Helpdesk Research Report: Factors Contributing to Transitional Justice Effectiveness

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Query: What factors influence the effectiveness of international assistance for transitional justice in conflict and post-conflict situations? Please pay attention to issues such as strengthening rule of law and criminal justice, in addition to the role of non-retributive transitional justice mechanisms (whether national or international, formal or informal).

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Contents

Overview and Definitions ................................................................. 1
Legitimacy and Local Ownership ..................................................... 2
Government Commitment ............................................................... 3
Civil Society Involvement ............................................................... 4
Outreach ......................................................................................... 5
Capacity Building and Rule of Law ................................................. 6
Appropriate Timing ........................................................................ 7
Combination of Mechanisms .......................................................... 8
Empirical Research ........................................................................ 8
Resources ....................................................................................... 9

Overview and Definitions

1. International interventions in conflict-affected societies often occur at two stages: first, intervention during the conflict in an attempt to end the violence; and second, intervention in the
post-conflict phase in the area of reconstruction and more commonly in the last couple of decades to institute transitional justice mechanisms (Fletcher et al., 2009).

2. Transitional justice as defined by the United Nations is ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’ (UN Security Council, 2004, p. 4). These are seen to include judicial and non-judicial mechanisms, primarily individual prosecutions, truth-seeking, reparations, institutional reform and vetting.

3. Many claims have been made about the positive impact that transitional justice can have on societies recovering from violent conflict. Skeptics argue instead that many transitional justice measures can undermine negotiated settlements and exacerbate divisions. A recent survey of studies on transitional justice mechanisms finds that there is insufficient empirical evidence of either positive or negative effects (Thoms et al., 2010). There is growing recognition of the need to engage in more systematic research on the effects and impact of transitional justice; however such empirical research is still in the early stages. As such, it is not possible to discuss with any certainty the impact that transitional justice has on conflict-affected societies or the factors that influence positive or negative outcomes.

4. Nonetheless, there are some factors that have been identified in the literature as contributing to the effectiveness of transitional justice (whether supported through international assistance or domestic resources). These include: legitimacy and local ownership; government commitment; involvement of civil society; outreach; capacity building; appropriate timing; the use of a combination of mechanisms; and empirical research. Some of these factors are related to one another. This helpdesk research report provides a brief overview of each of these factors and discusses their potential contribution to the effectiveness of transitional justice.

**Legitimacy and Local Ownership**

5. Legitimacy and a sense of local ownership are essential to the effectiveness of social institutions (AIV and CAVV, 2009; Ramji-Hogales, 2010; van Zyl, 2005). While ideas and lessons can be drawn from prior experiences with transitional justice institutions in other contexts, there are no generalisable blueprints (Lutz, 2006; van Zyl, 2005). The prevailing policy options of criminal prosecutions and truth commissions (sometimes simultaneously) have resulted in an ‘almost prescriptive approach to “best practices” in dealing with the past’ (Fletcher et al., 2007, p. 210). Such a mechanical design and implementation of transitional justice in the immediate aftermath of violence are unlikely to be successful if context is ignored. In order for transitional justice mechanisms to be effective, they must be contextually and culturally appropriate and based on local needs. Transitional justice policymakers and practitioners need to give greater attention to and develop a better understanding of factors such as culture and history (Fletcher et al, 2007; Lutz, 2006; van Zyl, 2005).
This can be facilitated by studying local contexts and by promoting broad-based consultation and participation in developing transitional justice strategies.

6. **Studying local contexts:** It is important for academics and policymakers to learn about local preferences and perceptions of transitional justice (AIV and CAVV, 2009; Ramji-Nogales, 2010). This can be facilitated through empirical studies and population surveys. An understanding of and incorporation of local preferences in transitional justice strategies will help to determine the most appropriate mechanism(s) and could increase the legitimacy of transitional justice (Ramji-Nogales, 2010).

7. It is also important to study existing practices at the local level. In Guatemala, for example, a range of local-level mechanisms were implemented in the aftermath of conflict. These included memorialisation initiatives, psycho-social interventions, exhumations and conflict resolution based on Mayan methods. The existence and nature of such local practices should not replace national or international initiatives, but they can ‘provide important clues as to what would or would not resonate at a national level, what kinds of “reconciliation” have already occurred and what remains to be done’ (Arriaza and Roht-Ariaza, 2008).

