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Looking back and moving forward: Civil Society and state engagement in transitional justice and conflict transformation - a practitioners' view

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War and repressive rule deeply affect the social fabric of a society. For the majority of people – especially refugees, victims of torture and war crimes, and the relatives of the missing – the violence experienced does not only belong to the past; it continues to have an effect and is part of the present. In many cases, the violence has overturned the value system and the basis of social relationships has been completely destroyed, shattering people's trust in fellow citizens and state institutions. Hence, the transformation of post-conflict societies is undoubtedly a long and complex process. Experience gained over the past decades suggests that restoring justice by different means, truth-seeking mechanisms and the public recognition of past wrongs as well as institutional reform and the facilitation of new social relationships are central to this process. It ultimately has to involve all layers and structures of a society. Since the mid 1990s, combinations of measures in these fields are referred to as "transitional justice" (see Kritz 1995; UN SC 2004; Teitel 2000). With its various mechanisms it enables state and civil society actors to link and ensure complementarity between their various activities.

It is within this framework that we would like to situate civil society engagement for human rights in conflict transformation and explore a number of issues and challenges. It will be helpful for us to start out from two hypotheses that seem important: (1) The role of civil society has to be identified in close connection with that of other actors; (2) human rights interventions in order to contribute to conflict transformation have to be considered in close connection to interventions in other fields. The main conclusion we draw is that civil society engagement for human rights would have to situate itself in a range of activities in different fields and a range of actors in different structures and on various levels in order to contribute to conflict transformation. Continuity in activities or "maintaining the process" between actors and activities is the key to impact of civil society on conflict transformation.

We will start out by briefly explaining the concept of transitional justice. We then turn to situate human rights and civil society within this framework. Thirdly, we will look more closely at some of the roles civil society may play and challenges civil society is facing in engaging in transitional justice processes. We will fourthly come up with some recommendations on how to deal with these challenges when defending human rights as part of transitional justice and conflict transformation processes. Readers will note that

our argument is mainly built on experience from peace building and development organisations rather than on academic literature or reasoning.

1. Transitional Justice: The mechanisms, the actors

"The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." (UN SC 2004:4)

Since the mid 1990ies, transitional justice has developed into an important field within peace building interventions in post-conflict situations. Acknowledging the different justice concerns a society and individual victims have in times of transition, the concept includes a wide range of retributive as well as restorative justice mechanisms: International, mixed or national war crime tribunals, truth commissions and other truth seeking mechanisms, material as well as symbolic reparation, vetting and the reform of public institutions are part of this package.¹ Sometimes, traditional conflict resolution mechanisms and other community based reconciliation mechanisms/rituals, memorialisation and education are also included. Over the course of time, this package shall assist societies to constructively deal with their violent past, (re-)establish the rule of law as well as accountable and democratic institutions and guarantee the non-recurrence of violence. The concept not only emphasises the responsibility and legal obligation of the state to protect its people and redress injustice done, but also defines victims as rights-bearer.² What transitional justice finally aims at is contributing to conflict transformation by facilitating "civic trust" and new relationships amongst citizens as well as citizens and state institutions.

The concept also stresses the necessity of involving a wide range of actors: Besides state actors from different institutions, there are non-government advocates from different groups and layers of society: traditional leaders and institutions, non-governmental organisations, victims associations and veteran groups, faith based organisations and associations, professional associations, political foundations and parties.

In practise, the basic challenges in transitional justice work are the identification of viable entry or starting points for particular mechanisms, their mandate and design, as well as their timing and sequencing in order to ensure their impact on conflict transformation. It is with these challenges in mind that we now turn to the issue of where to situate civil society engagement for human rights that is geared towards conflict transformation.

