RESPONSES

Dealing with harm after COVID-19: what potential of transitional justice?

*Stephan Parmentier**

In their Notes from the Field, Ian Marder and Meredith Rossner provide a brief yet interesting overview of how quickly restorative justice practitioners have adapted themselves and their practices to the restrictions resulting from the COVID-19 pandemic in various parts of the world. In essence, they sketch two main strategies that have been adopted: first, shifting to the virtual world to continue offering restorative justice services of various kinds and to overcome these limitations by exploiting several virtual tools; and, secondly, creating new virtual support systems for persons and communities, at work, in the neighbourhood, the family, etc.

In the final part of their contribution, they draw attention to 'a growing call for a restorative approach to deal with the traumas COVID-19 has wrought'. They refer to pleas for truth and reconciliation mechanisms in Northern Italy, including community circles and other forms of dialogue allowing individuals to share their traumatic experiences during COVID-19 times and offer some form of reparation. They mention that some in the United States advocate for restorative justice approaches at the intersection of individual grief, institutional racism and police violence. While the language of their last part is clearly inspired by the language of transitional justice, they do not elaborate in more detail. Inspired by Ian's and Meredith's headlines, I intend to further unravel the various components of the transitional justice field, with the aim of exploring some fruitful approaches in the aftermath of COVID-19. After going back to the conceptual origins of transitional justice, I highlight the main mechanisms employed and focus on their potential for restorative justice as related to this unprecedented pandemic.

1 The concept of transitional justice

It should be noted that the term 'transitional justice' emerged in the early 1990s, in the aftermath of several international seminars and conferences that focused on the 'political transitions' from authoritarianism to democracy during the preceding decade. Several dictatorships in Central and Latin America (including Guatemala and Argentina) had been replaced, and the implosion of the

* Stephan Parmentier is a Professor of Sociology of Law, Crime and Human Rights at the Faculty of Law, KU Leuven, Belgium.
Contact author: stephan.parmentier@kuleuven.be.

Stephan Parmentier

communist regimes in Central and Eastern Europe was still fresh, not to mention the internal wars that still raged through the territories of ex-Yugoslavia. Just a few years later, South Africa organised its first democratic elections after four decades of apartheid, and in the same period Rwanda witnessed a vast genocide against its Tutsi minority (Arthur, 2009). As political and social realities were rapidly changing after many decades of the Cold War, there was a pressing need for a new language to understand these developments intellectually and to address their consequences through policy and practice.

'Transitional justice' became the catchword of a three-volume book project published in 1995, and containing numerous country studies of political transitions from authoritarian regimes to some form of democracy (Kritz, 1995; Siegel, 1998; Teitel, 2003; Zunino, 2019). Less than a decade later, the concept expanded significantly to include transitions from war and violent conflict to some kind of peace and stability. This was the result of an innovative United Nations policy report, which defined transitional justice in broader terms as

> 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.[1]

This definition proved wide enough to encompass transitional justice debates and mechanisms during ongoing violent conflicts (like the one in Colombia at the time) and relating to human rights violations in mature democracies (like the residential schools in Canada and Australia). Regional organisations such as the European Union and the African Union have since adopted policy documents that use very similar understandings of transitional justice.

Transitional justice was clearly conceived to address forms of authoritarianism, violent conflicts and other large-scale human rights abuses committed for political reasons by one or more offenders or perpetrators. These conditions seem quite different in the context of COVID-19, in the absence of specific perpetrators and their political motivations. Yet there is also a powerful red thread between these two contexts, namely the harm that was inflicted on individuals and communities, which results in multiple experiences of victimisation and a variety of attitudes to overcome the consequences. In our own empirical research in post-war Bosnia and Serbia, we identified at least three major components of harm that often operate simultaneously: physical, material and emotional harm (Jones, Parmentier & Weitekamp, 2012). They pertain to both direct and indirect victims (like partners, parents, children, neighbours, colleagues and the community at large). In the case of COVID-19, these three components are easily identified: the physical implications of being infected by the virus, being hospitalised, being taken to intensive care, recovering, or – in the

---

1   The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2004/616, para. 8; definition confirmed in: The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2011/634.

worst case – passing away (and all acts to avoid these situations); the logistical and financial consequences of infections, illness, recovery and death; and the feelings of anxiety, hope, despair, anger, trust, etc, which may result in traumatic experiences and complexes. For all these reasons, it is worthwhile to look at COVID-19 through the lens of transitional justice and explore its potential for restorative justice.

2 Mechanisms of transitional justice and their potential in the aftermath of COVID-19

Next to the scope of transitional justice, it makes sense to pay some attention to the strategies, institutions and procedures that shape transitional justice policies and practices. Despite some differences in wording, there exists a large consensus in the scholarly literature and the real world alike that transitional justice encompasses the following four mechanisms (or 'pillars'): criminal prosecutions, truth commissions, victim reparation programmes and institutional reforms (Parmentier, 2016). I briefly highlight their main features and, because of our focus on restorative justice, limit myself to truth commissions and victim reparation programmes. This implies that other transitional justice mechanisms, such as national consultations and memory work, will not be discussed separately.

