



USING TRANSITIONAL JUSTICE TO PROMOTE DEVELOPMENT

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Development Trends

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1. Time to join forces

– using transitional justice to promote development

NATIONAL POLICE ARCHIVE FOUND BY CHANCE IN 2005

In 2005, piles and stacks of documents were found in an abandoned police centre for disarmament of explosives in Guatemala City. This turned out to be the old National Police Archive documenting police activities up until the end of the conflict in Guatemala in 1996. These pages, found in complete disorder and attacked by mould, are today available online offering detailed information on the police involvement in the violence during the conflict.

Information from the documents played a fundamental role in the indictment of the former President Rios Montt for genocide, a ground breaking case, whose completion was the strongest sign, as of yet, of an efficient and independent justice system in Guatemala delivering justice for all its citizens. Unfortunately the sentence was declared invalid on procedural grounds by the Constitutional Court just 10 days later. But the fight for justice and recognition continue for the many indigenous victims in Guatemala, as does their fight for the right to non-discrimination and rule of law in a country crippled by organized crime and corruption that holds development back.

Violent conflict and abuse of power resulting in extensive human rights violations destroy the social fabric and trust that hold societies together. The recreation of this trust is therefore a key concern for development cooperation. Trust cannot, however, be built without justice and justice cannot be achieved without rule of law. Therefore transitional justice, which aims at healing wounds and creating the foundations for rule of law, becomes a precondition for sustainable development. A missed opportunity to support transitional justice is a missed opportunity to achieve development goals.

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The Development Trend will focus on the growing recognition of the need to strengthen the links between transitional justice and overall development. By establishing justice for past human rights violations transitional justice opens up for the changes necessary for the establishment of rule of law and the possibility for the population to start trusting in the state again. This process of transition is relevant to a large number of states on all continents: Colombia; Iraq; Tunisia; Myanmar; DRC; Uganda; Peru; Kosovo; Afghanistan and Cambodia are only a few examples.

The links between transitional justice and development have been developed and explored in books, articles and reports.³ In practice however the connection still needs to be strengthened further. Today there is a lack of coordination of



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efforts, which creates a risk for competing for the same resources, and a lack of analyses and understanding of how these two areas can best support and strengthen each other.

Drawing on the experience from two countries – Guatemala and Bosnia and Herzegovina (BiH) – where Sida actively supported the transitional justice processes, the Development Trend distils lessons learnt that are of relevance to the large number of recent or emerging post-conflict countries.

What role can transitional justice play for development?

Transitional justice developed throughout the 1980s and 1990s as a way for countries to deal with past extensive human rights abuses. The term refers to a number of different processes helping a country deal with a legacy of extensive human rights abuses, during a transition phase.¹ Transitional justice thus includes measures taken with the aim to re-establish the respect for human rights as a foundation for a democratic society. It is based on the rights and obligations established through international human rights law, international humanitarian law and international criminal law, including the right to justice, truth, reparation and guarantees of non-recurrence. Initially it received the interest of the human rights community, the international legal community and actors involved in conflict prevention. The relationship between transitional justice and development efforts was given notably less attention. Despite the fact that development actors have been involved with and supported transitional justice mechanism in many places for several years the wider relationship between the two areas has not been fully developed. The difference in actors working in the two fields, and a perceived difference in timing have hindered full coordination and cooperation.

Transitional justice relates to development in several ways. The main goal of Swedish development cooperation is to improve the living conditions of persons living in poverty and oppression. The respect for human rights constitutes an integrated part of that goal and as transitional justice focuses on establishing accountability for past human rights violations it directly contributes to the goal.

The special rapporteur on the promotion of truth, justice, reparations and the guarantee of non-recurrence, Pablo de Greiff, highlighted

that transitional justice also plays a fundamental role for development as a way to re-establish the trust between the population and the state, a trust that constitutes a precondition for development, both economic and social.²

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The relationship and links between transitional justice and development have received increasing interest in recent years with books and articles published on the topic. There are several ways in which transitional justice can be seen to support development including through individual or collective reparation, e.g. reinstatement of property, reintegration of victims and perpetrators in society, and vetting actors in the justice sector.

The discussion initiated by Pablo de Greiff goes beyond these direct effects as it focuses on the re-establishment of trust in society in general and the trust in justice sector institutions in particular. The line of argument can be seen to form part of a wider trend to increasingly highlight the importance of establishing rule of law both for the respect of human rights and for development. The link between rule of law and development has for example been studied in relation to the developmental progress of countries such as Taiwan. Part of the development success in Taiwan in the 70s and 80s can be found in the stability created by the respect for rule of law which led to low transaction costs, security and limited corruption.

Justice, rule of law and trust are if possible even more interlinked as they have the capacity to mutually strengthen each other but also to affect each other in a negative way. There can be no trust in the state without justice for serious human rights violations, no justice without rule of law, and in reality no rule of law without trust in the system and in the justice institutions.

There are several forums, which point to the fundamental role of rule of law for sustainable development. One of these is the on-going dis-

WHAT IS TRANSITIONAL JUSTICE?

