

# Transformative Justice – A Concept Note

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This concept note was developed as a discussion paper to think about the meaning and potential of transformative justice. The paper formed the starting point of several workshops and conferences discussing transformative justice from a range of perspectives, and relative to a range of themes and issues. Comments and suggestions are welcome and should be addressed to Paul Gready.

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## *Introduction*

Over the past 20 years, there has been a proliferation of ‘transitional justice’ mechanisms (primarily, criminal tribunals and truth commissions) that have promised accountability for perpetrators and redress for victims. Most of these mechanisms have focused on the level of the state and on state-related institutions in countries of the Global South, often supported by intergovernmental organisations. Yet, the performance and impact of such mechanisms has been at best ambiguous and at times disappointing. Furthermore, these interventions have been critiqued for treating the symptoms rather than the causes of conflict.

This suggests the need for a new research agenda, one that offers a concept of justice that is more ‘transformative’ than ‘transitional’, i.e. that seeks to change pre-conflict structures in ways that are more inclusive, less unequal and more fair. This research agenda also provides an alternative approach to dealing with state fragility, conflict and security. Transformative justice is not a completely new concept, including within the transitional justice arena (Lambourne 2009, UN Women 2010), but it remains inadequately theorised and has not been sufficiently translated into policy and practice.

This concept note seeks to define transformative justice, and what an associated research and practitioner agenda might look like. It contains three sections. The first outlines the origins and motives of the move from transitional to transformative justice. The second details five impediments to structural transformation which if not addressed have the potential to re-ignite conflict, and spread insecurity over national borders: (1) poverty and inequality; (2) resource exploitation and environmental degradation; (3) high levels of political, social, and/or criminal violence; (4) fragile states and institutions; and (5) the continued marginalisation of sections of the population, notably women and children. A final section discusses two process dimensions of transformative justice: globalisation, and the role of non-governmental actors.

## **Origins of Transformative Justice (and Some Words of Caution)**

This section addresses both the reasons why a more transformative approach is needed (structural and every day violences) and some entry-points within existing transitional justice thinking (‘holistic approaches’).

### *Structural and ‘everyday’ violence(s)*

Structural violence is the systematic violence of social institutions that oppress certain social groups, condemning them to abject poverty and the marginalisation that accompanies severe inequality. Farmer refers to these indirect forms of violence as “the social machinery of oppression” (2004:307).

He also argues out that the discomfort that accompanies this term results from its challenge to the dominant moral economy which prefers to blame the individual over the collective, the specific over the persistent (Farmer 2004). Both structural and everyday violences may result in damage and death, yet 'everyday violence' tends to describe more tangible and direct forms of violence. In contrast to structural violence, everyday violence is more readily blamed on the individual, her criminality, his substance abuse, the lack of coping mechanisms, and so on. Yet the two are intrinsically linked, since everyday violence can also be analysed as a concrete manifestation of structural violence and a product of the oppression and desperation of inequality, marginalisation, and poverty. Our thinking builds on other work that links structural with everyday violence (e.g. Scheper Hughes 1993, Bourgois 2002) in order to better understand the perpetuation and reproduction of inequalities and human insecurities.

In the proliferation of mechanisms that aim to address the wounds of conflicts such as truth commissions, trials, tribunals, apologies and reparations, everyday forms of violence remain hidden, with no parallel national or international initiatives or sanctions. Everyday violence may include gang violence, violence associated with drug trafficking or other forms of 'crime', violence against particular groups in society (based on gender, sexuality, race and ethnicity, religion, health or family) both in public and private spheres, violent clashes over access to resources, and domestic violence, including violence against children. These forms of oppression are often justified in the name of punishment or retaliation, in response to a particular form of behaviour and perceptions of deviance. Violence against particular groups tends to permeate institutions of both state and society and be reproduced on a daily basis through these institutions. Everyday violence is normalised by labels that remove it from the political sphere into criminal, domestic, or social spheres. As a result, everyday violence escapes the attention of processes of peacemaking and transitional justice. Nevertheless, the ordinary and routine use of violence serves to reproduce inequalities, reinforce oppressive hierarchies and silence resistance, as Taussig states, it is "terror as usual". These forms of everyday violence are grounded in the same structures that feed into political conflict, and should receive equal priority if lasting peaceful societies are to be achieved. Such an analysis builds on Galtung's work (1969), who asserted that if underlying structural violences are not addressed after conflict has ceased, peace is unlikely to be sustainable or universal, an analysis which must be extended to other apparently 'peaceful' societies.

