

Transitional Justice in Post-conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children

International Center for Transitional Justice (ICTJ)

Abstract

Since the publication of the 2004 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, the field of transitional justice has continued to make progress in promoting the rule of law in countries that have experienced serious human rights violations. At the same time, the field continues to face new challenges, one of the broadest but most important of which is the need to adapt measures initially designed to confront abuses in post-authoritarian contexts to post-conflict and fragile state settings. This document reviews three areas in which, since 2004, progress can be seen but challenges - particularly related to postconflict and fragile settings—must be faced: reparations, truth-telling, and children. It also suggests ways in which the international community can contribute to meeting the emerging challenges.

Keywords: transitional justice – reparations – truth-telling – children and transitional justice – conflict and post-conflict states

Reparations

Although a right to reparations was already contained by 2004 in a number of human rights treaties, the adoption by the UN General Assembly in 2005 of the Basic Principles and Guidelines on a Right to Reparation and to a Remedy for Gross Human Rights Violations and Serious Violations of International Humanitarian Law marked a turning point because it incorporated standards for the implementation of the right to reparations. Furthermore, while the Rome Statute was adopted prior to 2004, the increasing importance since then attached to the International Criminal Court's (ICC) reparations mandate, reflected in both the Court's pronouncements and in the growing support of donor states to its Trust Fund for Victims, suggests the recognition of victims' needs as an equal and indispensable element of international justice. At the national level, reparations programmes have been recommended by truth commissions and implemented by a number of states before and since 2004.

Despite international recognition of the right to reparations, however, many states have been unwilling or unable to establish reparations programmes or implement truth commission recommendations or court orders involving that right. In some cases, particularly in postconflict developing countries, this has been due to a lack of capacity and resources. In other cases, there continues to be a deliberate conflation of development programmes with reparations measures.

These challenges point to the need to encourage development actors and state and international institutions with a reparations mandate to identify not only shared goals but ways in which they can reinforce and complement their respective programmes. An emerging and related challenge is the extent to which reparations can contribute to guarantees of non-repetition, including by addressing the vulnerability of certain classes of victims who were already in pre-existing situations of marginalisation, including women, indigenous communities, and the poorest, often rural, communities in postconflict countries.

Through its various agencies, human rights monitoring mechanisms, and system of rapporteurs and Special Representatives of the Secretary General's (SRSGs), the UN has contributed immensely to elaborating on the content of reparations for those situations and victims within particular mandates, including women and children in armed conflict, and in relation to torture, genocide, and forced disappearances. It is important, however, for states and NGOs to encourage other UN agencies, rapporteurs, and SRSGs - including those involved in health, education, food, displacement, and indigenous communities - to examine the relevance of the right to reparations to their work. Some donor states have contributed significantly to the ICC's Trust Fund for Victims, but more support is required if it is to become effective and credible. With important exceptions,

many states have been reluctant to support national reparations programmes in postconflict countries or the efforts of post-dictatorship governments seeking to recover ill-gotten assets or reduce foreign debt burdens which, in some cases, have been or can be important sources of funding for reparations programmes.

Truth-telling

The creation of truth commissions in postconflict and fragile settings has become a well-established practice, supported by a framework of legal principles and best practices that is ever more consolidated. Soon after the publication of the 2004 Secretary-General's report, the notion of a right to the truth was affirmed in the General Assembly (the Basic Principles and Guidelines on a Right to Reparation, and the Resolution on the Right to the Truth), as well as in resolutions and reports of the Human Rights Council. The right to the truth has since been elaborated in regional bodies' resolutions. The entry into force of the Convention on the Protection of All Persons Against Enforced Disappearances, in 2010, as well as recent country jurisprudence have further strengthened the concept. In addition, truth-seeking has found new and creative instruments, as truth commissions have gone beyond the classic model of national commissions examining large patterns of violations, to include smaller local commissions; commissions focused on violations against specific populations, such as indigenous peoples; and commissions emerging from civil society. Significant research has enriched the work of truth commissions regarding the treatment of victims and the special needs of women, indigenous peoples, and children.

At the same time, significant challenges remain. Many recent truth commissions have failed to conclude their mandates, or have done so in a substandard manner. Many commissions emerge from governmental decision without adequate consultation or civil society buy-in, and some commissions are created without sufficient political will to clarify facts, provoking strong resistance and even rejection from victims. Additionally, in spite of significant normative progress and even in the face of explicit truth commission recommendations, many states remain slow to respond to requests to declassify archives and to conduct effective searches for the missing and disappeared.

The international community, through the UN and regional bodies, has been instrumental in supporting truth-seeking initiatives in postconflict and fragile settings. The extensive compilation and systematisation of good practices for truth commissions has set strong standards for truth-seeking. However, more needs to be done: commissions often are created in situations of acute lack of local material and human resources, and the international community needs to find rapid instruments to cooperate. Instruments of truth-seeking other than truth commissions, such as the search for the missing and disappeared and the preservation and use of archives, receive scarce attention in immediate postconflict settings. It is important for the further strengthening of the practice of truth-seeking to see stronger cooperation and sharing of experience among different UN agencies, missions, and regional bodies.

Children

The need to include children and youth in transitional justice efforts has been gaining recognition in recent years. A landmark development was Sierra Leone's Truth Commission, which included violations of children's rights in its mandate, conducted children's hearings, and produced a child friendly version of its report. Other commissions have included children in their focus in Peru, Timor-Leste, Liberia, and most recently Canada and Kenya. In criminal justice, while the victimisation of children is still insufficiently documented and proceedings are seldom child friendly, there have been some positive developments as well: two landmark sentences for the crime of forced recruitment have been recently issued, in 2011 in Colombia and in 2012 by the ICC. Normative developments in reparations have included the 2005 Guidelines on Justice in Matters Involving Child Victims and Witness of Crime, but national reparations programmes have inconsistently acknowledged or redressed violations against children.

Despite significant development, important challenges remain for effectively including children in transitional justice measures. Most importantly, there is a lack of awareness and understanding of the potential role for children and youth among practitioners, policymakers, and donors. There is also a need to conduct empirical research of the impact on children of their participation, and to produce informed best practices for this participation (such as guidelines on child witnesses in criminal justice proceedings, or crafting child-sensitive outreach programmes). Further challenges include the need to adopt child friendly mechanisms early in the process; budgeting the costs of such mechanisms; and the need for coordination among transitional justice actors, child protection agencies (CPAs), and other children advocates groups.

Children advocates worldwide, including the SRSG for Children and Armed Conflict, UNICEF, academics, NGOs, and CPAs, have in recent years promoted the normative framework regarding children and transitional justice, while UNICEF, together with NGOs, has taken a lead role in conducting research and creating knowledge. The Innocenti Research Centre's 2008 Expert Paper Series on Children and Transitional Justice was followed by important publications such as UNICEF-ICTJ's 2010 *Children and Truth Commissions* and UNICEF's 2010 *Children and Transitional Justice*, which includes Key Principles on Children and Transitional Justice. These principles seek to develop common minimum standards for children in transitional justice, and have been taken up at the policy level, as evidenced by their mention in the 2010 Report of the SRSG on Children and Armed Conflict, and by a section on the need for a child-sensitive approach to transitional justice in the 2010 Guidance Note of the Secretary General on the UN Approach to Transitional Justice. The 2011 Report of the Secretary General on the Rule of Law and Transitional Justice also refers to the need to include children in a significant manner, and calls for the development of common minimum standards.