

Introduction to the Concept of Transitional Justice

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1. Introduction

Transitional justice is a multilayered and complex concept. The 2004 SG Report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹ A similar, slightly more comprehensive definition is advanced in the Max Planck Encyclopedia of Public International Law: “Transitional justice describes a field of international law which is concerned with the question how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy.”²

The question of transitional justice thus arises in particular in two sets of constellations: either as a matter of post conflict justice in the context of armed conflict; or when dealing with past abuses committed by dictatorships or authoritarian regimes. The concept is characterised by a past of massive human rights abuses and a process of transition to peace and democracy. The primary objective of transitional justice is to end impunity and establish the rule of law in the context of democratic governance.³

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¹ The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, 23.8.2004, S/2004/616, at para. 8.

² Seibert-Fohr, Anja: Transitional Justice in Post-Conflict Situations. In: Wolfrum, Rüdiger (Ed.): Max Planck Encyclopedia of Public International Law. Oxford 2012, at para 1.

³ Put differently, transitional justice addresses challenges for societies emerging from violent pasts, i.e. bringing perpetrators to justice without endangering democratic progress; developing judicial or third party fora capable of resolving con-

There are several mechanisms of how this can be achieved. Current approaches to transitional justice – which will be further detailed in part 4 – include: investigations and the criminal prosecution of perpetrators, truth commissions, reparations for the victims, but also issues of state building and institutional reform as a matter of long-term stability. In fact, over time, a broadening of the concept of transitional justice is conceivable: from a rather narrow focus on law and jurisprudence to political considerations of developing stable democratic institutions and renewing civil society.

This contribution proposes to introduce the concept of transitional justice. For this purpose, at first part 2 will deal with the concept's historical background and give a brief overview of its emergence. Part 3 will outline the applicable international legal framework. It will look into the exigencies under international human rights law and international humanitarian law in particular and examine the parameters which guide any action in the field. On this basis, current approaches to transitional justice will be discussed in part 4, such as the criminal prosecution of perpetrators, truth commissions, reparations and questions of institutional reform. Part 5 will be dedicated to the specific challenges posed to countries which emerge from a violent past and transit to democracy. Since, at times, a purely domestic approach to transitional justice is insufficient, also international involvement is needed. Especially recently, international actors increasingly seem to engage when it comes to accompanying transitions to democracy. A brief account of these activities will be given in part 6.

Overall, it is argued that always clearer (human rights) parameters govern approaches to transitional justice. Likewise, relevant international actors, especially the UN, take an increasingly nuanced and differentiated approach on a case specific basis. This seems particularly necessary given the complex nature of transitions and the high values at stake: the democratic future of societies emerging from violent past.

flicts; working out reparations; creating memorials; developing educational curricula that redress cultural lacunae and unhealed trauma in a nation's historic memory.

2. Historical background

2.1. Generalities and early times

The term “transitional justice” is of rather recent origin. At the international plane it effectively emerged after the Second World War as question of how to deal with widespread and systematic human rights abuses.

Still, considerations of transitional justice – i.e. of how to deal with past abuses and crimes committed in situations of conflict – are traceable back to ancient times. Then, however, serious human rights abuses were frequently dealt with through the provision of amnesties. For instance, already in ancient Athens, around 400 BC, the punishment of political acts committed against the Athenian tyrants was forbidden after their defeat in order to foster oblivion.⁴ Hugo Grotius, in *De iure belli ac pacis* held that in the aftermath of war it was not fitting to follow up former wrongs in peace. Accordingly, many peace treaties from the 1648 Westphalian Peace Treaty on until the 19th century provided for amnesty clauses.

2.2. Post World War II developments

After the Second World War, it seems useful to distinguish between international and domestic developments in the field of transitional justice.