Recent research has begun to highlight the connections between public and private violence (Wilding 2010, Hume 2008, 2010), political violence and domestic violence (Boesten 2010a), ethnic and economic violence and urban and military violence. But to date there has been little recognition of the blurred nature of the boundaries between categorisations of violence, and its absence, i.e.: war/peace, democracy/authoritarianism, political/domestic – though interrogating these connections is key to how we understand conflict resolution at the level of the household, the community, the state and the global system, both during formal conflict and formal peace. The term transformative justice may allow us to explore structural violences and perspectives on justice in a range of different political settings with a view upon creating communication for sustainable peace for all (Lambourne 2009). Transformative justice allows us to look at the communities affected by systemic violence with the aims to seek forms of justice that break with the structures that may have led to violence in the first place (see also Eriksson 2009). While both Lambourne and Eriksson looked at post-conflict societies this should be expanded to societies normally perceived as at peace, recognising that the state of peace should signify more than the absence of large scale organised violence (Keen 2000). Many 'peaceful' societies fail to provide physical security, especially for particular marginalised or subordinated groups (Pankhurst 2003). This corresponds to feminist concerns about 'low-intensity' violence that many women face in non-conflict zones, but also links to a growing preoccupation with 'post-war' crime and violence (Kelly 2000, Bourgois 2001, LAP Special Issue 2008).

Highlighting the political nature of structural violence enables us to question the role of the state in the reproduction and escalation of such violences. What role does the state play in 'peacetime' in ameliorating or challenging gendered violence (Jacobs *et al* 2000) or in perpetuating and creating violence (Pearce forthcoming)? The high incidence of violence against women in many societies is one example; high levels of violence against and among young men, is another (such as gang violence, Deuchar 2009, Dowdney 2005, Rodgers 2005). The structural violence presented by poverty, marginalisation, and exclusion shape these forms of physical violence. Therefore, a key underlying question that remains unaddressed in contemporary forms of transitional justice is how we conceptualise these different forms and locations of violence, and how this informs the construction of conflict resolution and reconciliation processes in communities and households in different contexts.

A related argument is that transitional justice processes need to develop a more sophisticated understanding of the relationship between past, present, and future, and between continuity and change in postconflict societies. Forms of structural violence invariably remain the most stubborn form of continuity in societies with a violent and oppressive past, and there is therefore a need to link challenges in the present more clearly to structural continuities with the past.

What do we know about the past-present interface? First, government priorities quickly shift from redressing the past to building the future, and therefore a failure to engage with political concerns and volatile new policy agendas in the present (for example, relating to violent crime, poverty, race and xenophobia in South Africa, or with violence at household and community level after most conflicts, in particular related to violence against women) can result in instant obsolescence. Second, an anticipatory faculty is important because the past often affects the present not as straightforward repetition – as suggested by the cry "never again" – but in modified, evolving ways, through complex processes of continuity and change. For example, violence in South Africa was localised, privatized and de-politicized, rather than brought to an end. More success is likely if the past's impact on the present is conceptualized beyond prevailing clichés – such as drawing a line under the past. The study of cultural constructions of 'memory' as a reflection on both past and present is interesting and promising, but generally fails to take into account concrete societal problems and policy concerns. If transitional justice is to fulfil its ambition for non-repetition, it needs to engage with the past *and* the present, and be more critical of the past's ongoing presence in shaping the present, and thus the future.

#### *'Holistic approaches'*

There is a growing tendency to adopt holistic understandings of transitional justice. First, it is currently common practice to define transitional justice broadly, to include some or all of the following: criminal prosecutions, truth-telling, reparations, and institutional reform as core interventions; but also commemorative practices, educational reform, reconciliation initiatives, and more. Such ambition provides connections between transitional justice and broader notions of peace-building, reconstruction, and repair. Second, keywords are also viewed through the holistic prism. For example, much recent commentary on the peace versus justice debate – prioritizing an end to violence versus prosecutions and the rule of law – seeks to move beyond a standoff between the two. It does so by arguing that justice and accountability should include judicial and non-judicial measures, and look to the future as well as to the past (criminal accountability; truth commissions; reparations; reform of the security and judicial sectors; demobilization and integration of ex-combatants; and indigenous or community based-justice) (Hayner 2009). Similarly, peace is understood to span both negative peace (prioritizing an end to violence) and positive peace (addressing the underlying causes of violence). The danger is that definitions become too broad to be meaningful. Third, in the shift from substitution to complementarity, interventions are seen in both/and more, rather than either/or, terms. Whilst in the past it was often assumed that truth commissions would be a compromise where trials could not take place, now it is argued that the two

can, and should, coexist (Roht-Arriaza and J. Mariezcurrena eds. 2006). One influential framing of such holism is the “ecology model” of social reconstruction (Fletcher and Weinstein 2002; Stover and Weinstein eds. 2004). This approach suggests interventions at multiple levels of society – state, community, individual – and spanning fields as diverse as the rule of law and justice, security, education for democracy, economic development, and reconciliation.

