⁷ Bruce Baker, “Who do people turn to for policing in post-war Sierra Leone?” *Journal of Contemporary African Studies* Volume 23, Number 3 (September 2005), at http://www.c-r.org/our-work/west-africa/documents/Sierra_Leone%20policing2005Baker.pdf; Bruce Baker, “Post-War Policing by Communities in Sierra Leone, Liberia, and Rwanda,” *Democracy and Security*, Volume 3, Number 2 (May 2007), pp. 215-236; UK DfID, *Safety, Security and Accessible Justice. Putting policy into practice*, (London, July 2002).

¹⁸ See for example, Ruti G. Teitel, *Transitional Justice*, (New York: Oxford University Press, 2000), Neil J. Kritz ed., *Transitional Justice: How emerging democracies reckon with former regimes*, (Washington, D.C: United States Institute of Peace Press, 1995), Martha Minow, *Between Vengeance and Forgiveness: Facing history after genocide and mass violence* (Boston: Beacon Press, 1998), Edel Hughes et al, *Atrocities and International Accountability. Beyond Transitional Justice* (New York: United Nations University, 2007), Rama Mani, *Beyond Retribution: Seeking justice in the shadows of war* (Cambridge: Polity Press, 2002), Robert I.

Transitional justice approaches emerged and developed from the transitions following military dictatorships in Latin America, South Africa after apartheid, in a number of African states emerging from conflict, and post-Cold War transitions in Eastern and Central European states. There was an increasing international consensus that transitional justice measures were needed to deal with past human rights abuses, which coincided with goals of some donors, banks and aid agencies, all of whom prioritized stronger rule of law to enable economic development.¹⁹

We have used the UN Secretary General's definition of transitional justice, which describes the range of processes and mechanisms that are used to help a society come to terms with a legacy of human rights abuses arising from conflict or authoritarian rule.²⁰ These human rights violations could include torture, extrajudicial execution, disappearances, war crimes, crimes against humanity, forced labour or enslavement, and may have been committed by state security forces, rebel groups, militias, corporations, and private persons. Transitional justice may utilize judicial and non-judicial mechanisms to ensure accountability, serve justice and achieve reconciliation. The actual combination depends on the context, but usually includes prosecutions, reparations, truth-seeking, institutional reform, vetting or lustration.²¹ These mechanisms can be used within a multi-faceted process in one country, in some cases resulting in complex relationships between different transitional justice institutions.²² For example, Sierra Leone had both a Truth Commission and Special Court and East Timor had a Commission for Truth, Reception and Reconciliation and Special Panel for Serious Crimes. Transitional justice can involve wholly domestic processes, completely international ones, or hybrid ones.²³

Key transitional justice policies and practices

As discussed in the UN Secretary General's definition in the report of 2004, transitional justice encompasses a range of activities. For the purposes of this article we will focus on a limited set of mechanisms which are most likely to have an impact on peacebuilding activities or vice versa.

Prosecutions

Prosecutions can take place in a wide range of fora, namely national courts, *ad hoc* criminal tribunals, mixed or hybrid tribunals and the International Criminal Court (ICC). Domestic prosecutions in conflict-affected countries have been carried out

Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000) and see also generally the *International Journal of Transitional Justice*. NGOs include the International Center for Transitional Justice www.ictj.org, Oxford Transitional Research Group <http://www.csls.ox.ac.uk/otjr.php>, The Transitional Justice Institute <http://transitionaljustice.ulster.ac.uk/>

¹⁹ Naomi Roht-Arriaza, "The new landscape of transitional justice", in Naomi Roht-Arriaza and Javier Mariezcurrena ed. *Transitional justice in the twenty-first century*, (Cambridge: Cambridge University Press, 2006), pp.8-9.

²⁰ *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc. S/2004/616 (23 August 2004), para 8.

²¹ *Ibid.*

²² Roht-Arriaza, "The new landscape of transitional justice," p. 9.

²³ *Ibid* p. 10.

by national courts to deal with war crimes in a number of cases. Examples include processes in Colombia, where trials of demobilised members of paramilitary groups are underway; in Iraq the Supreme Iraqi Criminal Tribunal has been established; and in Bosnia and Herzegovina war crimes are been dealt with by national courts, at entity level in cantonal and district courts, with many more guarantees than previously.²⁴ However, domestic prosecutions may not always be a possibility where the national court system has been devastated by conflict or corruption or bias is widespread. In these circumstances, hybrid or mixed tribunals are possible alternatives.²⁵ They use elements of both domestic and international justice, with a mix of standards and personnel from both systems and have been used in a number of countries, including Sierra Leone, Bosnia and Herzegovina, Kosovo, Cambodia and Lebanon. In contrast, the ICC is permanent and entirely international in nature. The ICC has jurisdiction over the crimes of genocide, war crimes and crimes against humanity committed after 1 July 2002 where the the state where they occurred is unable or unwilling to genuinely investigate or prosecute.²⁶

Commissions of inquiry

Commissions of inquiry are usually established at the end of conflict or authoritarian rule, and are often created to establish a public record of the conflict, or particular period in a country's past. Although mandates may vary, there will usually be a number of commissioners who will carry out investigations and hearings, write a report and make recommendations. The goals of a commission will often include: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; to promote reconciliation and reduce conflict over the past.²⁷

Vetting

During conflict, many perpetrators may be public employees or hold public office. It may therefore be necessary to carry out a vetting process to exclude employees from public institutions in the post-conflict period. Although vetting can be complicated to implement, there are a number of reasons to undertake such a process. Vetting shows that the new government or regime is willing to

²⁴ Felipe Gomez Isa 2008. "Paramilitary Demobilisation in Colombia: Between Peace and Justice". FRIDE working paper, 2008. Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking accountability after war* (Cambridge: Polity, 2007) p. 126-7. OSCE Mission to Bosnia and Herzegovina, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina. Progress and Obstacles*, March 2005, available at <http://www.oscebih.org/documents/1407-eng.pdf>, last visited 31st July 2009.