At the international plane, a shift towards the criminal prosecution of perpetrators took place especially with the International Military Tribunals of Nuremberg and Tokyo. More recent developments, since the mid 1990s, included the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). The ICC as a permanent international criminal court is perhaps the most important landmark and definite achievement of this evolution. Still, currently, a “third” generation of international criminal tribunals, so called “hybrid” courts with national and international involvement, is observable. Examples include the Special Court for Sierra Leone (SCSL, 2002), the Ex-

⁴ Seibert-Fohr: Transitional Justice, at para. 2.

traordinary Chambers in the Court of Cambodia (2003) or the Special Panels for Serious Crimes in the District Court of Dili (East Timor) (2000).⁵

At the domestic level, a diversity of approaches continues to exist when it comes to addressing issues of transitional justice. In particular the question whether crimes may be amnestied in the interest of reconciliation received varying answers. A rather strict approach was pursued in Germany after the fall of the Berlin Wall in Central and Eastern European countries. The Federal Republic of Germany prosecuted those responsible for gross and systematic human rights violations such as killing fugitives at the Wall, although with comparatively lenient sentences. A programme of vetting and lustration disqualified Stasi agents and informants from public employment. In Latin America, conversely, during the transitions to democracy after the military dictatorships of the 1970s and 1980s, many of the past abuses were met with amnesties in countries such as Argentina or Chile. The same holds true for Peru when it came to dealing with human rights abuses committed in the fight against left wing guerrillas (the Shining Path) under Fujimori. However, almost the entirety of these amnesty laws was recently repealed; *inter alia* because of the pressure of the Inter-American Court of Human Rights.⁶ In Colombia, to facilitate transition and the demobilization of non-state armed groups, compromise formulas were sought, with reduced sentences for paramilitaries who laid down their arms and confessed. Again a different path was chosen in South Africa with the establishment of a Truth and Reconciliation Commission in 1995 which granted individual amnesties in return for the disclosure of crimes committed.

The challenges faced during these transitions will be dealt with in a subsequent part 5. For now, it seems sufficient to ascertain/diagnose the diversity of possible approaches to questions of transitional justice. Still, as will be argued in the following, clearer criteria may be derived from

⁵ Other examples include the War Crimes Chamber of the Court of Bosnia-Herzegovina (2005), the Panels in the courts of Kosovo (2001) or the Special Tribunal for Lebanon (2009).

⁶ For details on the jurisprudence, see section 3.1.

international human rights and humanitarian law which reduce the national leeway of action on how to deal with past abuses.

3. The exigencies under international law for approaches to transitional justice

An increasingly tight international legal framework governs – and more and more limits – domestic (and international) approaches to transitional justice. International human rights law, but also international humanitarian law establish parameters for how to deal with past abuses. Further normative criteria are found in international criminal and refugee law.

3.1. International human rights law

Several international human rights conventions deal with gross human rights violations and explicitly oblige State parties to prosecute the respective abuses. These include the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Slavery Convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, and the International Convention for the Protection of all Persons from Enforced Disappearances.⁷ A more comprehensive and even stricter duty to prosecute all crimes against humanity and war crimes is derived from the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity⁸ by some commentators.

While general human rights conventions do not contain explicit provisions mandating criminal trials against offenders, universal and regional human rights treaty bodies have established such as duty in their jurisprudence. They have based the obligation to criminally prosecute serious

⁷ Most of the conventions are widely ratified. See United Nations Treaty Collection, <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>>, accessed on 15.1.2013.

⁸ As of January 2013, the Convention was ratified by 54 States parties. (Ibid.).

human rights violations on the states' duty to protect and ensure human rights.

In particular *Velásquez Rodríguez v. Honduras* (1989),⁹ a decision of the Inter-American Court of Human Rights, was a landmark case. In the judgment, the Court found that states have the duty to take reasonable steps to prevent human rights violations; to conduct serious investigations of violations when they occur; to impose suitable sanctions on those responsible for the violations; and to ensure reparation for the victims of violations.

Likewise the European Court of Human Rights (ECtHR) has established comparable state obligations in several Turkish and later Russian cases since the mid-1990s. In *Aksoy v. Turkey* (1996),¹⁰ the Court held, for instance, that states parties have an obligation to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible in case of torture allegations. In *Mahmut Kaya v. Turkey* (2000),¹¹ the ECtHR held that the persistent failure by Turkish authorities to investigate unresolved killings in South-East Turkey constituted a violation of a state's duty to prevent repetition. A duty to secure the right to life by an effective official investigation to ensure the accountability of state agents responsible for unlawful killings was reaffirmed in the Chechnyan disappearance case *Bazorkina v. Russia* (2006).¹²

Overall, the jurisprudence of human rights monitoring institutions evidences their critical position towards amnesties.¹³ The most outspoken

⁹ Int-Am Court HR, *Velásquez Rodríguez v. Honduras*, Compensatory Damages (Art. 63(1) ACHR), 21.7.1989, Series C, No. 7.