There are four main areas of transitional justice measures:

1. **Criminal Justice** – criminal responsibility for human rights violations is established through judicial procedures.
2. **Reparation and victims’ rights** – the right to reparation and redress focuses on trying to restore the situation the victim was in before the violation was committed. Victims’ rights also include the right for victims to participate in the design of the transitional justice process and other reform processes. The rights of specific groups such as women and children require specific consideration.
3. **Institutional reform** – justice and security institutions may require reforms in order to transform into democratic, efficient institutions. These measures often include vetting processes of judges, police or military.
4. **Truth and memory** – truth commissions play a fundamental part in transitional justice. Other elements of truth and memory are official apologies, memorials and monuments.

discussion on the new Sustainable Development Goals (SDG), that are to replace the Millennium Development Goals (MDG) after 2015. Pointing to the failure of the MDGs to consider aspects such as justice and rule of law, Pablo de Greiff refers to the development in Tunisia, which delivered very well on the MDGs but failed to answer to the population's demands for justice, which led to public unrest. The importance of rule of law for development can also be seen in the report by the United Nations High Level Panel of Eminent Persons on the post 2015 Development Agenda and its suggested goals. The High Level Panel's report includes three targets related to justice and rule of law under the overall goal to ensure stable and peaceful societies.

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The linkage between development and rule of law becomes especially clear in post-conflict situations where war and conflict have erased the institutional capacity of the state structures and with that the respect for rule of law. This leads us back to the issue of transitional justice offering a process to re-establish the trust of the population in the state in general, and more specifically in the justice institutions. One example showing that there can be no rule of law without justice and how the lack of rule of law limits wider development, is Liberia. Ten years after the end of the conflict the transitional justice process is not advancing and so far no criminal justice has been granted to the victims of the conflict. With well-known war crime perpetrators in public positions, the country suffers from rampant corruption, a non-functioning justice system and very low levels of trust in the justice system and police.

It must also be emphasised that a formal transitional justice process is in itself not a magic key to the establishment of trust in the society. In both case studies presented below, Guatemala and BiH, extensive efforts have been made to support and strengthen the transitional justice process, and some very important achievements have been reached on the individual level. Despite this, the overall trust for the state among the population is low, which in a fundamental way affects the overall development in both

countries. In Guatemala the indigenous population still does not expect the state to treat them as fully worthy citizens; and in BiH ethnic rhetoric still plays an important role in political discourse.

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For a transitional justice process to deliver on the issue of trust the process as a whole must be successful. The delivery of justice, truth and reparation in individual cases has a value in itself not least from a human rights perspective. But from a development perspective it is the broader results of the transitional justice process, which lead to wider changes that are of interest.

In addition to support for human rights and the rebuilding of trust discussed above, transitional justice also contributes to development through adding directly to development results in each of the four areas. This contribution includes measures such as capacity building of institutions and empowering civil society. As one example, capacity development of the police in human rights may lead to an increase in the efficiency of the police force as the population is more likely to turn to the police to report ordinary crime as well, if they can trust that their rights will be respected by the police. Similarly development interventions in the area of justice reform should not only coordinate with on-going transitional justice initiatives but also include the principles guiding transitional justice and seek to maximize possible synergy effects. Experience shows us that the failure or success of wider rule of law reform is closely linked to the success or failure of criminal justice for past human rights violations and vice versa.

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PHOTO: ADAM HAGLUND / FORUM FOR LEVANDE HISTORIA

The right to reparation can take different forms. Direct individual money transfers may affect development in a positive way. Reparations can also be collective in their nature and include health care programmes and education efforts and be very similar to development programmes. A differentiation between the two is, however, important as there are different types of responsibilities, rights and recognition involved. The act, on behalf of a state, of providing reparation constitutes recognition both of the harm caused to the victim and the state's responsibility to protect the rights of the victim.

In the two examples considered in this text; Guatemala and BiH, the conflicts ended close to 20 years ago and Sweden has supported the transitional justice processes ever since. The countries

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have been selected based on Sweden's long and active support in the area. Both countries have well known transitional justice processes, which, though they have developed in a very uneven manner, are still on-going. From this perspective it is especially interesting to note that both countries still face fundamental development challenges that are rooted in the conflict and directly related to the issues of trust, justice and rule of law. ■

2. Fighting impunity in Guatemala

THE CONFLICT AND PEACE PROCESS IN GUATEMALA

Guatemala is a multi-ethnic country with more than 23 ethnic groups – many of them part of the Maya culture. From 1960 until the peace accords were signed in 1996, Guatemala suffered from an internal conflict between the military and guerrilla forces where the main victims were the indigenous population. An estimated 200 000 were killed or disappeared. The peace accord included a series of reforms to address some of the structural problems behind the conflict, however these measures were never properly implemented and soon the violence escalated to the same levels as during the war. The high level of violence combined with widespread impunity means that Guatemala today is a country where the strong rule over the weak.

The lack of rule of law and high levels of corruption constitute key challenges for development in Guatemala today. There is a fundamental lack of trust among the indigenous population towards the state as they do not believe that the public institutions will treat them as equals before the law. These problems, as we will see, are key aspects that the transitional justice process seeks to address.

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The failure to implement the institutional reforms intended in the peace accords means that the political and economic structures, which governed Guatemala during the conflict, to a large extent, remain intact. The underlying reasons for the conflict, based on structural inequalities and racism, are therefore still present in today's society. There has been no real transition in Guatemala, something that has hindered both the transitional justice process and wider reforms.