²⁵ Chandra Sriram, *Globalizing Justice for Mass Atrocities: A revolution in accountability*, (Oxon: Routledge, 2005) p.79-81.

²⁶ The website of the International Criminal Court is available at <http://www.icc-cpi.int/>.

²⁷ Priscilla Hayner, *Unspeakable truths: confronting state terror and atrocity* (London: Routledge, 2001) p. 24. See generally Bronwyn Leebaw, "Reassessing truth commissions," in Robert Denemark, ed., *The ISA Compendium Project*, Human Rights volume (New York: Wiley-Blackwell, forthcoming 2010).

combat impunity and that no one is above the law.²⁸ It may also be used to demonstrate a clear break with the culture that enabled such abuses to go unpunished. Vetting can therefore contribute to rebuilding public trust in institutions, which may be particularly low due to actions of public employees during the period in question.

Restorative justice

There has been growing recognition of the role that restorative justice methods can play in supporting the needs of victims and the building of community relations in addition to the emphasis on punishment of the perpetrator, or retributive justice. There is a growing body of jurisprudence from regional human rights courts and international courts that affirms the rights of victims to seek reparation.²⁹ This can involve financial compensation, but could also be symbolic or collective. Supporters of reparation argue that by demonstrating the acknowledgement of past abuses and committing resources to restorative means, it provides recognition to victims, builds community trust and public trust in the state.³⁰

Amnesties

Although amnesties are seen as a means to avoid accountability and blanket amnesties have been rejected by international law, there are ways in which they might contribute to transitional justice goals. Alternatives to blanket amnesty have been used in a number of countries, for example in South Africa amnesty was given to perpetrators who gave testimony in front of the TRC.³¹ There are therefore different degrees of amnesty that may be suitable to be used in different contexts.

The so-called “justice vs. peace” divide

The question of the promotion of justice or peace has been a long-standing debate in the fields of conflict resolution and transitional justice, with scholars and policy makers of each frequently taking polarized stands.³²

²⁸ Laura Davis, “*Transitional Justice and Security System Reform*”, (Initiative for Peacebuilding and International Center for Transitional Justice, 2009), p.12-13. Available at http://ictj.org/static/Publications/Trans_Justice_SSR_5.pdf.

²⁹ Hayner, *Unspeakable truths*, p. 170-171.

³⁰ *DDR and Transitional Justice*, Issue Paper, Second International Conference on DDR and Stability in Africa, United Nations Office of the Special Adviser on Africa and Government of the Democratic Republic of Congo, (Kinshasa, 12-14 June 2007) available at <http://www.un.org/africa/osaa/speeches/ddr%20and%20tj%20in%20africa%20-%20english.pdf>, last visited 17 September 2008.

³¹ Hayner, *Unspeakable Truths*, p.98-99.

³² Chandra Lekha Sriram and Youssef Mahmoud, “Bringing Security Back in,” in Thomas J. Biersteker et al, *International Law and International Relations: Bridging theory and practice*, (Oxford: Routledge, 2007) p. 224 and Miriam J. Aukerman “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal*, Vol. 15 (Spring 2002).

The arguments of human rights advocates for accountability are multiple and complex, but can be grouped into two sets of claims. One is about retributive justice and the value responding to serious crimes.³³ Some have further argued for the ability of punishment to deter future abuses.³⁴ Beyond prosecutions focusing on perpetrators, proponents may advocate transitional justice mechanisms such as truth commissions or reparations provide a victim-centred approach allowing victims a public voice, as potentially cathartic or healing.³⁵ The other claim is that accountability processes of some sort are essential for longer-term peacemaking and peace building.³⁶ Advocates argue that failure to prosecute could undermine the legitimacy of the successor government.³⁷ Impunity for certain key perpetrators will undermine people's belief in the rule of law and the potential to build a culture of respect for rule of law.³⁸

On the other hand, many engaged in conflict resolution and post-conflict peacebuilding will be concerned that the promotion of accountability can disrupt those activities. Again, the arguments are complex but there are two primary sets. First there may be a serious concern that the promotion of accountability may unavoidably disrupt conflict resolution and peacemaking activities, because it may directly target those who are most needed to achieve a lasting peace agreement, and prolong the conflict. That is to say, combatants on all sides, who are essential to the negotiation of a peace agreement, are also highly likely to have engaged in significant violations of international human rights and international humanitarian law. There is therefore a fear that those targeted by accountability mechanisms will bring about a backlash, and if armed they may go back on agreements and renew fighting.³⁹ To deal with this problem, the inclusion of amnesties in peace agreements could potentially secure peace, order and security based on this 'political bargain'.⁴⁰

Secondly, there is an objection that short and medium term security and the endurance of any peace agreement and efficacy of peacebuilding tools may be hampered by the pursuit of accountability. Specifically, there may be a tension between accountability processes that exclude certain former combatants from future roles in government, the police or some professional roles, and key elements of strategies for disarmament demobilization and reintegration (DDR) of ex-combatants, and for rule of law and security sector reform programming. Even the promotion of rule of law could potentially be in tension with accountability efforts, where accountability efforts may destabilize the judiciary in the short term, or divert resources from broader capacity building and infrastructure projects.⁴¹

³³ Aukerman, "Extraordinary Evil, Ordinary Crime," pp. 40-41.

