

Connecting Transitional Justice and Development

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Ladies and gentleman, distinguished guests,

When I was asked whether I would like to give the key note speech to open this conference I felt honoured yet also humble. In the light of what your countries – and possibly yourselves – have gone through, what can I explain to you regarding dealing with your past? How can I adopted your perspective and know what is important for you today and in the future?

Having lived in Uganda myself, but never having been to Cambodia, I was also challenged by the enormous difference of your countries respective experience: a still ongoing extremely violent conflict in Northern Uganda – and a massive genocide in Cambodia’s past. An indictment against the leaders of the Lord’s Resistance Army in Northern Uganda by an international tribunal – and ongoing trials of leading génocidaires in Cambodia’s hybrid court. At present, you find yourselves at very different stages in your transitional justice processes, with very different needs, interests and questions.

Having said this, what struck me when preparing for this lecture was at least one similarity in the data of almost identical surveys conducted in Northern Uganda and Cambodia.¹ When asked what their most immediate concerns were in both countries the respondents stated poverty reduction, economic growth, health care and education – justice ranked rather low on their list of priorities. In short, development seemed more important than transitional justice.

But is this an either / or question? Can we have either development or justice? Are their points of convergence between the two? And if yes, how do they connect? Let us see whether I can shed some light on the latter questions in the coming 40 minutes. Having said this, my aim in this presentation is

¹ Phuong Pham et al., 'So We Will Never Forget. A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia', (Berkeley: Human Rights Center, University of California, 2009), Phuong Pham et al., 'When the War Ends. A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda', (Berkeley: Human Rights Center, University of California, 2007).

not to provide answers but to invite you to think about some questions I shall raise in the course of this lecture.

In order to do so I will first explain my understanding of transitional justice, its aims and instruments. This will provide the foundation on which – in a second step – I shall attempt to draw out some tenuous links between the two fields, TJ and development.

What is TJ?

Transitional justice (TJ) refers to ways and means of dealing with the past after a violent conflict or a dictatorship. Importantly, the concept transitional justice closely links the moment of transition with the pursuit of justice. It is based on the assumption that in order to move on politically and socially some form of dealing with gross human rights abuses, crimes against humanity and war crimes is necessary. Only a clear break with the past enables peaceful coexistence in the future.

Why does dealing with the past matter?

One central aim of transitional justice is to contribute to building stable societies where the recourse to violent conflict is prevented. Much of this runs under the heading ‘peacebuilding’ and suggests that building sustainable peace after violent conflict or dictatorship requires not only the construction of new institutions, fostering of democratization or the implementation of market structures but also the encouragement of peaceful coexistence, civic trust and – a long way down the line – potentially some form of reconciliation between the parties to the conflict. Because the end of a violent conflict or a dictatorship, Paul Lederach once remarked, is nothing more than a beginning of a long journey. The fact that half of all peace accords tend to fail within the first 5 years – the so-called conflict trap – highlights the need to improve the relationship between the parties to the conflict in the aftermath of violence.

More precisely, transitional justice seeks to further this aim through

- Identifying and prosecuting perpetrators
- Uncovering the truth about human rights violations
- Preventing future crimes
- (Re)establishing the dignity of victims
- Encouraging reconciliation and peaceful coexistence

What forms can it take?

A number of instruments are available to further these objectives. Which ones are most appropriate depends on the particular context of the society in which they are established, as well as on temporal sequencing and combinations. Moreover, their selection depends on the kind of violent crimes that were committed, their scope and dynamics. There is no one-size-fits-all solution.

By and large, the following mechanisms are being established under the heading transitional justice:

- Prosecution through national, international or hybrid tribunals
- Uncovering of the extent and nature of crimes through national or international truth commissions
- Reparations for the victims of abuses including compensation, rehabilitation or symbolic gestures
- Institutional reforms include security sector reform, improvement of the judiciary and lustration of personnel involved in the atrocities.
- Construction of memorials and museum, and memory work more generally

Let us briefly look at three of these mechanisms in more detail since I would like to return to them later: tribunals, truth commissions and reparations.