Such definitions usefully move beyond legal responses to include wider political and social processes, and can serve to integrate official, top-down mechanisms and unofficial, local, community or grassroots initiatives. The notion that trade offs are not always inherent in decision-making processes and more than one intervention can be required in circumstances where none standing alone would succeed (interventions may be mutually constitutive), are useful ways of reshuffling the transitional justice pack. Yet, transitional justice is the art of imperfect solutions and difficult choices, in the context of competition for finite resources and delicate political dynamics. While we now know more about what should be done, we still know relatively little about how these objectives might be achieved. If necessary, how should interventions be prioritized so that they are sequenced over time, rather than traded off against one another in a zero sum scenario?

Bosire (2006) in a piece with the suggestive title “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa”, argues that strengthening state institutions should be seen as a precondition or entry-point for successful transitional justice measures in this part of the world. Without functioning institutions little will be achieved. In transitional justice circles this domain is normally consigned to the wish-list of potential outcomes (via truth commission recommendations, for example), rather than as a necessary enabling condition. Other familiar sequencing cum trade-off challenges include the fact that perpetrators often receive benefits (amnesty; demobilization, disarmament and reintegration programs) before victims, or in circumstances where victims receive little to nothing (prosecutions, reparations); the complex question of whether transformation precedes reconciliation or vice-versa; and the role of unofficial, local interventions vis-à-vis official, top-down counterparts (laying foundations, complementing, substituting, critical engagement).

To this reservation another could be added: should transitional justice be taking on more when it is far from clear that it can successfully achieve its original, far more modest, remit (truth, justice)? Holism is both a reaction to past shortcomings, and runs the risk of reproducing them on a broader canvas. Conceptualization of terms such as truth and justice, for example, remains weak. While it is important to interrogate linkages between such keywords, many analyses slide into a mire where justice, for example, entails pretty much everything. It is a sleight of hand to overcome what were previously seen as tensions – truth versus justice, peace versus justice – by defining the terms indistinguishably. Definitions of transformative justice need to avoid this pitfall, as it would render the concept incoherent and incapable of being applied in a meaningful way. Finally, holism is characteristic of the era of transitional justice in that while it is not unreflective, its criticisms are of the “more work” variety; they anticipate the industry doing more not less. In sum, the embrace of holism means that contemporary transitional justice encompasses an array of interventions (bringing in constituencies and skills beyond mainstream transitional justice and human rights); and is grappling with questions of timing, prioritization, sequencing and inter-relationships.

### **Themes of transformative justice**

Five impediments to transformative justice are addressed in this section, which build on the idea that addressing structural violence is essential to building sustainable peace for all.

### *Poverty and Inequality*

Almost regardless of where one looks, the clearest legacy of a violent or repressive past is enduring poverty and inequality (Gready 2010). Transitional justice has to date failed to provide an adequate response to this concern. In large measure this is because economics and development constitute a policy domain from which it is excluded and in which other models prevail. Many commentators argue that the liberal peace has come to dominate the various economic and developmental aftermaths subsumed under the rubrics of transitional justice, peace-building and post-conflict reconstruction (e.g. Paris 2004).

The liberal peace thesis, although it comes on no single, agreed form, essentially maintains that political democracy and market economics are the foundations of sustainable peace, both within countries and between states. Critics determinedly bark along the borders of these assumptions. Among the most pertinent criticisms are that processes of democratization and market liberalization are themselves conflict-generating, exacerbating social tensions and competition at a juncture when a country is ill-equipped to contain these developments within peaceful limits (Cramer 2006; Thoms and Ron 2007). Whether described in terms of “pathologies” (Paris 2004: 8, also 151-78) or “dialectically linked integration *and* fragmentation” (Lipschutz 1998: 14), such processes endanger the sustainability of peace.

In South Africa, compromises of a kind familiar to peace process in many parts of the world were made, as it became the exemplar of a new global compact that both facilitates and places constraints upon the changes associated with political transition. A negotiated settlement paved the way for majoritarian democracy and elections; a truth commission and an amnesty provision eased the passage; past gross violations of human rights received attention while structural violence became the most enduring legacy of the past; and neo-liberalism trumped more redistributive economic policies. That, to date, transitional justice mechanisms generally have fitted so seamlessly into this mainstream paradigm (while being excluded from its decision-making processes), and shared similar conceptions about the preconditions for peace and reconciliation, surely warrants pause for thought. Whose interests are being furthered and what kind of transformation is being sought? What continuities are sanctioned and what conflicts fuelled?