³⁴ Luc Huyse, "Amnesty, truth or prosecution" in Luc Reyckler and Thania Paffenholz, eds., *Peace-building, a field guide* (Boulder: Lynne Rienner Publishers, 2001).

³⁵ Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York: Routledge, 2001), p. 28.

³⁶ *The rule of law and transitional justice in conflict and post-conflict societies*, para 2.

³⁷ Huyse, "Amnesty, truth or prosecution," p.325.

³⁸ *ibid.*

³⁹ Sriram and Mahmoud, "Bringing security back in," p.223.

⁴⁰ Ellen Lutz, "Transitional justice: lessons learned and the road ahead," in Roht-Arriaza and Mariezcurrena eds., *Transitional Justice in the Twenty-first Century*, p.330.

⁴¹ For further details see the discussion of rule of law below.

Moving Beyond 'justice vs peace'

In practice, analysts and policymakers do not in fact operate in these simplistic dyads.⁴² Rather, they seek to strike a balance between different demands and policies, or to consider creative sequencing. Peacebuilding is a multifaceted process and transitional justice can also address multiple goals and there are therefore many ways in which they potentially intersect. We seek here to begin identifying means by which transitional justice and peacebuilding activities may be made more complementary, where possible. As such, this is as yet a relatively speculative endeavour, but we have sought to use concrete examples not only of tensions between the two, but also complementarities, in order to lay the groundwork for future dialogue and programming.

It is important to find commonalities between the two processes, particularly since activities in the field have begun to overlap. A number of peace operations have been mandated to address transitional justice as well as activities in rule of law, SSR and DDR. For example, as international territorial administrations, UNMIK in Kosovo and UNTAET in Timor-Leste had responsibility for judiciaries, police and prison services.⁴³ UNMIK and UNTAET also established the hybrid trial process in each country.⁴⁴ We consider whether greater complementarities might be found at a policy level amongst the various actors, notwithstanding some obvious tensions. This is particularly relevant in light of the newfound emphasis in the United Nations system upon consolidating peacebuilding, through both the Peacebuilding Commission and the Peacebuilding Fund, each of which might in principle enable better engagement between transitional justice and peacebuilding at a policy level.

Contradictions and complementarities: transitional justice and tools of peace building?

So, how might transitional justice be complementary to, rather than purely in competition with some of the key elements of post-conflict peacebuilding? It is critical to consider carefully the complex dynamics between and amongst all of these tools, recognizing first the contradictions but taking seriously existing and potential complementarities.

Rule of law promotion

Contradictions

In the first UN report on rule of law and transitional justice, the two concepts are considered together and have developed hand in hand.⁴⁵ While this may have had

⁴² Lutz, "Transitional justice: lessons learned and the road ahead," p.327.

⁴³ *The rule of law and transitional justice in conflict and post-conflict societies*, para 11.

⁴⁴ UNMIK regulation 2000/6 gave the SRSG the power to appoint an international judge and prosecutor and UNMIK regulation 2000/64 gave the SRSG the power to appoint majority judges. UNTAET set up the special panel through regulation 2000/15.

⁴⁵ See for example, UNDP, "Strengthening the Rule of Law in Conflict/Post-Conflict Situations. A Global Programme for Justice and Security," "Given its development mandate, UNDP's support to transitional justice processes will not be done in separation

some positive effects, it may also have created some confusion over the distinctions between the two. It may therefore seem counterintuitive to suggest that rule of law promotion is, in any sense, in contradiction to transitional justice and accountability; however in some cases it may well be. Specifically, processes of transitional justice may divert resources, both capital and human, that might otherwise be dedicated to rule of law promotion. In the case of Rwanda, for example, some have argued that the resources invested in the development and assistance to national courts should have been equivalent to those committed to the International Criminal Tribunal for Rwanda (ICTR).⁴⁶ However, other commentators argue that it is not so clear that investing in the national judiciary to the same extent as the ICTR would have made a greater contribution to promoting the rule of law and encouraging reconciliation.⁴⁷

There are other ways in which transitional justice processes can present challenges to early rule of law building. Transitional justice processes might further destabilize severely damaged justice sectors in the short-term, making it more difficult to promote longer-term rule of law in several ways. Firstly, they can provoke responses from perpetrators or elements of the old regime which could destabilise fragile peace of nascent democracies, as they might question its legitimacy or actively seek to undermine the authority of public institutions.⁴⁸ Deciding who will judge the old regime is very difficult when there are many pressures on judiciary in a post-conflict context, such as lack of personnel or allegations of corruption.⁴⁹

Secondly, the attempt by national courts to prosecute perpetrators could put excessive pressure over the judicial system which is in most occasions severely damaged after a conflict.. Processes to try those accused of genocide in Rwanda, where the national judicial system was completely destroyed after the genocide, have put great stress on the judicial system.⁵⁰ The lack of capacity has meant that many accused remained in custody for years without having been convicted or even having had their cases heard, in the majority of the cases, generally in appalling prison conditions.⁵¹ The government thus sought to transfer most of the cases to the local level, to an alternative community-based jurisdiction, and keep only the most serious crimes within the jurisdiction of national courts.⁵² At the local level cases are heard by the so-called *gacaca* courts, which were intended to provide decentralised and participatory processes to help try the hundred of

from broader capacity building programmes in the Rule of Law/JSSR sector. ..." p. 10.

⁴⁶ Jose Alvarez, "Crimes of State/Crimes of Hate: Lessons from Rwanda," *Yale Journal of International Law*, vol. 24, (1999), p. 466.

⁴⁷ Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law*, vol. 95, no. 7 (2001), p. 25, has argued that: "It takes more than money to transform a fledgling group of hastily trained magistrates and lawyers into a viable judicial system capable of complying with minimal guarantees of a fair trial."