Few cases of criminal justice

No special mechanisms for prosecuting crimes committed during the conflict were created, and the responsibility for the prosecution of these crimes was placed with the Head Prosecutor. One result of this is the lack of systematic prosecutions of crimes committed during the conflict and a very small number of completed cases. The general trend has rather been one of overarching impunity for crimes committed during the conflict. The impunity has continued, covering also

crimes committed after the conflict. Today widespread corruption and the lack of independence of the judiciary are serious problems for the country as a whole. With the appointment of a new Head Prosecutor⁴ in 2010 the prosecution of cases however improved notably.

The most significant improvement is the prosecution of Rios Montt, the first case against a former head of state for genocide in his own country.⁵ The trial against Rios Montt in 2013 had a great symbolic value for many victims, constituting recognition of their suffering. One man attending the trial expressed that “They need to respect the pain of the Maya” though he added that justice in his country was only “for the rich”.⁶ Unfortunately the Constitutional Court annulled the verdict against Rios Montt, in a criticised decision, stating that the accused's rights to legal counsel of his choosing had been breached.⁷ Summarizing the area of criminal responsibility, the general lack of rule of law in Guatemala has impeded prosecutions and the right to justice with the exception of a small number of cases.

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In the area of victims' rights and reparation, victims and victims associations have played a fundamental role bringing the transitional justice process forward by actively supporting the prosecutor as concurring complainants.⁸ The role of the victims as a motor in bringing cases to trial has empowered them to continue the fight for justice. However, it cannot be said that this empowerment has been facilitated by the Guatemalan state, but rather developed through the victims' movements itself. In relation to reparation there have been some payments of individual reparation through the national program for

restitution (*Programa Nacional de Resarcimiento*) though the programme has had problems and is now facing an uncertain future.

The foreseen institutional reforms were never implemented

In the area of institutional reform, the foreseen reforms in the peace accords did not take place as planned.⁹ The police therefore suffer both from a general lack of resources and from widespread corruption. The judiciary also suffered from a lack of reforms for a long period. However, some change in political will had been noted in recent years, and several important reforms have been sent to the Congress for approval. Still, weak, inefficient and corrupt justice institutions have so far not only failed to enforce and protect the rights of the victims of the conflict, but continue to fail to protect and enforce the rights of the majority of the population in Guatemala.

The work of the truth commissions

The fourth and last area of transitional justice is memory and truth. The Historical Clarification Commission (*Comisión de Esclarecimiento Histórico, CEH*) was a UN-backed truth and reconciliation commission. The Commission presented its report in 1999 and gave a detailed picture of the vast extent of the violations committed, highlighting the responsibility of the Guatemalan army for crimes committed. A year earlier the Guatemalan Archdiocese’s Office of Human Rights presented its report on crimes committed (RHEMI).¹⁰ Both reports were received with criticism and denial from the ruling elite and the military.¹¹ The denial on behalf of the perpetrators shows the deep divide, which remains in Guatemalan society in relation to what happened during the conflict and the reasons behind the conflict.

In the area of truth and memory great progress was made when the old police archives accidentally were found in 2005. This allowed for a detailed documentation of the activities of the police during the conflict. There has also been progress in the area of identification of missing persons. The greater part of this work has however been carried out by civil society and not by the Guatemalan state institutions.

In many aspects the transitional justice process in Guatemala has not been able to deliver on the key aspects of creating conditions for the re-establishment of trust, justice and rule of law and it cannot be expected to constitute the sole

answer to these problems, which in today’s Guatemala are linked to a complex set of issues, not least to the political will to carry out the needed deeper reforms of the country. What the transitional justice process does is to continue to put focus on these issues offering the measures that will help Guatemala come to terms with its history and the lack of trust between the population and the state.

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Challenges to deliver on trust, justice and rule of law in Guatemala

The transitional justice process in Guatemala has in many ways been an ambitious process and comprehensive in its design. The process has included some very important successes, especially lately, but 18 years after the conflict Guatemala has still not come to terms with the legacy of the violent armed conflict that occurred from 1960–1996. Issues relating to how to deal with transitional justice still cause conflict in today’s Guatemala.¹⁵ One important reason why the transitional justice process has not developed is the lack of actual transition of Guatemalan society. As the economic and social structures remain the same, there is no internal motor for change within the Guatemalan state. This affects both the transitional justice process and the overall democratic development.

Another challenge concerns the lack of overall reform of the justice sector and the division in the prosecution of current and historic crimes. There is general consensus among experts and practitioners that the current situation of extreme violence and corruption in many ways is linked to criminal activities during the war.¹⁶ Though the prosecution of today’s criminality partly requires different investigation techniques and prosecutorial strategies than the prosecution of historic crimes, information and techniques could be shared to facilitate the prosecution of both groups of crimes. However, today the prosecution of these two sets of crimes are

SWEDISH DEVELOPMENT COOPERATION IN GUATEMALA

- Development cooperation played an important role in the peace negotiations and Swedish support has focused on the implementation of the 12 peace accords since the 1990s.
- The main current programme in the area of transitional justice is Programa de Acompañamiento a la Justicia de Transición (PAJUST). It was designed as an effort to combine capacity building and support to civil society with concurrent support and capacity building of weak state actors i.e. strengthening both duty bearers and empowering rights holders, and increasing their cooperation.
- A change in attitude among the political leadership and strong diplomatic pressure led to the appointment of the new Head Prosecutor Claudia Paz y Paz in 2010. Her commitment to the fight against impunity made direct Swedish support to the Prosecutors Office possible, for the first time in 2012.
- The importance of political and diplomatic support to the transitional justice process and especially to criminal justice has been highlighted by many sources.¹³ Sweden has acted both separately and together with other actors to support the transitional justice process and its main defenders.¹⁴