Tribunals are courts in which individuals are punished for their participation in genocide, crimes against humanity or war crimes. Their objective is to rectify past abuses, i.e. to correct past injustices through punishment. They draw a clear line between victims and perpetrators, even if this is not always possible, and frequently only prosecute the main authors of human rights abuses.

Truth commissions, in contrast, are temporal institutions that seek to uncover the truth about human rights abuses through individual testimonies of victims. Their aim is not punishment – even though in some cases their findings were later used in court cases – but revealing wider structures of violations and creating a record of what happened to whom where and when. Some truth commissions, most notably the South African Truth and Reconciliation Commission, also seek to contribute to national and individual reconciliation.

Reparations are material or symbolic means or gestures that are ideally provided by the perpetrators to the victims. Reparations recognize the loss of the victims and signify an acceptance of guilt and responsibility by the perpetrators. In cases crimes were committed by the state, after a change of government the successor government takes on the responsibility of providing reparations. In most cases, the loss endured by the victims can never be made up for financially so that reparations have, first and foremost, a very strong symbolic meaning.

After this brief description of TJ measures I would like to turn to the link between TJ and development.

How do TJ and development connect?

By way of introduction I would like to state that linking TJ and development is a very novel field of investigation. So far, not much literature is available and the arguments are still sketchy, rather than well sustained. Against this backdrop, in this presentation I would like to highlight some links and points of convergence, instead of providing answers and recommendations. Importantly, with view to your workshops over the next days, I would like to encourage you to wonder if and how these aspects are relevant for your particular context and – if yes – you need to make the connection more explicit in your own advocacy work. Food for thought is all I can offer at this point.

But let me first pause for a moment to pose the question what development actually means.

What is development?

In order to understand the connection between transitional justice and development it is first of all necessary to agree on a definition of development. In its most basic sense, development refers to a process in which circumstances are improving for the better. In a narrow sense, it might refer to economic growth and the distribution of material goods. This is a very widely used definition. Yet, in our particular context of societies after war, genocide and human rights abuses a more substantial definition seems to be required, since not only material structures lie in shambles as a result of the violence, but also social structures. I would therefore like to propose a definition of development which I take from the United National Development Programme UNDP. In its Development Report the organization states that development is

a process of enlarging people's choices. The most critical ones are to lead a long and healthy life, to be educated, and to enjoy a decent standard of living. Additional choices include political freedom, guaranteed human rights and self-respect.²

Based on this definition, transitional justice and development share one common goal: the improvement of relations and structures in order to enhance the well-being of all members of a society. While TJ does this by looking backwards at past human rights abuses, as well as forwards to a more stable society, development does this primarily with view to the future.

² UNDP Human Development Report quoted in Roger Duthie, 'Towards a Development-sensitive Approach to Transitional Justice', *IJTJ* 2 (2008): 293.

While the UNDP definition seems to be more appropriate for our concern –, i.e. societies emerging out of conflict and repression – my choice is also guided by a more pragmatic intention since it would be hard to argue that TJ leads to economic growth and the improvement of material well-being. But, as we shall see shortly, one might be able to argue that it contributes to wider social change as identified by UNDP.³ Even though only tenuously.

So let us return to the connection between TJ and Development.

How do TJ and Development connect?

A number of general arguments can be made connecting TJ and development and I will do so in the following before looking more precisely at specific TJ instruments in order to tease out more precisely how they are linked to development.

Addressing root causes and social justice

When considering the link between TJ and development it is first of all striking that most violent conflicts and dictatorships occur in countries that are struck by poverty and want. Poverty does not only refer to economic and material disadvantages, but also to disempowerment and vulnerability,⁴ which frequently points at policies of marginalization and discrimination of parts of the society by the central government. This manifests itself in poor economic infrastructures, bad housing, schools and health services as well as limited political representation in national matters. If used as a deliberative policy of marginalization this form of impoverishment can be labelled ‘structural violence’, as opposed to direct violence, where discriminating social, political and economic structures – established by a government in place – impact on a population to the extent that their needs are not being met. In the long run, this form of violence might lead to actual deaths due to bad services and provisions. In Kenya, for instance the lifespan of individuals varies up to 30 years, depending on where they live.⁵ In some cases, this form of structural violence gives rise to militant opposition and a violent struggle for recognition. Here, then, poverty and the lack of development are amongst the root causes of a violent conflict. Against this backdrop we may ask: in the aftermath of violence, do they need special consideration in form of social justice as an element of transitional justice? Can there be lasting peace without social justice?

