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Résumé/Abstract (300-500 mots/words) :

This policy paper

1. gives a short overview of the concept of transitional justice and associated institutions;
2. outlines some of the relevant shortcomings and common points of criticism *vis-à-vis* institutions related to transitional justice;
3. discusses the potential usefulness of information technology in the context of transitional justice.

The paper concludes that introducing insights from and practices developed in the field of cyberjustice into the area of transitional justice has considerable potential, notably with respect to rendering transitional justice institutions more efficient, accessible and intelligible. The brief also identifies several limitations to the use of information technology in the context of transitional justice.

Cyberjustice in the Context of Transitional Justice

1. Overview of the concept of transitional justice

"Transitional justice" has become a popular term and a large interdisciplinary field, especially since the 1990s and the establishment of the first international criminal tribunals since the post-World War II Nuremberg and Tokyo tribunals. The concept "transitional justice" is usually employed in the context of periods of transition from totalitarian or authoritarian regimes to more democratic regimes[1] and in the aftermath of armed conflicts. It is used to denote several forms of "justice" and a number of different judicial and non-judicial mechanisms that attempt to achieve various goals.

As discussed in a 2004 report of the United Nations Secretary-General, the notion of transitional justice

> 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.[2]

Most often, transitional justice is associated with the establishment of institutions dealing with massive or systematic violence. These institutions include

- international criminal tribunals, i.e. the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC);
- internationalized or hybrid criminal tribunals, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC);
- truth and reconciliation commissions (TRC), such as the TRC in South Africa established to ensure the transition from the Apartheid regime to democracy as well as the TRCs in Latin America dealing with political crimes committed during the military regimes.

Other transitional justice mechanisms include

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[1] By way of example, in her seminal book *Transitional Justice*, Ruti Teitel aims to "explore the role of the law in periods of radical political transformation." Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 4.

[2] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc. S/2004/616 (23 August 2004) at para 8.

- criminal trials before already existing domestic tribunals;
- traditional justice and reconciliation mechanisms, such as *mato oput* in Uganda or the *Gacaca* courts in Rwanda;
- amnesty programs;
- reparations for victims;
- public apologies and commemoration provisions;
- institutional reforms, especially of the military, police, and judiciary.

These mechanisms are not mutually exclusive but rather complement each other. This means that several mechanisms may be used in the same situation of transition. In Rwanda, for instance, the ICTR, national criminal courts and *Gacaca* courts have all dealt with individual accountability for crimes committed during the genocide; in Sierra Leone, an internationalized criminal tribunal and a TRC worked in parallel. Since only a few persons allegedly most responsible for genocide, crimes against humanity or war crimes can be tried before international and internationalized criminal tribunals, mid- and lower-level perpetrators are usually tried at the national level or are offered an amnesty and are re-integrated into society. In several situations, like in South Africa, amnesty is not granted unconditionally but tied to full disclosure of the political crimes committed by the individual in question. In addition to the question of individual accountability, the collective responsibility for the systemic dimension of large-scale abuses may be addressed to some extent via public apologies, reparation programs for victims and institutional reforms.

The goals of transitional justice mechanisms vary and overlap. The most common goals are:

- ending impunity and providing accountability for past crimes, especially grave violations of human rights law and international humanitarian law;
- deterring future atrocities;
- revealing the truth;
- bringing about reconciliation;
- offering reparations; and
- promoting peace and democracy.