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partly separated. For example the International Commission against Impunity in Guatemala (CICIG), which was created in 2007, has the mandate to specifically fight current organized crime and corruption. CICIG, thus only focuses on the criminality of today. Several of the measures proposed and results achieved by CICIG, however, are of interest for the transitional justice process as they include long term reform and restructuring of the police and the judiciary and therefore will affect all legal areas. But the prosecution of historic crimes cannot benefit from the full support offered by CICIG.

Another example of the link between the prosecution of historical and current crimes can be found in the recent advances in the prosecution of war crimes such as the Rios Montt trial. The trial could offer the necessary security arrange-

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ment to carry out the proceedings thanks to the fact that it was held in a high risk court created through the work of CICIG. The progress noted after the appointment of the Head Prosecutor Claudia Paz y Paz in relation to both the prosecution of historic crimes and the fight against current crimes also highlights the argument that the justice institutions must be seen as whole and not as separate divisions working in isolation.

The fact that the Public Prosecutor's office receives capacity development and support from different directions means that there is a risk of overlap or fragmentation of the institution and inefficient use of resources.¹⁷ Efficiency gains could be made if the development programmes were made to include the prosecution of historic human rights violations as well as current crimes i.e. measures to ensure criminal justice for war crimes (transitional justice measures) should be incorporated into wider institutional reforms (development programmes).

A strong and vibrant civil society

The role of civil society is very important in any transitional justice process, and in Guatemala civil society has probably been even more decisive in the process than in many other countries. Part of the reason for this is that the Guatemalan state has in many aspects failed to take responsibility to ensure the right to justice, truth, reparation and non-recurrence.¹⁸

This leads to the next challenge: to balance support to civil society and strengthening of institutions. Apart from being the very motor pushing the transitional justice process forward, Guatemalan civil society organisations (CSOs) have also taken on some concrete tasks, which traditionally lie within the area of responsibility of the state. The CSOs' direct involvement in the prosecution of specific cases is one such area. The concept of concurring complainants is a general legal concept in Guatemalan judicial procedures and not specific to human rights cases. It has given civil society a possibility to prepare and present cases to the official prosecutor, ensuring that they contained the necessary evidence for convictions. However, combined with lack of capacity in state institutions and specifically within the prosecutor's office, this partly removed the initiative for the prosecutions from the prosecutor. In practice it has meant that cases are not likely to move without the support of civil society. The involvement of victims, apart from taking a large part of the burden for preparing cases, has also meant increased protection for the involved prosecutors and judges through an increased public attention and pressure to prosecute.¹⁹

Another notable task where civil society has played a fundamental role is exhumations and identifications of missing persons carried out by *Fundación de Antropología Forense de Guatemala* (FAFG). The work of FAFG has without doubt led to a greater number of identified bodies and burials but as such the responsibility for exhu-

mations should lie with the state.²⁰ There is a public institution in Guatemala, Instituto Nacional de Ciencias Forenses de Guatemala (INACIF), which is mandated with the responsibility for exhumations and identification of bodies. INACIF has, however, limited capacity compared to FAFG. There is also an element of trust, or rather lack of trust in state institutions, that makes the victims prefer to have the bodies of their relatives handled by an independent CSO rather than by the same state that participated in their disappearance. In both these cases CSOs have stepped in to replace the state in fulfilling its obligations as the state lacked resources, capacity and legitimacy.

The strengthening of civil society in its role as fundamental bearer of the transitional justice process in this way is, however, not an uncontroversial issue. There is a risk that by supporting civil society the donor community has encouraged it to take over responsibilities that should lie with the state. Though it has delivered results and proven efficient in the short run it may prove counterproductive in the long run as state institutions are not capacitated to carry out these tasks on their own.

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The situation in Guatemala is special and makes it difficult to draw general conclusions. The comparison with the second case: BiH, however, allows us to put the process in some perspective. The comparison is intriguing, as the processes include fundamental similarities as well as differences. Notably they both developed during the same timeframe when transitional justice was still in an early phase and certain childhood diseases could therefore be expected. They also show the fundamental truth that transitional justice processes, much as development processes generally, are slow moving and include important progress as well as setbacks. The length of the process constitutes a special challenge as attention moves away from the transitional justice process into other areas. The risk here is that problems, which are not addressed, remain and impede development, much as has happened in BiH. ■

3. Promoting reconciliation in Bosnia and Herzegovina

THE CONFLICT AND PEACE PROCESS IN BOSNIA AND HERZEGOVINA

It is estimated that more than 100,000 people were killed and two million people, more than half the population, were forced to flee their homes as a result of the war in BiH that raged from April 1992 through November 1995. The Dayton peace agreement created a weak federal structure in BiH, with two entities; Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FiBH). The FiBH is further divided into 10 cantons, each with Bosniak or Croat majority. The structures thus created are still in place leaving BiH with a heavy and dysfunctional administration and no less than 14 different governments operating on canton, entity and state levels.