³ Roger Duthie, 'Towards a Development-sensitive Approach to Transitional Justice', *IJTJ* 2 (208): 294.

⁴ Jane Alexander, 'A Scoping Study of Transitional Justice and Poverty Reduction', (London: DFID, 2003), 47.

⁵ GTZ, 'What do Transitional Justice Mechanisms Gain by Including Economic, Social and Cultural Rights Dimensions?' (Eschborn: GTZ, 2009), 4.

Exiting the conflict trap and creating conditions for development

Moreover, in addition to poverty being a potential cause for violence it is almost certainly a consequence. The experience of violence – be it in form of a civil war, dictatorship, or genocide – destroys infrastructures, buildings and land. Yet beyond these material repercussions it also destroys social relationships, civic trust and trust in one's neighbours, family structures and community relationships – all vital not only for personal well-being but also for working together to move the country out of its post-conflict paralysis. Against this backdrop it is thus important to note that TJ processes do not operate in a vacuum but in a specific context often marked by poverty and destitution.

In order to exit the conflict trap and avoid a relapse into violence it is necessary to foster political and social stability as well as security.⁶ This, as outlined by way of introduction, is one of the objectives of TJ and might be achieved through measures such as prosecution and truth finding but also institutional reforms such as of the Security Sector Reform or the legal apparatus.⁷ These measures might transform existing conflicts to a point that civic trust, trust in one's community members and the relations between the parties to the conflict improve, providing an environment that is conducive to social, economic and political development. This raises the question how and what kind of TJ measures might lead to an improved social and political climate that allows long-term development efforts to strive more fruitfully?

Responding to global agenda setting

Another, yet by no means unrelated point of convergence between TJ and development is the rising interest of development actors – e.g. international donors – in the topic. In Germany, the Federal Ministry for Development places a particular emphasis on researching the link between TJ and Development, the German GTZ implements projects to that effect, the German DED and its Civil Peace Service have launched a series of projects in the field of TJ and dealing with the past more generally.

For other development actors, too, TJ has become an appealing sector for funding. According to recent research, over the past 10 years 'notions such as development co-operation have been reformulated in legal terms'.⁸ As a consequence, an increased amount of international efforts engage in activities such as the construction of courts and the persecution of perpetrators of mass atrocities. It has been suggested that 5 percent of development aid to Rwanda and Guatemala between 1995 and 2005 was allocated to transitional justice measures.⁹

⁶ Alexander, 'A Scoping Study'.

⁷ Duthie, 'Towards a Development-sensitive Approach': 299.

⁸ Barbara Oomen, 'Donor-Driven Justice and its Discontent: The Case of Rwanda', *Development and Change* 36, no. 5 (2005).

⁹ Ibid.

The development organization of the United Nations, the afore mentioned UNDP, is amongst those development agencies that have revealed a specific interest in funding TJ measures in post-conflict societies, including providing support and advice to the truth commissions of El Salvador, Guatemala, Peru, Sierra Leone and Timor Leste as well as to capacity development of the Gacaca tribunals in Rwanda and the War Crimes Chamber in Bosnia and Herzegovina.¹⁰

These funding priorities of international development donor agencies lead to more means being available for transitional justice measures. For in many cases, the choice of implementing TJ instruments is not only based on political factors but also on available resources.¹¹ Dealing with a past of human rights abuses requires a number of well functioning institutions and structures to investigate, prosecute and trial perpetrators. In particular, after mass violence these institutions are weak and malfunctioning and require substantial financial assistance to be reconstructed. TJ then becomes a luxury in a highly resource-constrained context in which much of the social, economic and political life is in need of rebuilding.¹² The matter of resources raises the question if and to what extent funds allocated to transitional justice are lacking in other development sectors, in other words, if TJ and development compete with each other for funds from international donors.¹³

Criticism frequently voiced against tribunals, in particular, is that they are extremely expensive and that the amount of people tried in their courtrooms stands in no relation to their expenses. While this is certainly a serious challenge it should be noted that international tribunals, in particular, are mostly not funded out of the same budgets that are available for development projects.¹⁴ Nevertheless, on a national scale there might be some competition as to whether funds by donors are donated to TJ or to development sectors such as reconstruction, education and health.