8. **Consultation and participation:** The degree of legitimacy is affected by factors on the ‘input’ side and ‘output’ side. On the ‘input’ side, it is important to consult with and involve as many stakeholders as possible in designing transitional justice strategies. This can contribute to a sense of ownership and broad-based support for transitional justice mechanisms among various population groups (AIV and CAVV, 2009; Lutz, 2006; van Zyl, 2005).

9. On the ‘output’ side, a mechanism can acquire legitimacy by functioning effectively and producing useful outcomes (van Zyl, 2005). Transitional justice proceedings should be open and transparent, preferably in language that can be understood by wide segments of the population (AIV and CAVV, 2009).

10. It is important that processes and mechanisms are considered ‘legitimate’ not only by political elites (or even the general population) but also by victims (Lutz, 2006). This may be challenging, however, as ‘factors that may legitimise an institution in the eyes of one transitional justice actor are likely to delegitimise it from the viewpoint of another’ (Ramji-Hogales, 2010, p. 16). A victim-centred approach is needed to determine the preferences of victims and to engage their active participation in transitional justice (Ramji-Hogales, 2010; Orentlicher, 2007).

**Government Commitment**

11. The degree of political or governmental support to creating a functioning state that adheres to rule of law and democratic principles influences the effectiveness of transitional justice efforts. Fletcher
et al. find that regardless of the source of the conflict or the transitional justice mechanism selected, it is the government’s commitment to and implementation of structural change that is critical to sustainable peace. The effectiveness of a truth commission in promoting stability, for example, is dependent on the political will to support public debate and dialogue on the official account of the past that emerges and to implement the commission’s recommendations (Fletcher et al., 2009).

12. Political or governmental support for transitional justice does not, however, necessarily translate into a sense of local ownership. In Cambodia, for example, the government decided belatedly and with much ambivalence to support the ‘Khmer Rouge Tribunal’. This does not mean that the tribunal was the product of broad local consultation or that it enjoys popular support (van Zyl, 2005).

13. In some cases, it may even be necessary to bypass governments with poor human rights track records in establishing transitional justice institutions, relying instead on other sources of support such as civil society organisations or victims’ groups (van Zyl, 2005).

Civil Society Involvement

14. Many transitional justice scholars and practitioners have long advocated for the important role of civil society in transitional justice processes. Priscilla Hayner states, ‘The strength of civil society in any country – how many and how well organized the nongovernmental advocacy, community-based, research, and other such organisations are, will partly determine the success of any transitional justice initiative. Because of their information, contacts, and expertise in human rights issues, the contribution of nongovernmental organisations can be crucial’. This, she argues has played out empirically as civil society has played an important role in every country that has experienced a successful transitional justice endeavour (Hayner, cited in Duthie, 2009, p. 11).

15. Civil society can play various roles in transitional justice. These include:

- providing insights into local culture, economics and politics;
- determining the most relevant goals and means of transitional justice through public deliberation;
- contributing to the design of initiatives;
- helping with victim assistance, for example, acting as legal advocates for the poor;
- assisting with data collection and investigation;
- lobbying government officials;
- mobilising society to participate in and to disseminate the lessons of transitional justice efforts;
- monitoring initiatives, for example, acting as court monitors in trials;
- making connections in local communities; and
- implementing bottom-up ‘reconciliation’ programmes (Duthie, 2009).
16. Civil society groups are likely to have closer links with and a deeper reach into victims’ communities than official institutions. As such, they are important sources of information for truth commissions, tribunals, reparations programmes and other transitional justice initiatives. They are also important in facilitating the reach of transitional justice into communities, a process known as ‘outreach’.

**Outreach**

17. There is an emerging consensus that outreach is an essential component of any transitional justice process (Vinck and Pham, 2010; Lambourne, 2010). Trials, truth commissions and other transitional justice mechanisms will be restricted in their effect on societies in transition if the public is not familiar with the processes and do not perceive them as fair or just. Public awareness is necessary for the basic functioning of transitional justice mechanisms; testimonies are only possible if affected communities are aware of the existence of the tribunal or truth commission, for example. Public awareness is also essential for mechanisms to have a transformative impact on society (Vinck and Pham, 2010) and to be perceived as legitimate (AIV and CAVV, 2009; Vinck and Pham, 2010).

18. The absence of outreach activities in the early years of the International Criminal Tribunal for the former-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) resulted in a lack of awareness of the tribunals, the alienation of societies from the tribunals, misunderstandings, and in some cases, scepticism and hostility toward the tribunals (Ramji-Nogales, 2010; Cole, 2007).