2. Where to situate human rights and civil society in this framework?

From the short description above it can be taken that human rights occupy, in fact, a central place within the transitional justice framework. For once, they constitute a basis and a point of reference for the very idea of transitional justice: Transitional justice mechanisms are considered a response to gross human rights violations and crimes against humanity as defined by international humanitarian law. Hence, transitional justice relies on international law and legal principles and many of the (victims' centred)

¹ There is a multiplicity of definitions and understandings of transitional justice, and fair amount of overlap with other related concepts, such as dealing with the past and reconciliation. This article can not explore the conceptual linkages. For deeper analysis of these topics see Lederach 1994; Henkin 2002; Bloomfield et al 2003; Bleeker and Sisson 2004.

² The state's obligations to prevent human rights violations, conduct serious investigation of violations when they occur, impose suitable sanctions on those responsible for the violations and ensure reparation for the victims of the violations is based on a ruling of the Inter-American Court in 1988.

rights transitional justice practitioners seek to establish in post-war or post-authoritarian situations have become ratified in standing human rights conventions, such as the right to know, the right to reparation, the right to justice and the guarantee of non-recurrence (UN Commission on Human Rights 1997/Joinet Report and UN 2004).

As a matter of fact, even though the majority of researchers and practitioners today would argue that transitional justice “extends well beyond courts and tribunals” (UN SC 2004:9), needs a context-sensitive comprehensive approach and does not only aim at fighting impunity but also at reconciling divided communities, a focus on criminal justice and a preponderance of legalistic approaches can be observed in practice. There are certainly many reasons for this practice, amongst them the growth of a global human rights movement in the 90ies of the last century, the “end of impunity” strategy of the international community resulting in the set up of the International Criminal Court (ICC) and the lack of interaction between and shared learning amongst the human rights/transitional justice community and the peace building/conflict transformation community.

However, the criminal justice approach faces many challenges in the context of generalised violence and mass crimes: National justice systems are overwhelmed by the scale of the task of bringing war criminals to justice, and international ad-hoc tribunals set up in The Hague or Arusha are detached from the population affected and/or perceived as politically biased. War crimes tribunals, in general, are confronted with procedural challenges and a restriction to “really getting to know the facts” because of the very nature of the crimes, i.e. the circumstances under which they are committed. Even though transitional justice processes are supposed to empower victims and change victim-offender relationships, we still know little about the empowering or disempowering and traumatising impact of trials on victims-witnesses.³ We also know little about the effects that acquittal of a presumed (mass) murderer, guilty pleas or the dropping of charges because of time constraints⁴ might have on the individual (victims) level as well as the community level. Does it really further the idea of due processes and the rule of law or does it boost feelings of hatred and revenge?

Not all injustice can be legally solved and, indeed, is addressed by transitional justice interventions. In reality, very often a fairly restricted understanding of human rights governs the mandates of the mechanisms. They usually refer to violations of civil and political rights. It is rare that we find violations of social and economic rights included in mandates of any of these mechanisms (Kraushaar 2009; Harwell/Le Billon 2009) although they are very often at the heart and among the root causes of many of the extremely violent conflicts we are confronted with. Without addressing their legacy peace and justice will most certainly not be very effective (Reiff et al 2007).

Taken by its broad definition transitional justice could contribute to open up the scope of conflict transformation to a more broadly understood practice of human rights engagement as well as more serious engagement for non-judicial mechanisms. This would allow not only to establish retributive but also re-distributive justice.

3. Roles and challenges for civil society

If we now turn to the role of civil society within the transitional justice framework we realise that in theory – and at a first glance – state institutions are at the heart of the concept: Transitional justice stresses the duty of the state to protect its citizens and to offer reparation for harm they suffered. Moreover, it seeks to (re-)establish legitimate and accountable institutions which can exert normative authority. Again - in theory - the

³ According to Kiza, war victimisation and war victimology is a “dark field phenomenon” (Kiza 2006: 23). Victimology looks into the structure of victimisation, typologies of victims, victim-offender-relationship, victims precipitation, victims’ needs and rights, fear of crime, etc. (see Kiza et al. 2006).