For local actors such as yourselves it is thus important to carefully assess what is most needed in your societies and to articulate your own priorities. It is moreover paramount to wonder to what extent TJ initiatives are donor driven – reflecting a current fashion amongst international agents – or if they are emerging from within our societies. This is significant regarding both, the existence and the design of TJ instruments. Is this form of justice brought to you by tribunals or truth commissions best suited to address your particular needs? Do your expectations correspond with the proposed forms of justice? Are there alternatives, rooted within your own cultural contexts that are better equipped than predominantly western-style TJ mechanisms?

¹⁰ Duthie, 'Towards a Development-sensitive Approach': 302.

¹¹ Ibid.: 297.

¹² Rama Mani, 'Dilemmas of Expanding Transitional Justice, of Forging the Nexus between Transitional Justice and Development', *IJTJ* 2 (2008): 253.

¹³ Duthie, 'Towards a Development-sensitive Approach': 298.

¹⁴ Ibid.

Prosecuting development related crimes

A further point of connection between TJ and development is the inclusion of development related crimes in transitional justice instruments themselves. For if one objective of transitional justice is to promote peaceful coexistence and to prevent future violence it is necessary to address the root causes of the conflict which, as argued earlier, manifest themselves in economic, social and cultural discrimination. Against this background it can be argued that distributive justice – an equal distribution of wealth and opportunities – is as important as rectifying justice as subject to current conceptions of transitional justice that deal primarily with civil and political rights.¹⁵ This may happen through dealing with development issues more directly during TJ processes through prosecuting violations of social, economic and/or cultural rights including those related to conflict resources, land, corruption, education and health.¹⁶

So let us look at these rights, the so-called ESC rights in more detail. Generally, TJ processes and instruments are based on a limited understanding of what constitutes a crime. They focus almost exclusively on civil and political rights. The following table juxtaposes civil and political rights with ESC rights.¹⁷

Civil and Political Rights	Economic, Social and Cultural Rights
<ul style="list-style-type: none"> • the right to the enjoyment of all civil and political rights and prohibition of discrimination • the right to be treated equally before the courts and tribunals • the right for minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language • the right to life • prohibition of torture, cruel, inhuman or degrading treatment or punishment • prohibition of slavery and the slave-trade in all their forms • the right to liberty and security of person • the right to be protected from arbitrary or unlawful interference with privacy, family, home or correspondence • the rights to freedom of thought, conscience and religion and expression • The rights to peaceful assembly and freedom of association • the right to take part in the conduct of public affairs; • the right to vote and to be elected 	<ul style="list-style-type: none"> • the right to the enjoyment of all economic, social and cultural rights • prohibition of discrimination • the right to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing • the right to the highest attainable standard of physical and mental health • the right to work, free choice of employment and just and favourable conditions of work • the right to social security • the right to protection and assistance to family, mothers, children and youth • the right of everyone to education • the right to free, compulsory primary education • the right to take part in cultural life and to enjoy the benefits of scientific progress • The right to form and join trade unions

¹⁵ Rama Mani, *Beyond Retribution. Seeking Justice in the Shaddows of War* (Cambridge/Oxford: Polity Press, 2002).

¹⁶ Duthie, 'Towards a Development-sensitive Approach': 301.

¹⁷ GTZ, 'What do Transitional Justice Mechanisms Gain', 5-6.

Even though human rights are considered to be indivisible, in many cases a differentiation is made between political and civil rights on one side and economic, social and cultural rights on the other. Political and civil rights are often treated as a “negative obligation”, for instance to abstain from torture, while economic social and cultural rights - for instance to realise education - are treated as positive and costly obligations which are not explicitly legally enforceable.¹⁸ Moreover, international law, on which much of the TJ work is based, considers civil and political rights as freedoms that can be violated. In contrast, economic, social and cultural rights are treated as entitlements by the state that can only be provided in the long term and depend on available resources.¹⁹

But if we think of countries such as Guatemala or Morocco it immediately becomes apparent that systematic discrimination manifests itself in access to health care, work, housing or education. Similarly, in regions such as Darfur the systematic burning of houses and villages and the forced displacement of the population are not mere side effects of the war but used in a very strategic way as an instrument of warfare, together with other human rights abuses.²⁰ We may thus ask: is not also necessary to prosecute these forms of violence?