⁴⁸ Sriram *Globalizing justice for mass atrocities*, p. 54.

⁴⁹ Huysse, "Amnesty, truth or prosecution," pp.325.

⁵⁰ Brown, "The Rule of Law," p. 7.

⁵¹ Ibid, as of 2006 about 80,000 Rwandans were incarcerated without having been convicted, were still awaiting a verdict or, in most cases, still waiting for their cases to be heard.

⁵² Ibid, most serious crimes (Category 1) were considered planning and supervising genocide and crimes of sexual nature.

thousands of backlogged cases.⁵³ However, the *gacaca* approach has been subject to the criticism that it fails to genuinely provide justice or reconciliation.⁵⁴ Further, governments may abuse accountability processes in a way which delegitimizes not only such processes and therefore jeopardises the chances of reconciliation, but also may delegitimize the judicial system as a whole. In Rwanda the national judicial system has been described as largely subordinated to the executive and even to elite unofficial actors who enjoy both economic and partisan political power.⁵⁵ Critics of *gacaca* have raised serious concerns about government co-optation and manipulation of these processes.⁵⁶ Government co-optation of accountability process may contribute to objections that both international and national justice are “one-sided” justice.⁵⁷ Concerns about manipulation of accountability processes have also been raised in Sudan. In June 2005, the Sudanese government set up a tribunal, the “Special Criminal Court on Events in Darfur,” purportedly to try individuals guilty of abuses. None of the first cases tried by the new tribunal concerned major crimes associated with the conflict. No medium or high-level government officials or militia leaders were suspended from duty, investigated, or prosecuted for serious crimes in Darfur. The government also tried to prevent international trials by setting up ‘tribal’ or ‘traditional’ justice courts for Darfur, which also have not conducted significant proceedings.⁵⁸ Such accountability initiatives may actually have a counterproductive effect over the rule of law as they contribute to maintain the

⁵³ Brown, “The Rule of Law,” p. 8. *Gacaca* trials involve a panel of “judges” chosen among the community’s reputable members, who receive some basic training. The hearings, denounce perpetrators and provide eyewitness accounts. Though often portrayed as “traditional” community-based justice, contemporary mechanisms differ fundamentally from the traditional form. See Lars Waldorf, “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,” *Temple Law Review*, vol. 79, n. 1, (2006) pp. 48-49.

⁵⁴ While some authors argue that *gacaca* processes do not adhere to fundamental principles of rule of law, see for example See Brown, “The Rule of Law” and Waldorf, “Mass Justice for Mass Atrocity”. In contrast, Phil Clark has argued that most commentators on *gacaca* have failed to understand its aims and methods, and thus criticize it for failing to achieve goals for which it was never intended. According to the author, critics have “ignored its capacity to facilitate restorative justice via meaningful engagement between parties previously in conflict, in the form of communal dialogue and cooperation, which are crucial to fostering reconciliation after the genocide”, Phil Clark, “The Rules (and Politics) of Engagement: The *Gacaca* Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda” in Phil Clark and Zachary D. Kaufman (eds.), *After Genocide. Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst & Company, 2008), p. 300. Rosemary Nagy suggests alternatively that the focus on international and Western definitions of rule of law and due process may in some instances overlook local conceptions of justice and the possibility of legal pluralism, although she is critical of *gacaca*. Nagy, “Whose Justice? *Gacaca*, National Trials and the International Criminal Tribunal for Rwanda,” in Joanna R. Quinn, ed., *Reconciliation(s): Transitional Justice in Postconflict Societies*, (Montreal: McGill-Queen's Press, forthcoming 2009).

⁵⁵ Human Rights Watch, “Law and Reality. Progress in Judicial Reform in Rwanda,” (New York: Human Rights Watch), p. 44.

⁵⁶ Brown, “The Rule of Law,” p. 9-10.

⁵⁷ In the case of Rwanda only genocide-related crimes have been prosecuted, with crimes committed by the RPF remaining unaddressed.

⁵⁸ See Sriram, *Peace as Governance*.

sense of impunity and the distrust in justice procedures, both formal and non-formal ones.

Complementarities

Transitional justice and rule of law promotion are potentially complementary. A key goal of transitional justice is to contribute to sustainable peace and the rebuilding of a society based on the rule of law and respect for human rights. The promotion after a conflict of a strong judiciary and a system based in transparency and equal treatment under the law is closely intertwined with the capacity of a country to address past human rights violations. Both are potentially mutually reinforcing in practice if complementarities can be exploited.

Rule of law promotion and transitional justice tools may interact in several ways. Firstly, the creation of processes to address past violations committed during the conflict, both external and domestic driven processes, can help to restore confidence in the justice sector, in particular, and in new democratic institutions in general.⁵⁹ In particular, the use of domestic courts for accountability processes helps to place the judiciary at the centre of the promotion and protection of human rights of the local population, which contributes to the enhancement of trust not only in the judicial system but also in general in public institutions and the government. As Kerr and Mobekk have argued, government initiation of an accountability process may signal a commitment to justice and the rule of law previously lacking.⁶⁰ Internal accountability processes may thus serve to support rule of law, and to a wider extent democracy and respect of human rights, by making it clear that the new regime is based in the respect of the law,⁶¹ and demonstrate that certain actions are not only proscribed by law but subject to punishment. Domestically-rooted judicial processes, as well as other transitional justice tools, such as commissions of inquiry, may also support the development of mechanisms and rules for democratic and fair institutions by a) establishing regularized procedures and rules and b) promoting discussions rather than violence as a means of resolving differences and reassuring population that their demands will be met in independent, fair and unbiased fora, be this a regular court or an ad hoc judicial or non-judicial mechanism. This is not to imply that internationally-driven transitional justice mechanisms, such as ad hoc tribunals for the prosecution of international crimes, do not have a role to play in the development of the rule of law in the countries for which they have been established. However, it is clear that such distant processes can only address the needs of a post-conflict society to a limited extent, whether those needs be the promotion of rule of law or wider transitional justice objectives such as reconciliation. The experiences of the ICTR and the ICTY have generated a strong debate about the impact of external tribunals, and demands that they leave legacies for affected countries. The completion strategy of the ICTY highlights the objectives of enabling stronger rule of law and the capacity to address past crimes in the countries emerging from the former Yugoslavia, and particularly in Bosnia and Herzegovina.⁶² The impact of this strategy still remains to be seen.

