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**Transitional Justice – Does It Help Or
Does It Harm?**

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Transitional Justice – Does It Help Or Does It Harm?

Dorota Gierycz

[Abstract] Transitional justice refers to a range of approaches that may be used to address past massive human rights violations. Transitional justice mechanisms include international tribunals, reconciliation commissions and truth-seeking measures. In recent years their importance and visibility increased due to gross human rights violations associated with armed conflicts in different parts of the world. While the crimes committed in Srebranica and Rwanda shocked the public opinion and paved the way for establishment of international judicial bodies, the peaceful transition in South Africa drew attention to its Truth and Reconciliation Commission (TRC) as a possible model for seeking peace and justice through non-judicial means. So what is the added value of Transitional Justice for coming to terms with the past and building just and peaceful societies? The author reviews some past experiences and models of Transitional Justice and points to their weaknesses and strengths. As the main achievements she cites the international tribunals' contribution to the development of jurisprudence in some areas of international criminal law and the delivery of justice in a manner impossible for local courts in post-war countries; as their weaknesses, the perception of delivering the "winners' justice" and rather limited involvement of populations from the affected countries. She also provides sets of recommendations as to how to improve the effectiveness of reconciliation commissions established in post-conflict countries, in the context of the United Nations peace operations.

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The concept

Transitional justice generally refers to a range of approaches that may be used to address past massive human rights violations. There is no one accepted definition, but its understanding as “accountability for past mass atrocity or human rights abuses” introduced by the International Centre for Transitional Justice (ICTJ) captures the essence of the concept.¹

The term comprises two rather vague elements: “transition” and “justice”. Transition – from certain structure and point in time, which have to be established, towards a desired state of affairs, in this case a society enjoying democracy, respect for human rights and fundamental freedoms.

The meaning of “justice” often causes emotional reactions and is subject to various interpretations. It raises traditional questions of what kind of justice is contemplated, for whom and by who it is to be administered. For example, what seems to be just and fair from the perspective of the rich and mighty, protecting their properties by private security firms, can be questioned by the poor and marginalized struggling for daily survival. The theft of a loaf of bread, bottle of water, or medication is illegal and as such will lead to proceedings and punishment prescribed by law. It may, however, be perceived as a morally right and just act by the perpetrator and his social environment experiencing poverty, starvation and marginalization.

Another aspect of “justice” often cited in the context of transitional justice discussions links the historical roots of the concept with justice as defined by the victors and imposed on the losers of the conflict. Examples of the Nuremberg and Tokyo trials are cited in this respect and the notion of the “Nuremberg justice” as symbolic for this attitude. In recent years the term the “Hague justice” informally entered the debate with connotations similar to that of the “Nuremberg justice”.

Others, however, link the legal roots of the transitional justice concept with the Universal Declaration of Human Rights of 1948 stating that “...everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him (!) by the constitution or by law” (art. 8) and the International Covenant on Civil and Political Rights (ICCPR) of 1966 further expanding on these provisions and obliging states to adopt, if necessary, adequate legislative measures to meet these obligations and redress their violations if they occurs through effective remedies (art.2)².

In order to set a more tangible framework for the discussion on transitional justice, make it less politically suspect and subjective and more reflective of the universal principles to be applied by all, the United Nations placed it in the framework of international norms, comprising international human rights law, international humanitarian law, international criminal law and international refugee law.

1 (<http://www.ictj.org/en/about/mission>).

2 Article 2, para 2 states: “Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provision of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The Report of the Secretary General to the Security Council on “The rule of law and transitional justice in conflict and post-conflict societies” (S/2004/616) of 23 August 2004³ reflects this approach and attempts to clarify some concepts. It defines “justice” as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the wellbeing of society at large” (para.7)⁴. This definition reflects lessons learned from the enormity of crimes and violence associated with wars in the former Yugoslavia, Rwanda, Cambodia or Sierra Leone by broadening the perspective and putting more emphasis on the victims and the war-torn societies themselves, not only bringing perpetrators to justice.

Transitional justice mechanisms

Transitional justice mechanisms include a broad spectrum of options, ranging from national or international tribunals, reconciliation commissions, truth-seeking and justice-serving measures, thoroughly addressed in the literature of the subject. Their main division is into judicial and non-judicial bodies, with the former ones considered more directly threatening to the alleged perpetrators (often the key former warlords) thus carrying the risk of undermining the fragile peace process, especially in the first post-conflict phase.

The judicial bodies (or as some called them, accountability mechanisms) comprise criminal and civil domestic and international courts. International criminal courts can be permanent (International Criminal Court - ICC) and ad hoc (International Criminal Tribunal for the Former Yugoslavia - ICTFY and International Criminal Tribunal for Rwanda - ICTR) as well as mixed (called also hybrid courts) composed of local and international judges and applying a mixture of local and international law. The latter include special criminal courts in Sierra Leone and Cambodia based on negotiated agreements and the courts in Kosovo (1999) and East Timor (2000) operating on the bases of UN Security Council resolutions and created by UN missions (United Nations Mission in Kosovo - UNMIK and United Nations Transitional Administration in East Timor – UNTAET, respectively) within their strong executive mandates over both territories.

Non-judicial mechanisms comprise mainly truth and reconciliation commissions - temporary, officially established bodies which main role is fact finding, investigation of past abuses committed over certain period of time and root causes of the conflict, promotion of broad discussion of the past, including dialogue between the perpetrators and the victims. Such commissions conclude their work with reports containing results of their inquiries and recommendations of: amnesty⁵ or prosecution; reparations to victims, which can include some monetary and non-monetary elements, such as resti-

3 “The rule of law and transitional justice in conflict and post-conflict societies” Report of the Secretary General, Security Council (S/2004/616), 23 August 2004. Ian Brownlie, Guy S. Goodwin-Gill (editors) “Basic Documents on Human Rights”, Fourth edition, Oxford University Press, Oxford, 2002.

4 “The rule of law.....” (S/2004/ 616), op. cit, p.4.

5 Except for legally excluded cases, see below p.9.

tution of victims' legal rights, official apologies, monuments, commemorative ceremonies and programmes of rehabilitation; legislative and institutional reforms; and changes in education and code of conduct of mass media. The recommendations are aimed at addressing and compensating the wrongs of the past, preventing a relapse of the conflict and ensuring sustainability of peace and social transformation.