After the war there was a strong international presence in BiH. The Dayton Peace Agreement created the post of High Representative of BiH, appointed by the Peace Implementation Council to interpret the civilian implementation of the peace agreement and play a central role in the reconstruction of BiH.

A strong focus on criminal justice

The transitional justice process in BiH can only be described as long and complicated.²¹ One of its main characteristics is the strong focus on criminal responsibility and prosecution. War crime cases²² have been dealt with on four different levels; the International Criminal Tribunal for the former Yugoslavia (ICTY), the War Crime Chamber of the Court of Bosnia and Herzegovina (State Court), other local courts in BiH and national courts in other countries such as Sweden.²³

In few countries have such a large amount of resources been invested in the criminal prosecution of crimes committed during the conflict. Despite this there is a sense in BiH that justice has still not been done and the prosecution of war crime cases remains one of the main priorities for the transitional justice process according to the population.

When it comes to victims' rights, and the right to reparation, the picture is slightly dif-

ferent. Due to the large number of displaced persons after the war a lot of focus was put on the right to return and the restitution of property as part of the right to reparation. The international community sought to create the conditions for a mixed society where Bosniaks, Bosnian Serbs and Bosnian Croats would live side by side again. As part of these efforts almost all of the 200 000 property claims were solved by 2003. Unfortunately the restitution of property did not lead to the expected results as many of the displaced persons chose to sell their property and not to return to areas where they would be in minority.

Another aspect of victims' rights that was given attention in an early stage was the large number of missing persons. These two perspectives: that of the right to return and restitution of property and the rights of missing persons, came to domi-



PHOTO: ADAM HAGLUND / FORUM FÖR LEVANDE HISTORIA

nate the reparation discussion. Furthermore the victims' movements never really managed to move beyond their ethnic identities and unite as victims. The victims are therefore still thought of as Bosniak, Bosnian Serb or Bosnian Croat victims. The limited cooperation over ethnic lines between the victims groups has hindered them from acting as a joint strong voice in society. A wider recognition of victims' rights is therefore lacking in BiH.

One overlooked issue of victims' rights is the gender aspect.²⁵ So far the transitional justice process in BiH has given limited attention to the specific rights of the many women victims of abuses. The large numbers of victims of sexual abuses have not received justice or any broader recognition of their status as victims and rights holders.

Concerning institutional reform there have been wide and thorough reforms of institutions in the justice sector in BiH including vetting of the police, judges and prosecutors.²⁶ The establishment of a new state structure and the reconstruction of public institutions together with a strong international presence directly after the war meant that large resources and attention were invested into this area.

The lack of a truth commission

In relation to truth and memory it is notable that there has been no truth commission and no wide participatory process establishing the facts and the reasons of the conflicts in BiH. This makes it still possible for completely separate accounts of the war to be given in different parts of the country, despite the fact that there is no lack of information or analysis of the war. Documentation and research on what happened during the war is available from CSOs, academics and others. The work of the ICTY has also contributed to the documentation of the war, as the court has gone to great lengths to establish not only the specific acts by the perpetrators on trial but also the wider pattern in which these acts were committed. Several Balkan CSOs have also invested great efforts in documenting and reporting on the crimes committed during the conflict.²⁷ These initiatives have however never really taken off and received nationwide coverage and acceptance. The information has not spread wide enough, or the initiatives, though some were quite successful, did not manage to become part of the public debate and general knowledge. Since there has been no public, overall process around truth, there is no generally accepted truth.

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Memorials play a special role in BiH where instead of contributing to dealing with the past, they are causes of conflict and distress. Almost all memorials are one sided and many are offensive to the other ethnic groups. Unfortunately the monuments tend to reinforce ethnic separation rather than bridge it.

Overall Bosnians have thus not yet been able to put the past behind them. Though the situation is stable the division between the ethnicities remain and with that a lack of trust. Great advances have been made but a lot still remains. From a development perspective the effects of the ethnic division become very clear, as it effectively hinders development in a series of areas. Most notably it hinders progress in relation to EU accession, where the different ethnicities, despite a common goal of EU accession, fail to effectively unite behind that goal. The transitional justice process has thus yet to achieve progress to the point where Bosnians feel that justice has been done and they can put the war behind them.

Challenges to deliver on trust, justice and rule of law in BiH

One of the greatest challenges in BiH is to achieve sustainable results. One aspect of this is the political nature of all transitional justice work, which makes it very dependent on the overall political development in the country. An additional aspect is the long time periods and slow and uneven progress. Results take a long time to materialize, and even longer to consolidate and setbacks can undo years of work within a couple of weeks.

The support to state level justice institutions in BiH has been especially vulnerable to the changes in political support. The new chambers of the State Court for example were created in a moment of national and international support for the fight against impunity, which was a key factor in their success. The international involvement and diplomatic pressure was an important part in the creation of the momentum. With time this changed however, and after the initial years during which the State Court and the prosecutor's office (PO), together with other State level justice institutions, were

SWEDISH DEVELOPMENT COOPERATION IN BIH

- The cooperation in BiH was initiated with humanitarian support during the war. A central part of the support has gone to the two sections of the State Court created in 2005; Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption and the corresponding special departments with the prosecutor's office (PO).