Each society in transition has dealt and deals with past, and possibly present, forms of violence and injustice in different ways. The respective goals have to be balanced, and different mechanisms to achieve them can be envisaged. The society in question is, in principle, free to choose which mechanism or mechanisms are considered appropriate. The situation may, however, be different when it comes to international crimes, such as crimes against humanity and genocide. In this case, states have an obligation, under international law, to hold the most responsible individuals accountable. Numerous authors have analyzed at length the general prohibition on amnesties for the gravest crimes and the obligation to deal with and ensure accountability for serious violations of international humanitarian law and international human

rights law.[3] In a few words, granting blanket amnesties, especially for genocide, crimes against humanity, and war crimes, has become less and less acceptable from a legal perspective, and it can be argued that such amnesties, without providing for any form of individual accountability or truth-telling, have been outlawed by the international legal community. Although amnesties are, in general, still permissible under international law, the establishment of the ICC and the decisions of regional human rights courts suggest, as it has been argued, that "a prohibition against the grant of blanket amnesties for the commission of *jus cogens* crimes may now have crystallized as a matter of general customary international law".[4]

2. Shortcomings and points of criticism *vis-à-vis* transitional justice-related institutions

Transitional justice institutions, particularly criminal tribunals, are often criticized for providing one-sided justice. Similar as in the case of the post-World War II tribunals in Nuremberg and Tokyo that were installed by the Allied powers to prosecute and punish the vanquished war criminals, the ICTR, for instance, has been criticized for trying only Hutu *génocidaires* and for ignoring the crimes committed by Tutsis.

Nevertheless, it can be said that the establishment of transitional justice institutions usually generates much hope. Whether it is the trial of one or a few criminal leaders before an international tribunal, or the work of a commission collecting victims' testimonies, such institutional responses are often expected to solve numerous, deep-rooted problems and bring about lasting change. Because of limited mandates and resources, such high hopes may cause great disillusionment. International criminal tribunals, for instance, are very costly but do not contribute to improving the economic situation on the ground. In other words, uncompensated victims do not necessarily feel to be "better off" after lengthy high-level trials that many will, in the end, perceive as a waste of money.

In addition to these inherent but often raised limitations of transitional justice institutions, the field is characterized by important binary debates impeding the development of more constructive and original approaches as well as by a marked tendency towards overly technical responses.

Binary debates

[3] See e.g. Diane Orentlicher, "Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime" (1990) 100 Yale LJ 2537; Michael P Scharf, "The Letter of the Law: The Scope of the International Obligation to Prosecute Human Rights Crimes" (1996) 59 Law & Contemp Probs 41; Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) 14 EJIL 481.
[4] Leila Nadya Sadat, "Exile, Amnesty and International Law" (2006) 81 Notre Dame L Rev 955 at 1022.

Transitional justice implies balancing several goods and goals, which are often perceived as competing with each other, and not as complementarity. The result is a common tendency toward unhelpful binary debates:

- peace versus justice;
- retributive justice versus restorative justice and forgiveness;
- reconciliation versus punishment;
- remembering versus forgetting;
- individual versus collective justice;
- perpetrator- versus victim-centered approaches, etc.

The "peace versus justice" debate, for instance, has often been presented through a somewhat oversimplified dichotomy. The distinction between emphasizing justice, which is associated with the promotion of human rights, and emphasizing peace, which is primarily linked to conflict resolution, is noticeable both in the academic literature and in the different approaches of practitioners and civil society organizations working in conflict situations. Here, peace and justice appear as competing, and not as complementary, goods. Should the international community attempt to try the Sudanese President Omar al-Bashir, or the Syrian President Bashar al-Assad, before the International Criminal Court, or does this outlook prolong the respective conflict? Should they be offered an amnesty so that peace is given a better chance? As Payam Akhavan has argued, this dichotomy is "embodied in the caricatures of the naïve 'judicial romantic' who blindly pursues justice and the cynical 'political realist' who seeks peace by appeasing the powerful".[5] The reality is, of course, more complex and requires more nuanced analysis.