To move beyond these rather broad-brush statements requires an assessment of why specific mechanisms, such as truth commissions, should do more on economic and social rights, and what they might usefully and realistically do.<sup>1</sup> There are four main responses to the ‘why’ question. First, if truth commissions are a victim-centred mechanism, then economic and social rights matter as these are often prioritised by victims and by local populations (for example, see Robbins 2009 on Nepal, and Vinck and Pham 2008 on Eastern Democratic Republic of Congo). Surveys of the views of victims and local populations suggest that an appropriate sequencing might be as follows: security and basic needs as immediate priorities, with truth, justice and reconciliation coming later. Second, a socio-economic focus would enhance the potential of truth commissions to address the root causes of conflict, and hence optimise its preventive role. In their analysis of whether human rights abuses cause internal conflict, Thoms and Ron (2007) argue that economic and social rights violations, and

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<sup>1</sup> Commentary on transitional justice and economic concerns is recent, but gathering momentum. Mani (2002) argued for an integrated approach to justice after conflict (legal justice or the rule of law, rectificatory justice, and redistributive justice). Early contributions to the debate also came from Alexander (2003) and Arbour (2006). In 2008 the *International Journal of Transitional Justice* published a special issue on transitional justice and development (Volume 2, Number 3), and a year later the International Center for Transitional Justice and the Social Science Research Council released the volume, *Transitional Justice and Development: Making Connections* (de Greiff and Duthie, eds 2009).

discrimination, function as the underlying, structural causes of conflict (creating grievances and group identities). Civil and political violations are the proximate causes or immediate triggers of conflict (regime change, violations of personal integrity and security rights) (also see Arbour 2006, and Mani 2002). Third, human rights itself has in recent years moved on to stress the equal importance and indivisibility of civil-political and socio-economic rights. One example of indivisibility in the transitional justice sphere is that impunity for violations across these categories of rights can clearly be mutually reinforcing (Carranza 2008). Fourthly, the 'springboard thesis' argues that highlighting economic and social rights could act as a 'springboard' for the embedding of such rights, and a fuller conception of justice, in new democracies (Arbour 2006). To summarise, local ownership, prevention, better analysis and the 'springboard thesis' are the reasons why economic and social rights matter. The 'why' question has effectively been answered; the 'how' question is now the biggest hurdle for our research agenda.

#### *Resource exploitation and environmental degradation*

Natural resources have long been central to upheaval, discontent, and processes of marginalisation and growing inequality in a number of countries. The conflict in the DRC increasingly revolves around access to mining areas that produce minerals, including the currently in-demand coltan for use in electronics. Charles Taylor's use of so-called 'blood diamonds' to finance armed violence is central to his current trial at the Special Court for Sierra Leone in The Hague. In the meantime, oil extraction in the Niger Delta is a source of un-going tension and violence. Dutch disease and the 'resource trap' can have devastating effects and cause continuous violent conflicts (Collier 2007). In addition to such high-profile and relatively well-publicised conflicts over access to natural resources, increasing competition over mining rights are played out at local levels. In Ghana, poor men and women struggle to maintain their livelihoods in the wake of advancing state-sponsored international corporations (Bush 2008). In the Andes, conflicts between the state, international mining companies and indigenous communities are on the increase since the boom in mining started some fifteen years ago. Tensions over land ownership, water pollution, and rights to mine sharpen a whole range of simmering social conflicts in Ecuador, Bolivia and Peru (Bebbington et al 2008). Debates about land ownership, political decision making processes, and environmental issues such as water pollution have put issues of indigenous rights and identity back on the national agenda; direct foreign investment and neoliberal development models of 'trickle down' have once again globalised issues of equality, marginalisation and redistribution, and have come with worrying levels of privatisation of security. In sum, increasing global competition over access to and ownership of natural resources such as oil, metals and minerals, and resources new to global competition such as water and land, fuel existing conflicts and create new.

These issues are largely debated from an economic perspective which divides the field in a neoliberal pro-extractive industries camp and a grassroots movement of resistance. While ideas about corporate social responsibility (CSR) are supposed to bridge the divide, in practice whole populations are excluded from any engagement with the decision-making about the future of their land and their economy. CSR nor international regulation have yet been able to find satisfying solutions to such tensions, and state regulation is largely incapable of properly including those marginalised by the process. Using the term global 'land grab' is not exaggerated in this context and this cannot continue without political and social consequences on a world scale. Existing social divisions and structural violences are reproduced in the process.