¹⁰ ECtHR, *Aksoy v. Turkey*, Reports 1996-VI, 2260.

¹¹ ECtHR, *Mahmut Kaya v. Turkey*, Reports 2000-III, 149.

¹² ECtHR, *Bazorkina v. Russia*, App 69481/01.

¹³ As argued by Seibert-Fohr: *Transitional Justice*, at para. 8: "The essential requirements for dealing with past human rights abuses under the CCPR, according to the HRC, are an official investigation identifying the perpetrators, compensation and rehabilitation of the victims, the determination of individual responsibility and efforts to establish respect for human rights, to ensure non recurrence and to consoli-

was the Inter-American Court of Human Rights, which, in several cases such as *Barrios Altos v. Peru* (2001);¹⁴ *La Cantuta v. Peru* (2006);¹⁵ *Almonacid v. Chile* (2006);¹⁶ *Gomes Lund y otros* (“*Guerrilha do Araguaia*”) *v. Brazil* (2010)¹⁷ or *Gelman v. Uruguay* (2011),¹⁸ declared national amnesty laws for enforced disappearance, genocide, torture or crimes against humanity as not in keeping with the convention. Given their incompatibility with victims’ rights, the Court found that they contradicted the American Convention on Human Rights (ACHR) and even considered them to be null and void.¹⁹

This (recent and especially Latin American) trend to repeal amnesty laws not in line with the convention notwithstanding, it may be doubted whether an absolute ban of amnesties for serious human rights violations already forms part of existing customary international law.²⁰

date democracy. Gross human rights violations such as summary executions, torture and enforced disappearances could not be amnestied. At least the decision to grant an amnesty should be based on democratic process. Likewise, human rights violators should be excluded from service in the military, police force and the judiciary.”

¹⁴ Int-Am Court HR, *Barrios Altos v. Peru*, Merits, 14.3.2001, Series C, No. 75.

¹⁵ Int-Am Court HR, *La Cantuta v. Peru*, 29.11.2006, Series C, No. 162.

¹⁶ Int-Am Court HR, *Almonacid Arellano y otros v. Chile*, 26.9.2006, Series C, No. 154.

¹⁷ Int-Am Court HR, *Gomes Lund y otros* (“*Guerrilha do Araguaia*”) *v. Brazil*, 24.11.2010, Series C, No. 219.

¹⁸ Int-Am Court HR, *Gelman v. Uruguay*, 24.2.2011, Series C, No. 221.

¹⁹ See for further reference, Binder, Christina: The Prohibition of Amnesties by the Inter-American Court of Human Rights. In: *German Law Journal* 12/2011, pp. 1203-1230. Note, however, that even though there is a universal consensus that amnesties are usually detrimental to the prevention of further crimes, a right of victims to have their abusers prosecuted has been repeatedly rejected by the Human Rights Committee (e.g. *Bautista de Arellana v. Colombia*, 27.10.1995, Comm. No. 563/1993) and the ECtHR (*Öneryildiz v. Turkey*, Reports 2004-XII, 79).

²⁰ See Seibert-Fohr: *Transitional Justice*, at para. 10. In fact, in the South African Truth and Reconciliation process, which its individual amnesty scheme in exchange for confession, this seemed acceptable to the international community. Likewise when drafting the Rome Statute of the ICC, despite efforts to regulate amnesties, no agreement could be reached which would outlaw such measures in their entirety.

3.2. *International humanitarian law (IHL)*

Further elements of how to approach transitional justice can be derived from international humanitarian law.²¹ The four 1949 Geneva Conventions provide for an obligation to prosecute war criminals for grave breaches of the Conventions. Thus, amnesty clauses in peace treaties for serious war crimes are no longer permissible.²² Still, apart from criminal prosecution, IHL does not provide for specific transitional measures to be taken in post-conflict situations. It remains focused on the humanitarian problems arising from a situation of belligerent conflict or occupation. To exemplify, its rules on belligerent occupation concentrate on the security concerns of the occupying power and the interest of the population to preserve the *status quo ante*. They do not address the need for institution building in the interest of transition to peace, rule of law and respect for human rights. In the long run, the need to build state structures able to sustain societal needs goes beyond humanitarian assistance as guaranteed in humanitarian law.