2.1 Truth (and reconciliation) commissions

In transitional justice studies, truth commissions constitute relatively novel mechanisms to deal with the legacy of the dark past. As mentioned elsewhere (Hayner, 2011: 11-12),[2] they generate facts and figures about the larger events and tendencies of the past and about the direct and indirect causes that led to the autocracy, the war and the human rights abuses. Always set up as temporary bodies, at the national or international level, their specific mandates result from complex political processes and sometimes heated debates. Their grand objective is to create some common ground in the transitional society in order to understand the past and construct a new future. For the latter purpose, they often formulate all kinds of recommendations for a variety of actors. It is therefore important that they receive sufficient support from state agencies, international, national and local: not only do state agencies provide the legal competences and the financial resources for the commissions, but they are also called to implement their recommendations.

Unlike courts and tribunals, truth commissions are non-judicial bodies, and they focus more on the experiences and expectations of the victims than on their perpetrators. While many truth commissions have an exclusive focus on truth-seeking, some of them also embark on the 'road to reconciliation'. In the latter case, they are often considered prime examples of restorative justice, although they seldom involve direct encounters between victims and perpetrators. Since

2   For contextual and long-term overviews, see i.a. Bakiner (2016) and Sarkin (2019).

Stephan Parmentier

the first such commission in Argentina (1983), more than 40 commissions have been set up in diverse countries and contexts.[3] The South African Truth and Reconciliation Commission of the late 1990s became well known for the ample space given to victims, the efforts to bring victims and perpetrators together and the public sessions and media broadcasts (Parmentier & Weitekamp, 2019).

In the context of COVID-19, one or more bodies similar to truth commissions could serve important purposes, at the local, national and international levels across many countries and regions seriously hit by the pandemic. Their mandates could be tailored to the specific features and circumstances of the pandemic. They could be asked to document facts and figures, record individual experiences and expectations of victims and stakeholders, reconstruct specific bottlenecks as well as root causes of the problems, and increase the common understanding about the pandemic. They could also be asked to issue recommendations of various types – individual and systemic, financial and non-financial, short-term and long-term. In order to get started properly and implement the recommendations appropriately, they would need sufficient support from the state organs. This is particularly true if they included a reconciliation aspect, which could lead to individual encounters between persons or agencies.

2.2 *Victim reparation programmes (including institutional reforms)*

Another major pillar of transitional justice consists of various programmes and schemes to try to repair (some of) the harm caused to victims of serious human rights violations and international crimes. The diversity of institutional and procedural formats fit the upcoming and worldwide trends in law and politics towards 'reparative justice' (Mani, 2002). Early examples were found in the extensive arrangements between those states that lost the First and Second World Wars and the victorious states, and some related to specific categories of war victims. Today, many legal instruments and policies in human rights law and criminal law have incorporated provisions about redress for victims, in the form of procedural remedies and substantive reparations.

In contrast to popular perceptions, victim reparations in transitional justice contexts encompass a much wider set of actions than just monetary compensations. Their broad scope was, for the first time, in 2005, clearly illustrated in a 'soft law' document of the United Nations, which is gradually being incorporated into binding legal instruments (including court judgments).[4] The Basic Principles and Guidelines (hereafter BPG) enumerate five main categories of victim reparations that can be grouped together under three major headings (Letschert & Parmentier, 2014):

---

3   For an extensive digital collection about truth commissions, see the website of the United States Institute for Peace (USIP): www.usip.org/publications/2011/03/truth-commission-digital-collection (last accessed 15 May 2021).
4   United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147. For an overview, see i.a.: De Greiff (2006), Ferstman and Goetz (2020), Shelton (2005).

a   material and other tangible measures that focus on, e.g. the restitution of goods and rights; financial compensation for several types of harm suffered; and specific medical, psychological and social services;

b   legal actions, including judicial investigations and sanctions for offenders who committed violations and crimes, victim participation in reparation programmes and criminal trials, and legislative and institutional reforms and human rights training in order to prevent future violations and crimes;[5]

c   symbolic measures, with the purpose of offering recognition of general and specific forms of victimisation, and including the disclosure of facts, the establishment of memorial days/memorials and public apologies.