⁵⁹ Sriram, *Globalizing Justice for Mass Atrocities*, p. 54. Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity, 2007), p. 120.

⁶⁰ Kerr and Mobekk, *Peace and Justice*, pp. 120-121.

⁶¹ Sriram, *Globalizing Justice for Mass Atrocities*, p. 54.

⁶² Raab, Dominic, "Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals", *Journal of International Criminal Justice*

Secondly, the (re)building of infrastructure and capacity of the judicial system may be a critical step in the promotion of a culture of respect for rule of law and peaceful conflict resolution.⁶³ The emphasis on rebuilding the rule of law may support longer-term transitional justice goals, particularly through embedding rules and institutions that may help to ensure the non-repetition of atrocities and make return to conflict more difficult.⁶⁴ Peacebuilding and transitional justice practitioners alike often consider rebuilding national institutions and rejection of the culture of impunity to be essential to transitional justice.⁶⁵

Beyond the strengthening of the judiciary, other reform processes can promote rule of law and accountability. The development of institutions that counterbalance the power of certain groups, including the government, such as national human rights commissions or anti-corruption commissions, may contribute to the establishment of a strong institutional and social structure more capable of withstanding social tensions and therefore avoid the recurrence to conflict.

Security and stability

Promoting short and longer-term security and stability in conflict-prone and post-conflict countries often requires the reduction and reform or fundamental transformation of groups with the capacity to engage – legally and legitimately or otherwise – in the use of force. These groups may include armies, militias, rebel groups, and in rare instances even criminal gangs. In such situations, two processes are of particular utility in reducing the risk of violence and violent conflict: Disarmament, Demobilization, and Reintegration of ex-combatants

vol. 3 no.1 (2005), pp. 82-102; Pocar, Fausto, “Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy in the ICTY”, *Journal of International Criminal Justice*, vol. 6, no. 4, (2008) pp. 655-666; Donlon, Fidelma, “Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina”, in Haynes, Dina F., *Deconstructing the Reconstruction. Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, (Hampshire: Ashgate, 2008), pp. 257-285.

⁶³ Richard Sannerholm, “Legal, judicial and administrative reforms in post-conflict societies: Beyond the rule of law template,” *Journal of Conflict and Security Law*, (Spring 2007), pp. 79-85 is however critical of training, recognising that it is an important aspect of institution-building, but arguing that it is unclear what effect of training programs has in the long term perspective.

⁶⁴ Peter Uvin and Charles Mironko, “Western and Local Approaches to Justice in Rwanda,” *Global Governance*, vol. 9, no. 2 (2003), p. 228, argue that: “The best way to prevent future human rights abuses is by strengthening the rule of law and the corresponding independent judicial institutions and uncorrupted governmental bodies,” cited in Sriram, *Globalising Justice for Mass Atrocities*, p. 54.

⁶⁵ The UN Secretary General states clearly in the introduction of his report *The rule of law and transitional justice* that: “Our main role is not to build international substitutes for national structure, but to help build domestic justice capacities.” Aucoin, “Building the Rule of Law,” p. 44, argues that “Transitional justice efforts therefore must focus not only on the more visible international and hybrid mechanism, they must also include significant assistance designed to strengthen the local justice sector and equip it for the prosecution of these specialized crimes.”

(DDR); and Security Sector Reform (SSR).⁶⁶ DDR and SSR are terms of art regularly used by international actors such as the United Nations and NGOs engaged in conflict resolution and peacebuilding.⁶⁷ It is worth noting that while we treat them separately here, these processes can overlap and can have mutually positive or negative effects.

Disarmament, demobilization and reintegration of ex-combatants

Contradictions

Most obviously, combatants from one or more parties are likely to be highly resistant to any accountability processes enshrined in peace agreements. Leaders and their cadres are less likely to cede arms and canton fighters if they fear arrest, whether by an international or domestic court. This compounds their general security fears attendant to disarming: as noted earlier in this paper there is some evidence that the Special Court for Sierra Leone may have affected not only DDR in Sierra Leone, but also in neighboring Liberia.⁶⁸ And not only have negotiations with the Lords Resistance Army (LRA) in Northern Uganda stalled repeatedly over ICC arrest warrants for the top leaders of that rebel group, but cantonment of fighters at assembly points in Southern Sudan has also been affected by disputes over accountability at the ICC and elsewhere. Indeed, comments attributed to Joseph Kony, head of the LRA, indicate that he has been

⁶⁶ We discuss here only disarmament, demobilization, and reintegration (DDR) of ex-combatants for the sake of brevity, but many programmes in practice separate Reinsertion as a distinct category, and others also add an additional term of Reconciliation or Rehabilitation, leading to the expanded term DDRRRR. Further, while UN agencies refer to security sector reform, an increasingly used term is security *system* reform.