Advocates for a more narrow understanding of human rights, who argue that political and civil rights should be given priority, often suggest that the fulfilment of political and civil rights automatically leads to the fulfilment of social, economic and cultural rights. However, lessons we have learnt from TJ processes so far suggest that there is not automatism, that ESC rights do not follow naturally.²¹ In cases such as South Africa where the Truth and Reconciliation Commission primarily looked at direct violence, torture and abuses the wider social and economic repercussions of the apartheid regime remained under-examined and unaddressed.

After this general overview of the connections between TJ and development let us look at how ESC rights manifest themselves more specifically regarding tribunals, truth commissions and reparations.

Tribunals

Let us now look at the role of ESC rights in crime tribunals. Even though national, international and hybrid tribunals focus mainly on civil and political rights there have been some cases which have dealt with the violation of ESC rights.²² The International Crime Tribunal for the former Yugoslavia, for instance, has in the case of *Kupreskic* recognized that “the comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with ... intent.”²³

¹⁸ Ibid., 8.

¹⁹ Louise Arbour, 'Economic and Social Justice for Societies in Transition', in *Annual Lecture* (New York University School of Law: 2006), 11.

²⁰ Ibid., 9.

²¹ Ibid., 9-10.

²² Ibid., 16-17.

²³ Ibid.

In a similar vein, using starvation of civilians intentionally or depriving them of goods indispensable for their survival has also been accepted as an international crime.²⁴

Critics, however, argue that the persecution of ESC violations is not suitable for judicial enquiry. In contexts where civil and political rights have been abused on a massive scale the courts might simply lack the capacity to deal with additional cases.²⁵ Their limited temporal and financial scope makes it already difficult to trial the most prominent war criminals or génocidaires, let alone additional ESC cases. This poses a real dilemma and raises the question how, a cost-effective way to establishing fair trials in which not only a handful of individual perpetrators are prosecuted can be linked to wider social injustices.²⁶

Truth Commissions

In the past, the majority of truth commissions have addressed violations of political and civil rights.²⁷ More recently, though, truth commissions have started including root causes and the impact of socio-economic discrimination. For instance, the mandates of the Sierra Leonean, Liberian and Kenyan truth commissions include investigating the role of economic actors and economic crimes, even though their main focus remained on the role of natural resources during the conflict, rather than on ESC rights as root causes.²⁸

So far, the only truth commission which explicitly dealt with economic, social and cultural rights was the independent Commission for Reception, Truth and Reconciliation (CAVR) in East Timor.²⁹ Its mandate included to look at the context, causes, motives and perspectives which led to the violations. The Commission stated that the impact of these conditions were often only marginally considered, but were just as damaging and perhaps longer lasting.³⁰ Its final report lists human rights violations from decolonisation until 1999, with a specific section on the violations of ESC rights. Among the violations highlighted by the commission was the use of education as a propaganda tool which restricted children's educational development, the resettlement of whole villages in regions plagued by poor soils and malaria to endanger people's health, as well as the manipulation of cash crop prices in order to fund military missions while reducing the farmers' chances of earning an adequate living.³¹ And yet, similar to the tribunals just discussed there remains much scepticism regarding the broadening of the mandate of truth commissions. Time, resources and capacity might be stretched to a point that they become inefficient.

²⁴ Ibid.

²⁵ GTZ, 'What do Transitional Justice Mechanisms Gain', 12.

²⁶ Mani, 'Dilemmas of Expanding Transitional Justice': 55.

²⁷ Arbour, 'Economic and Social Justice for Societies in Transition', 18.

²⁸ GTZ, 'What do Transitional Justice Mechanisms Gain', 14.

²⁹ Ibid.

³⁰ Ibid.

