

Understanding ‘Dealing with the Past’ and ‘Transitional Justice’

This pamphlet provides a brief introduction to the concepts in transitional justice and dealing with the past, framed in a manner most relevant to communities in Sri Lanka.¹

I. What is “Dealing with the Past” and why do conflict-affected countries need it?

‘Dealing with the past’ and ‘Transitional Justice’ are often used interchangeably to refer to what the United Nations calls “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.”²

The term ‘transitional justice’ has been critiqued as seeming too narrow, and implying a clear transition of governance, which is not the case in many conflict-affected countries. As such, DWP is the preferred term for a more holistic perspective on addressing issues in society that have risen out of conflict.

A legacy of mass atrocities leaves devastating impacts on communities that can last long after an armed conflict ends. DWP frameworks are 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. DWP includes both judicial and non-judicial mechanisms.

DWP is a channel towards building real and sustainable peace. DWP is a process that not only provides redress to victims but should also address the root of the abuses that took place during the war.

The incorporation of all four pillars for a successful DWP strategy reflects the need for a holistic approach towards justice in the post-war context – again, one that both looks to the past and is also forward looking. Further, DWP processes have the flexibility to be context specific. Such DWP processes are essential in addressing the abuses related to the conflict..

Criminal justice is often regarded as the most essential approach to justice seeking, however if

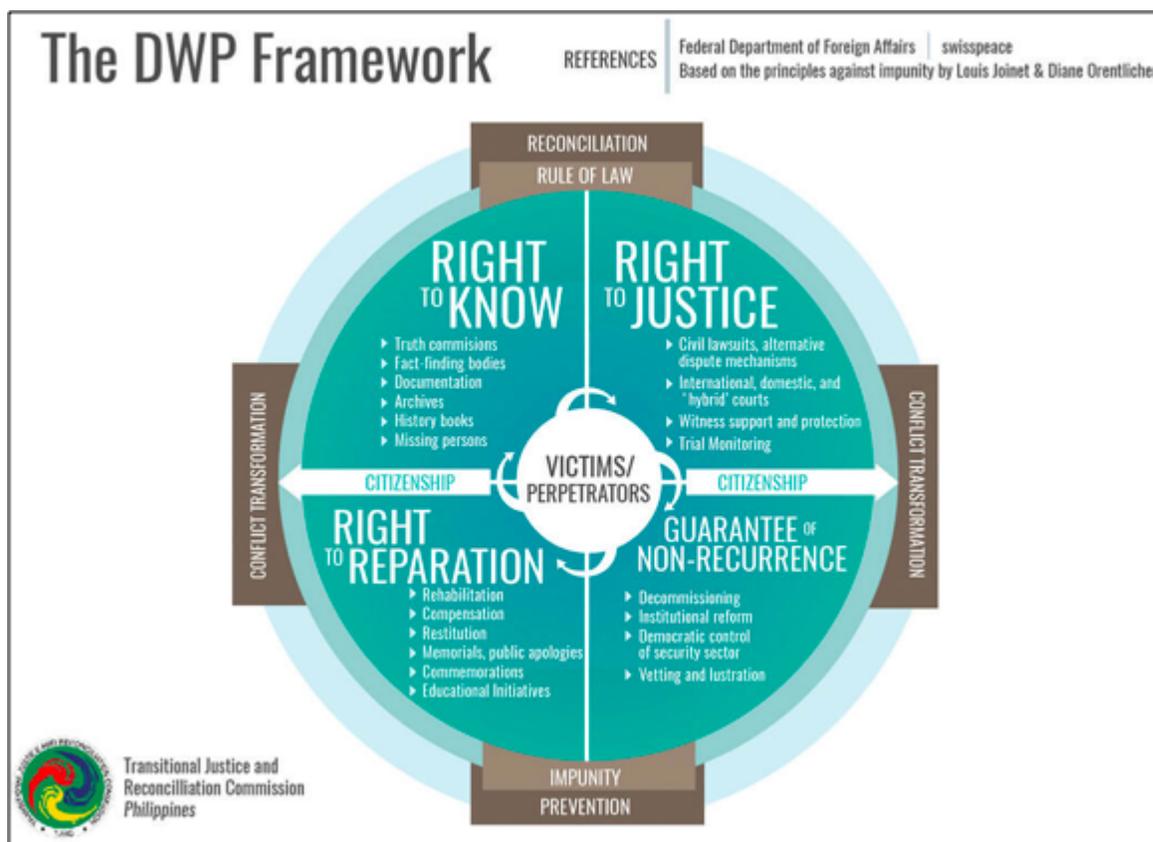
¹ This pamphlet was prepared by Dharsha Jegatheeswaran with research assistance from Kirthika Umasuthan, both of the Adayaalam Centre for Policy Research.

