

# Introduction to Transitional Justice

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This pamphlet provides a very brief introduction to the concepts in transitional justice, framed in a manner most relevant to civil society organizations and activists in Sri Lanka.<sup>1</sup>

## What is “Transitional Justice”?

According to the United Nations (UN), “[t]ransitional justice 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.”<sup>2</sup>

A legacy of mass atrocities leaves devastating impacts on communities that can last long after an armed conflict ends. Transitional justice is meant to both look to the past to address the legacies of conflict and ideally address the root causes of the conflict, but also look forward, to restore rule of law, repair and strengthen key institutions such as police forces and state departments, and foster reconciliation. Transitional justice includes both judicial and non-judicial mechanisms.

The “four pillars” of transitional justice are:

- Right to Truth
- Criminal Justice
- Reparations
- Guarantees of Non-Recurrence

A successful transitional justice strategy must incorporate all four pillars.

## Understanding the Four Pillars of Transitional Justice

### **(I) Right to Truth**

According to the UN, the right to truth entitles victims of violations under international human rights and humanitarian law, and/or their families, to seek and obtain information regarding:

- Reasons why a person was victimized;
- Facts, circumstances and reasons around the commission of the violation;
- Progress and results of an investigation into the violation;
- Identity of the alleged perpetrators, including the chain of command and responsibility; and
- Fate and whereabouts of the victims, in the event of death, missing or enforced disappearances.<sup>3</sup>

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<sup>1</sup> This pamphlet was prepared by Dharsha Jegatheeswaran, Senior Researcher at the Adayaalam Centre for Policy Research, for use by the Tamil Civil Society Forum, in an initial workshop for activists participating in a learning tour of South Africa.

<sup>2</sup> “United Nations Approach to Transitional Justice” (March 2010), *Guidance Note of the Secretary-General*, accessed at: [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

Often times the right to truth is only associated with non-judicial bodies such as 'truth and reconciliation commissions' or in the Sri Lankan context for example, an 'Office on Missing Persons'. However, according to the UN, judicial procedures such as international criminal tribunals and national criminal judicial proceedings can also contribute to recognizing the right to truth. In addition, the UN recognizes the importance in maintaining archives of documentation and access to information in the implementation of the right to truth.<sup>4</sup>

## (2) Criminal Justice

Criminal prosecutions of perpetrators of international crimes, including genocide, crimes against humanity, and war crimes, are a critical component of transitional justice and the component that is often the most demanded by victim communities. For victims and their families, criminal prosecutions are often vital to their ability to move on from the horrific scars of an atrocity crime, and consider reconciliation.

Criminal prosecutions can also:

- Restore rule of law;
- Reinforce condemnation of atrocity crimes;
- Put an end to impunity;
- Aid in ensuring non-recurrence;
- Support vetting processes in security sector reform;
- Build a historical record to support truth and memory work; and
- Help a country come to terms with its past and build better state structures.

The most contentious part of criminal prosecutions are where they are going to be held and by whom they will be conducted, largely due to faith or lack thereof in the State. This pamphlet will not go into too much detail on this, but here are the three options currently considered:

- **International Criminal Court (ICC):** The ICC was established by the Rome Statute in 1988, and can try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and crimes of aggression.<sup>5</sup> The ICC can only exercise its jurisdiction: (a) where the crimes were committed by a State that has ratified the Rome Statute (Sri Lanka has not), or a national of such a state, or in such a state; (b) where a State that is not party to the Rome Statute has accepted the jurisdiction of the ICC;

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<sup>3</sup> "Promotion and Protection of Human Rights: Study on the Right to Truth" (8 February 2006), Office of the UN High Commission for Human Rights, accessed at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement>

<sup>4</sup> *Ibid.*

<sup>5</sup> "Understanding the International Criminal Court", International Criminal Court, accessed at: <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>.

OR (c) where the crimes were referred to the ICC Prosecutor by the United Nations Security Council<sup>6</sup>, which has only happened twice – with Sudan in 2005, and Libya in 2011.