When it comes to repairing the harm generated by COVID-19, most – if not all – of the reparation measures listed can also apply:

a   material measures could entail the restitution of personal and collective freedom to citizens and society at large; financial compensation for several costs incurred; and specific medical, psychological and social services;

b   symbolic measures could serve the main purpose of recognising many forms of victimisation during and after the pandemic, like a detailed account of facts and figures, establishing memorial days and other forms of memorialisation, and even public apologies from relevant agencies and persons;

c   legal actions hold the potential to deal with the aftermath of the pandemic and may include victims participating in designing reparation programmes, and legislative and institutional reforms to remedy systemic failures and prevent similar problems. In practice, it seems that judicial investigations and criminal sanctions for persons involved in offences during the pandemic (like serious negligence, fraudulent actions or even corrupted decisions) will be more difficult to consider from a restorative justice viewpoint. On the other hand, it should be recognised that certain problematic acts could give rise to civil proceedings under liability and tort law, with a view to repairing some harm for some victims.

3   The way forward

In the context of transitional justice, massive numbers of persons are confronted with serious human rights violations and international crimes, and, as a consequence, their harm tends to be very wide and very deep. Several authors have asserted that in such contexts all reparations are largely symbolic because they cannot repair the harm (Hamber, 2009). The same could be said about efforts to construct truth and undertake reconciliation. What they mean is that the past cannot be undone and that victims cannot be brought back to the situation before the authoritarianism, war and violent conflict started. The ultimate challenge therefore lies in addressing the consequences of the violations

---

5   Institutional reforms are often seen as part of victim reparations and sometimes considered a separate pillar of transitional justice.

and crimes and in seeking a 'new balance' for individuals, groups and society. On this difficult and winding road ahead, there is definitely room for restorative justice principles and restorative measures.

As suggested above, the transitional justice principles, policies and practices can also apply to the ongoing pandemic and post-pandemic times ahead of us. Obviously, the high death toll in many countries of the world cannot be undone, nor can the many difficulties that resulted from medical, social and material problems be turned back. The major challenge therefore lies in confronting this past, with the objective of understanding it and designing adequate reparations for some of the harm inflicted. If applied with honest concern and genuine care, these truth and reparation initiatives are likely to generate new insights and practices that are crucial for those countries and regions that still suffer from the pandemic at present, particularly many countries in the Global South.

References

Arthur, P. (2009). How 'transitions' reshaped human rights: a conceptual history of transitional justice. *Human Rights Quarterly*, 31(2), 321-367.

Bakiner, O. (2016). *Truth commissions: memory, power, and legitimacy*. Philadelphia: University of Pennsylvania Press.

De Greiff, P. (2006). *Handbook of reparations*. Oxford: Oxford University Press.

Ferstman, C. & Goetz, M. (eds.). (2020). *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (2nd revised ed.). Leyden: Brill Publishers.

Hamber, B. (2009). *Transforming societies after political violence: truth, reconciliation, and mental health*. Heidelberg: Springer.

Hayner, P. (2011). *Unspeakable truths: transitional justice and the challenge of truth commissions* (2nd ed.). London: Routledge.

Jones, N., Parmentier, S. & Weitekamp, E. (2012). Dealing with international crimes in post-war Bosnia: looking through the lens of the affected population. *European Journal of Criminology* (Special Issue on Atrocity Crimes and Transitional Justice), 9(5), 553-564.

Kritz, N. (ed.) (1995). *Transitional justice*. Washington: US Institute of Peace Press.

Letschert, R. & Parmentier, S. (2014). Repairing the impossible: victimological approaches to international crime. In I. Vanfraechem, A. Pemberton & F.M. Ndahinda (eds.), *Justice for victims: perspectives on rights, transition and reconciliation* (pp. 226-243). London: Routledge.

Mani, R. (2002). *Beyond retribution: seeking justice in the shadows of war*. Cambridge: Polity Press.

Parmentier, S. (2016). Transitional justice. In W.A. Schabas (ed.), *The Cambridge companion to international criminal law* (pp. 52-72). Cambridge: Cambridge University Press.

Parmentier, S. & Weitekamp, E. (2019). The truth and reconciliation commission in South Africa in perspective: origins and achievements. In M. Natarajan (ed.), *International crime and justice* (2nd ed) (pp. 439-444). Cambridge: Cambridge University Press.

Sarkin, J. (ed.) (2019). *The global impact and legacy of truth commissions* (Vol. 24, Series on Transitional Justice). Antwerp: Intersentia Publishers.

Shelton, D. (2005). The United Nations principles and guidelines on reparations: context and contents. In K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens (eds.), *Out of*

the ashes: reparation for victims of gross and systematic human rights violations (pp. 11-33). Antwerp: Intersentia Publishers.

Siegel, R.L. (1998). Transitional justice: a decade of debate and experience. *Human Rights Quarterly*, 20(2), 431-454.

Teitel, R.G. (2003). Transitional justice genealogy. *Harvard Human Rights Journal*, 16, 69-94.

Zunino, M. (2019). *Justice framed: a genealogy of transitional justice.* Cambridge: Cambridge University Press.