19. Outreach activities have since been adopted by the ICTY, ICTR and other international, hybrid and national tribunals and truth commissions. The aims are to **ensure the transparency of proceedings**; and to inform and promote understanding of the institutions and the system of rule of law more generally. Special attention has been paid to explaining the legal process and emphasising that these transitional justice mechanisms are not aimed at targeting any one group, but rather at seeking individual accountability. Outreach may thus produce ‘greater judicial accountability, demonstrate that judicial arbitrariness is no longer acceptable [and] educate on the rule of law’ (Vinck and Pham, 2010, p. 422).

20. There is insufficient empirical research, however, to determine the most beneficial ways to reach out to communities in conflict-affected societies. The assumption is that developing a proactive public information and outreach effort is sufficient to improve public awareness and knowledge; however, this may not be the case. In evaluating the International Criminal Court (ICC)’s outreach activities, Vinck and Pham find that reliance on popular mass media, such as radio and newspaper in Sub-Saharan Africa, can reach large segments of the population. They find that it is insufficient, however, as key victim groups such as women are often information poor and do not have access to media. Their sources of information are interpersonal communication channels. Thus outreach
must also be local and strategies need to be developed and invested in to target hard-to-reach populations (Vinck and Pham, 2010).

21. In recent years, outreach activities have expanded beyond the aims of promoting transparency and awareness to include engagement and participation of affected communities. The structure of the Extraordinary Chambers in the Courts of Cambodia (ECCC) includes victim participation, whereby victims can not only appear as witnesses but can also file complaints as civil parties and be represented by civil party lawyers in court proceedings. This innovation has been followed by the ICC (Lambourne, 2010). Outreach of the ICC seeks to increase not only support for the activities of the Court but also participation in them (Vinck and Pham, 2010). Such participation could contribute to greater local ownership and legitimacy of transitional justice institutions and measures.

22. Outreach activities should also extend to future generations in order to have a longer-term effect. Cole argues that transitional models and outreach must pay far greater attention to history education and the incorporation of the findings of transitional justice mechanisms in educational curricula (Cole, 2007). This has happened in very few countries. In South Africa, the Truth and Reconciliation Commission produced a complex and difficult to digest seven-volume report which was not accessible to the majority of the population. The Commission did not have any strategy to provide appropriate materials that could be used to teach about the Commission and its work in schools. In contrast, in Guatemala, the Commission for Historical Clarification (CEH) produced accessible copies of its conclusions and recommendations to be printed in newspapers and placed in public libraries. School programmes have begun to incorporate teachings of the CEH findings (Cole, 2007; Chapman, 2009).

Capacity Building and Rule of Law

23. Transitional justice mechanisms ideally should contribute to domestic rule of law. Fletcher et al. find that the strength of the rule of law in a country is strongly linked to the ability of a country to ‘chart an autonomous path of transition’ (Fletcher et al., 2009, p. 212). It is thus important that the mechanisms and processes involved in transitional justice ‘do not exist in a vacuum, but are an integral part of the reconstruction and consolidation of the rule of law’ (AIV and CAVV, 2009, p. 30). It is essential that internationally-sponsored efforts to conduct criminal trials are linked to efforts to strengthen domestic rule of law (Fletcher et al, 2009).

24. Transitional justice mechanisms related to criminal justice depend significantly on the national or local justice system, which is often weak and defective particularly in fragile and conflict-affected states. There is a tendency to have national trials designed and staffed by international actors in order to address this capacity gap. In Bosnia and Herzegovina, for example, the local judiciary felt that their expertise was neglected. Even in the case of hybrid tribunals (such as in Sierra Leone,
Cambodia and East Timor) that lend themselves to capacity building and knowledge transfer, experience has shown that capacity building has been limited due in part to conflicts of interest. It is necessary for international actors to take specific additional measures to strengthen local capacity (AIV and CAVV, 2009). In Rwanda, thousands of lawyers have been trained over the past decade and have been able to replace foreign lawyers involved in genocide trials (AIV and CAVV, 2009). This can be an important component not only of capacity building but also of outreach (Peskin, cited in Lambourne, 2010).

25. At the same time, however, domestic prosecutions in Rwanda (which were supported with international funding) were undermined due to inadequate due process protections, politicisation and poor detention conditions (van Zyl, 2005). This was due in part to insufficient resources. In addition, after a period of sustained human rights violations, populations are often unwilling to accept the idea that suspects also have rights. Aside from building up a physical and knowledge infrastructure, transitional justice mechanisms can specifically help to establish a culture of human rights. Communication strategies are essential here (AIV and CAVV, 2009).