3.3. *Résumé: towards always tighter parameters*

Parameters of how to deal with transitional justice processes may be derived from international human rights law as well as from international humanitarian law. Especially international human rights law establishes an increasingly tight framework to deal with a past of human rights violations with its rejection of amnesties. Further elements are added by the rejection of the death penalty as a violation of the right to life (at least at the European regional level); women's rights as outlined most importantly in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); and children's rights as established in the Convention on the Rights of the Child (CRC).

²¹ Note that a distinction is to be made between the nature of the conflict and the crimes at stake.

²² See the extension of the duty to grave breaches listed in Additional Protocol I (1977) as well as to other Conventions. See Seibert-Fohr: *Transitional Justice*, at paras. 11 and 12 for further reference.

These human rights obligations guide approaches to transitional justice, at domestic and international level. They limit the leeway of states to deal with past human rights violations. They also reflect on UN approaches: For instance, the UN will not support amnesties for most serious human rights violations such as genocide.²³ Nor will it back national processes with capital punishment. The UN also, increasingly, includes a gender focus in its transitional justice programmes.²⁴ The different approaches to transitional justice will be addressed next.

4. Current approaches to the concept of transitional justice

4.1. Generalities

Transitional justice consists of a variety of instruments and mechanisms, both, judicial and non-judicial. They include the criminal prosecution of perpetrators, truth seeking initiatives, reparation programmes, or institutional reform as well as memorialisation efforts. Obviously, these initiatives do not mutually exclude each other but should be viewed in a complementary way, being used in combination. In order to “repair” a society, a holistic approach is needed. The choice which is made in a particular societal situation will vary in accordance with the respective local and cultural context and may also include traditional and customary ways to achieve justice and reconciliation. The most “prominent” examples of the latter are perhaps the Gacaca courts in Rwanda.

The major mechanisms to deal with past human rights abuses are prosecutions; truth commissions; reparations; and institutional reform.²⁵ These will be dealt with below.

²³ See 2004 Report of the Secretary General, The rule of law and transitional justice in conflict and post-conflict societies.

²⁴ See part 6 for further reference.

²⁵ As to the goal which is primarily pursued, one may distinguish between the dimensions of retributive justice (the criminal prosecution of perpetrators of human rights violations); restorative justice (confessions, institution building and the like) and distributive justice (e.g. reparations for victims).

4.2. Criminal prosecutions of those responsible for human rights violations

The criminal prosecution of perpetrators who have committed major human rights violations is a first and perhaps most obvious way of dealing with past abuses.²⁶ Still, different kinds of constraints – be they logistical, financial or institutional – sometimes make it impossible to take a strict stance on prosecution. The criminal prosecution of all perpetrators might simply overburden state structures. Thus, at times, considerations such as massive numbers of offenders, corrupt, weak or inefficient judicial structures and a government lacking the necessary support and stability may require softening the stand on prosecution. Partly, countries opt only to prosecute the most senior leaders (e.g. SCSL, Extraordinary Chambers in the Court of Cambodia). Other states have proceeded to prosecute (and/or to provide reparation) only decades later, such as certain European states for crimes committed in the Second World War. The ECtHR condoned such tardy prosecution in *Kononov v. Latvia* (2010)²⁷ by finding that this was not in violation of the non-retroactivity principle of Art 7 European Convention on Human Rights (ECHR) when the conduct violated the 1907 Hague Convention on the Laws and Customs of War.²⁸

Likewise, international support may be needed.²⁹ The assistance of the international community is particularly crucial when states are unwilling

²⁶ Those responsible for committing crimes, including serious violations of international humanitarian and human rights law, must obviously be tried in accordance with international standards of what constitutes a fair trial.

²⁷ ECtHR, *Kononov v. Latvia*, App 36376/04.

²⁸ Seibert-Fohr: *Transitional Justice*, at para. 17.

²⁹ As mentioned in section 2.2, examples of international (or mixed) prosecution include the Nuremberg trials after the Second World War – although these were qualified as “victors’ justice”. In the 1990s, the Security Council set up the International Criminal Tribunals for the Former Yugoslavia and Rwanda: the ICTY and ICTR. The Statute of the International Criminal Court (ICC) entered into force in 2002 and has so far been ratified by 121 states. (See the UNTC). A third generation of international criminal courts are hybrid courts with international and national involvement, such as the Special Court for Sierra Leone; the Special Panels for Serious Crimes of the Dili District Court; or Extraordinary Chambers in the Courts of Cambodia.

or unable to conduct prosecutions. This is accounted for in the statutes of international and hybrid tribunals. The Statutes of the ICTY and the ICTR, for instance, provide for the tribunals' concurrent jurisdiction.³⁰ The ICC's jurisdiction is complementary in accordance with Article 17 of the ICC Statute.³¹ But also other types of international involvement are possible, e.g. for exhumations, the investigation of mass crimes and/or the preservation of evidence.