#### *High levels of political, social, and/or criminal violence*

Violence in myriad forms is now widely acknowledged to be a characteristic of transitional societies. Violent crime is endemic in a number of Central American states - writing about Guatemala, for example, Snodgrass Godoy (2005) refers to the "razor's edge" between crime and human rights, and the transition from the "public" violence of state-sponsored genocide to a massive wave of "private"

postwar criminality. Thoms and Ron (2007) argue that processes such as democratization and regime change are themselves dangerous, in essence that regime transition is a major conflict risk factor. "Democracy, it seems, is good for peace if you have it, but efforts to achieve democracy, such as elections-promotion, may plunge a country into conflict" (702). Explanations for such violence include the ruptures in dominant political and economic arrangements caused by "conflicts over liberalization" (the rapid adoption of democratic norms and liberal economic policies in countries where patrimonialism or clientism reign: Lund 2006: 48-9); related conflicts over the terms of accumulation and the distribution of wealth, the scramble for position before the rules of the game become fixed, leading to a continuum of violence in late capitalist transitions (Cramer 2006); enduring structural violence (poverty, inequality, discrimination); and weak states, whether in terms of modest institutional reach and legitimacy or an inability to secure a monopoly over the means of violence. Many of these explanations are both globally informed and locally textured.

In the South African context, Graeme Simpson (2001, 2002, 2004) has argued that the evaluation of transitional justice mechanisms, such as the TRC, must be placed in the context of the linked challenges posed by justice in transition and violence in transition. In such evaluations the stress should arguably fall on the forward looking task of how truth commissions contribute to institutional transformation and resurrecting the rule of law, in contexts where the entire administration of justice is in crisis. Simpson argues that patterns of violence and social conflict are reconfigured and re-described during political transition rather than brought to an end. Truth commissions need to anticipate both that social conflict will play itself out in different ways in the future and that violent crime that may appear new is often both historically informed and rooted in ongoing experiences of social marginalization, political exclusion and economic exploitation. In essence, the past returns in the future, but in forms that transitional justice mechanisms such as truth commissions often fail to anticipate, and criminal justice responses often fail to place within a historical context.

It is worth reiterating that the marriage of crime and politics, in South Africa or Guatemala, as elsewhere, is not new to the transition era. The danger during the transitional moment is that a human rights prism on the past segregates and prioritizes the political, whilst subsuming and overlooking other forms of violence. Simultaneously, as violent crime becomes rooted in the intersections between the past and the contradictions of the transitional present, there is a shift from political violence obscuring criminal violence to criminal violence obscuring its political implications (Gready 2010). Criminal violence in this latter setting is inextricably linked to politics: reworking responses to political legacies; drawing on familiar methods and actors; rooted in enduring "identities of exclusion" (Harris 2005); confident of political connections, protection and impunity; and, increasingly, an expression of dissatisfaction with the new order.

In the context of rising levels of violent crime, hard line law and order measures and a backlash against human rights can attract widespread public support in transitional settings. This is a profound challenge for human rights and transitional justice practitioners. The shift from political to criminal violence is accompanied by other forms of displacement that run the risk of marginalizing human rights. Violence is carried out by private actors in the interests of power and wealth as well as the state at the bequest of politics. Priorities veer from an embrace of human rights and the rule of law to muscular crackdowns, from hatred of authoritarian responses to a certain nostalgia for the past, from human rights being seen as part of the solution (on the side of the victim/people) to its reframing as part of the problem (on the side of the criminal/enemy). Human rights organizations themselves struggle with transition from a familiar discourse of critique to an unfamiliar one of constructive engagement.<sup>2</sup> A human rights disconnect seems commonplace:

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<sup>2</sup> Balancing critique and collaboration in the criminal justice sector echoes the reconfiguration of civil society-state relations outlined in the discussion of non-governmental actors below. It entails a shift in focus from a violations approach to an emphasis on effectiveness (conviction rates, policing competence) and prevention.