⁴ Because of the completion strategies of ICTY and ICTR.

role of civil society might be best described as complementary to the state or “watch dog” function. But reality looks different, of course: Quite a number of forms of civil society engagement for human rights become thinkable and have in fact been tried out

As transitional justice mechanisms are intended to bring about change in the political and social system, they inevitably become the focus of different (power-) political interests. Hence, when and by whom transitional justice mechanisms are initiated and how they are developed further will crucially depend on state *and* civil society actors. Many elements that may describe the context or the actors themselves play a role. Here we would like to look at three of them in more detail: the continuity of actors between the conflict and the post-conflict situation, the space civil society actors are given or can occupy and the nature of the civil society itself.

3.1 Continuity of elites

In most cases, the political and military elites responsible for war and human rights violations remain in power or establish themselves in positions of authority, blocking reform processes and promoting a culture of impunity, despite the fact that many peace treaties provide for reforms, constitutional amendments and individual transitional mechanisms. However, even in cases where there is a voluntary handover of power following elections, certain state sectors, notably the security and justice sector continue to be dominated by old forces. This means that there are only gradual variations in the continuity or discontinuity of elites, which nonetheless crucially determine the available scope to develop and implement transitional justice mechanisms.

To give an example, in Guatemala, 36 years of civil war ended in 1996 with the signing of peace agreements which provided for wide-ranging reforms and various transitional justice mechanisms. However, the implementation of the reforms stagnated within a few years. The continuity of elites and the concentration of political and economic power are still restricting the scope for democratic reforms. Hence, the root causes of the protracted civil war have not yet been overcome.

In Lebanon, no official policy even tried to address the legacy of the civil war. The Ta'if Peace Agreement did not call for the prosecution of war crimes or a truth seeking process and brought those responsible for staging the war to power. A general amnesty law was passed by the government in 1991 and with the then evolving demobilisation process, many of the approximately 30 000 permanent militia fighters were either integrated into the army or public administration. Hence, the continuity of “war time personnel” on different levels within the system as well as the lack of political accountability not only seriously hamper attempts to address past abuses, but also undermines a broader process of value based socio-political change: Twenty years after the war, civil society still calls for an official commemoration day, public apologies, new history text books, the opening of mass graves, the identification of missing persons – and war crimes prosecution. Most likely, the Hariri Tribunal, set up to investigate the assassination of former Prime Minister Hariri will not initiate a change in this regard, because it is not embedded in a broader transitional justice approach and has already become another example of political instrumentalisation of a tribunal in a divided society.

Very often, civil society is also situated within this framework of continuity. They themselves have to undergo changes in representation, membership, and organisational participation to make sure they truly represent the issues and human rights concerns linked with past atrocities and future perspectives of those groups within their society that so far had no access to education, economic resources and political participation. E.g., in Nepal feudal structures and persuasions remain reaching far inside civil society organisations. Many of them are still dominated by members of the old ruling families and it is only very slowly that representatives of the disadvantaged groups gain access to leading posts and positions within civil society organisations.

3.2 Space for civil society action

In order to (re-)vitalise the civilian dimension in politics and society – especially participation in decision-making processes, assertion and enforcement of rights, and non-violent conflict resolution – civil society actors are essential. However, the space for its engagement depends on a number of factors, i.a., the situation of the state institutions, the political power relations mentioned above, or the continuity of actors, in this case in state institutions.

If there is no political will for truth seeking and the restoration of justice, parties, civil society organisations and interest groups can establish the conditions that are important for such processes at a later stage. For example, they can propose legislation, document human rights violations, create safe spaces for “story telling” or provide support to victims’ groups.