⁶⁷ See generally OECD DAC *Handbook on Security System Reform: Supporting security and justice* (2007 edition), at <http://www.oecd.org/dataoecd/43/25/38406485.pdf>; OECD DAC, *Security Sector Reform and Governance* DAC Guidelines and Reference Series (2005), at <http://www.oecd.org/dataoecd/8/39/31785288.pdf>; United Nations Integrated DDR Standards (December 2006) at <http://www.unddr.org/iddrs/>; UNDP Practice Note, *Disarmament, Demobilization, and Reintegration of Ex-combatants* (2005), available at http://www.undp.org/cpr/documents/ddr/DDR_Practice_Note_English_PDF.pdf; *Securing peace and development: the role of the United Nations in supporting security sector reform. Report of the Secretary-General* (23 January 2008), UN Doc. A/62/659-S/2008/39; *Disarmament, demobilization, and reintegration* Report of the Secretary-General, UN Doc. A/60/705 (2 March 2006); UK Department for International Development, “Safety, Security and Accessible Justice,” (2002), at www.dfid.gov.uk/pubs/files/safesecureaccjustice.pdf; UK Department for International Development Briefing, “Non-state Justice and Security Systems,” (London: DfID, May 2004); Alan Bryden, Timothy Donais, and Heiner Hänggi, *Shaping a security governance agenda in post-conflict peacebuilding* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, November 2005); Nicole Ball and Luc van de Goor, *Disarmament, demobilization, and reintegration: Mapping issues, dilemmas, and guiding principles* (Clingendael, August 2006), at http://www.ssronline.org/document_list.cfm?type=3&a1=25; Nicole Ball, Eric Scheye, and Luc van de Goor, *From project to program: Effective programming for security and justice* (Clingendael, December 2007), at http://www.ssronline.org/document_list.cfm?type=3&a1=25; Heiner Hänggi and Vincenza Scherrer, eds., *Security Sector Reform and UN Integrated Missions: Experience from Burundi, the Democratic Republic of Congo, Haiti, and Kosovo* (Geneva: Centre for the Democratic Control of Armed Forces, 2008).

⁶⁸ Sriram, *Globalizing justice* chapter 6.

particularly concerned about what some have called the “Taylor effect”, referring to Charles Taylor, former president of Liberia, who was allowed to go into exile in Nigeria on leaving office, but who was subsequently arrested and surrendered to the Special Court for Sierra Leone.⁶⁹

In many instances, excombatants are embedded in state security forces, which makes broader reform, including promotion of the rule of law, difficult, because the very groups charged with enforcing new laws may have the most to lose through reforms.⁷⁰ It is also likely to lessen citizen confidence in the security forces and government generally, and may provoke outcry from victims, as discussed below. Where rebel or state fighting forces are comprised of one ethnic, religious, or other group, new structures which incorporate them may face accusations of bias. Nonetheless, inclusion of former fighters not only in new military but also new civilian security structures is common: for example in El Salvador’s peace agreement the former rebel FMLN was allocated a percentage of the new civilian police; in Rwanda the victorious (and nearly mono-ethnic) RPF dominated the post-genocide security forces.

Complementarities

We turn now to the possibility that some DDR processes and transitional justices may share similar goals and even utilize similar tools. DDR programs may seek to promote return and reintegration and possibly reconciliation between individuals, and between individuals and communities. In so doing, they seek to promote reintegration, which relies heavily on the willingness of communities to accept former combatants. This willingness, and longer-term coexistence of victims and perpetrators, could be promoted by the types of reconciliation processes which transitional justice has often sought to promote. In this way they share common goals with transitional justice processes. Tools such as truth commissions may facilitate a discussion of the past which allow communities to move forward, and to acknowledge and accept the return of combatants who were also perpetrators. Alternatively, a range of traditional processes of accountability and conflict resolution often also seek to promote reconciliation, at the level of the community, or of individual (or groups, or families) of victims and perpetrators. Cleansing ceremonies and other traditional processes may be used by communities or supported by local NGOs to facilitate reintegration while seeking reconciliation. For example in Sierra Leone, there have been efforts to use traditional processes to return former child combatants to communities.⁷¹

While the spectre of prosecutions most obviously may be an impediment to DDR processes, as discussed above, there is a somewhat lesser possibility that it

⁶⁹ Chandra Lekha Sriram and Amy Ross, “Travel Advisory: War Criminals Beware, Justice Ahead,” (29 October 2007) at <http://jurist.law.pitt.edu/forumy/2007/10/travel-advisory-war-criminals-beware.php>; Sriram and Ross, “Catch-22 in Uganda: The LRA, the ICC, and the Peace Process,” (17 July 2006) at <http://jurist.law.pitt.edu/forumy/2006/07/catch-22-in-uganda-lra-icc-and-peace.php>.

⁷⁰ Sriram, *Peace as governance*.