Transitional justice versus peace process

There is a tendency of perceiving the peace process and the quest for justice as mutually excluding rather than complementary propositions. One of the frequently asked questions is: What is the impact of transitional justice on post-war recovery, does it help or does it harm? Some traditional peace negotiators believe that the peace process has to involve the former foes, some with blood on their hands and therefore it should not be disturbed by human rights related claims. They can be addressed later, once the stability is achieved and peace consolidated. On the other side, some human rights lawyers and civil society activists insist that a lasting peace is inseparable from justice and that the basic causes leading to the conflict and related gross human rights violations should be addressed as quickly as possible to create a solid basis for a democratic and just state.

Although the two tendencies can contradict each other in a short term, in particular in the phase of peace negotiations or during the first power sharing agreements, the long term goals should be perceived as common. Justice, democracy, respect for human rights and participation by all constitute objectives of every peace process. Without them it is not possible to overcome the legacy of the past and to achieve social transformation indispensable for eradicating past divisions, inequalities and discrimination which had led to the violent conflict.

There are, however, some practical preoccupations as to when transitional justice mechanisms should be introduced, how they should be determined for a specific conflict, and by whom.

Most of transitional justice mechanisms (international tribunals and courts in particular) focus on key perpetrators, often in the position of command or political leadership during peace negotiations. That may pose serious difficulties in the attempt to suspend hostilities and reach peace agreement if there is a notion of post-conflict prosecution of those responsible, or even a simultaneous attempt to establish proper legislative bodies. For example, the ICTFY had been established in 1993, two years before conclusion of the Dayton Agreement to the detriment, as some believed, of the expediency of the negotiations. At the time, however, there was no public indictment against Milosevic, one of the key participants in the Dayton process. Milosevic was detained by newly elected Serbian government and transferred to The Hague much later, in spring 2001. Neither has serious effort been made to apprehend, until the Dayton agreement was considered firm, the notorious warlords, Radovan Karadic and Radko Mladic who still remain at large. The 2003 Accra Comprehensive Peace Agreement concluding war in Liberia and paving way for Charles Taylor's relocation to Nigeria did not

prevent his arrest and transfers to Sierra Leone and subsequently The Hague in 2006 on the order of the Special Court for Sierra Leone

The development of international jurisprudence reflected in the ICC's Statute excludes amnesty for certain category of crimes⁶. That legally restricts the legality of deals and amnesties to be reached by or with the parties in conflict. The agreements contradicting international law should not be honoured by the United Nations and its members. That significantly reduces the space for accommodating war-lords at the peace table and securing their safe exit.

Most of transitional justice mechanisms were created as the conclusion of violent conflicts, in the context of peace agreements or their aftermath, in the conditions excluding possibilities of nation-wide debate. Thus, while the objective need for justice delivery, reconciliation and healing was uncontested, the forms chosen and timing had not necessarily been suitable to the local context and have not matched expectations of the majority of local population. Being poor, marginalized and invisible they were not present at the peace negotiations. Neither were they represented at the post-war political scene, dominated by local urban elites. Thus, all basic decisions related to ending impunity and establishing transitional justice to deal with the abuses of the past were taken without listening to the voices of those most affected. Moreover, the views of local elites, often vividly interested in keeping the status quo, or pursuing war related interests and affiliations were too often and too eagerly taken for the voice of the society and the victims.

It seems that consensus is emerging that this practice should be reconsidered. Decisions on the nature and form of transitional justice mechanisms should be based on a thorough analysis of the situation in the country and conflict's effects on all social groups, with special emphasis on women and vulnerable groups (minorities, elderly, youth, disable, ex-combatants, IDPs and refugees). Gender analysis should be applied throughout the process. Without listening to the diversity of opinions of people on the ground and understanding of their views it may be difficult to work out most suitable measures and strategies aimed at justice and reconciliation

In selection and establishment of lead transitional justice mechanisms (tribunals, truth commissions or both) the focus should be not only on their immediate impact, but also their overall influence on social dynamics and governance, as well as development of the justice sector, police and corrections, reform of the legal system, establishment of an independent oversight mechanism monitoring state institutions and a long term perspective of ending impunity and establishing the rights based rule of law. Thus, transitional justice measures increasingly involve long-term reforms aimed at preventing a relapse of the past violations not only the means related to the pursuit of "accountability for past mass atrocities or human rights abuse". The approach to transitional justice is becoming holistic.

It is difficult to assess the role of transitional justice mechanisms. The ongoing debate of politicians, practitioners and researchers is not conclusive, but points to the case by case approach rather than a search for one pattern fitting all circumstances. Some aspects of the debate allow formulating

6 Such as genocide, war crimes, crimes against humanity and gross violations of human rights, see below p. 9.

broader reflections on transitional justice, its weak and strong points and areas in need for in-depth research. Some of them are presented below.

Tribunals and Courts

International courts are established when the domestic justice system is unwilling or unable to prosecute the alleged war criminals. That is the case of countries emerging from prolonged, violent conflicts or dictatorships. As reforms and reconstruction of local judiciary institutions are lengthy processes, too long to postpone legal actions against key culprits responsible for gross violations of human rights, international courts are the only institutions with sufficient impartiality and technical skills to deliver justice.

Efficiency of international tribunals

It is difficult to measure the efficiency of international judiciary and its impact on the post-war recovery, public opinion and legal culture. The views on its utility and importance are mixed. The high professional standards of the international tribunals (in particular ad hoc tribunals) are generally recognized, notwithstanding criticism. A few high profile cases (Milosevic) have been handled in a public and transparent manner, breaking with a deeply rooted view that justice can not reach those at the top. There is a concern, however, about the duration and complexity of the proceedings, their financial costs, distance from the crime scene and poor media coverage. All these factors weaken the cause - effect connection in the eyes of the public.

Placing the ad hoc tribunals in the third countries (The Netherlands, Tanzania) weakens the accessibility of the proceedings to local victims and their families and diminishes their demonstration effect of justice delivery. On the other hand, it reduces significantly courts exposure to local pressures and personal risks for courts' employees, witnesses and even indictees. The case of Charles Taylor's trial by the Special Court for Sierra Leone illustrates this dilemma. While originally Charles Taylor had been transferred to Freetown to stand a trial, it was quickly decided that the risks for potential witnesses and his own safety were too high. The proceedings were moved to The Hague although that significantly increased the costs of trial, limited the number of witnesses and accessibility of the proceedings to the population of the countries in which the crimes had been committed. It also gave grounds to questioning transparency and fairness of the proceedings by his supporters and sceptics.