- Support to civil society focuses on human rights broadly, but includes several aspects of transitional justice such as documentation projects and legal assistance. Sida has sought to connect civil society with the justice institutions to facilitate participation and dialogue but has had limited success.

- Sweden contributed to victims' rights partly through support to the International Commission of Missing Persons (ICMP). ICMP works in three areas: DNA identification of missing persons, capacity building of the Missing's Persons Institute (MPI) and strengthening civil society through working with family associations.

allowed to grow strong, the support from politicians gave way to political criticism and attacks on the institutions. The increase in capacity and independence of the justice institutions led to a decrease in support by the political leadership especially from RS. The State Court was said to be illegal, biased against Bosnian Serbs and playing to the interest of foreign actors.²⁸

The support to the State Court and PO included both the work with war crimes and the work against organized crime and corruption. The attention of the international community focused, however, almost exclusively on the work of the war crime chamber. As a result the work in the area of organized crime and corruption was less successful. The failure to achieve convictions in the area of corruption may have damaged the overall perception of the Court among the public, as people's perception of rule of law and its applicability to all does not distinguish between crimes. The support to the State Court and PO also showed the need to consider the entire institution when working with capacity development. Targeted interventions, which may strengthen specific parts of the justice institution, risk creating capacity gaps in other places undermining overall rule of law reform.²⁹

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Despite difficulties, prosecution and the establishment of criminal responsibility is an area of significant progress, with a large number of convicted perpetrators of war crimes. And the work is continuing.³⁰ It is interesting to note that Bosnians still place criminal justice on the top of the transitional justice agenda with a sense that justice has not been done.³¹ It shows the limitations of criminal justice. Few, if any justice system, have the capacity to deal with all human rights violations after a conflict, especially if they have to deliver justice for current crimes as well. The level of resources put into prosecutions and the level of satisfaction raises the question of management of expectations. The holistic approach of transitional justice clearly indicates that criminal justice can only be seen as one of several ways to establish justice for past violations. The current focus on criminal prosecution in BiH

therefore needs to be complemented by a broader notion of justice for the victims and the complementary forms of justice and truth measure should be communicated to the population. For a transitional justice process to succeed and contribute to the establishment of trust, the expectations on the process must be realistic. A balance between several different measures and actors has to be sought.

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The strong focus on the individual criminal responsibility of perpetrators has allowed society to avoid the difficult and dangerous discussion of broader, collective guilt. It has however also meant that victims have not been recognised as a wider collective, which has limited their participation in society. The role of the victims and victims associations have been and still are a complicated matter. As the victims are divided according to ethnicity, their demands tend to play into the overall ethnic rhetoric, which hinders them from uniting and reduces their role and influence. In general the perception among the public is that the victims of the war have largely been abandoned by society.³²

The role of civil society

Though there is a well-established civil society in BiH it has not been able to structure itself to become a partner to the state in the transitional justice process. One reason may be the general perception of civil society and its role in the region as it struggles with its representativeness and access to public institutions. The lack of a strong and broad victims movement that goes beyond ethnicity and beyond the specific issues of return and missing persons can be seen throughout the transitional justice process. One example is the lack of public support which the state institutions experience and that make them especially vulnerable to attacks from politicians. It can partly be explained by a lack of public outreach from the State Court and the PO. However, had there existed a broad victims' movement with an interest in the work of the State Court and the PO and the willingness to step up in their support, the situation would probably have been notably different. ■

4. Lessons learned and ways forward

The two presented case studies clearly show us that transitional justice is not magic wand, but a long and uphill struggle, strongly defined by the specific conditions in the country. The examples also show us how closely linked progress and setbacks in the transitional justice process are to the overall development of the countries. It is important to note that the shortcomings of the respective transitional justice process do not constitute the reasons behind the current ethnic division in BiH or the lack of rule of law in Guatemala. These problems go far deeper and can rather be found in the underlying causes of the conflicts. But there is a direct connection between the possibilities to address the problems that these countries face and the transitional justice processes. Offering mechanisms to deal with key aspects of these problems, the progress of the transitional justice processes is fundamental for sustainable democratic development in both countries.

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This makes the analysis of the transitional justice process a key aspect for understanding the development challenges in the country - and working with transitional justice in a holistic manner a fundamental step in achieving sustainable democratic development. It also shows that long after the conflict, political attention and diplomatic focus, as well as programmatic considerations, have to be given to the transitional justice process as part of the overall development cooperation. To continue to give attention to the transitional justice process constitutes a special challenge as national as well as interna-

tional actors tend to move their focus onto other issues, be it fighting organized crime or supporting economic growth. The incorporation of transitional justice in long term development programmes can ensure a continued commitment and focus on transitional justice over time.

As stated before it is the wider processes of change that transitional justice can trigger that are of interest from a development perspective. Individual rights and cases play a fundamental role here, as symbols of change, as signs that the top leadership is held responsible and as practical examples of what change means. To say that development seeks wider change that can lead to an increase in the general trust in society does therefore not take away importance from the individual human rights perspective of the process. It does, however, indicate that development actors should take a holistic approach and seek synergies with other development efforts to strengthen these wider changes. To achieve that wider change and re-establish trust in society certain considerations have to be made.