² “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>.

done in isolation, such an approach is not only unrealistic, but will also be ineffective at addressing massive human rights violations. For example, when massive wrongs such as genocide take place, the judiciary may not have the capacity to effectively prosecute such crimes due to issues such as the lack of resources and lack of power to act in the best interest of the public³.

The “four pillars” of DWP are:

- Right to Know
- Right to Justice
- Right to Reparation
- Guarantees of Non-Recurrence



³ “What is Transitional Justice” (20 February 2008), *United Nations*, accessed at: http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf.

II. Understanding the Four Pillars of DWP

(I) Right to Know

According to the UN, the right to know 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.⁴

Often times the right to know 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 know.⁵

In addition, the right to know includes activities such as fact-finding bodies, documentation, archiving and creating historical education books. Notably, many of these activities also touch on some of the other pillars of the DWP framework.

Many activities considered part of the right to know can be done ‘unofficially’, meaning by non-state, non-UN bodies. This is particularly relevant in contexts where official state-sponsored mechanisms have not commenced, or where there is a lack of political will to realize the ‘right to know’. In certain contexts, unofficial attempts to realize the right to know can actually place pressure on states and international bodies to commence official mechanisms.

Examples:

- *ND – Burma* - ND-Burma is a collaborative space for Human Rights Documentation for NGOs. The NGOs use Martus (a technology tool) to collect standardized data on human rights violations and then produce reports and engage in joint advocacy initiatives. It is an “unofficial” documentation project in Burma in anticipation of transition and in hope of influencing the government to commence a truth-seeking mechanism.

⁴ “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>>.

⁵ *Ibid.*

- *Syria Tracker* - Syria Tracker compiles citizen reports on human rights violations in Syria and maps them using Kenyan-based Ushahidi software. Over 4500 reports have been compiled and Syria Tracker hopes to provide details on the fatalities, and the name, location and details of each victim if an accountability mechanism is ever established for Syria.
- *Guatemalan Forensic Anthropology Foundation (FAFG)* - FAFG is a not-for-profit technical-scientific organization that “contributes to the strengthening of the justice system and to the respect for human rights through the investigation and documentation of historical violations.” The evidence FAFG uncovered in exhumations of a former military base helped put 8 top former military leaders on trial in Guatemala.

(2) Right to 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 comes 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.⁶ 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

⁶ “Understanding the International Criminal Court”, *International Criminal Court*, accessed at: <https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>.

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; OR (c) where the crimes were referred to the ICC Prosecutor by the United Nations Security Council⁷, which has only happened twice – with Sudan in 2005, and Libya in 2011.

E.g. Darfur, Sudan

The United Nations Security Council (UNSC) referred Darfur to the ICC in order to "investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable." Although Sudan is not a signatory to the Rome Statute, the ICC was given jurisdiction over crimes that appear in the Rome Statute through UNSC Resolution 1593 (2005). Sudan's President Omar Al Bashir was charged with crimes of genocide – however, he is not in the custody of the ICC.⁸

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.

E.g. Sierra Leone

The Special Court for Sierra Leone (SCSL) was initiated by the government of Sierra Leone, the United Nations and the international community after the signing of a peace agreement in May 2001. The court was of mixed jurisdiction and composition, and was also complemented by other activities such as educating the public on humanitarian law.⁹ However, there were several criticisms regarding the process in terms of impact, legitimacy, fairness and efficiency.¹⁰ For example, the court has had very little impact on citizens' everyday life because it is not seen as legitimate process to the local community and many local groups felt ignored in the consultation process leading to the establishment of the SCSL.¹¹

⁷ *Ibid.*

⁸ "Darfur, Sudan", International Criminal Court, accessed at: <https://www.icc-cpi.int/darfur>

⁹ Sesay, G. M. & Suma, M. (2009). *Transnational Justice and DDR: The Case of Sierra Leone*, p.5. Retrieved from <<https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf>>.