In the past international courts faced various funding problems and the issue has not been permanently resolved. Considering the complexity of many cases and amount of evidence to be considered, they are bound to take long time and be very expensive. The question is often posed if they are cost-effective. Although justice delivery should not be judged in monetary terms, from the perspective of post-war, deprived societies, such proceedings are often perceived as a waste of resources which could otherwise improve the lives of "common" people who are not implicated in war crimes.

The high costs, distance and lack of local ownership affecting the work of international tribunals were behind establishment of mixed criminal courts,

placed on the territories of former conflicts and combining international and local judges. The criminal courts of Sierra Leone and Cambodia as well as Kosovo and Timor –Leste (both established under UN temporary administration) are cases in point. There was an assumption that the presence of local judges would ensure at least partly local ownership, and that it would motivate local lawyers to upgrade their skills. It has to be carefully assessed if the presence of local judges, indeed, brought the justice closer to people. Some believe that it rather undermined professional standards of the courts and their credibility. For example, the shortcomings of the UN Special Panels for Serious Crimes in East Timor⁷ were greatly attributed to low qualifications of local judges and public defenders. Mixed courts, however, visibly motivated local lawyers to improve their qualifications and make use of employment opportunities provided by the courts.

While international tribunals and mixed criminal courts usually address the most serious cases of gross violations of human rights involving senior leaders of government, military or militias, national courts focus primarily on the “second layer” – the local leaders responsible for ordering or executing war crimes. In Rwanda, however, national courts have been unable to prosecute numerous crimes related to the 1994 genocide, amounting to over 100 000 individuals awaiting trial in 2000.⁸ In the circumstances the government decided in 2002 to transfer most of the cases to a new adjudicative system called “gacaca” courts, based on traditional practice of community dispute resolution. Numerous “gacaca” courts were established across the country. The system divides offenders into three categories with the first category reserved to regular national courts (those responsible for genocide or crimes against humanity). It provides opportunity of reducing sentences of those who confessed. With most cases still pending it is difficult to assess the system. Some concerns, however, were raised as to its fairness and professional standards.

Delivery of justice in a manner impossible for local courts.

International tribunals are better positioned to deliver justice in the post war reality than local courts and to convey the message that the International Community (IC)⁹ will not tolerate atrocities and gross violations of human rights. They tend to be better staffed and have better human and material resources in their disposal. They are to operate in accordance with international principles and regulations, independently, without fear of retribution and on strictly defined legal basis. They should be impartial in law application and treatment of parties involved. The observance of these principles is critical for the image of the international judiciary and its credibility.

7 In 2000, the UN Transitional Administration in East Timor (UNTEAT) established the Special Panels for Serious Crimes within the Dili District Court and the Serious crimes Unit under the Timorese Prosecutor General’s Office to try those responsible for such crimes as war crimes, genocide and crimes against humanity. See also David Cohen, “Justice on the Cheap Revisited: The Failure of the Serious Crimes Trials in East Timor”, *Asia-Pacific Issues, Analysis from the East-West Center*, No.80, May 2006.

8 “Alternative Justice Systems: Rwanda’s Gacaca Courts”, Henry Steiner, Philip Alston, Ryan Goodman “International Human Rights in Context. Law, Politics, Morals”, Third Edition, Part F, 14.D, pages 1319-1331, Oxford University Press, 2008.

9 In this paper the term “International Community - IC” refers to governments and inter-governmental organizations, as well as their representatives.

The transparency of the proceedings is equally important. It has to be reconciled, however, with specific security concerns of various parties involved, the victims and alleged perpetrators, members of judiciary, prosecution and defence and witnesses who could be threatened, subjected to various forms of pressure and intimidation. Thus, specific decisions as to whether or to which extend certain proceeding should be open to public and mass media, in particular television, should be taken on case by case basis, keeping in mind the right to fair trial of parties involved and the right to information of the public at large. It is not easy to balance such often conflicting demands and some of them may be occasionally prioritized, other sacrificed. For example, the media and public access to court proceedings may be restricted to protect privacy and the rights of victims of rape, or minors. It can also be applied in cases of overwhelming political and public interest that can lead to the interference in the procedures and threaten security of the court or impartiality of the judges.

The critics of the “Hague justice” point to the politization of the process, its selectivity and perception of delivering the “winners` justice”. They claim that many alleged war criminals in all parts of the world escape justice and some of the choices are politically motivated. For example, there are no tribunals addressing the recent gross human rights violations in Ethiopia and Eritrea, or in the Delta State in Nigeria.

The perpetrators facing tribunals mainly represent former war lords, military command associated with the state or a warring faction, or leading politicians of the state responsible for the atrocities. Two additional categories should be given more attention: transnational corporations (TNCs) often fuelling wars and violence due to their profit-oriented activities and private security companies increasingly present in the conflict zone, who escape clear rules and regulations of their conduct and any accountability. For example, there were considerable discussions related to the possibility of indictments against business leaders whose firms were allegedly complicit in genocide or gross violations of human rights in the Democratic Republic of Congo (DRC). They were involved in extracting diamonds, gold and timber and protected by security firms whose employees (de facto local militias) were implicated in numerous atrocities. As there was no authority controlling the territory the possibility of international prosecution of responsible corporate leaders was considered as one of the few avenues for acting against systematic abuse of local people, murder, rape and forced displacement¹⁰. The abuses related to the activities of Royal Dutch Shell in Nigeria neither led to litigation against Shell nor major redress of the situation of local workers and communities. Shell made only small concessions to pacify the workers and improve its image. The local protests, often violent, continue.

10 David P. Forsythe, “Human Rights in International Relations”, chapter 8, *Transnational corporations and human rights*, Cambridge University Press, 2006, Graff, Julia “Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo”, *Human Rights Brief*, 11, 2 (Winter 2004); Steiner, Henry J, Alston, Philip, Goodman, Ryan, “International Human Rights in Context. Law, Politics, Morals”, Third Edition, Oxford University Press, 2008, Chapter on Transnational Corporations and Human Rights, pp.1387- 141.