**Appropriate Timing**

26. Transitional justice measures are often designed and implemented hastily in the immediate aftermath of violence. Fletcher et al. find that countries which experienced international transitional justice interventions in the immediate post-conflict phase demonstrate mixed results in terms of internal political stability and support; whereas countries that were self-reliant and proceeded with transitional justice slowly benefited with greater internal political stability and support (Fletcher et al., 2009).

27. The study also finds that all countries examined modified their original transitional justice responses after a moderate period of time in order to better satisfy the needs of victims. This demonstrates that state responses to mass violence are dynamic rather than static. ‘This leads us to consider the importance of time and the need to support opportunities for evolutionary change in how countries confront the past’ (Fletcher et al., 2009, p. 216). It is thus beneficial to view transitional justice as an ongoing process of transformation.

28. In Cambodia, for example, dramatic changes have taken place that resulted in the initiation of criminal prosecutions of the Khmer Rouge in the past decade. Allowing too much time to pass, however, can be problematic as there are now only a few people who can still be prosecuted and evidence is much more difficult to produce (AIV and CAVV, 2009).
Combination of Mechanisms

29. In order for transitional justice to be effective, ‘a combination of different mechanisms is required, enabling a comprehensive approach that may evolve over time’ (Ramji-Nogales, 2010, p. 60; see also AIV and CAVV, 2009). A range of mechanisms allows for approaches that are more innovative and more likely to satisfy various dimensions together. For example, some mechanisms may be more ideal for issues of procedural fairness, while others may resonate more with local populations (Ramji-Nogales, 2010).

30. Olsen et al. argue that single mechanisms should not be promoted. They find that there is an important interaction between trials, amnesties and truth commissions that allows for better human rights and democracy outcomes. Even where countries initially opt for amnesties, successor regimes can subsequently initiate trials (‘delayed justice’). The combination of partial amnesties and some human rights trials can also be effective (Olsen et al., 2010).

31. The adoption of multiple mechanisms may also be problematic, however, as their roles may become confused or even at odds with each other. In Sierra Leone, for example, some perpetrators did not tell the truth at the Truth and Reconciliation Commission as they were concerned that they would face prosecution at the Special Court for Sierra Leone, which was operating at the same time (Ramji-Nogales, 2010).

Empirical Research

32. Reliable empirical evidence of the state-level impacts of transitional justice is limited and still in the early stages. Many early findings are questionable or contradictory and thus cannot provide useful guidance to policymakers for making sound decisions (Thoms et al., 2010). Studies to date are limited in various ways: they focus on a single region or on a single mechanism; they do not examine microlevel engagement; and they do not engage in longitudinal studies. Thus, it is difficult to determine the dynamic effects of different types of processes over time and to accurately assess differences in outcomes across countries (Backer, 2009).

33. In the absence of clear and robust evidence, policy choices usually reflect popular appeal or conventional ‘wisdom’; for example, the use of a truth commission is often an automatic policy choice without regard to specific context and to other policy options (Cuevas and Rojas, 2009).

34. In order to improve decision-making and the effectiveness of policy choices, it is essential to conduct careful, sustained and cross-national analysis of the transitional justice record (Thoms et al., 2010). The dynamic interactions of key factors that affect societal responses to transitional justice also need to be examined over time (Fletcher et al., 2009). ‘By uncovering the conditions under which specific transitional justice mechanisms are most likely to have desired effects on transitional
societies, careful research can produce more policy-relevant knowledge than that provided by broad cross-national generalisations’ (Thoms et al., 2010, p. 354).

35. In order to engage in such research, there needs to be more systematic or regular sharing of data and survey design among transitional justice researchers. Collaboration between researchers and civil society groups would also allow for a participatory research approach that would give local community advocates a voice in the design and implementation of research. This would result in studies that are responsive to community needs and that help to develop the research capacity of local organisations (Cuevas and Rojas, 2009).

Resources


http://ijtj.oxfordjournals.org/content/2/2/152.abstract


http://ijtj.oxfordjournals.org/content/1/1/115.abstract

http://www.ictj.org/static/Publications/Dev_CivilSociety_Full.pdf

http://ijtj.oxfordjournals.org/content/3/2/183.abstract


http://www.allacademic.com/meta/p_mla_apa_research_citation/4/1/4/7/7/p414779_index.html?php sessid=c9d2c0656af7d55e9ce4975fd6bf24b0314

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http://students.law.umich.edu/mjil/article-pdfs/v32n1-ramji.pdf

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http://ijtj.oxfordjournals.org/content/4/3/421.abstract

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