Overly technical responses: the top-down toolkit approach to transitional justice

The common emphasis on technical institutional responses in the field of transitional justice has tended to standardize mechanisms and processes, thus overlooking particular needs and obstructing the development of original responses. As Phil Clark and Nicola Palmer write in a recently published volume, "[t]he toolkit approach to transitional justice begins with institutions and appears to work backwards through questions of needs and objectives."[6]

Moreover, in the transitional justice literature, advocacy and analysis are not always easily distinguishable. Slogans like "no peace without justice", promoted by prominent human rights organizations, do not necessarily contribute to pursuing an unbiased analysis of particular situations and of the kind of peace and the kind of justice for which a particular society in

[5] Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism" (2009) 31 Hum Rts Q 624 at 625.
[6] Phil Clark & Nicola Palmer, "Challenging Transitional Justice" in Nicola Palmer, Phil Clark & Danielle Granville, eds, *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia, 2012) 1 at 6.

transition longs. Establishing an internationalized criminal tribunal to try those allegedly most responsible for the crimes committed or prosecuting a handful of political and military leaders before the ICC may have a positive impact. However, the belief that such institutional responses may resolve a large-scale crisis on their own and bring about peace is an illusion.

With the domestic political and legal order being deficient or contested, the call for particular institutional responses, such as an involvement of the ICC, often comes from the so-called international community, and not necessarily from the communities immediately concerned. Some transitional justice institutions have, therefore, been criticized as a new form of imperialism. This problem is particularly visible in the case of the ICC. Here, one of the main points of criticism concerns the fact that all situations that have, so far, been brought before the ICC stem from African countries. It is true that a multilateral treaty founded the ICC, which means that its jurisdiction is largely dependent on the consent of states.[7] Despite their initial support for the ICC – its statute has been ratified by roughly two-thirds of all states, including the majority of African states – many states now criticize the ICC, notably for the fact that only crimes committed on African soil have so far been investigated and prosecuted. This has fuelled an intense debate over the usefulness and appropriateness to involve the ICC in such situations. In this debate, internationalized criminal trials, and criminal trials more generally, are sometimes condemned as a "Western" invention, or even a "Western" conspiracy that lacks concern for local needs and does not create local ownership. Transitional justice may thus appear as a top-down or outsiders' construction of justice processes, quite contrary to bottom-up, community-based mechanisms.

It should also be noted that none of the objectives associated with transitional justice institutions named above are universally accepted and cherished goods. By way of example, "truth" may mean different things in different places over time, and the temporality of truth and memories are not necessarily linear or perfectly rational. Testifying before a TRC, whether in South Africa concerning political crimes committed during the Apartheid regime or in Canada regarding experiences of abuse in the Indian residential schools, may have a therapeutic effect for victims and encourage the feeling that the crimes of the past will not be forgotten or repeated. At the same time, such "truth-telling" may re-traumatize victims, who will, moreover, not gain any particular benefits, such as monetary reparations, from the proceedings. Uncovering the truth may be a first step towards reconciliation, but reconciliation may also become more difficult precisely because of a truth-claiming process compiling countless narratives and counter-narratives. Finally, testifying may also put at risk the personal security of witnesses, especially in situations of political instability.

[7] The only exception is a decision of the United Nations Security Council under Chapter VII of the UN Charter, which may trigger ICC jurisdiction over a specific situation even if the state in question has not accepted the ICC's jurisdiction.

3. Using information technology in the context of transitional justice

Although transitional justice is still an emerging field, much literature has already been devoted to theorizing its concepts and assessing the usefulness, limits, and practical implications of transitional justice-related institutions. However, no serious efforts have been made to apply concepts and practices related to "cyberjustice" to transitional justice. This section suggests possible ways in which information technology could mitigate some of the shortcomings of transitional justice institutions cited above and facilitate transitional justice processes.

Information-sharing

As noted above, the almost regular use of transitional justice mechanisms in the context of political transformation or post-conflict situations is a fairly new phenomenon. Although every situation requires specific responses, sharing information among similar transitional justice institutions, and across different contexts, is important. International and internationalized criminal tribunals as well as truth and reconciliation commissions, despite different mandates, can and ought to learn from each other. In our increasingly networked world, both judicial and non-judicial mechanisms can be expected to resort more and more to electronic records and video conferences. In addition to electronic file storing and sharing, which already facilitates the access to relevant material, new technologies certainly have additional potential to facilitate the exchange of knowledge and best practices and thus to strengthen transitional justice mechanisms.