- **Hybrid Court:** Hybrid courts are courts of mixed composition – containing both international and domestic aspects. Hybrid courts can fall along a spectrum, ranging from a court that is almost entirely international, to a court that is primarily domestic. The type of judicial mechanism which Sri Lanka committed to implementing in UN Resolution 30/1, is a hybrid court with a vague definition of where on the spectrum it would fall.
- **Domestic Court:** In certain instances, atrocity crimes are tried in domestic courts, but this requires a number of factors including political will to be present.

### (3) Guarantees of Non-Recurrence

Guarantees of non-recurrence are the steps a state must take to ensure that a history of mass atrocities does not repeat itself. This primarily is focused on reforms of institutions that may have had a role in atrocity crimes (such as the police, military and judiciary), and ensuring that state institutions conform to the rule of law and are democratically controlled.

Guarantees of non-recurrence also include measures to improve accountability of state institutions which may include: vetting military personnel, structural reform, greater civilian oversight of police, creating more accountable legal frameworks, disarmament, demobilization and reintegration of security forces, and education of state employees.<sup>7</sup>

### (4) Reparations

Reparations ARE NOT development programs, which citizens of a country are entitled to as citizens, not victims. Individual victims or communities that have been victimized by atrocity crimes are entitled to reparations as a result of the harms they have suffered. Reparations generally fall into one of the following categories:

- **Rehabilitation:** Assisting victims with coping with and moving past the violations they have been subject to, e.g. psycho-social counseling, legal services, etc.
- **Compensation:** Financial compensation to individuals or groups – note that this DOES NOT equal development programs which the state has an obligation to conduct for all of its citizens
- **Restitution:** Returning a victim to the state they were in before the violation occurred, e.g. returning a displaced person to their lands, releasing a political prisoner from jail, etc.

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<sup>6</sup> *Ibid.*

<sup>7</sup> International Centre for Transitional Justice Website, "Institutional Reform", accessed at: <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>

- **Memorials/Apologies:** Where the state makes symbolic gestures aimed at addressing the past in a meaningful way, and respect the dignity of victims, e.g. the State publicly apologizing for a pogrom

## **Conceptual Debates in Transitional Justice**

The above provides a very basic overview introduction to “transitional justice”. But equally important to be aware of, are the ongoing conceptual debates about transitional justice.

### **(1) Use of the word “transition”**

A common source of debate is whether a country is truly in a transition. For example, in Sri Lanka, while the language of transitional justice is being used, many Tamil civil society actors feel that there has not truly be a ‘transition’, since many of the same actors remain in power in government and in the military. On the other hand, some scholars have argued that it does not matter whether a country is truly in ‘transition’ or not, but rather that transitional justice can be seized upon in any moment where “an opportunity has emerged to address massive violations, even if it is a limited opportunity”.<sup>8</sup>

### **(2) “Official” vs “Unofficial”**

There are ongoing conversations around the world in transitional justice contexts about the role of civil society in conducting “unofficial” investigations into human rights violations, and the weight and credibility of such investigations. On one side of the debate, there are many who feel that the highly-specialized, technically trained and experienced experts that conduct UN or official investigations cannot be replaced. On the other side, many believe that CSO “unofficial” investigations often raise situations that may not be addressed otherwise, and should not be dismissed or discouraged.

### **(3) Sequencing**

Another contentious ongoing debate is in regards to how mechanisms under the four pillars should be “sequenced”, particularly in relation to parallel political processes that may be happening. Some scholars have framed the sequencing conversation as a peace versus justice debate, which often leads to prioritizing of political processes to secure peace while putting justice processes on hold. Other scholars have argued that peace and justice are inextricably linked, and should not be framed as an either/or. Either way, most scholars are in agreement that states must have a comprehensive strategy to deal with transitional justice, which contains a timeline of how they plan to implement measures under the four pillars.

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<sup>8</sup> International Centre for Transitional Justice Website, “About Transitional Justice”, accessed at: <https://www.ictj.org/about/transitional-justice>