With the on-going “war on terror”, violence in Iraq and Afghanistan, abuses in Guantanamo and Abu Ghraib¹¹ there are justified claims that some serious breaches of international standards are being “overlooked” and the perpetrators are not facing justice. Even if, in some cases, they are subjected to national military and court proceedings that does not correspond to the gravity of committed crimes and does not satisfy international standards and expectations. Moreover, as the war in Iraq is considered illegal the absence of any international debate on related accountability is perceived as a manifestation of the “double standard” applied by the International Community¹². That undermines the credibility of established transitional justice mechanisms, courts in particular. For example, many Africans who are far from being sympathetic to Charles Taylor and agree with his prosecution in terms of his war record, question his apprehension and trial as representing the “double standard” rather than a triumph of justice.

Many point to the fact that the USA is not party to the ICC and that its delegation, together with that of China, Iraq, Israel, Libya, Sudan and Yemen voted against the ICC Statute. The US Ambassador at Large for War Crimes Issues, Scheffer, explained then the US position as follows: “There is a reality, and the reality is that the United States is a global military power and presence. Other countries are not. We are.We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global power”¹³(NYT)

Selectivity of the process is also raised with regard to some national/local power-holders who are not challenged because they are “critical for peace consolidation on the ground” or are sufficiently feared by the locals to prevent their cooperation with the prosecution. For example, in Liberia, the 2005 democratic elections which brought to power the President, Ellen Sirleaf Johnson, also gave parliamentary mandates to some alleged perpetrators of gross human rights violations. Why did local constituencies voted for them? Did they not know, or did they not mind it? It seems that they took a survival approach which had enabled them to live through the decades of conflict and terror. With the history of past failures of the International Community (IC) to stabilize Liberia, the experience taught people to accommodate the power brokers rather than antagonize them. It is particularly relevant in remote areas where the “strong men” directly influence people’s fates, but does not necessarily mean that they enjoy local support. The case of Charles Taylor’s arrest and handover to the Special Court for Sierra Leone seems to confirm this point. Contrary to some expectations, that the arrest can upset the political balance and even lead to street protests, nothing happened. Neither in Sierra Leone nor in Liberia there were signs of public discontent. Instead there were some cautious signs of relief and joy that the

11 See Decision of the Inter-American Commission on Human Rights of the Organization of American States, Detainees in Guantanamo Bay, Cuba, March 13, 2002; Michael Ratner, “Litigating Guantanamo”, *International Prosecution of Human Rights Crimes*, Wolfgang Kaleck, Michael Ratner, Tobias Singelstein, Peter Weiss (editors), Springer, 2007.

12 Francesco Francioni, “Access to Justice as a Human Right”(Editor), Oxford, Oxford University Press, 2007; also by the same author “Balancing the Prohibition of Force with the Need to Protect Human Rights: A Methodological Approach”, Cannizzaro and Palchetti (editors), “Customary International Law on the Use of Force”, Leiden/Boston, 2005, pp. 269-293.

13 New York Times, August 13, 1997, A8.

threat of his return is over and that justice was delivered. The only voices of dissent came from his political supporters.

Similar conclusions could be drawn from the 2004-05 survey of the UN Office of the High Commissioner for Human Rights in Geneva and the United Nations Development Programme (UNDP) in Liberia. It focused on a country-wide collection of information on war atrocities and its analysis. Over 13 thousand people volunteered information to the statement-takers who travelled across the country and made themselves available to those interested in the locations of their convenience. They ensured confidentiality of statements, but no protection of statement givers. The number and content of statements made by victims and their families clearly confirms their strong motivation to tell their stories and seek justice.

Development of jurisprudence in the areas of international criminal law

The work of international tribunals, in particular the International Criminal Tribunal for the Former Yugoslavia (ICTFY) contributed to expanding the jurisprudence related to questions of rape in war and its final recognition as a war crime and crime against humanity; better definition of torture and elements of genocide; and elaboration of doctrine of command responsibility. Some of these notions were subsequently fully defined in the Rome Statute establishing the International Criminal Court (ICC) in July 1998 (operational since July 2002)¹⁴.

Such common international legal framework further led to the exclusion of blanket amnesty in cases of genocide, war crimes, crimes against humanity and gross violations of human rights. On those grounds the United Nations refused to recognize an unconditional general amnesty included by the warring factions in the Lome Peace Agreement concluding the war in Sierra Leone in 1999 and moved on to negotiate establishment of a criminal court.

International jurisdiction and struggle to end impunity in cases of most serious crimes gave a new meaning to the universality principle allowing national third-party courts (that are neither courts of countries in which violations took place, nor international tribunals) to bring up the charges in exceptional circumstances, when the justice system of the country where the violations took place is unable or unwilling to proceed. Spain has to be given due credit in this respect. The Spanish courts ordered the arrest of Pinochet during his visit in London in 1998¹⁵ and undertook litigation and sentencing in Spain of an Argentinean citizen for crimes against humanity committed in Argentina¹⁶. The Constitutional Court of Spain ruled in 2005 that the principle of universal jurisdiction takes precedent over national interests and ordered the National Court to proceed with the charges of genocide, torture, murder and illegal imprisonment brought up by Rigoberta Minchu against the government of Guatemala (1978-1986) leading to arrest warrants for the former President Efraim Montt and a few of his collaborators¹⁷. Other coun-

14 Rome Statute of the International Criminal Court, UN doc. A/Conf.183/9, July 17, 1998 (<http://www.un.org/icc/romestat.htm>).

15 Roht-Arriaza, Naomi, "The Pinochet Effect: Translational Justice in the Age of Human Rights", 2005.

16 The case of Adolfo Scilingo, <http://www.asil.org/-ilib/2005/04/ilib050426.htm#j3>

17 http://www.cja.org/cases/Guatemala_News/guatemalawarrants.pdf

tries followed. In 2005, a Dutch court convicted two Afghan generals on war crimes committed under the communist regime;¹⁸ a British jury convicted an Afghan warlord on crimes against humanity charges under the Taliban¹⁹; and Belgium courts tried alleged participants in Rwandan's genocide.

What is reconciliation?

