DEFINING TRANSITIONAL JUSTICE

In 1995 three volumes entitled “Transitional Justice” were published by the United States Institute for Peace, edited by Neil J Kritz. The foreword was written by Nelson Mandela, who had just assumed the Presidency of South Africa. In his foreword, he writes as follows:

“This important publication on transitional justice comes at a time when the world is grappling with the problems of governance, legitimacy, democracy, and human rights. In recent years, particularly during the past decade, there has been a remarkable movement in various regions of the world away from undemocratic and repressive rule towards the establishment of constitutional democracies.

In nearly all instances, the displaced regimes were characterized by massive violations of human right and undemocratic systems of governance. In their attempt to combat real or perceived opposition, they exercised authority with very little regard to accountability.

Transition in these societies has therefore been accompanied by enormous challenges. While it has signified new hopes and aspirations, it has at the same time brought into sharp focus the difficult choices that these countries would have to make on their road to democracy and economic progress.”
This characterizes exactly the challenges and choices facing societies in transition.

1. Despite the fact that Transitional Justice has become a very widely accepted term, there nevertheless remains confusion about this concept. The word *transitional* itself is readily understood; it signifies that the old order is dying but that the new order has not yet been born. The Shorter Oxford English Dictionary of Historical Principles defines transition as “A passing or passage from one condition, action or (rarely) place to another. It is a journey – never short – often precarious”. A country in transition is a country which is emerging from one particular order and is uncertain and unsure as to how to respond to the challenge of the new. These countries face the problem of dealing with the past on the one hand and the challenge of new directions on the other, as well as the problem of ensuring a sustainable peace so that democracy and economic growth can flourish.

However, it is when we come to the term *justice* that the issue becomes more controversial. Of course there are different kinds of justice. Justice is often referred to as retributive or restorative or distributive, or even quite starkly as economic or social transformation. For some who are committed to criminal justice, there is a suspicion that transitional justice may be less than that and therefore should be very carefully defined in case it detracts from the strength and legitimacy of criminal justice, both domestic and internationally.
However, it should be clear by now that transitional justice is not a contradiction of criminal justice. It is simply a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive, and even violent, systems. Therefore rather than detracting from criminal justice, transitional justice in this sense offers a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assists in the start of a process of reconciliation and transformation.

2. The Rule of Law is fundamental to the existence of a free society. It separates us from anarchy. It follows that to maintain the rule of law, accountability for transgressions against the law is imperative. In the past decade in particular the prosecutions of war criminals has featured very prominently. International criminal law has moved from the single most important example historically, that is of Nuremberg and Tokyo, to a much wider legal response to most crimes. It is this shift from impunity to accountability in terms of prosecutions which has become the defining feature of the international human rights movement.

It is quite understandable that supporters and advocates of these developments rejoice at the possibility of achieving justice for grave human rights abuses.
To victims whose hands and arms were amputated in Sierra Leone, to HIV positive rape victims in Rwanda, to families burnt out in their homes in East Timor and Bosnia, the day of reckoning for perpetrators brings enormous comfort. Therefore, whilst the search for justice is often imperfect, it is clearly well worth the pursuit.

Prof Noah Novogrodsky, who has worked in the Special Court in Sierra Leone, acknowledges that all these international attempts at securing justice reflect very real political compromise. Most of us acknowledge that the establishment of courts is a pale substitute for preventative action and that prosecuting some but not most human rights violators simply constitutes realpolitik in another form. To put it another way, there are clearly limits to law and whenever there are human rights violations on a huge scale, such as in the former Yugoslavia or Rwanda or Sierra Leone, it is impossible to prosecute everyone. So whilst international criminal law offers a measure of personal culpability in the face of grotesque crimes, there are limits to what it can achieve and the horror of Darfur suggests that it is not the deterrent that most of us had hoped for. Further, there are considerable political restraints. Examples of this include the Extraordinary Chambers for Cambodia which will examine only the crimes of the Khmer Rouge committed between 1975 and 1979. The Iraqi Special Tribunal has no jurisdiction to judge crimes committed since the invasion.
The International Criminal Court for its part labours under well known US opposition and cannot begin to apply universal rules to fully half the world’s countries, including states like Russia, China and Sudan. All of this suggests that whilst criminal justice is extremely important, societies in transition need other instruments and other models in order to supplement one form of justice. I repeat, therefore, that transitional justice is not a contradiction of criminal justice and the International Center for Transitional Justice advocates a holistic approach to transitional justice which attempts to complement retributive justice with restorative justice.