First of all, the process needs to be holistic. This requires overall analysis of the process in order to identify its strengths and weaknesses. The right to justice, truth, reparation and guarantees of non-recurrence all need to be included in the process. In practice it means that the process has to cover all of the four areas of transitional justice; criminal responsibility, victims' rights, institutional reform and truth and memory. Measures may not be possible in all areas initially but wider change will require that the broader range of justice and victims concerns is addressed sooner or later.

Trust cannot be built if no change is offered. If the process after the conflict offers no change to the underlying issues causing the violence the

population cannot be expected to trust in the authorities who participated in the violence. Transitional justice cannot be expected to create change in itself, but if there is a will for change it can channel this will and translate it into change and possibilities for wider development. This leads to the importance of political and diplomatic pressure. Support to a transitional justice process cannot be seen as primarily a technical issue. On the contrary it is a highly political issue, and international political support in the form of diplomatic engagement in the issues of justice should therefore be a fundamental part of Swedish support. A combination of financial support and diplomatic support and presence is required.

As the re-establishment of trust between two parties requires a certain balance between the parties, transitional justice measures have to ensure that both the empowerment of the victims and the strengthening of the state institutions take place. The state cannot single-handedly restore faith in it. It needs input from an organised and capable civil society, which can channel the needs and wishes of victims and allow for meaningful participation in the processes. On the other hand trust cannot be created if civil society replaces the state in implementing the rights to justice, truth, reparation and non-recurrence.

Furthermore, rule of law cannot be built without taking into account justice for past human rights abuses, in the same way as justice for past crimes cannot be sought without considering the current situation. Experience shows that trust for justice institutions will need to be built as a whole. Trust in a specific prosecutor or even in a specific institution will not create the overall relationship between the population and the state that is needed for rule of law. The institutional reform aspects of transitional justice will therefore need to be very closely intertwined with other wider reform initiatives in the justice area and public administrative reform.

Experience shows that trust for justice institutions will need to be built as a whole.

These are some concrete, practical measures, based on experience, for how to strengthen transitional justice with the aim to promote not only increased respect for human rights but overall development i.e. using transitional justice both as a tool for human rights and as a strategic tool for development. ■

HOW TO CONDUCT AN ANALYSIS OF THE TRANSITIONAL JUSTICE PROCESS

1. The scope of the process – are all four areas included?

- a. Criminal justice
- b. Victims' rights and reparations
- c. Institutional reform
- d. Truth and memory

2. The content of the process – are the four main rights included

- a. Right to justice
- b. Right to truth
- c. Right to reparation
- d. Guarantees of non-recurrence

3. The actors involved in the process – is there a balance between civil society and public institutions?

- a. Civil society broadly
 - Level of meaningful participation in the process
 - Gender perspective
 - Children's rights

b. Government and state institutions

- Justice institutions
- Other public institutions

4. The context of process – are the power structures changing?

- a. What are the overarching political context and power structure?
- b. How does the transitional justice process relate to other on-going reform processes?
 - Justice sector reform
 - Security sector reform
 - Demobilisation, demilitarisation and reintegration process
 - Public administrative reform

Relevant analytical tools:

- Human rights based approach
- Power analysis
- Conflict analysis

1. The Secretary General defined Transitional Justice as follows: 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. See Report to the United Nations Security Council, (2004) The rule of law and transitional justice in conflict and post-conflict societies. S/2004/616. paragraph 8.
2. See Pablo de Greiff (2013) Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/68/345.
3. See Pablo de Greiff and Roger Duthie, (2009) Transitional Justice and Development, Making Connections, Advancing Transitional Justice Series. New York: Social Science Research Council. See also Roger Duthie (2008) Toward a Development-Sensitive Approach to Transitional Justice, *The International Journal of Transitional Justice*, Vol. 2, 2008, 292-309 and Helen Clark (2011), A Role for Development in Transitional Justice: the Arab Spring and Beyond, presentation on the occasion of the New York University Emilio Mignone Lecture on Transitional Justice and Development, 14 November 2011. See also the World Bank (2011) World Development Report 2011, Conflict, Security and Development, Washington DC: the International Bank for Reconstruction and Development/The World Bank.
4. Head Prosecutor Claudia Paz y Paz.
5. On 10 May 2013 Ríos Montt was convicted for having committed genocide against the Maya-Ixil community during 1982-1983 and sentenced 50 years for genocide and 30 years for violations of international humanitarian law.
6. See International Crisis Group Javier Ciurlizza (2013) Justice on trial in Guatemala: The Ríos Montt Case. Latin America Report No 50, 23 September 2013, p 3.
7. The Constitutional Court declared part of the trial invalid based on the court's omission to follow an appeal court's ruling to remedy a due process violation of Ríos Montt's right to counsel. This decision, which was taken with the vote of three judges and two dissident judges, has been criticised by several judges and legal experts. As the judges have withdrawn from the case not being able to hear a case in which they have already given a sentence, the case will have to be started again from the beginning. See International Crises Group, Justice on trial in Guatemala: The Ríos Montt Case.
8. The Guatemalan justice system allows for victims and victims' associations to act as concurring complainants (*quelleraente adhesivos*) supporting the prosecutor through the preparation of the case and the presentation of evidence.
9. See International Crisis Group. (2010) Guatemala: squeezed between crime and impunity, Latin America Report No 33 – 22 June 2010, pp. 9-12. The police remain largely with the same persons as before the peace accords and has also suffers from notable budget cuts leaving the national police with very low capacity to both investigate and fight crime.
10. The Guatemalan Archdiocese's Office of Human Rights presented its 1400 page long report on 24 April 1998.
11. See Lavinia Schwedersky (2012) Memory politics in Guatemala: Linking the Battle over Truth with the Pursuit of Justice. Oxford: Transitional Justice Research Working Paper Series: Debates p 7.
12. See Swedish Embassy (2012) Ambassad promemoria 2012-03-28, Guatemala City.
13. See Impunity Watch. (2013) La hora de la verdad?, Monitoreo de la Justicia Transicional en Guatemala. p 111 and International Crisis Group (2010) Guatemala: Squeezed between crime and impunity, Latin America Report No. 33 – 22 June 2010 p 22.
14. In the Ríos Montt trial several ambassadors were present at the strategic dates of the trial, and at all times during the trial were there some representative from the international diplomatic core present in the court room.
15. See article with Javier Ciurlizza International Crises Group Programme Director for Latin America and the Caribbean. "No hay acuerdo sobre en qué se debe hacer justicia y en qué no" <http://www.plazapublica.com.gt/content/no-hay-acuerdo-sobre-en-que-se-debe-hacer-justicia-y-en-que-no>
16. From quick wins to long-term profits? Developing better approaches to support security and justice engagements in fragile states: Guatemala Case Study February 2013 pp. 12, 14. See also Lavinia Schwedersky. (2012) Memory Politics in Guatemala: Linking the battle over Truth with the Pursuit of Justice, pp. 4-5 and Raquel Aldana (2012) A reflection on Transitional Justice in Guatemala 15 years after the peace agreements, Social Science Research Network. Electronic copy available at: <http://ssrn.com/abstract=1927583> p 6.
17. Sweden supports the work of the Prosecutor's Office via direct support, and through PAJUST and through support to CICIG.
18. In the best of cases it has failed to act and in the worst of cases agents of the state has actively acted to hinder the implementation of these rights. Instead it is the civil society who has slowly but surely advanced the fight for justice and the implementation of the rights of the victims and not allowed the transitional justice process to die. Sweden has invested much support in civil society through different channels.
19. Raquel Aldana (2012) A reflection on Transitional Justice in Guatemala 15 years after the peace agreements, Social Science Research Network. Electronic copy available at: <http://ssrn.com/abstract=1927583>, pp. 7 – 9.
20. It can be noted that the International Commission of Missing Persons in BiH who carries out a similar work when it comes to identification of missing persons, through the use of DNA technics, also has worked extensively to set up and support the public institution responsible for identification and exhumation of missing persons.
21. It could be said that the transitional justice process in BiH started even before the peace agreement as the International Tribunal for Former Yugoslavia (ICTY) was established in 1993 when reports of the human rights violations and war crimes committed in Croatia and BiH started to reach the international community. On the other hand at the time of the writing of this Development Trend the BiH has still not approved on the Transitional Justice Strategy which still on exists in a draft format.
22. In this article the term war crimes is used to include war crimes as defined by international humanitarian law, crimes against humanity and genocide.
23. The ICTY has indicted 161 persons and sentenced 69 persons for serious violations of international humanitarian law in the territory of the former Yugoslavia. Out of these approximately 95 cases were in a Bosnian context. At the national level, 205 cases of war crimes had been completed in BiH by national courts convicting 227 persons in the period from 2004 to 2013. Out of these 167 were tried by the State Court. This work is however far from completed and approximately 1320 investigations are opened against more than 8000 suspected perpetrators. See Swedish Embassy in Sarajevo. (2013) Mål om krigsförbrytelser i Bosnien och Hercegovina – hur många finns det egentligen? Amnr SARA20130124 p 6.
24. See UNDP. Facing the past and access to justice from a public perspective, UNDP Special Report, p 21.
25. As many as 20 000 women may have been victims of rape and sexual abuses during the war. Despite this the ICTY has included it in the indictment in only 18 cases. On the national level the State Court has so far only tried 12 cases which included charges of rape and sexual abuses.
26. Alexander Mayer-Rieckh (2007) Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina', Chapter 5 in Justice as Prevention: Vetting Public Employees in Transitional Societies, A. Mayer-Rieckh and P. de Greiff, (eds.), Social Science Research Council, New York.
27. There is for example a civil society initiative seeking to establish a regional truth commission covering all of the wars in EX-Yugoslavia. Under the lead of Humanitarian Law Centre (Serbia) the Rekon initiative has tried to join civil society associations in the demands for a regional truth commission. The initiative was initiated in 2004 but has slowly won ground. If successful it could play a crucial part in moving transitional justice forward in BiH.
28. During the spring of 2011 the prime minister of RS Milorad Dodik threatened to call for a referendum on RS future cooperation with the State Court and the PO claiming its lack of prosecution of war crimes against Bosnian Serb victims.
29. See Lucid Linx Consulting (2013) Evaluation Registry of BiH Project Assessment, Sarajevo.
30. Exactly how many remaining cases of war crimes there is, is not known but HJPC have stated that they consider that there are an approximately 12 500 persons suspected for war crimes.
31. See UNDP Professor Zoran Pajic, Facing the past and access to justice from a public perspective, UNDP Special Report p 21.
32. See UNDP Professor Zoran Pajic, Facing the past and access to justice from a public perspective, UNDP Special Report p 21.

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