It could be argued, that the stubborn adherence to these categories [political/ criminal] has become the Achilles heel of the human rights movement in Latin America, producing a dangerous disconnect between the concerns that most citizens consider paramount and the issues traditionally advocated by rights groups. Populist politicians have stepped into the breach – many of them with individual and institutional ties to past atrocities – promising a platform of *mano dura* [“rule by an iron fist”] that has paved the way for the rollback of many hard-won democratic rights. (Snodgrass Godoy 2005: 600)

### *Fragile states and institutions*

The notion of fragile states is complex and contested (GDI/UNDP 2009: 5-6), with definitional, normative and empirical shortcomings all noted (GSDRC 2010). Nevertheless, those states labelled as fragile are commonly characterised by either ongoing violence and insecurity or a legacy of conflict, and are commonly described as deficient in attributes that are crucial for the maintenance of peace and protection of human rights, notably “incapable of assuring basic security, [and] maintaining rule of law and justice” (GSDRC 2010: 9). Thus fragile states are frequently ones where transitional justice measures have been implemented, generally with international involvement, for instance in Sierra Leone and the Democratic Republic of Congo (DRC), yet their effectiveness in dealing with past human rights abuses is questionable and their limitations in ensuring present and future human security is evident. In this sense perhaps fragile states highlight both the shortcomings of a transitional justice approach, given that the notion of fragility is associated with institutional incapacity and instability, and the huge challenge that they pose to any broader notion of transformative justice. While the concept of transformative justice may have greater potential to incorporate the wider agenda of structural change and institutional strengthening that is required to address the constant threat to human security posed by fragile states, this very fragility simultaneously emphasises the substantial obstacles to the achievement of such structural transformation. Briefly the limitations of a transitional justice approach and the challenge to a transformative justice approach posed by fragile states are outlined below.

In post-conflict contexts, relatively fragile states such as Sierra Leone and Rwanda have implemented transitional justice measures, in conjunction with international actors, which have focused on holding alleged perpetrators accountable for past abuses, including through prosecutions, while tending to neglect those institutional reforms necessary to build strong state structures in the legal and judicial spheres. If a situation of fragility and weak governance persists, this is likely to not only undermine the effectiveness of dealing with past injustices and violations, but also provide less protection against possible future violence and abuses. This is not to disregard the attention that transitional justice measures have given to security sector and judicial reforms, but it is to suggest that such mechanisms have tended to focus more on reforming personnel and not the larger institutional structures, for example the vetting and exclusion of individuals as human rights abusers from the justice and security sectors. It should also be acknowledged that truth commissions in recent years have focused more than previously on institutional accountability and institutional reform. For example, Ghana’s truth commission looked at the role of the chieftaincy, the judiciary, prisons and the security forces in past human rights abuses, and made non-binding recommendations for institutional reforms that were subsequently accepted by the government in

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Difficult questions are raised by these realignments. Can NGOs overcome their ingrained hostility towards the state and security institutions? Can they work with the state and yet avoid co-option? How should perpetrators’ and victims’ rights, human rights and public security, be balanced? Organizations are frequently inadequately equipped for the transition from a focus on political to criminal violence, and may take time to develop the skills necessary for a more partnership-oriented role.

2005. However, it is pertinent to enquire about the implementation and impact of those recommendations, as well as the extent to which the truth commission has influenced (or not) the development of Ghana's national human rights institution. Similarly, hybrid courts, such as those in Sierra Leone and Timor-Leste, were also encouraged to promote institutional reform, particularly through capacity-building in the conventional criminal justice system. Yet, research is again needed to determine whether this has actually happened or not. Our argument here is that without greater attention to reforming the institutional structures that promoted (or permitted) violence, then transitions to situations of greater justice, with future protection of human rights and human security, will remain dangerously incomplete and unsustainable.

Potentially, a transformative justice approach widens the agenda and places more emphasis on state building and institutional reforms. In advocating a shift from transition to transformation, though one that seems to sit within a transitional justice approach rather than being a more distinctive break with it, Lambourne (2009) identifies 'political justice' as one of four elements of a transformative justice model. This is outlined as "including institutional reform, rule of law and respect for human rights, addressing socioeconomic needs and avoiding the appearance of victor's justice or a culture of impunity" (2009: 45). She also incorporates Mamdani's notion of 'political justice' as entailing "a move towards democracy that involves institutional reform and separates and makes accountable the executive, legislature, judiciary and administration" (Lambourne 2009: 45, citing Mandani 2001), and notes that "without political justice, transformative justice is incomplete and peacebuilding unsustainable" (Lambourne 2009: 45). It is evident that a transformative justice approach, inclusive of this element of political justice, involves a focus on state building measures, specifically within the legal and judicial spheres as well as democratic structures more generally, in order to secure the rule of law and protection of human rights. This is a broad agenda, one that may be especially pertinent in so-called fragile states, yet is clearly a highly challenging agenda in states characterised by fragility in post-conflict or post-authoritarian settings. Indeed, the very symptoms of that fragility, inclusive of "mass migration, organized crime, violent conflict, communicable diseases, environmental degradation and... terrorism" (GSDRC 2010: 8), are likely to act as significant impediments to the achievement of such structural transformation.