“Reconciliation” means different things to different people. It is a long-term objective which requires acknowledging, remembering and learning from the past in order to come to terms with the acts of violence and injustice and strive to create relationships based on trust, respect and mutual support between the communities, neighbours and individuals in the future²⁰. The process of reconciliation is critical to developing a democratic culture and it applies to everyone, not only the victims and perpetrators. It is both, a goal and a process.

Reconciliation does not imply amnesty for all, massive forgiveness or rejection of judicial mechanisms, although sometimes, its interpretation is deliberately pushed in this direction. For example, in some countries reconciliation and amnesty for perpetrators were sought as tools enabling some members of the political elites implicated in past human rights violations to escape accountability. The inclusion of provisions granting unconditional amnesty for all and calling for the establishment of truth and reconciliation commission, in the 1999 Lome Peace Agreement represented a similar attempt. In Uganda (1974) and Zimbabwe (1985), the creation of reconciliation commissions mandated with investigating gross human rights violations under President Idi Amin (The Commission of Inquiry into the Disappearance of People in Uganda) and President Robert Mugabe (Zimbabwe Commission of Inquiry) respectively, constituted a mockery of justice. The exercise was aimed at easing public pressure and improving international image of the leaders, as well as seizing the initiative and control over the evidence documenting the abuses of their regimes

Non-judicial transitional justice mechanisms

Non-judicial mechanisms searching truth and reconciliation (called Truth or Truth and Reconciliation Commissions) constitute another possibility of addressing past human rights abuses. More than 30 such institutions have been already established²¹ under various names, with diversified mandates, focuses and modus operandi. Some were established as inquiry panels, others were focused on providing a nation-wide discussion forum enabling both, victims and perpetrators to tell their tales. All were victim centred and aimed at contributing to a long term reconciliation though dealing with the inheri-

18 (<http://www.rferl.org/featuresarticle/2005/10/d3185711-2419-4fb5-b5f3-f4c613773c-70.html>)

19 <http://www.globalpolicy.org/intljustice/universal/2005/0720afghan.htm>

20 (Bloomfield, David; Barnes, Teresa; Huyse, Luc (editors), “Reconciliation after Violent Conflict”, IDEA handbook, Stockholm, 2000).

21 “The rule of law.....” S/2004/616, op. cit. p.17.

tance of the past in deeply divided societies. Their main focus was on fact finding, providing victims with information on the fate of their loved ones, listening to their grievances and their validation through a broad range of recommendations aimed at addressing accountability for the crimes of the past, including reparations to victims, and structural and legal reforms aimed at prevention of such occurrences in the future.

The TRCs were mainly established on the bases of legislative or administrative acts stating their purposes and mandates (sometimes clearly, sometimes vaguely), for a defined period of time. Some commissions have been initiated by international organizations and/or local actors towards the end of hostilities (El Salvador, Sierra Leone, and Liberia) and their establishment was mandated by UN sponsored peace agreements. Others were national, resulting from democratization processes after prolonged periods of dictatorship, oppression and violations of human rights (Chile, Argentina, South Africa).

The mandate of each commission specifies its powers, time-frame, structure and composition. Most commissions conclude their work with a final report containing its findings and recommendations for further actions addressed to various actors, the highest state authorities in the first place. Such recommendations have exclusively advisory role. The reports should have been broadly disseminated and easily available to the public but in many cases they were not.

The record of truth and reconciliation mechanisms is uneven. In order to play the prescribed role they should be professionally and institutionally strong, representative for people from all walks of life (women, ethnic and religious minorities), locally owned, independent and transparent, properly financed and credible. While in some countries with a strong legal tradition and good education standards emerging from dictatorships it was visible (Chile, Argentina), in the countries devastated by decades of violent conflict, with almost total destruction of institutions and social fabric and high illiteracy level, such conditions simply did not exist and could not be created overnight (Sierra Leone, Liberia). Thus the TRC mechanisms could not be established without strong international involvement.

Almost all truth and reconciliation mechanisms encountered problems related to their establishment, mandate delivery or reports. Some were specific to their individual circumstances, some are more common.

It seems that the commissions with more focused mandates and highly professional teams (some Latin American Commissions) managed to come with well documented reports, containing a broad spectrum of pragmatic recommendations within relatively short period of time. For example, within its mandate of investigating “disappearances after arrest, executions and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on life of persons carried out by private citizens for political reason”²² the Chilean Commission successfully considered about 3 000 cases fitting these criteria. In Argentina, the focus on the disappeared helped to channel commission’s investigations. The dissemination and implementation of the reports however, were not dependent

22 Priscilla B. Heyner, “Unspeakable Truths. Facing Challenge of truth Commissions”, Routledge, New York 2002, p. 36.

on the commissions but political reality. Thus in some cases they were delayed (Argentina, Chile), in others de facto rejected (El Salvador)²³. Even if political circumstances do not allow fully utilize the results of commission's work, a well substantiated report may have a long term impact in the country in documenting the conflict and internationally as a model for similar bodies in other countries (Chile, Argentina).

Whether a commission is national, international or mixed does not seem to have a decisive bearing on the outcome of its work. Considering the circumstances prevailing in most of the countries it seems rational to consider mixed commissions, combining international technical expertise and impartiality with local knowledge and professional involvement as a good option.

Truth telling versus criminal responsibility

While the commissions have a great potential for helping societies to establish facts, create a forum for dialogue and foster reconciliation, their relation to accountability of perpetrators and their potential self-incrimination are controversial. On the one hand, a voluntary truth telling should not be used against those who chose this path. It would discourage frank testimonies and blur the difference between judicial and non-judicial institutions. On the other hand, part of the commission's mandate is truth finding and making recommendations. If commissions stop short from recommending prosecution in certain cases they may be in breach of international human rights and humanitarian law and be perceived as the promoters of impunity.

In the best known case of South Africa (1995), the Truth and Reconciliation Commission (TRC) explored the abuses under the previous regime and gave the perpetrators an opportunity either to tell the truth and seek forgiveness or face the prosecution. That also provided sufficient basis for the victims or their families to receive reparations. Constituting undoubtedly an innovative approach to post-conflict reconciliation, the South African model has been both, praised for its consolidating and constructive social role and blamed for downplaying criminal justice factor and enabling impunity. In the period of post-apartheid transition it greatly contributed to promotion of a peaceful dialogue and stability. It would be worth, however, to assess the long-term impact of the South African TRC on social transformation in South Africa, as - judging from the current legal perspective - it contradicts international standards excluding certain types of crimes from amnesties²⁴.