In Bosnia, for example, long-standing efforts to establish a truth commission failed till today. Nonetheless, there are several other truth-seeking and fact-finding mechanisms on the national or regional level: National and international human rights organisations and victims associations collected data on human rights violations and missing persons, three independent organisations from Croatia, Serbia and Bosnia and Herzegovina initiated a broad discussion amongst civil society organisations on a truth-seeking mechanism at the regional level and various local initiatives have created space for individual story telling or implemented oral history projects (Djordjevic 2002; Zupan 2006). Many organisations hope that these pieces of the puzzle can in future be fitted together to provide a broader picture and ultimately, in a further step, be integrated into the overall context of the wars in former Yugoslavia. Similar truth seeking efforts of human rights organisations and victims associations can be found in Lebanon, too (Kraft et al. 2008).

In the absence of an independent judiciary, human rights organisations from former Yugoslav countries cooperated with the ICTY. Later on, they monitored national war crimes trials and one human rights organisation even offered witness protection for Kosovars appearing in front of Serbian courts. Civil society organisations also initiated a symbolic trial: The “Women’s International War Crimes Tribunal on Japanese Sexual Slavery” in December 2000 wanted to raise awareness of the fate of the so called “comfort women” during World War II and press the Japanese Government to finally provide individual compensation to victims.

Where state institutions are missing or very fragile as is the case with the Democratic Republic of Congo or where they have civil society in a grip as in Zimbabwe civil society organisation are engaged in a low profile but very essential part of documenting human rights violations. Even in very state controlled situations like that of Rwanda where civil society is very much seen as part of state action there are organisations that slowly and cautiously try to open up the scope of discussion and action, e.g., by proposing new ways for victims, ex-combatants and ex-prisoners to develop together new economic and social opportunities or to act together during the period of national commemoration of the genocide. One of the challenges is of course – apart from working in a tense or even hostile environment - to ensure continuity to later stages. In South Africa, for example, archives of the church were later used by the TRC, and many years after the truth commission in Chile, documentation of human rights violations done by NGOs were handed over to courts or found their place in museums. Chile is also one of the rather rare examples of having provided reparation for victims, including a better access to health services and education for victims of marginalized groups.

3.3 The nature of civil society

Here, three points interest us in particular: the organisational strengths and weaknesses of civil society in post-war and post-dictatorial situation, the self-conception and traditions of civil society, as well as the relationship to state institutions.

In cases of a vital civil society and strong symbolic figures or institutions with moral integrity, transitional justice mechanisms initiated by civil society emerged as a catalyst of further processes. However, symbolic figures are not always "at hand", and wars and authoritarian rule weaken civil society voices and the (re-)organisation of civil society on a lasting basis. Often, those who oppose nationalism, discrimination and violence are among the first victims. After violent ethnopolitical conflicts in particular, the political parties and civil society reflect the deep divisions that exist between social groups. In Guatemala, for example, divisions between the different victims and civil society groups effectively blocked the furthering of a reparation programme for years. In former Yugoslav countries, no institution with moral integrity exist and there are not only tensions between victims associations of the different national (ethnic) groups, but also between urban based NGO and victims associations as well as between human rights organisations and civil society organisations promoting peace and conflict transformation. These frictions weaken the role of civil society in promoting transitional justice from below.

Another important point is to what extent a civil society tradition and the idea of citizenship, i.e. the rights and duties of a citizen, existed in a country or society before a conflict and what their orientation and the understanding of their own role were. In many countries, civil society organisations understand themselves as being at the service of their government and not at all as their critical watch dog. This may, of course, have something to do with their respective strengths and weaknesses and with the degree of repression of their governments. But it sometimes is also linked with the traditions of understanding of social and political participation. Certainly in countries with a strong feudal tradition and hierarchical set up where the respect of superiors is also considered a value in and of itself we find very often the idea among civil society to be at the service of their government. Nepal is a case in point where the still feudal mind set, as one NGO representative put it, keeps women and members of socially and economically marginalised groups (Dalit) from joining civil society organisations, more particularly from claiming leading posts within these organisations or for speaking up on behalf of their own groups. Similarly, in Rwanda civil society organisations see themselves much more as helping the state to implement new legislation and not critically reviewing this legislation in the first place, with a view to its possible consequences for disadvantaged groups.

