

Accountability, Impunity and the Art of the Compromise: a Direction Home for Transitional Justice?

By Susan Kemp, September 2009

What is “transitional justice” and where does it sit within the broader field of accountability, impunity and remedies for international crimes and human rights abuse? As originally conceived, transitional justice was a highly specialised sphere. It focussed on how to make rational choices that were morally and politically acceptable, in the face of the tough dilemmas of balancing competing policy goals and legal obligations during periods of a historically exceptional nature. Over the years, the definition and purpose of transitional justice have drifted, becoming ever more diffuse and indistinct not only from the field of accountability and remedies in international law but from institution and peace building. This drift risks diluting the value of transitional justice and promoting the inappropriate pre-eminence of exceptionalist policy goals to the realm of accountability and remedies generally.

Defining transitional justice and its role matters, not only in theory but also in practice. Responses to crimes and human rights violations, according to the transitional justice paradigm, are chosen, understood, applied and evaluated through the lens of their consequences for specific transitional policy goals: avoiding the collapse of a new democracy or the breakdown of a nascent peace back into armed conflict. This affects how victims’ demands are perceived and managed, how resources for remedies are allocated and can dictate the level of moral and political legitimacy of state and society’s responses to those demands.

Investigation, information disclosure, prosecution, reparations and measures to prevent future violations have a long history in international law. These remedies are only “transitional justice measures” sometimes: when they respond to crimes and human rights violations that were committed during an armed conflict or period of authoritarian repression and when they applied in a period of transition. Responses to crime and human rights violations generally, including those committed during a transitional period, are not “transitional justice measures.”

Transitional justice is therefore a concept linked to temporary circumstances that are often difficult to define: Transitions might last for an indeterminate period depending on what their goal is, and policy goals such as democracy, peace and reconciliation may themselves be permanent ideals. The transitional policy goal of reconstruction of trust between citizens and state may be inapplicable following international or non international armed conflict where the state institutions have neither collapsed nor have repressed the domestic population, The implementation of transitional justice measures may still be outstanding many years after a transition has ended. The crucial moments for transitional justice are instead the decision-making window when choices must be made about reckoning with former regimes or armed opponents and the period in which those choices entail risk to democracy and peace.

It is in these periods that we find not only the well-known crossroads of law with policy that transitional justice occupies, but also two additional factors that best define transitional justice, give it a unique value, and distinguish it from general post-conflict or post-repression human rights remedies and international justice obligations: dilemmas and risk.

That all states must fully comply with all human rights and international law obligations vis-à-vis the perpetrators of international crimes and violations of the conflict or repressive regime is merely a restatement of international obligations. Despite positive progress in securing investigation, enquiry and disclosure, prosecutions, reparation and reform over the last decades, and despite new actors such as the International Criminal Court and more limits on permissible lack of compliance with international law, dilemmas continue to arise in countries around the world trying to become peaceful and/or democratic states. The value and role of transitional justice lies in how to choose and design responses to crimes and human rights violations where the response itself carries a risk to the existence of democracy and peace.

Where willingness exists but there is a lack of resources or ability to deal with the past crimes, perhaps due to their large scale or complexity, creating that ability is not a matter of transitional justice. In other words, transitional justice is not about helping states or societies manage their assets, but helping them manage risks when faced with competing social goods.

If this is the relationship transitional justice has to remedies and obligations, what is its relationship to impunity? Impunity is of course a wider problem than transitional justice. Combating impunity for current serious crime and human rights abuse is also of key importance to states and societies worldwide, and pernicious impunity for current crime can equally endanger the rule of law and democracy. Strategies to help states deal with impunity generally and legal developments such as those regarding standards of effective remedies will necessarily also aid transitional justice efforts respond to crimes committed in a conflict or repressive era.

In a chapter of the forthcoming book "*Fragmentation and Diversification in International Criminal Law*" (Stahn C., and van den Herik, C., Eds), Impunity Watch Legal Adviser Susan Kemp sets out the full discussion and arguments behind this brief comment. More information on the work of Impunity Watch is available online at www.impunitywatch.org