In 1997-1998 the concern that a premature reconciliation discussion can undermine the work of the ICTFY made the leadership of the Tribunal (its chief prosecutor and president) to pronounce themselves against the attempts to create a truth and reconciliation commission in the former Yugoslavia, promoted by some NGOs. They argued that it would confuse the public, make the perpetrators seek cooperation with the commission and undermine the accountability principle²⁵

23 Hayner, *op. cit.*, p.38, See also Martha Doggett, "Death Foretold: The Jesuit Murders in El Salvador" Georgetown University Press, 1993, Washington DC.

24 See above, footnote 5.

25 Hayner, *op. cit.*, pp.207-209.

In Sierra Leone, one of the factors hampering the work of TRC was a parallel existence of the criminal court and the fear that the testimonies made in front of the TRC will be used as incriminating material by the court. The Commission made numerous public statements to confirm confidentiality of its material and encourage public participation in its work. In Argentina, however, the National Commission on the Disappeared, as generally anticipated, handed its files and evidence over to the prosecution. This significantly sped up the charges against senior members of the military regime.

The 2005 TRC Act in Liberia reflected the current state of the art of international jurisprudence by including a specific provision excluding from the Commission's authority recommendations of amnesty or reconciliation in cases of violations of international humanitarian law and crimes against humanity (Section 26g, TRC Act, June 2006). Moreover, the Commission had the authority to request a court to exercise subeana power to make testimonies obligatory if the TRC had so chosen. The logic of these formulations points towards inevitable recommendations for prosecution in some cases. Thus, it was anticipated that the Commission would formulate at the outset of its work the criteria enabling a basic distinction between the crimes excluded from amnesty and others, which could be suggested for amnesty in the Liberian context. Such a distinction would prevent unnecessary confusion and mistrust among the population. That has not been done. During the first year of its existence the Commission was sending mixed messages generally overemphasizing confidentiality and non-consequential nature of truth telling and created the impression that there would be no legal consequences even in cases of gross human rights violations.

Another controversy relates to the question whether or not the commission is qualified to name the perpetrators and make such pronouncements public. Some believe that it is a prerogative of courts only. Others, that in the countries with no judiciary mechanism it should be a role of the commissions²⁶ The Commission in El Salvador, for example, decided, within its mandate, to name perpetrators despite a strong pressure from the government and threats to its security, which made the commission to relocate to UN Headquarters in New York to finish its report²⁷. The commission in Guatemala (officially called the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer) decided not to follow this example and not to identify individual perpetrators. The South African TRC made names of the accused regularly known through public hearings.

Timing for establishment of reconciliation mechanisms

The timing for establishment of truth and reconciliation mechanisms is difficult to define. In theory, it seemed that non-judicial mechanisms should facilitate the healing process, allow people to share painful experiences, address root causes and look for possibilities of working together towards common goals from the earliest post-conflict stages. All national discussion,

26 Mendez, Juan E. "Accountability for Past Abuses", *Human Rights Quarterly*, 19, 1997, p.127.

27 Hayner, op. cit, p. 38-40.

if truly inclusive and properly handled, should also help to channel victims' grievances through such bodies rather than risk mob justice and individual revenge. If the victims see that there is a serious attempt to end the impunity they may be more willing to cope with daily deprivation on the aftermath of the conflict and tolerate the presence of former oppressors in their vicinity. Guided by this logic, some peace agreements concluding violent conflicts contained provisions obliging to establish reconciliation mechanisms within a strictly defined, short period of time. The agreements concluding hostilities in Sierra Leone and Liberia are cases in point.

These decisions, however, overlooked the fact that a reconciliation process can not be imposed and can not be rushed. Even if initiated by the IC it can not be successful without broad and conscious public participation. It has to be long-term and – with time - locally owned.

The 2003 Comprehensive Peace Agreement (CPA) in Accra, concluding hostilities in Liberia requested, *inter alia* establishment of a truth and reconciliation commission in the transitional period – the period leading to free and democratic elections in 2005. In 2004 a few leading civil society organization, assisted by the United Nations Mission in Liberia (UNMIL) and international experts organized a public campaign aimed at discussing the concept and future creation of the Liberian Truth and Reconciliation Commission (TRC). The TRC Act was drafted and adopted by the “transitional” parliament in June 2005. The Act provided strict terms and deadlines for establishment of the Commission. It *inter alia* obliged the International Community (IC), led by ECOWAS, to establish a selection panel representing leading political parties and NGOs and, subsequently, organize a nation-wide, broadly advertised and transparent search for candidates for commissioners from all walks of life, ethnic, religious and age groups, women and men. The panel was also tasked with reviewing war related records of the candidates to ensure that those with dubious backgrounds would be excluded from the process. Short listed candidates were subsequently interviewed, rated by the panel by consensus and submitted to the head of the “transitional” government (the Chairman Bryant) for endorsement. The process was followed to the letter. All requirements, including a final approval by the head of state took about three months. In February 2006 the commissioners were officially appointed by the newly elected President, Ellen Sirleaf Johnson and nothing indicated the forthcoming problems with the Commission.

Soon after the inauguration, however, the TRC faced major difficulties in delivering its mandate. It was unable to select its secretariat in accordance with legal requirements; its initial budget and work programme were subject to frequent and voluntary changes by the commissioners; it severed its previously well functioning contacts with the IC; and became the scene of open disagreements among the commission members.

The troublesome history of the Liberian TRC which is far from being over requires a separate and thorough assessment. With the hindsight, however, it seems that some of the problems can be attributed to the way of its establishment and imperfections of the legislative act, both delivered in a rush, to meet the terms of the Accra Agreement.