¹⁰ "The Special Court for Sierra Leone Under Scrutiny", <<http://hrlibrary.umn.edu/instreet/SCSL/Case-studies-ICTJ.pdf>>.

¹¹ Triponel, A. & Pearson, S. (2010). What do You Think Should Happen? Public Participation in Transitional Justice. *Pace International Law Review* 22(1), p.121. Retrieved from <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1026&context=pilr>>.

Domestic Court

In certain instances, atrocity crimes are tried in domestic courts, but this requires a number of factors including political will be to present.

E.g. Uganda

Following the peace talks in 2006 to 2008, between the Ugandan government and the Lord's Resistance Army (LRA), an agreement was reached in which it was determined that the government was to create institutions to address crimes committed during the war. In the context of prosecutions, the government set up a special division of the High Court – named International Crimes Division of the High Court. The special court has jurisdiction over genocide, crimes against humanity and war crimes, as well as international crimes such as human trafficking and piracy. However, the court faced barriers such as legislative inadequacy, gaps in law, inconsistencies between international and domestic law and impartiality. In reference to the final point, the court has yet to prosecute Ugandan defense forces for atrocities.¹²

(3) Guarantees of Non-Recurrence

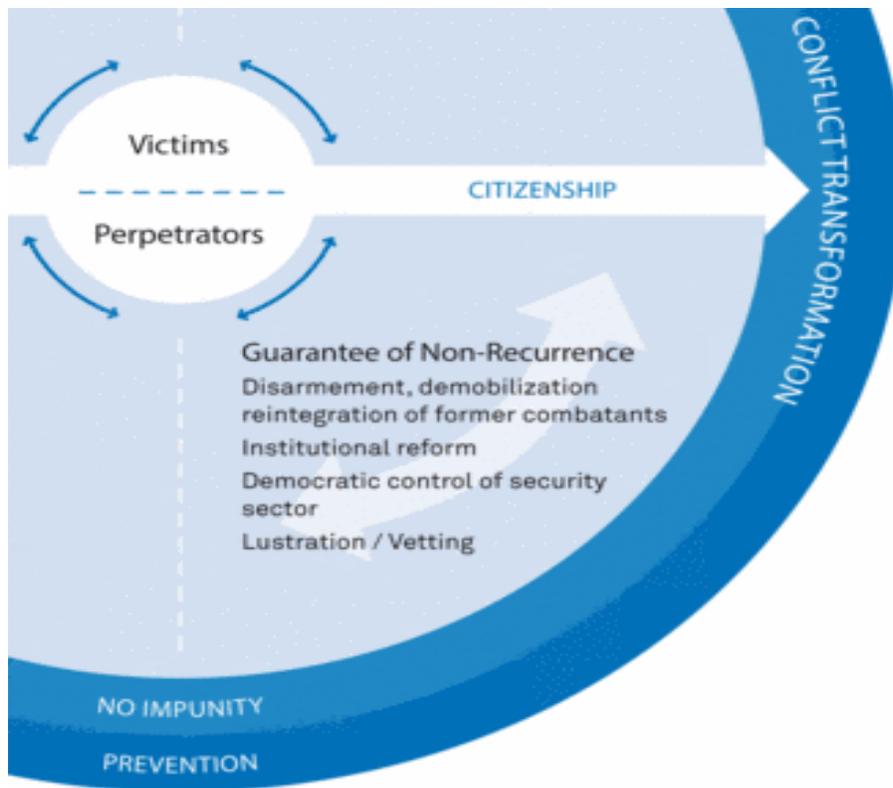
Guarantees of non-recurrence are the steps a state must take to ensure that a history of mass atrocities does not repeat itself. This primarily is focused on reforms of institutions that may have had a role in atrocity crimes (such as the police, military and judiciary), and ensuring that state institutions 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 and security forces, creating more accountable legal frameworks, disarmament, demobilization and reintegration of security forces/former combatants, and education of state employees.¹³

Also a critical part of non-recurrence and overlapping with the criminal justice pillar, is the removal of officials in state institutions that were culpable or had some role in mass atrocities committed.