In other cases, however, civil society struggled for a long time against oppressive and violent state structures and built their self-conception on resistance to the state. For those organisations, it's not easy to transform their identity when the violent conflict is over and political reforms slowly start to take roots. Years after the fall of Milosevic, for example, some human rights organisations still deeply mistrusted state institutions and rather thought about supplementing them then developing a more complementary role.

4. Maintaining the Process: Linking actors and fields of intervention, including external actors

Bringing the different threads together certain conclusions can be drawn and bearing in mind that different actors have to work in close connection and their respective roles can only be identified with respect to each other:

- It is important to analyse to what extent the implementation of transitional justice mechanisms must be linked to the strengthening of state institutions (capacities competences and infrastructure) even if we look at civil society engagement, and which steps are required here.
- It is equally important to see whether long-term measures to support civil society actors are required first of all, in order to establish the conditions for active

participation in the design and implementation of transitional justice mechanisms. The weaker and the more fragmented and indeed, the more government-oriented the civil society, the more important it is to identify entry points, develop long-term partnerships, and not to overburden (or over-fund) civil society actors.

For external actors this means that long-term support is needed not only for empowering civil society actors on the transitional justice “issues” at stake in their country, but also for taking into consideration and addressing the much broader socio-political inequalities. This is particularly important where it relates to what extent questions of land reform, right to food, women’s and minorities’ rights can be put onto the political agenda. Moreover, external actors, supporting civil society need to be aware of the many pitfalls and roll backs along the process, and integrate elements of supervision, risk management/protection and organisational learning in their support programmes for local partners.

External actors must also be aware of the fact that the frictions and factions of local civil society may even be deepened by them, if and when they are not aware of the causes and consequences of tensions and divisions amongst civil society actors as well as existing forms of co-operation or networks. : They must be equally aware of the need to support NGOs in transforming their own identity, e.g., as “resistance” movement that has mainly seen the state as an enemy to a now more complementary understanding of their role.

We have also seen the importance of human rights as basis and guiding principles of transitional justice and conflict transformation processes. But we have equally realised its limits in highly complex, extremely violent situations. Thus it is all the more important to explore the range of mechanisms that transitional justice has to offer:

- Exclusive concern with a legalistic approach/ judicial responses run the risk of overburdening certain mechanism with overly ambitious objectives and expectations.
- Links between human rights oriented activities and other mechanisms and processes have to be developed and maintained as otherwise important outcomes and effects reached with one will be lost if not taken up by another.
- Here timing and sequencing of transitional justice measures are one of the major challenges. Very often, individual measures, such as the documentation of human rights violations or the identification of missing persons, are a pre-requisite for further steps.

By way of conclusion five key questions seem important to us in order to maintain processes and allow to gestalten a process that looks back in order to move forward and transform social, political and economic relationships coming out of and having caused violent conflicts into relationships where non-violent conflict resolution might be preponderant:

- (1) Which structural prerequisites (e.g. capacities of public institutions, political will, a strong civil society) are in place in the society concerned in order to implement transitional justice measures? Are initial steps necessary to establish these conditions, and what might they consist of?
- (2) Is the mandate of the various mechanisms formulated in such a way that there is complementarity between them and bias/ partiality is largely ruled out? Which period of time, violations/ crimes committed and actors are defined in the mandate?

- (3) Do detailed needs assessments and sector analyses exist for the various mechanisms? Has any mapping of international actors been undertaken which provides information about priorities and possible gaps?
- (4) Have co-ordination and consultation mechanisms been established with partner governments and civil society actors? Are sufficient human and financial resources available for these mechanisms?
- (5) Which opportunities exist to create synergies between transitional justice mechanisms and development programmes? Which co-ordination and planning processes are required in this context?

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