4.3. Truth Commissions

Truth finding initiatives focus on the investigation of past human rights violations. They are undertaken by truth commissions, commissions of inquiry and other fact-finding missions, with truth commissions being the most prominent initiative.

Truth commissions have the primary purposes of investigating and reporting on key periods of recent abuse. They map and document patterns of past violence: this usually includes statements from victims and witnesses, thematic research, the organization of public hearings, declassification of archives and the like.³² More than 30 truth commissions have been created worldwide so far.³³ Perhaps best known is the 1995 Truth and Reconciliation Commission in South Africa. Other prominent examples are found in Argentina, Chile, El Salvador, Ghana, Guatemala,

³⁰ Art. 9 of the ICTY Statute: "Concurrent jurisdiction ... 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

³¹ Art. 17 of the ICC Statute: "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; ..."

³² Commissions of inquiry and other fact finding mechanisms likewise establish the truth after serious human rights violations but usually operate under a narrower mandate.

³³ See 2004 Report of the Secretary General, The rule of law and transitional justice in conflict and post-conflict societies at p. 17.

Liberia, Morocco, Panama, Peru, Philippines, Sierra Leone, South Africa, South Korea and East Timor.³⁴

Truth commission may be established regardless of whether trials are conducted to inquire into and reveal past wrongdoing. In fact, while these commissions – with their primary focus on reconciliation – were initially regarded as alternatives to criminal measures, there is now a wide conviction that they work in a complementary way. Since it is not the purpose of prosecution to serve the rights of each victim individually, the victim-centred approach of truth commissions is important to address individual grievances and foster reconciliation. They are thus an important element of restorative justice. In fact, it would overburden the justice system to ask criminal trials to rehabilitate and compensate the victims. This especially when faced with large scale abuses and weak judicial structures. What is more, truth commissions may contribute to building a historical record, identify the root causes of a conflict and map patterns of past violence in order to prevent recurrence. Especially in cases of enforced disappearances this may be important for close relatives too, since it should help them to cope better with the uncertainty as regards the fate of the person who disappeared.

The truth commissions' relationship to an eventual criminal prosecution of perpetrators varies. Sometimes, their insights feed into the criminal investigations, such as in Peru. Only rarely have truth commissions the competence to provide for individualized amnesty, such as in South Africa.³⁵ Even if truth and reconciliation commissions do not have a say in prosecution, their relationship to institutions tasked with the latter should be clarified *ab initio* so as to avoid tensions as for example in Sierra Leone.

³⁴ Ibid.

³⁵ Likewise in East Timor, the Commission for Reception, Truth and Reconciliation allowed perpetrators of less serious crimes to provide community services as a sentence in exchange for confession.

4.4. Reparations

Victims' reparation programmes can contribute to repair the material and moral damages of past abuse. They may comprise a diversity of measures such as financial compensation, return of property, official apologies, but also psychological aid to victims and memorialisation efforts. The latter could include museums and memorials to preserve the public memory of victims and raise moral consciousness of past abuses. Reparation programmes have been established in countries such as Chile, Argentina and Brazil to cope with the atrocities committed during the military dictatorships. Other examples include the Canadian government's apology "Statement of Reconciliation" to indigenous Canadian families for removing their children, including a 350 Million Dollar fund; or the Iraq Compensation Commission which also had international involvement.

While providing for (financial) reparations is surely important, a mere compensation of victims does not seem sufficient. Rather, reparations should be accompanied by some kind of accountability of perpetrators in order to avoid the appearance of hush money. What is more, it may overburden states – incoming governments after violent conflicts – to fully compensate victims for large scale violations. Full reparations may exhaust limited state resources and could jeopardize other measures necessary for transition, such as institutional reform. Thus, in practice, reparations are often symbolic.³⁶ In other cases, victims are compensated decades after the injustice was suffered. In Austria, for instance, the *Nationalfonds für Opfer des Nationalsozialismus* was established in 1995, 50 years after the end of the Second World War. It has paid around 5,000 Euro each to approximately 30,000 victims of National Socialism so far. The *Allgemeine Entschädigungsfonds* for "*verfolgungsbedingte Vermögensentziehungen*" was established in 2001 on the basis of the Washington Agreement. In June 2012 it decided the last of more than 20,000 applications.