Cost-efficiency

Paying more attention to technological solutions in the context of transitional justice could also increase the cost-efficiency of the institutions in question. Money is indeed a significant factor that may determine institutional responses to systematic or widespread violence. Consider that the ICTY and ICTR, for instance, have each spent close to 2 billion USD since their creation in 1993 and 1994, respectively. This enormous amount of resources is one of the reasons why no international criminal tribunal – but rather hybrid tribunals like the Special Court for Sierra Leone – has been created since then to deal with a specific situation.

The fact that the ICTY is located in The Hague, Netherlands, and the ICTR in Arusha, Tanzania, increased the financial onus. The situation is similar in the case of the ICC, which is located in The Hague, whereas all situations currently before the ICC originate from African countries. This means that not only the tribunals' staff, but also indictees, witnesses and experts must travel to the seat of the tribunal, which is not easily accessible from the respective conflict region. Of course, establishing a tribunal and conducting the proceedings primarily in a "neutral" location, possibly at a significant distance from the conflict region, may be advisable in politically unstable situations; the drawback is that the proceedings before such tribunals are, compared to domestic trials, very long and costly, and are therefore in particular need of optimization. Obtaining

witness and expert statements via video-link, for instance, would significantly reduce the costs related to travel and possibly contribute to expediting the usually lengthy trials before the tribunals. Improved information technology and its careful integration into the procedure can also be expected to help reduce the risk that the rights of the accused, for instance because of the inability of the defence to "directly" cross-examine witnesses, are hindered, or perceived as being hindered. So far, the tribunals have made only very restrictive use of video-link for testimonies.[8] By way of example, although the Rules of Procedure and Evidence of the ICTY state that proceedings may be "conducted by way of video-conference link" (Rule 81 *bis*), the judges have identified several criteria that must be assessed whether to allow testimony via video-link, including whether the witness is unable, or has good reasons to be unwilling, to come to the tribunal.[9]

Access, participation, outreach

Information technology represents additional opportunities in the context of transitional justice with respect to access, participation, and outreach. Many transitional justice institutions, in particular the international criminal tribunals, have been severely criticized for not being sensitive to local needs and concerns. In a few words, the institutions themselves have done little, or not enough, to explain their mandate and objectives to a broader audience. Moreover, the local population, especially from remote areas, has often not been able to participate in the proceedings and have only had a vague idea of the institutions' mandate and work. The result is the creation of wrong or exaggerated expectations and a diminished capacity of the respective institution to have a positive impact on the society in transition.

New technologies may therefore play an important role in increasing access to transitional justice institutions and in facilitating communication between the institutions and their constituencies. Especially communities with low literacy rates may benefit from visual – ideally live – representation of proceedings held in other areas. Moreover, it should be borne in mind that even if an armed conflict has ended and a society is already "in transition", security may still be a major concern. Along with destroyed or not maintained road infrastructure, this factor may diminish the capacity of transitional justice institutions to effectively reach out to many local communities. While costly and not easy to install in remote villages, information technology could, at least in some situations, improve the situation. Ideally, this technology should not only be used to increase the flow of information in a unidirectional manner, i.e. from the institution to the local communities, but to facilitate dialogical communication. Enabling local communities to

[8] See e.g. Michael G. Karnavas, "Gathering Evidence in International Criminal Trials: The View of the Defence Lawyer" in Michael Bohlander, ed, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 75 at 144.

[9] For a recent decision applying these criteria, see *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Accused's Second Motion for Video Link Testimony for Čedomir Kljajić (30 May 2013) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para 5.

provide meaningful input is important and can be expected to contribute to enhancing local ownership over transitional justice mechanisms.