⁷¹ Chandra Lekha Sriram, *Disarming, demobilising, reintegrating and security sector reform: Options for effective action* (Human Rights Internet and Folke Bernadotte Academy, forthcoming).

might provide incentives for DDR. This might be the case where amnesty or reduced sentences can be offered as inducements for combatants to take part in DDR processes. Reportedly, the threat of extradition of some members of the paramilitaries in Colombia to the US helped convince some that a deal involving demobilization and lesser sentences at home was preferable.⁷² In Colombia compromises related to prosecution were also linked to non-penal measures of transitional justice, including truth-telling and reparations. Similarly the threat of ICC prosecutions in Uganda may have contributed to the willingness to conduct peace negotiations between the Government and LRA in Juba, which included the signing of a DDR agreement, although the Juba talks ultimately collapsed.⁷³ Uganda approached the ICC in December 2003 to investigate Lords Resistance Army (LRA) crimes, and in July 2005 the ICC issued warrants for five LRA leaders in July 2005.⁷⁴ Peace negotiations between the LRA and the Ugandan government faltered as the LRA sought protection against ICC indictments and rejected the possibility of national criminal trials.⁷⁵ Initially, the Ugandan government sought to refer only the crimes of the LRA to the ICC, although the Ugandan army has been accused of serious abuses as well. The Prosecutor of the ICC however made it clear that he has the authority to investigate crimes committed by the Ugandan army as well as the LRA. According to some, concerns about prosecutions of the army by the ICC convinced the Ugandan government to pursue negotiations with the LRA over the use of domestic trials and traditional justice mechanisms.⁷⁶ The agreement includes provisions for a special division of the High Court of Uganda to try serious crimes from the conflict, establishment of a truth commission and reparations.⁷⁷ However, despite the drafting of this agreement, Joseph Kony failed to sign the Final Peace Agreement (FPA) in April 2008, citing the risk of prosecution by that special division.⁷⁸ He did not take part in discussions on 29th November 2008, again due to concerns about accountability, specifically the lack of clarity about the planned domestic procedure.⁷⁹ For such inducements to be effective, both the threat of prosecution and the durability of any amnesty or other protection offered must be credible. With prosecutions before international courts such as the ICC, there can be no guarantee that any domestic amnesty will provide the protections that combatants may seek.

DDR processes could also be tied more explicitly to institutional reforms which are friendly to human rights. Often peace agreements and DDR processes mean

⁷² Sriram, *Peace as governance*, chapter 5.

⁷³ Agreement between the Government of Sudan and the Lord's Resistance Army on Disarmament, demobilisation and reintegration, Juba, Sudan, 29th February 2008.

⁷⁴ Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen were indicted.

⁷⁵ Human Rights Watch, "Uganda: LRA atrocities demand action". 18 May 2008.

⁷⁶ Katy Glassborow. "ICC judges to review LRA cases". Institute for War and Peace Reporting ICC-Africa update 193, 19 November 2008. Available at: http://www.iwpr.net/?p=acr&s=f&o=347885&apc_state=heniacr200811.

⁷⁷ Government of Uganda and LRA, *Agreement on Accountability and Reconciliation* Government and LRA; Government of Uganda and LRA, *Annexure to the agreement on Accountability and Reconciliation*; and Human Rights Watch, *Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation*, February 2008.

⁷⁸ International Crisis Group, 2008. *Northern Uganda: The Road to Peace, With or Without Kony*. (Brussels: International Crisis Group, 2008) pp. 3-4.

⁷⁹ *Ibid*, i-ii.

that former combatants will take part in new security structures, as already discussed. However, this incentive might be linked more explicitly to the acceptance by leaders of militaries or armed groups (in peace agreements or through acquiescence to mandate reform) of wide-ranging changes in institutional mandate and oversight and training, which in tandem with judicial and other institutional reform might promote more human rights-friendly security forces. While this would not explicitly promote transitional justice processes, it could have the forward-looking effect of promoting future protection of human rights. DDR processes also may shape future SSR activities. In El Salvador, for example, former members of the FMLN and state security forces were included in a new civilian police, but that force was also subject to significant changes in mandate and oversight, and human rights training.⁸⁰

Developing links between reparations for victims and programmes for ex-combatants could also be explored further. Packages for ex-combatants received as part of reinsertion and reintegration may cause resentment in the broader community.⁸¹ One way to overcome this is for ex-combatants to contribute to reparations schemes, as in Colombia. It is also worth considering the relative value of packages granted to ex-combatants and reparations to victims. In Rwanda, ex-combatants received \$700 while victims received nothing and in South Africa victims waited 6 years after the Truth and Reconciliation Commission Report for reparations, which were much smaller than the demobilization grants and special pensions awarded to ex-combatants.⁸² Reintegration processes can be designed so as to minimise community resentment; for example the IDDRS recommend that reintegration assistance be designed to move quickly from assistance to individual ex-combatants to community-based assistance programmes.⁸³

Security sector reform

Contradictions

Tensions between security sector reform and transitional justice are fairly obvious and straightforward, and in many ways which will not be repeated here mirror tensions between DDR processes and transitional justice. Reform processes present a challenge to the often previously unfettered powers of security forces. They often involve a reduction in their size and the change in their mandate, restricting police and other domestic security forces to purely domestic matters, and promoting civilian oversight over police and military bodies. As a challenge to the traditional authority of these organizations, they may in themselves be destabilizing. Reform efforts which also involve the inclusion of former rebel groups in new or reformed military or police structures may be strongly resisted by existing state security structures. Thus, for example, members of the Nepali military objected to the planned inclusion of former Maoist fighters into the army on the grounds that they are politicized and lack professional discipline; the police in El Salvador similarly objected to former rebel fighters whom they

⁸⁰ Sriram, *Confronting past human rights violations*.

⁸¹ *DDR and Transitional Justice*, p.10-11.

⁸² Ibid, p.11.; Hugo van de Merwe and Guy Lamb, "Transitional Justice and DDR: The case of South Africa", (New York: ICTJ, 2009), p.22.

⁸³ UN, *Integrated Disarmament, Demobilization and Reintegration Standards*, 4.11.

viewed as ideological being included.⁸⁴ Transitional justice processes, whether vetting, which may compel the exclusion of members of one or more fighting forces from new security structures, or accountability, by which they may risk imprisonment, may make such challenging reform processes even more difficult.