³⁶ See e.g. the South African government's decision to reduce the compensations proposed by the Truth and Reconciliation Commission.

4.5. Institutional reform

Increasingly today, transitions are viewed from a broader – and more future oriented – perspective which also focuses on institutional reforms. Institutional reforms are concerned with the building of fair and equitable institutions as a safeguard against the recurrence of human rights violations. They embrace constitutional and legal reforms (including security system reforms) as well as free elections. Measures such as vetting, lustration and disarmament, demobilisation and reintegration (DDR) programmes are important components of such reforms.

Vetting is the screening and removal of members of the public service who are responsible for grave human rights violations. It also implies refraining from recruiting them. For instance, candidates for the 2009/10 Afghan elections were vetted.³⁷ Another example was the removal of corrupt court officials involved in crimes of the fallen Tunisian regime. A sub-category of vetting is *lustration*, which refers specifically to the vetting processes and laws that were implemented in the former communist countries in Central and Eastern Europe after the Cold War. In fact, in East Germany after the end of communism, abusers were removed from public positions through lustration procedures as a mechanism of transitional justice.³⁸ *DDR programs*, conversely, assist ex-combatants in rejoining society as part of peacemaking efforts. Disarmament often takes place with the help of UN forces, as, for example, in Sierra Leone. In any case, relevant institutional reforms should be complemented by further initiatives such as comprehensive training programmes.

Overall, since institutional reforms are increasingly concerned with the development of stable democratic institutions and the general implementation of the rule of law, a welcome broadening of the approach to transitional justice is conceivable.

³⁷ Vetting does not necessarily imply dismissal from the state apparatus. There are examples of alternative personnel systems that provide for the inclusion of “inherited personnel” in exchange for their exposure or confession.

³⁸ In other Eastern and Central European countries, however, the lustration process was incomplete.

4.6. *Résumé*

There is a generally broad reliance on initiatives of transitional justice. As was held by Olsen, Payne and Reiter: "... transitional justice mechanisms are utilized in the aftermath of virtually every period of repression or violence."³⁹ The authors also identify variations across regions and transition type.⁴⁰ Thus, the use of truth commissions and/or human rights trials is not an isolated or marginal practice but very widespread and occurs in the bulk of transitions. Still, transitional justice processes have to face important challenges.

5. Selected challenges to the implementation of transitional justice

Due to space constraints, this contribution will be limited to three major challenges to the implementation of transitional justice: The possible tension between justice and achieving peace (Peace v. Justice) when the conflict is still ongoing (1.); the huge variety of national (social, institutional, political) contexts (2.); and domestic (financial, institutional, political) constraints to implementation (3.).

5.1. *Peace v. Justice*

For long, one of the major challenges to the concept of transitional justice was reflected in the so-called Peace v. Justice debate. There was the perception of an inherent tension between the goals of achieving peace and justice in the aftermath of conflict which were viewed as mutually exclusive. Especially when the conflict/fighting was still ongoing, "peace school proponents" argued accordingly that the only way effectively to end violence was by granting amnesties and brokering negotia-

³⁹ Olsen, Tricia D./Payne, Leigh A./Reiter, Andrew G.: *Transitional Justice in the World, 1970-2007: Insights from a New Dataset*. In: *Journal of Peace Research*, 47/2010, p. 803, at p. 807.

⁴⁰ *Ibid.*, at pp. 807-8. According to the authors, post-authoritarian states, particularly in Europe, lead in the implementation of lustration policies and reparations. Europe also leads in trials. Truth commissions spread evenly across Latin America, Africa and Asia and Oceania. All three non-European regions demonstrate a high use of amnesties after civil war. (*Ibid.*)

tions to persuade criminals to lay down their arms.⁴¹ “Justice school proponents” stated, conversely, that if the perpetrators of human rights abuses did not stand trial, impunity for crimes would continue into the new regime, preventing it from fully achieving a transition from conflict.