The Mission Statement of the ICTJ reads as follows:

“The International Center for Transitional (ICTJ) assists countries pursuing accountability for mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systematic abuse remain unresolved. It provides comparative information, legal and policy analysis, documentation, and strategic research to governments, nongovernmental organizations, and others. Its work focuses on five key elements of transitional justice: developing strategies to prosecute perpetrators, documenting violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and promoting reconciliation.”
The ICTJ is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so.”

I turn now to these five key pillars, which amplify a holistic approach the transitional justice:

3.1 **Accountability**

The rule of law and the fair, even administration of justice deserve our greatest respect. No society can claim to be free or democratic without strict adherence to the rule of law. Dictators and authoritarian regimes abandon the rule of law at the first opportunity and resort to brazen power politics leading to all manner of excesses. It is of central importance, therefore, that, as far as possible, those who violate the law are punished. Legal prosecutions have at least three additional advantages: **firstly**, prosecutions in most cases prevent high-ranking perpetrators from returning to positions of authority; **secondly**, tribunals and special courts aim to punish those who bear the greatest responsibility for human rights violations and thus assist in breaking the cycle of collective reprisals; **thirdly**, due process avoids summary justice. It is often forgotten that both Stalin and Churchill advocated putting Nazi leaders against the wall and shooting them! The words of Justice Jackson are salutary:
“The wrongs we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”

But, as we have seen, there are limits to law and we need to embrace the notion of justice which is wider, deeper, and richer than retributive justice. It is not only impossible to prosecute all offenders, but an over-zealous focus on punishment can make securing sustainable peace and stability more difficult. Further, to achieve a just society, more than punishment is required. Documenting the truth about the past, restoring dignity to victims, and embarking on the process of reconciliation are vital elements of a just society. Equally important is the need to begin transforming institutions; institutional structures must not impede the commitment to consolidating democracy and establishing a culture of human rights. It follows that approaches to societies in transition will be multi-faceted and will incorporate the need for consultation to realize the goal of a just society.
3.2 **Truth Recovery**

“Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process”.

Madeleine Albright, 1993

One of the non-judicial mechanisms that has gained great prominence over the last 15 years is the truth and reconciliation commission. It was first used in South America but has since spread to many other parts of the world. There have been approximately 27 such commissions, with varying degrees of success. Currently, there are at least four commissions underway, namely Morocco, Sierra Leone, East Timor and Ghana. Several others are in the offing, including the Democratic Republic of Congo, Liberia and Iraq. In fact, there is hardly a Peace Accord which doesn’t refer to a truth commission as one option for dealing with the past.

The truth commission, as indicated by its title, is concerned first and foremost with the recovery of truth. Through truth-telling, the commission attempts to document and analyse the structures and methods used in carrying out illegal repression, taking into account the political, economic and social context in which these violations occurred. In some ways it is unfortunate that the word “truth” is used. Beyond its Orwellian overtones, many critics rightly feel that it is impossible for all the truth to ever be known.
In its final report, the South African Truth and Reconciliation Commission distinguishes between four kinds of truth:

The **first** is objective or factual or forensic truth. The Act which governed the work of the TRC required it to ‘Prepare a comprehensive report which sets out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal.’

The **second** is personal or narrative truth. Through the telling of their own stories, both victims and perpetrators have given meaning to their multi-layered experienced of the South African story. Through the media these personal truths have been communicated to the broader public. Oral tradition has been a central feature of the Commission’s process. Explicit in the Act is an affirmation of the healing potential of truth-telling. One of the objectives of the TRC was to ‘restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they were the victims.’

It is important to underline that the stories we listened to didn’t come to us as ‘arguments’ or claims as if in a court of law. They were often heart-wrenching, conveying unique insights into the pain of our past. To listen to one man relate how his wife and baby were cruelly murdered is much more powerful and moving that statistics which describe a massacre involving many victims.
The conflict of the past is no longer a question of numbers and incidents; the human face has shown itself, and the horror of murder and torture is painfully real.

The third is social or ‘dialogical’ truth. Judge Albie Sachs, even before the Commission began its work, talked about ‘microscope truth’ and ‘dialogical truth’: ‘The first is factual and verifiable and can be documented and proved. Dialogical truth, on the other hand, is social truth, truth of experience that is established through interaction, discussion and debate.’