Demands from transitional justice processes for the exclusion of specific violators of serious human rights violations, and for the protection of human rights to be included in new mandates, may make reform efforts yet more challenging. Thus, for example, in El Salvador, a military that had begun to accommodate significant efforts at reform and civilian oversight protested strongly when a report of a truth commission threatened to name members as perpetrators. Police officials were less vocal but did express concern.⁸⁵ Yet security sector reform is essential for medium and longer-term accountability or transitional justice processes.⁸⁶

Complementarities

Provision of security is linked to broader provision of access to justice, although the two are not therefore identical and both may be addressed separately in peace agreements and peacebuilding processes. Without an effective and legitimate force which can guarantee a climate of security and transparency, accountability processes would be difficult to develop and their outcomes difficult to implement. In the absence of security forces committed to the support of rule of law and transparent authority, both rule of law and accountability efforts are jeopardized. SSR processes might further benefit transitional justice processes where a justice-sensitive approach includes provision for oversight, vetting, and human rights training, and where accountability for past abuses is not excluded or even treated as an element of SSR, although the last approach has yet to be seriously attempted.⁸⁷

Transitional justice processes which pursue accountability for past abuses, including through the exclusion of abusers from security forces or their prosecution, might help to bolster new security forces, providing them greater legitimacy, and demonstrating a break with the past. This might assist with internal legitimacy and morale of the forces themselves, as well as legitimacy with the populace at large. It is for this reason that vetting of existing members of state security forces and any former rebel or militia groups joining state security forces is essential.⁸⁸ Such vetting should be done on a case-by-case basis, rather than excluding entire groups, which may be destabilizing.⁸⁹ Mandate reform and the creation of ombuds or oversight bodies can also bolster both accountability and security sector reform.

⁸⁴ Sriram, *Disarming, demobilising, reintegrating and security sector reform*.

⁸⁵ Sriram, *Confronting past human rights violations*, passim.

⁸⁶ Sriram, *Disarming, demobilising, reintegrating and security sector reform*.

⁸⁷ Laura Davis, "Transitional Justice and Security System Reform". (Initiative for Peacebuilding and International Center for Transitional Justice, 2009), p.12. Available at http://ictj.org/static/Publications/Trans_Justice_SSR_5.pdf.

⁸⁸ Sriram, *Confronting past human rights violations* chapter 4.

⁸⁹ Eirin Mobekk, "Transitional Justice and Security Sector Reform: Enabling Sustainable Peace", Occasional Paper No 13 (Geneva: DCAF, 2006), p.78.

While there is a growing body work promoting a justice-sensitive approach to SSR, more research is needed to identify key lessons and translate them into new policies.⁹⁰ There are in any event a range of definitions of SSR, some of which include key elements of transitional justice, some of which do not, and there remains variance even within the United Nations system.⁹¹ The Bureau of Crisis Prevention and Recovery in UNDP has programmed in Justice and Security Sector Reform (JSSR), which includes transitional justice, while elsewhere in the UN transitional justice is not treated as an element of SSR.⁹² Options for both transitional justice and SSR are context-dependent, as therefore are policies to balance or strike compromises between them. However, this does not mean that it cannot be done, for example, while the tensions identified above regarding El Salvador were very real, the combination of activities of vetting, human rights training, and mandate changes were critical both to the reform of the security sector and to human rights promotion, and to a measure of transitional justice.

Conclusions

We have sought to elaborate upon both the complementarities and the between key tools of transitional justice, such as trials, truth commissions, vetting, amnesties, and restorative measures such as reparations, and some of the most critical elements of post-conflict peace building, particularly as carried out by the UN, the EU, and bilateral donors today—DDR, SSR, and rule of law promotion. However of course, the picture is even more complex than discussed here, for in fact, all four of these tools, strategies, and policies of peace building are in a dynamic relationship with one another, sometimes complementary and sometimes contradictory. This is certainly well understood by programmers on the ground, but perhaps what is needed is a greater understanding at the level of policy, such that those designing general benchmarks and goals of one set of activities do so in discussion with those designing them for others. It is here that the addition of a transitional justice module to the IDDRS, being completed as this piece was written, may be one important contribution to efforts to develop greater complementarities amongst the tools.

More generally, the interaction between transitional justice and peacebuilding should be more closely examined in bodies such as the Peacebuilding Commission, and interagency groups in the UN, for example dealing with topics such as DDR and rule of law. This, of course, requires something that large bureaucracies with many offices with competing interests are not historically particularly good at—coordination. Nonetheless such coordinated efforts are needed if the different peacebuilding activities are to become less in tension, not to deny that there are very real tensions between the goals of these different activities. Nonetheless, there are areas where what is needed is more productive thinking about how key tools can be incorporated into more holistic strategies of peacebuilding.

⁹⁰ For example, the Initiative for Peacebuilding (IFP), funded by the EU has a Security cluster consisting of several civil society organisations that have examined justice-sensitive approaches to security in a few countries.

⁹¹ Heiner Hanggi and Vincenza Scherrer (Eds), *Security Sector Reform and UN Integrated Missions: Experience from Burundi, The Democratic Republic of Congo, Haiti and Kosovo*, (Zurich: Lit Verlag, 2008) p.4.

⁹² *Ibid*, p.5.

Finally, our inquiry has considered only in passing short-term versus long-term results and options regarding timing and sequencing of transitional justice measures and peacebuilding measures deserve further research. It will be impossible to prescribe these for all circumstances, but a clearer identification of situations in which specific measures may be developed simultaneously, and indeed in tandem, and ones in which certain measures should take precedence, may emerge from closer comparative study and the ongoing evolution of programming. Our goal here has been to lay the groundwork for greater dialogue and engagement of actors working towards the shared goal to building a just and durable peace after conflict.