Creation of truth and reconciliation institutions should be preceded by broad awareness raising campaigns and inclusive social dialogue involving

all social, political, ethnic and religious groups; women; minorities; people of all ages; inhabitants of all parts of the country. It requires much more time than was envisaged in the cases of Sierra Leone and Liberia. It also requires more focused efforts to engage in a meaningful manner with majority of the population which is illiterate and impoverished, lives in distant and hardly accessible locations and has no voice. Even if attempts were made to “bring awareness raising campaign to the hinterland” sporadic visits and workshops could not truly explain the objectives of the TRC and engage people struggling for their daily survival in a long term reconciliation debate. More time and space is required. Otherwise, like in the above cases, most discussions and decisions concerning reconciliation will be limited to key NGOs and other representatives of local elites, often competing with each other for influence in the new reality and access to the donors.

International support versus local ownership

In war-torn countries all structures are affected. The Rule of Law institutions, critical for establishment of the transitional justice system are in general weak. Judiciary and police are often compromised by association with war-parties or oppressive regimes. They lack technical expertise and infrastructures. The legal systems require basic reforms to bring them up to international standards. All these factors point to the necessity of international involvement in the creation of transitional justice institutions. On the other hand, if such institutions are to operate in the local context, at least a minimum of work towards the reconstruction and transformation of local structures would be necessary. The transitional justice can not operate in vacuum. For example, if the judiciary system as a whole is considered dysfunctional²⁸ it is not realistic to expect that courts will properly support the work of the TRC in, for example, executing a subpoena power. The same concerns protection of the commission which should be, in principle, provided by local authorities. With a weak and unreliable police force, unable to confront criminality without assistance of the UN military there can be no proper security provided to truth and reconciliation mechanisms.

Most regulations establishing non-judicial transitional mechanisms require inclusion in their composition of citizens from all walks of life, representative for the societies in which they operate. This rightly established principle has to be, however, reconciled in practice with high technical demands facing TRCs. Their establishment and running is complex and requires: the knowledge of relevant laws of the country and international standards; skills to elaborate TRC internal regulations guiding its work and relations among commissioners and staff of the commission; adoption of work plans, budgets, and deadlines which are transparent and understandable to the local community and acceptable to the donors. Moreover, as such commissions increasingly provide a forum for speaking up for both, victims and perpetrators they have to organize hearings, either public or in camera presided over by the commissioners, informed by specifically collected statements and well research material. It is a highly sensitive task.

²⁸ Like in the case of Liberia, as per statement of the UN High Commissioner for Human Rights, Louise Arbour to the Security Council and the press in the summer of 2005.

This gap can be filled by inclusion of foreign experts as commissioners (Sierra Leone), or members of the commission (Liberia) and appointment of professional secretariats (national or mixed) providing necessary technical support. The IC can play the role in assisting technical aspects of work of the commissions financially and in kind.

International assistance should not, however, be perceived as interference in the substance of their work. Such a distinction, clear in theory is often complicated in practice.

While international support in the form of financial assistance is always welcome by local actors, the advisory role of international experts to the commissions is not necessarily the case. The line between the interference and advice can be easily crossed if there is no common understanding of the objectives and underlying principles, or if, indeed, there are conflicting perceptions.

While the IC should refrain from interfering in specific cases, it should firmly stand by the principles and international standards as well as the goals and mandates which made it involved in a concrete operation. These goals and principles should be clarified to the local partners from the earliest days of international engagement. After all, it was the collapse of legitimate structures and incapacity of local population to stop the violence that brought in the international presence. For example, while the IC should not be involved in selection of individuals for the TRC secretariat, it should ensure that the process was transparent, selection was on merits, in accordance with established and publicised criteria and job descriptions, and that the war related records of potential employees were screened. The IC may also enquire if the principles of democratic institution building such as transparency, respect for rules and regulations, fair and equal treatment of employees, sensitivity to possible corruption are applied to the Commission. Such legitimate queries are sometimes necessary to ensure a practical implementation of the stated objectives, even if they are perceived as unwanted interference by some TRC staff.

Employment by the commission constitutes an attractive opportunity, in particular in jobless societies. If the selection process is not guided by clear rules, based on merits and transparent it can affect not only quality of candidates but credibility of the commission.

In Sierra Leone and Liberia there were a lot of initial problems related to the composition and functioning of the TRC secretariats. In both cases, some commissioners chose to recruit staff in disregard to the professional requirements of the process, and were rather guided by personal or political motives. As the Commissions were not able to decide on the long-term staffing many short term employees were brought on board, on temporary basis, with unspecified roles and personal affiliation to the individual members of the commission. That significantly affected quality of the secretariats, exhausted budgetary assignments and encouraged personal loyalties of the staff rather than institutional identification with the Commission. Dysfunctional secretariats, in turn, further incapacitated the commissions in implementing their mandates and led to difficulties with the International Community.

Salaries and allowances constitute another divisive issue. It is difficult to judge what should be an appropriate salary level for the commissioners and

commission's employees. On the one hand, there is the argument traditionally used in justifying high salaries of the judiciary that a sufficient salary should provide conditions for impartiality and focus on mandate delivery. It should free them from daily financial preoccupations and make them less vulnerable to corruption. A higher salary would also justify higher expectations and demands. As some of the commissions were mixed, composed of national and international commissioners, or members with comparable status, their payments should be equal. Moreover it would be impossible to attract professional foreigners or members of diaspora to work at the salary scale of the post-war country.

Others argued that potential members of truth and reconciliation commissions should be motivated by other than monetary factors and that their material standard should not stand out among their compatriots with comparable qualifications and responsibilities. Otherwise it can provoke envy, or even hostility, suspicion of corruption, accusations of selling national interests, or disconnect from and disregard for "normal" people.

The disproportionately high salaries in the case of TRC in Sierra Leone, including remuneration of the employees of the Commission's secretariat were criticised by both, international and local actors. Moreover, they did not ensure smooth operation of the TRC. The Commission was torn by internal divisions, accusations of corruption and low morale. That combined with the politisation of its work and the strong impression of a bias seriously undermined its credibility and led to the imposition of personal changes by the IC.

Despite (or maybe because of) these experiences, the level of commissioners' salaries in Liberia remained high. They were guaranteed by the TRC Act which set them at the level of supreme-court judges, although most commissioners had no comparable qualifications. Serious delays in the mandate implementation and public disagreements among members of the TRC in Liberia broadly reported by mass media, posed a question whether the Commission members who disrespect and undermine each other can reconcile the nation. Finally the IC stepped in. A TRC advisory group composed of members of the International Contact Group on Liberia (ICGL)²⁹ was established to review jointly with the TRC its work, assist the Commission in problem solving and bringing operation back on track. In the meantime the international financial assistance to the commission was suspended.