People from all walks of life were involved in the TRC process, including the faith community, the former South African Defence Force, NGOs, the media, the legal and health sectors, and political parties – and obviously the wider South African population through the media and public scrutiny. What I am emphasizing here is that almost as important as the process of establishing the truth was the process of acquiring it. The process of dialogue involved transparency, democracy, and participation as the basis of affirming human dignity and integrity.

Finally, the fourth kind of truth is healing and restorative truth. The Act required the South African TRC to look back to the past and to look to the future.
The truth which the Commission was required to establish had to contribute to the reparation of the damage inflicted in the past and to the prevention of it ever happening again in the future. But for healing to be a possibility, knowledge in itself is not enough. Knowledge must be accompanied by acknowledgement, an acceptance of accountability. To acknowledgment publicly that thousands of South Africans have paid a very high price for the attainment of democracy affirms the human dignity of the victims and survivors and is an integral part of the healing of the South African society.

3.3 Reconciliation

A number of commissions have talked not only about truth, but also about reconciliation. If the word “truth” conjures up problems for many people, so does the word “reconciliation”. It has religious connotations, especially in the Christian faith, and there are many who would prefer that the word and the concept of reconciliation not be used in commissions which are seeking to recover the truth and focus on victims. At its best, reconciliation involves commitment and sacrifice; at its worst, it is an excuse for passivity, for siding with the powerful against the weak and dispossessed. Religion, in many instances, has given a bad name to reconciliation, because its representatives have often joined forces with those who exploited and impoverished entire populations, instead of being in solidarity with the oppressed.
When reconciliation calls for mere forgetting or for concealing, then it is spurious. In Argentina, the concept of reconciliation is regarded with deep skepticism. In that country, the Catholic Church, in large measure, supported the military junta, and the perpetrators of human rights violations were always the first to call for reconciliation. The same is true of Rwanda, where religious groups and priests and nuns participated in the massacre of the Tutsis. In this context, talk about reconciliation is highly suspect and can be viewed as a call for amnesia. Unless the call for reconciliation is accompanied by acknowledgement of the past and the acceptance of responsibility, it will be dismissed as cheap rhetoric. Perhaps one of the ways in which to achieve at least a measure of reconciliation in a deeply divided society is to create a common memory that can be acknowledged by those who created and implemented the unjust system, those who fought against it, and the many more who were in the middle and claimed not to know what was happening in their country. The process of reconciliation is never cheap. It can in fact involve demilitarization, the handing over of arms and the re-integration of former rebel armies. Thus the process is never comfortable and often dangerous.

The process of reconciliation can begin at different points in the transition of a country from a totalitarian state to a new form of democracy. For some, it begins at the negotiation table; for others, when perpetrators are indicted and prosecuted. The release of political prisoners or the acceptance of a new constitution that guarantees fundamental freedoms may facilitate the beginning of reconciliation.
For others, it is when free and open elections are held in which all citizens can participate. There are many starting points, but it is never a one-step, short-term process. The process is ongoing, especially in countries where oppression has been deep and lasting. If reconciliation is to succeed, it must have an impact on the life chances of ordinary people. If genuine coexistence is to take place, then the building of trust is indispensable. If trust is absent, citizens will not be prepared to invest their energies in the consolidation of democracy.

In my view, reconciliation, both as a process and a means of seeking an often elusive peace, must be understood through the lens of transitional justice. Reconciliation stands a better chance and is better understood if victims believe that their grievances are being addressed and that their cry is being heard, that the silence is being broken. Reconciliation can begin when perpetrators are held to account, when truth is sought openly and fearlessly, when institutional reform commences, and when the need for reparation/s is acknowledged and acted upon. The response by former victims to these initiatives can increase the potential for greater stability and increase the chances for sustainable peace. The process of reconciliation has often been hindered by the silence or the denial of political leaders concerning their own responsibility and the failure of the state. On the other hand, however, when leaders are prepared to speak honestly and generously about their own involvement or, at least, the involvement of their government or the previous government, then the door is open for the possibility of some reconciliation amongst its citizens.
President Patricio Aylwyn of Chile highlights what I believe is the irreducible minimum for reconciliation to have a chance, and that is a commitment to truth and justice. When he received the Report of the Chilean Truth and Reconciliation Commission, he emphasized the following point:

*This leaves the excruciating problem of human rights violations and other violent crimes which have caused so many victims and so much suffering in the past. They are an open wound in our national soul that cannot be ignored; nor can it heal through mere forgetfulness. To close our eyes and pretend none of this ever happened would be to maintain at the core of our society a source of pain, division, hatred and violence. Only the disclosure of the truth and the search for justice can create the moral climate in which reconciliation and peace will flourish.*