¹² Kenyans for Peace With Truth and Justice, "Domestic Prosecution of International Crimes", accessed at <<https://www.africaportal.org/dspace/articles/domestic-prosecutions-international-crimes-africa-kenya>>.

¹³ International Centre for Transitional Justice Website, "Institutional Reform", accessed at: <<https://www.ictj.org/our-work/transitional-justice-issues/institutional-reform>>.



14

(4) Right to Reparation

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.

¹⁴ “Guarantees of Non-Recurrence”, *Swiss Peace*, accessed at: <<http://www.swisspeace.ch/topics/dealing-with-the-past/framework/guarantee-of-non-recurrence.html>>.

- **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

Reparations can be individualized or collective in nature. Individualized reparations require identification of specific individuals who have suffered specific harms and are thereby entitled to tangible reparations. For example, an individualized reparation may include the provision of compensation to an individual for loss of livelihood as a result of displacement by the war. Collective reparations look more towards delivering benefits towards a community or group of victims, that have suffered harms such as memorialization efforts or community-based programs.

As outlined above, not all reparations are tangible benefits, but rather can also include symbolic gestures such as memorials and public apologies. For example, over the last few years, many leaders of 'Western' countries have issued public apologies for the atrocities committed against indigenous peoples by colonizers historically in those countries. These apologies were seen as important symbolic gestures and a form of reparation.

Another challenge with reparations is setting out a list of priorities as few governments will have the resources or capacity to conduct a reparations program targeting all victim communities simultaneously. This requires meaningful and ongoing consultations with all war-affected communities to ensure reparations contribute towards non-recurrent and do not exacerbate root causes of conflict.

III. Important Debates in ‘Dealing with the Past’

The above provides a very basic overview introduction to the DWP framework. But equally important to be aware of, are the ongoing conceptual debates about DWP, some of which have been touched on already.

(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”.¹⁵

(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.

(4) Importance of consultations and a victim-centred approach

It is generally accepted that any successful DWP program will include meaningful consultations

¹⁵ International Centre for Transitional Justice Website, “About Transitional Justice”, accessed at: <https://www.ictj.org/about/transitional-justice>.

that are ongoing, and that policymakers will maintain a victim-centered approach.¹⁶ However, in practice, given political realities in most post-war countries, these principles are generally not upheld. Consequently, there is often a lot of tension about whether victim communities were adequately consulted in the formation of transitional justice mechanisms, and if they were not, whether those mechanisms can be seen as credible and capable of delivering true justice and/or reconciliation. There is growing international pressure for ensuring transitional justice processes include community-based participatory models, but it is still largely up to civil society in post-war countries to push for such inclusion.

(5) Victims and agency

Another interesting tension that is present in Sri Lanka as well, is the question of ‘authenticity’ of victims, and the reduction of their agency. Many international NGOs and diplomats, continue to seek out the most ‘authentic’ victim, which usually means an individual who expresses no political views, but rather only expresses their experience of victimization. A strong pushback to this has emerged out of feminist and grassroots approaches to transitional justice, but the boxing in of victim communities continues to be the norm in many post-war contexts. A result of this is that victims who do choose to voice political views, or try and take ownership of processes are seen as “politicized” and lose credibility.¹⁷

¹⁶ “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice” (March 2010), accessed here: < https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf>.

¹⁷ Kieran McEvoy and Kirsten McConnachie, “Victims and Transitional Justice: Voice, Agency and Blame”, (11 September 2013) *Social and Legal Studies*, accessed at: < https://www.researchgate.net/profile/Kieran_Mcevoy/publication/270488198_Victims_and_Transitional_Justice_Voice_Agency_and_Blame/links/557eadd108aeb61eae249f68.pdf>.