At the same time, new tools can and should not be applied without due concern for and understanding of the specific context. Socio-historical aspects are particularly important in the context of transitional justice; symbols and rituals play a central role. It is, for instance, virtually impossible to conceive adequate forms of reparation or compensation to victims in the aftermath of massive violence. This means that the symbolic value of trials, TRCs, public apologies and other mechanisms increases in importance. The *Gacaca* courts in Rwanda, for instance, a traditional form of resolving local village disputes, were remodelled after the genocide to try low-level perpetrators within their community. One of the ideas behind using the *Gacaca* courts system to deal with the genocide was to allow direct confrontation and, at the same time, to promote reconciliation. It is hard to imagine how modern information technology could have had any positive impact in this process.

In other words, a technocratic toolkit approach that imposes – or is perceived as imposing – certain mechanisms and methods can do more harm than good. By way of example, an increased computerization of the proceedings, that may appear useful and cost-efficient from an institutional design perspective, may contribute to alienating the primary constituency of the transitional justice mechanism in question. A TRC, for instance, will have difficulty establishing its credibility in a region without having held local hearings, with at least some of the commissioners being physically present. In many instances, it is the immediate and very personal involvement of victims, perpetrators and authoritative figures, such as judges, religious leaders, or village elders, that lays the groundwork for reconciliation, which will eventually allow those concerned to "move on".

Towards new transitional justice mechanisms?

Finally, information technology may contribute to imagining new transitional justice mechanisms. The typically centralized, somewhat elitist and hierarchical structure of tribunals and commissions has many obvious disadvantages. True reconciliation, for instance, will often have to transpire at the inter-personal and very local level, something that big institutions established in the capital or in The Hague will hardly be able to generate. These institutions are, moreover, not always able to deal with different local grievances; simple, community-based mechanisms may be much more effective in this regard.

It would, therefore, be useful to encourage decentralized, bottom-up approaches that give a greater voice to grassroots organizations, even in the planning phase of a particular mechanism. The result may be a more collective, and collectively-owned, perhaps even continuously evolving process, exactly what may be needed to deal with situations of massive trauma. The use of information technology may not only facilitate communication between and among the

communities involved; it may also contribute to developing a feeling of interconnectedness, to promoting social cohesion and to (re-)building a feeling of national unity.

Imagining new transitional justice mechanisms should be done with an important *caveat*: it would not be sensible to attempt to first conceive new mechanisms and then to find an application for them. Rather, the specific conditions, traditions and needs of a specific community should drive the use and creative development of such mechanisms. Already existing community-based dispute resolution mechanisms and other traditional forms of providing justice could be integrated. Ideally, this would lead to customized institutional responses, to be shared with but not imposed on other communities.

It seems obvious that using information technology to facilitate the establishment and operation of transitional justice institutions will be less complicated and more easily acceptable for the community in question if computers and the internet are not an entirely new phenomenon associated with strangers and a foreign lifestyle. However, even if village elders – to evoke an admittedly clichéd image – may not immediately recognize the usefulness of new technology and new methods of dispute resolution, it should also be highlighted that traditional mechanisms have evolved and changed over time. They can adapt, and they can also be integrated into new processes, of course always with the required attention to the respective beliefs, needs, and demands. The result will largely depend on the intensity and carefulness of such cooperative efforts, and on the capacity and willingness of the actors involved – the communities directly concerned, state authorities, and foreign experts and donors – to understand each other.

Conclusion

In sum, introducing insights and practices developed in the field of cyberjustice into the transitional justice debate has considerable potential. Above all, the use of information technology may be extremely useful and represent important opportunities, notably with respect to the optimization of existing transitional justice mechanisms and the development of new ones. However, cyberjustice initiatives may also entrench the already common "toolkit approach" in the field of transitional justice and contribute to further alienating the communities immediately concerned. Such initiatives may be met with particular suspicion in communities having little experience with computers and the internet.

Another aspect should be kept in mind: transitional justice is highly context-specific. Every period of transition is different and requires tailored responses. This does not mean that one society in transition cannot learn from the successes and failures in other situations; lessons learnt and best practices can and ought to be shared. However, there can be no one-size-fits-all approaches.