Over time, a change in perception, however, seems to have occurred. Increasingly, peace and justice are viewed as mutually reinforcing and justice is even considered to be an important precondition for peace. Put differently, the justice school of thought seems to have taken over, stating that only when justice is done, a new civil war will be prevented.⁴² Thus, the peace versus justice debate seems somehow settled; which also corresponds to the “pro justice”-stand taken in the relevant human rights jurisprudence.⁴³

5.2. *Variety of national situations and the impossibility of a “one fits all”-strategy*

A next difficulty to approaches to transitional justice is the variety of national situations. The political, social and institutional context differs from country to country. The variables are sheer endless and include factors such as the scale and extent of past human rights violations; varying numbers of perpetrators; differences in the strength of domestic institutional structures (especially of the judiciary); the varying importance of positions still held by former human rights perpetrators; a different

⁴¹ A positive example where selective amnesties in effect helped to cease conflict was Northern Ireland.

⁴² In a 2011 debate conducted in the Economist, 76% of participants agreed with the motion that achieving peace can only occur through the implementation of justice mechanisms. (*The Economist*. 2011, <<http://www.economist.com/debate/days/view/744>>, accessed 15.1.2013). Statistics seem to prove them right: The empirical analysis of Sikkink and Walling who compared human rights conditions before and after trials in Latin American countries with two or more trial years found that the majority of countries had improved their human rights ratings after trial. (Sikkink, Kathryn/Walling, Carrie Booth, The impact of human rights trials in Latin America. In: *Journal of Peace Research* 44/2007, pp. 427-445).

⁴³ See section 3.1. Note however, the reflection of the Peace v. Justice debate in Art. 16 ICC Statute which states that criminal prosecutions may be stalled for one year by the Security Council.

involvement of the international community; the distinct geo-political position of a state and the like. Consequently, a “one fits all” solution to transitional justice seems impossible. Rather, a case specific solution is to be found in each case.

5.3. Domestic (institutional, financial, political etc) constraints to implementation

The third challenge concerning the implementation of transitional justice strategies relates to the danger of overburdening fragile democracies when they have to deal with massive human rights violations. This in particular when state structures are weak and former rulers and human rights abusers still remain in influential positions. Especially democratic transitions in some Latin American countries such as Argentina showed the difficulty of bringing former members of the military junta to justice who had remained in influential positions. The crucial question is, accordingly, how to promote accountability for past abuses without risking a smooth transition to democracy?

Further problems relate to the frequently insufficient financial/institutional (and human) resources to deal with massive human rights violations committed in the past. Weak judicial and institutional domestic structures are overburdened when too many human rights perpetrators have to be brought to justice. The “best” example for such difficulties is perhaps Rwanda’s struggle to cope with hundreds of thousands of perpetrators in the aftermath of the 1994 genocide. Thus, at times, international support is needed. It will be discussed next.

6. The role of international actors in the implementation of transitional justice

6.1. Overview

A variety of international actors has taken up considerations of transitional justice: Transitional justice components are incorporated into relevant UN programs and peacekeeping operations; also International IDEA works with the concept. So do international NGOs, such as the

International Center for Transitional Justice. The World Bank's 2011 World Development Report on "Conflict, Security and Development" links transitional justice to security and development and emphasizes – on the basis of empirical research – the importance of transitional justice for the avoidance of cycles of violence. Finally, international criminal tribunals contribute significantly to processes of transitional justice.

6.2. Possible forms of international engagement

Perhaps most visible is the international engagement and support for domestic transitional processes in the field of criminal justice. International criminal tribunals such as the ICTY/ICTR or the ICC are mandated to take over from domestic courts when these are unwilling or unable to deal with a situation.⁴⁴ Apart from the establishment of international criminal tribunals, also other forms of international assistance, such as support in evidence gathering, investigations, and exhumations are possible. At times, international actors, mainly the UN, even engage in forms of interim administrations as was the case in Kosovo and East Timor. They are thus themselves mandated to implement the rule of law and engage in transitional justice; or set up peace keeping missions with important rule of law and justice components (e.g. Guatemala, Salvador).

6.3. Some parameters for UN involvement in transitional justice processes

There is a considerable variety of possible forms of international involvement. Positively, this involvement is more and more guided by human rights parameters and also attempts to follow case specific approaches based on local ownership. Particularly good examples are relevant UN initiatives.