*The continued marginalisation of sections of the population, notably women and children.*

According to research by the World Health organization, between fifteen and 71 % (WHO 2005) of women worldwide suffer from violence from their intimate partner. While accurate comparative numbers are difficult to obtain, every study that looks at violence against women reports outrageously high levels of physical and sexual violence that remain largely unaddressed by peacetime justice systems –this is true for Western and non-western, rich and poor countries. In Latin America, activists are campaigning against *femicidio*, i.e., killing of women because they are women, as the daily numbers of deaths are incredible in some areas (in 2004 1205 girls and women were killed in Mexico, 4 per day (Lagarde y de los Rios 2010); in Peru, an estimated nine women die per day because of gender violence (Meléndez López 2009). In addition, children may be targeted on based on the marginal position as street children, petty criminals or beggars. For example, the now infamous street 'clean ups' in Brazil, committed by off-duty police officers in death squads have prompted international outrage (Amnesty International 2003<sup>3</sup>, Scheper-Hughes and Sargent eds.1999).

In this light, the term peace needs serious adjustment. Of course, these statistics of physical violence may obscure the structural violence many women and children experience every day. While gender equality is an illusion in most countries, marginalisation, poverty, ill-health, and social, physical and sexual abuse are characteristic of societies with high levels of gender inequality (e.g. as measured by the UN gender related development index). Research also shows that violence against women often

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<sup>3</sup> <http://www.amnesty.org/en/library/info/AMR19/015/2003>

soars during and after political conflict (Nikolic-Ristanovic, 1999 Jacobs, S. M., Jacobson, Ruth, and Marchbank, Jen, 2000, Meintjes, S., A. Pillay, and M. Turshen, 2001, Pankhurst 2007). While some transitional societies have included a specific gender committee (Peru), included a gender perspective (South Africa), or provide platforms and programmes specifically for women and girls (Sierra Leone), there is much criticism about the level of gendered analysis in transitional justice mechanisms and post-conflict policy, and a resulting lack of transformative potential for a better future for women (instead of returning to pre-conflict situations) (Pankhurst 2007, Buckley-Zistel 2011). Issues of gendered violence, especially rape, during war time needs far more political and social scrutiny as part of the search for justice and reconciliation in order to actually transform gender relations for the better and provide women and girls with a future with opportunities that respects their rights. Domestic violence and sexual violence need to be addressed as part of peacebuilding, reparations, justice systems, security regimes and social services (including education), which should all be looked at from a perspective that includes an analysis of fundamental inequalities and social divisions. While on paper this is often the case – for example, gender mainstreaming is integrated in the discourse of international peacebuilding – evidence shows that, in practice, gender is still suppositious to most postconflict efforts (Rooney 2007, Bell and O'Rourke 2007, Boesten 2010).

### **Processes of Transformative Justice**

In this section two main processes are addressed: globalisation and the role of non-governmental actors.

#### *Globalisation*

To understand the contemporary era of transitional justice we need to interrogate it as a case study of the fault-lines within globalisation. Globalisation influences the manner in which ideas travel. In truth, the reach of the industry is uneven, with the majority of truth commissions, for example, having taken place in the Americas and Africa. Only one has set up shop in North Africa or the Middle East (Morocco, 2004). Recent analyses of the spread of transitional justice discourse have drawn on “the boomerang pattern” (Keck and Sikkink 1998: 12-13) and “spiral model” (Risse, Ropp and Sikkink (eds) 1999), as a feature of transnational advocacy network operations. Both models link the local and the global, with actors as diverse as NGOs, supportive states and international institutions putting pressure on recalcitrant states, notably in relation to human rights concerns. Civil society organizations and NGOs within and outside a given country are thereby instrumental in changing state behaviour and in the spread of international norms. Three examples illustrate ways in which these ideas have gained a hold in transitional justice debates.

Firstly, the notion of the “justice cascade” (Sikkink and Booth Walling 2006; also see Lutz and Sikkink 2001) makes the case that accountability for past human rights abuses is spreading through the increased use of trials and truth commissions. Powerful insider-outsider coalitions in Argentina have been at the forefront of innovation within this cascade. Similar processes are at work in the second example, Roht-Arriaza’s (2006: 208-24) “Pinochet effect”. The Pinochet case brought to the fore the role of diasporas and lawyers as transnational actors, and the fact that processes of accountability have been both domesticated in Chile and “spiralled on” in the external states from where pressure came for change (for example, raising the question of Spain’s own past). A third example explores the influence of the South African TRC on the Greensboro TRC in the United States. Tarrow (2005: 183-200) argues that such transmission requires diffusion, brokerage, mobilization and certification (by authorities). Brokerage – which “acts as a transnational hinge that communicates and adapts an external practice to new sites and situations” (190) – is highlighted as of particular importance to the spread of transitional justice norms (a specific broker cited is the International Center for

Transitional Justice [ICTJ]). In all these examples, processes of political globalisation are cast in a positive light.