### 3.3 Institutional Reform

For truth and reconciliation to flourish, serious and focused attention must be given, not only to individuals but also to institutions. Institutional reform should be at the very heart of a transformation. The truth commission is an ideal model for holding together both retrospective truth and prospective needs. Unfortunately, most truth commissions have chosen to focus almost entirely on individual hearings.
This is important and critical, but if commissions were to hold institutional hearings it would enable them to call to account those institutions directly responsible for the breakdown of the state and the repressive measures which were imposed on citizens of that state. In at least one commission an opportunity was created for spokespersons from the military, the police, the security forces, politicians, faith communities, legal representatives, the media and labour to give an account of their role in the past and – importantly – how they saw their role in the future. In other words, it is simply not enough to be merely concerned about the past. We must deal with it, but we must not dwell in it. We deal with the past for the sake of the future.

On a recent visit to Serbia, it was quite clear that one of the major problems preventing that country from moving out from its very dark and ominous past into a brighter democracy is that the institutions remained almost exactly the same. The same policemen were controlling the police forces; the same generals were controlling the army. And this was true of the major institutions. As I moved from one group of leaders to another, it was clear that unless and until institutions are radically restructured, there will be little opportunity for growth, for development and for peace in Serbia. This is not only true of Serbia but it is true of the former Yugoslavia as a whole.
It is true of all states that have failed and are in transition. In deeply divided societies where mistrust and fear still reign, there must be bridge building and a commitment not only to criminal justice, but also to economic justice. For that to be a reality, institutions as well as individuals have to change.

Vetting of former repressive security establishments is an essential part of institutional reform. But it has to be very carefully managed. Immediately after the invasion of Iraq, the Baath Party, Saddam Hussain’s party, was totally banned. This makes no allowance whatsoever for the need for security which is essential in the pursuit of justice and peace and allows for no individual responsibility rather than collective guilt. There can be little doubt that many Iraqis joined the Baath Party in order to survive. There are many other instances in the other countries where people were almost forced to join a party in order to enable their children to have access to education and even to food. It is well known that many Zimbabweans joined Zanu PF for the sake of their own personal security and the welfare of their children. Here too individual responsibility is the right approach.

3.4 **Reparations**

Reparations, too, have a long history, but until recently have not received sufficient systematic attention. The individual reparations issued by the Federal Republic of Germany were a watershed moment in the history of reparations.
Until 1952, reparations were solely an inter-state affair – payments by the losing state to the victorious one, as in the Versailles Treaty. Reparations to victims of the Holocaust were the first instance of a massive nationally sponsored reparations programme to individuals who had suffered gross abuses of their human rights.

It is worth emphasizing that from the standpoint of the victims, the reparations programme occupies a special place in a transition to democracy. Reparations are, for them, the most tangible manifestation of the efforts of the state to remedy the harms they have suffered. Criminal justice – even if it were completely successful, both in terms of the number of perpetrators accused (far from being the case in any transition) and in terms of results (which are always affected by the availability of evidence and by the persistent weaknesses of judicial systems) – is in the end a struggle against perpetrators rather than an effort on behalf of victims. From truth-telling, victims will obtain significant benefits that may include a sense of closure derived from knowing the fate of loved ones, and a sense of satisfaction from the official acknowledgement of that fate. But in the absence of other positive and tangible manifestations, truth by itself can easily be considered an empty gesture, cheap and inconsequential talk. Finally, institutional reform will always be a long-term project, which affects the lives of the victims only indirectly.
Reparations play an important role for victims and are one of the few efforts undertaken directly on their behalf. However, Pablo de Greiff reminds us that a freestanding reparations programme, unconnected to other transitional justice processes, is also more likely to fail, despite its direct efforts for victims. The provisions of reparations, without the documentation and acknowledgement of truth, can be interpreted as insincere – the payment of “blood money”.

In many ways, the dilemmas and challenges in reparations are a microcosm of the overall challenges of transitional justice. How does one balance competing legitimate interests in redressing the harms of victims and ensuring the democratic stability of the state? Similar to other areas of transitional justice, such as truth-telling or institutional reform, simple judicial decisions cannot provide the comprehensive solutions demanded by such interests. Rather, solutions must be found in the exercise of judgment and creative combination of legal, political, social and economic approaches.