⁴⁴ As discussed in section 4.2, the ICTY and ICTR have concurrent jurisdiction and thus primacy over national courts; the ICC has complementary jurisdiction and may only act when national courts are unable or unwilling to bring human rights perpetrators to justice.

Human rights exigencies and parameters are always more reflected in relevant UN strategies concerning the implementation of transitional justice. As mentioned, the UN does not support peace agreements which provide for amnesties for genocide, crimes against humanity and war crimes.⁴⁵ Nor will it support national criminal prosecutions with capital punishment. Furthermore, it is a guiding principle of the UN that women's rights should be ensured through transitional justice processes and mechanisms: women must be able to participate fully in the process and their perspectives must be adequately addressed. This especially since gender-based violence is a sad component of massive human rights violations.⁴⁶ Also a child-sensitive approach to justice mechanisms is recognized by the UN as relevant.⁴⁷ The UN furthermore advocates the need for a victim-centred approach.⁴⁸ Finally, a need to address the root causes of a conflict (including violations of economic, social and cultural rights) is increasingly referred to.⁴⁹ Such growing importance of human rights considerations seems essential to guide international approaches to transitional justice.

What is more, the UN increasingly develops case specific concepts – rather than adopting a “one fits all approach” –, which are based on national assessments and domestic participation. Likewise, the UN seems to be increasingly aware of the need of local ownership.⁵⁰ Strategy papers thus emphasize the need for national consultations and the importance to include domestic stakeholders.⁵¹ The UN also conducts outreach

⁴⁵ See 2004 Report of the Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies* at p. 21.

⁴⁶ See Guidance note of the SG, *United Nations Approach to Transitional Justice*, March 2010, at p. 5.

⁴⁷ *Ibid.*

⁴⁸ See SG Guidance note, *UN Approaches to Transitional Justice*, at p. 6.

⁴⁹ *Ibid.*, at p. 7.

⁵⁰ Especially the “hybrid tribunals” with international and national composition illustrate that international initiatives are increasingly embedded in the local context. In its 2004 Report, the SG supported a strategic approach which simultaneously addressees justice, peace and democracy. (2004 Report of the Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies* at p. 7-8).

⁵¹ *Ibid.*

programmes to enhance the legitimacy and ensure support of the local population.

Finally, a shift of focus to domestic institution building is perceivable. From a rather narrow focus on criminal prosecutions, more and more, the development of stable democratic institutions becomes part of international transitional justice strategies. The increased referral of prosecutions to domestic courts as part of the ICTY's completion strategy may be understood as an attempt to strengthen the rule of law in the former Yugoslavia and to produce a "spill over effect" on national programmes.

In short, relevant UN programmes – at least on paper – seem to do their best to reflect and account for the evolving forms of transitional justice – based on human rights considerations, the need for case-specific approaches, local ownership and participation. This is welcome in view of the crucial importance of transitional justice mechanisms.

7. Concluding observations

Increasingly strict parameters have been developed which guide the implementation of transitional justice. The concept of transitional justice evolved along the lines of – and was heavily influenced by – human rights law and the assertion that serious human rights violations shall be investigated, prosecuted and compensated for. Likewise, international humanitarian law plays an increasingly important role.

Still, despite the evolution of basic legal criteria, the question of transitional justice can be only partially addressed by strict norms. Apart from a minimum core, flexibility is needed. Every situation has to be addressed anew and differs in accordance with local contexts. Addressing massive human rights violations without endangering the peace process may require particularized answers. There is no one-fits-all solution; no general formula to be adopted. As stated by the International Center for Transitional Justice: "All transitional justice approaches are based on a

fundamental belief in universal human rights. But in the end, each society should – indeed must – choose its own path.”⁵²

In doing so, often, important challenges are to be met. The international community thus has an important role when it comes to supporting the implementation of transitional justice at domestic level. And it becomes increasingly engaged.

That is why this paper concludes on an optimistic note. International activities take place in an increasingly principled way, guided by human rights parameters and turned to case specific solutions. Likewise, the development of stable democratic institutions becomes more and more relevant for international action in the field of transitional justice. In short, the international community seems to be increasingly aware of how important it is for a society to address the past in order to reach the future.

⁵² International Center for Transitional Justice. What is Transitional Justice? 2009, <<http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>>, accessed 15.1.2013.