³¹ Arbour, 'Economic and Social Justice for Societies in Transition', 9.

Reparations

At present, reparation policies tend to concentrate on the consequences and symptoms of violent conflicts and dictatorships – but not at their root causes and ESC rights.³² Adopting an economic, social and cultural rights perspective would imply going back further beyond immediate consequences of the violence.

Nevertheless, reparations programmes bear the potential to redress the economic and social aspects of human rights law violations.³³ In individual cases, reparations programmes extended their scope from a narrow focus on a few civil and political rights abuses and included measures related to economic and social rights. Examples are here housing and property restitution programs in South Africa, Guatemala and Bosnia and Herzegovina. Furthermore, the Guatemalan and Peruvian truth commissions have made recommendations for educational reforms in order to improve the position of indigenous groups. It is however important to bear in mind that a more just distribution of goods such as land, education or health care is a political decision and not simply a matter of promoting ESC rights in reparation programmes.³⁴

An important example was set by the Moroccan Equity and Reconciliation Commission that proposed to treat reparations as being symbolic and material, and addressing individuals, communities and regions.³⁵ As a consequence, the Commission recommended providing communal reparations in order to advance economic and social development in specific regions which had previously been marginalised and/or subjected to political violence. Reparations to individual victims, it suggested, are not able to substitute more long-term socio-economic policies that help to make up for former inequalities and discrimination. In this sense, reparations may have a transformative potential. When considering reparations as part of a political project of constructing a more legitimate and inclusive political order, they have the potential to open a window of opportunity for more substantial social justice and change.³⁶

With view to development agencies it is however important to keep reparations and development projects conceptually distinct.³⁷ For development projects do not target victims of abuse, even though they might have reparative value. In turn, despite the fact that reparations at times might assist victims in meeting their basic needs they are by no means a substitute for broad-based development or distributive justice policies.³⁸

³² GTZ, 'What do Transitional Justice Mechanisms Gain', 18.

³³ Arbour, 'Economic and Social Justice for Societies in Transition', 18.

³⁴ GTZ, 'What do Transitional Justice Mechanisms Gain', 18.

³⁵ Arbour, 'Economic and Social Justice for Societies in Transition', 18.

³⁶ Ruth Rubio-Marín and Pablo Greiff, 'Towards a Development-sensitive Approach to Transitional Justice', *IJTJ* 3 (2007): 327.

³⁷ Duthie, 'Towards a Development-sensitive Approach': 299.

³⁸ *Ibid.*

Conclusions

So let me make some concluding remarks.

Even though transitional justice is a way of dealing with the past of a dictatorship or violent conflict - just like development it is also oriented towards the future since both have the aim of improving human lives and societies. More precisely, they both aim at consolidating a fragile peace in the aftermath of violence and repression.

In order to achieve this aim it could be argued that peace and reconciliation without economic justice is inadequate. In the eyes of many victims, justice will remain incomplete as long as socio-economic inequalities prevail.³⁹

If and how this is significant for Northern Uganda and Cambodia can only be judged by yourselves. With this lecture, my aim was to invite you to look at the link between TJ and development – even though it only exists in tangible ways – in order to encourage you to reflect on a number of questions:

First, was systematic marginalization – leading to the absence of development – amongst the root causes of your conflict? If yes, is it necessary to expand the notion of transitional justice to include social justice? And how can this be translated into action?

Second, how can transitional justice measures – in what ever way defined – lead to more trust and confidence within your society in order to create a favourable climate for implementing development programmes?

Third, is the TJ process within your country driven by external agents, e.g. international donors, or does it respond to needs from within your societies? Are the means and mechanisms suitable for your particular concerns?

Lastly, is it necessary to expand the scope of transitional justice to include economic, social and cultural rights? What are the benefits or their inclusion? What are the drawbacks?

These are by no means easy questions. How can they be, given the shock and horror your respective countries have experienced? Nevertheless, I think they are important for both Northern Uganda and Cambodia and I very much hope that you find raising them useful within the context of this conference – and beyond.

I wish you successful and fruitful days in Marburg and all the best for your work back home.

³⁹ Mani, 'Dilemmas of Expanding Transitional Justice'.

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