Thus, the high salaries did not prevent the TRCs from mismanagement, turf wars and public disagreements. The commissions which were meant to reconcile societies, be impartial, transparent and demonstrate unity of purpose and action turned into the opposite. In both cases the IC intervened to the outrages of the commissioners and their supporters in civil society who perceived such reactions as foreign interferences in the work of the commissions, undermining their independence and authority.

29 International Contact Group on Liberia (ICGL) was composed of heads of diplomatic missions to Liberia and intergovernmental organizations (UN, EU). It had been established to oversee the implementation of the Comprehensive Peace Agreement signed in Accra, in 2003 in the period of transition. After the elections of 2005 it played an advisory role to the Liberian Government and addressed the issues it considered critical for peaceful development and stability.

It should be noted that during the prolonged periods of problems and public controversies surrounding the TRCs in both countries, the civil society actors, including NGOs involved in their establishment remained conspicuously silent. Some even sided with the TRC commissioners and generated press attacks on the IC in mass media. The bounds among the local civil society elite were stronger than their sense of moral duty to address dysfunctionality of the commissions. In the absence of strong civil society organizations monitoring the work of TRCs, there is no other mechanism but the IC to correct their activities even if that carries a risk of being labelled as political manipulation.

Risks related to security and protection

Organization of fact-finding, report-writing and, above all, hearings providing a forum for both, victims and perpetrators to tell the truth and reconcile with the past, carries security risks for all involved. As transitional justice institutions generally operate in countries with weak (if any) Rule of Law system, with former war coalitions at least partly in tact, the protection of all participants in the process, in particular witnesses, is very problematic. Even in the countries with strong Rule of Law and functioning criminal justice systems the protection of key witnesses testifying in main criminal cases often requires changing their identity, relocation to the third country, or around the clock police protection. Such options do not exist in post-war countries. Even if the United Nations structures in the country (military or police-arm of the peace-keeping mission) support local authorities in this respect, the requirements go far beyond their mandate and capacity. In this respect, international tribunals and courts are by far better equipped in ensuring security.

The risks also involve members of the commissions who may be subjected to various forms of pressure and even violence. For example in Chile, the publication of the National Commission on Truth and Reconciliation report in 1991 was followed by three political assassinations. That stopped the envisaged nation-wide debate of its content and recommendations. In a long run, however, most of the recommendations of the report were implemented, including suggested changes in the legislation to institutionalise human rights and justice, and adoption of law authorizing the pensions for all affected by the Pinochet regime.

In Argentina, in 1984 the publication of the report of the National Commission on the Disappeared Persons led to numerous criminal cases against top military and two former presidents. Many people provided testimonies and it seemed that the cycle of impunity was broken. However, when the prosecution moved down to mid-level military a coup was threatened and the proceedings stopped. The “Law on due obedience” was adopted instead which cited following orders as duress that excludes prosecution.

The Commission on the Truth in El Salvador was established in 1991 as part of the peace accord. Although it was appointed by the UN Secretary General with the consent of both parties to the accord it worked under a constant threat of violence. Thus its commissioners and staff were exclusively

international and the final report, “From madness to hope” was completed in the UN Headquarters in New York.³⁰

Conclusions

All decisions on choosing and establishing transitional justice institutions should be taken on case by case basis, taking into consideration the state of the country emerging from violent conflict, views of local population (not only political elites), the status of local judiciary and other rule of law institutions, local tradition and post-conflict political and economic power structure, including security conditions.

While attempts should be made to initiate a reconciliation dialogue soon after the end of hostilities a choice of proper transitional justice mechanisms and their establishment should not be rushed. Such mechanisms should be created on the basis of national-wide, inclusive discussion, in the circumstances providing for freedom of expression and movement without fear of violence and repression. While the time-frame for their establishment should not be indefinite, their establishment should not be sped up on the expense of local ownership, effective monitoring by diversified civil society groups and ability to implement their mandates in terms on both, the letter and the spirit.

In cases of security threats posed by war lords and other parties involved in gross violations of international human rights and humanitarian law there may be a need for earlier establishment of judicial mechanisms to address those crimes, break with the culture of impunity and create secure environment enabling dialogue and reconciliation.

Transitional justice mechanisms and related broad social debate should lead to a law reform aimed at elimination of discriminatory regulations and creation of a rights based legal framework reflecting international legal standards, which, in turn, should prevent repetitions of abuses of the past.

All transitional justice institutions should be established in accordance with international legal standards. Any form of politicization of the process, or “double standard” in their application should be prevented.

Different models of transitional justice institutions, their impact on peace process, reconciliation and long term stability should be thoroughly analysed in order to assess their applicability in future practice

Particular attention should be given to transitional justice mechanisms in the context of international efforts aimed at development of the Rule of Law. Such efforts are increasingly undertaken in the context of the UN peace operations and are led by the UN. The experiences of TRCs in Sierra Leone and Liberia should be thoroughly analysed, so lessons can be learned from these experiences.

Analyses of root causes of the conflicts should be undertaken jointly by the local and international community. Although most of peace treaties and laws mandating UN activities and establishing transitional justice institutions explicitly call for identifying and addressing root causes of the conflict, it is rarely done in reality due to fear of their “disruptive” effect on the fragile peace. Thus, they are generally left for “better times” when, again, they are not taken up as not any more relevant, or just forgotten.

³⁰ See, Martha Doggett, *op. cit.*

Inter-relationships between reconciliation and judiciary transitional justice mechanisms should be given more attention. Existing experiences should be analysed to draw, if possible more general conclusions as to their scope and sequence, circumstances in which they should operate in parallel and what type of cases belong to which mechanism. Such guidelines should be subsequently considered on case by case basis in the future

The role of multinational corporations involved before and during a violent conflict with some of its parties and security companies participating therein should be subject to fact finding and inquiries of TRCs, whenever appropriate as comprehensive international research enables better understanding of these roles and subsequent elaboration of appropriate regulations and codes guiding their conduct.

The role and potential of transitional justice mechanisms should be reviewed in the context of ongoing discussion on the responsibility to protect.

The applicability of transitional justice mechanisms, in particular truth and reconciliation instruments as means of prevention should be further studied.

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