The argument made here about globalisation is of a different order (Gready 2010). First, to be sure, transitional justice and truth commissions are now a strand of political globalisation, an inevitable part of the international call and response of conflict and authoritarian aftermaths. The more troubling dynamic is how they are interwoven with other strands of globalisation. As noted above, globalisation as a whole is forging transitions and democracies characterized by continuity as well as change, by structures of inequality and patterns of conflict that are reconfigured rather than brought to an end. Little wonder that many transitions are stalled and without a clearly defined end-point (Carothers 2002). Limits are placed on structural change in new democracies, and within these limits the danger is that the previously marginalised are re-marginalised. Holistic understandings of transitional justice too rarely extend to a critique of these other facets of globalisation that profoundly shape transitional realities. The question ultimately is whether transitional justice has become the conscience of transitional globalisation without troubling its essential characteristics.

A second argument, however, is that to some extent transitional justice rubs against the grain on conventional conceptions of globalisation. The actors driving new ideas and institutional innovation are often located in the global South (e.g. Argentina, South Africa). Southern NGOs such as the Centre for the Study of Violence and Reconciliation in South Africa or Centro de Estudios Legales y Sociales in Argentina have been influential in their regions and beyond. This research project will seek to identify Global South to North and South to South processes of transmission and influence in promoting transformative justice. Furthermore, responses can be hybrid in nature, a blend of global templates and local, contingent priorities. For example, hybrid courts in places such as Sierra Leone consciously combine international and local laws and personnel.

#### *Non-governmental actors as drivers of change*

Reconfiguring state-civil society relations is a major challenge in transitional contexts in general, and for transitional justice interventions in particular (Bell and Keenan 2004; Crocker 2000; ICHRP 2003). Civil society itself can be weak: virtually non-existent, internally divided, mired in clientelist relationships with power holders and service delivery functions, dependent on the state or international donors, partisan, undemocratic and uncivil. Even for robust civil society actors, moving beyond an oppositional stance towards a previously repressive state requires not only macro-political change but also political processes and institutional arrangements through which new relationships can be negotiated. However fleetingly, transitional justice potentially provide such processes and arrangements, that while emblematic in their imperfection, help to shift mainstream civil society into new terrain. Civil society actors can learn to balance and shift between collaboration and capacity building to make the most of the legal and political opportunities within the new dispensation on the one hand, and monitoring, lobbying, critique and outright confrontation on the other. Negotiating roles, relationships, and spheres of influence represents a foundational lesson in democracy for both civil society and the state; and it is not always an easy set of lessons to learn:

As with civil society's general relationship to the new government [in South Africa], there were inherent tensions involved in NGOs' multiple roles as critic, supporter, watchdog and partner. It was particularly this "watchdog" function that was not well received by the TRC. (van der Merwe, Dewhirst and Hamber 1999: 66)

Two further challenges merit attention with regard to non-governmental actors. First, transitional justice mechanisms tend to prioritize and bring to the fore formal structures and specialized organizations rather than a broader-based community involvement. In essence, well-resourced,

organisational forms (NGOs, research institutes) are often privileged over less formal mobilizations. Beyond NGOs, there is a need to engage with long established strands of mobilization (women's groups, trade unions, churches, local or traditional justice mechanisms), new organizational forms emerging from transitional frustrations and opportunities (social movements), and donor and development discourses favouring participation and decentralization.

Second, a number of challenges remain with reference to access and influence. Examples of transparency and high levels of civic engagement are accompanied by "blind spots", where civil society interventions are neither invited nor welcome. Non-governmental actors tend to have better access to those institutions that are least likely to make a difference, rather than economic and political powerhouses, at both national and international levels. This is part of a broader problem, as transitional justice interventions themselves are delegated to institutions that matter least in transitional decision-making (ad hoc institutions, with the power to make but not enforce recommendations). As a result, victims and survivors of human rights abuse are invariably marginalized as transitions stall and power holders regroup.

This concept note is more concerned with why we need transformative justice (i.e. the critique of transitional justice), and less with how to operationalise transformative justice. In short, it is more about 'what needs to be done', than 'how might this objective be achieved'. The role of following discussions is to assess whether such a new research and practice agenda is indeed needed, and, if so, how it might be delivered.

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