Indeed, the success of reparations programmes, and transitional justice strategies in general, depends on the ability to form broad political coalitions. Victims, by virtue of their resilience and strength, in coalitions that demonstrate the resolve and solidarity of society as a whole can become, in Kahlil Gibran’s words, “a voice that causes the heavens to tremble.”
Conclusion

In a recently published book entitled “My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity” there is a very important foreword by Ariel Dorfman, writer, author and poet. Many in this audience will remember his remarkable play and later film entitled “Death and the Maiden”. In his foreword, he writes:

*It is comforting the watch the trials afterwards.*

*After the bombs and the machetes. After the war of brother against brother and neighbor against neighbor. After the torn bodies and the burnt-out villages. After the faces of grief and the faces of those who are so beyond grief they cannot speak and cannot cry. After the children blown up or hacked to death. After the rubble and the fires.*

*After all of this and too much more, so much more than anybody should be expected to witness, let alone live, yes, it is comforting to hear about, see from time to time, the trial of the man, some of the men, held responsible for any one of these outrages against humanity.*

*Comforting to watch the accusations, the evidence, the witnesses. Justice is being done, punishment will be meted out, a balance has been redressed to a universe gone mad.*
However, he continues:

“\And yet, crucial as these efforts to deal with the unspeakable may be, beneath my enthusiasm there has always lurked the suspicion that such performances of justice are not enough, that they do not answer by themselves, cannot answer, the really hard question left in the wake of destructive conflicts inside nations.

How can survivors coexist with those who killed their most beloved kin? How can trust be restored to a community where our best friends betrayed us, refused us refuge? Can the needs of an international war crimes tribunal for forensic evidence be reconciled with the needs of families desperate to identify and bury their butchered relatives? Indeed, can reconciliation ever be truly achieved in a society where the perpetrators deny their crimes? How is the damage repaired? Through money? Through symbolic and moral acts? Person by person or collectively? By providing education to the children of the dead or providing resources to the group that was injured? And can the ruined fabric that once held a society together ever be sewn together again? How to change the obdurate conditions that led to these conflicts in the first place, how to insure they will not recur? Can a different form of common identity, forged in tolerance and not in detestation, be built by former enemies who are now again neighbours? Are there ways in which trials and legal proceedings can be understood not as the ultimate solution to every horror that consumed that landscape but as part of an on-going quest for long-term peace? Are there alternative systems of restorative justice
which more efficiently integrate the vast and still-fearful community, taking into account the customs and traditions of its own members? And how to involve the victims in the definition of what is to be done, how to avoid imposing upon them formulas from afar and from the above, how to make them true participants in the rebuilding of their lives?"

These are disturbing, tough questions.

It is clear that we cannot let ourselves grow comfortable with easy explanations and simple solutions to human catastrophe.

There are enormous difficulties in pursuing justice in a normal situation, but when one attempts to do this in countries undergoing transitions, the problems are intensified. There is a need to balance two imperatives: on the one hand, there is the need to return to the rule of law and the prosecution of offenders. On the other hand, there is a need for rebuilding societies and embarking on the process of reconciliation. In helping to make states work, it is important, therefore, to balance accountability with the shoring up of fragile emerging democracies. The overall aim should be to ensure a sustainable peace, which will encourage and make possible social and economic development.

But the answer is not either/or. Once it is agreed that there must be the balancing of imperatives, then it is surely both/and. In other words, we must deal with the past and not dwell in it, but the measures that are taken have to be informed by the nature of each transition and the political space for accountability. For example, when the bombing
stopped in Afghanistan, some advocated the immediate introduction of trials and prosecutions.

However, it was clear that the major problem confronting Afghanistan was not, in the first instance, accountability but security, the return of the refugees, food for those who were in danger of starving and a measure of good governance so that law and order could be introduced and maintained. The same is true of Iraq. Whilst it is imperative to prosecute those who committed human rights violations during Saddam Hussein’s dictatorship, the first imperative was to stop the looting, to return to some measure of law and order, and to enable Iraqi leaders and people to begin taking part in future decision making, which will restore some semblance of stability and peaceful coexistence. It is only then that we can consider the options, judicial and non-judicial, which will meet the urgent needs of a state in conflict with occupying forces and a history of brutality and division.

Whilst every situation will be different, I am convinced that the holistic approach to transitional justice affords a genuine opportunity for at least some accountability, some truth, some reconciliation and healing, some transformation and some reparations for victims. This modest goal will demand commitment, wisdom and compassion, but it is the least we can do for those who demand to be heard. Those who demand that we build a world “where people die peacefully in their beds when their time has come, surrounded by the friends of yesterday and the neighbors of tomorrow” (Ariel Dorfman).