



Working Group on Development and Peace (FriEnt)

Linking Transitional Justice and Development

Keynote Speech of Juan E. Méndez at the FriEnt Panel Discussion on Justice and Development after War and Violent Conflict

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I. Introduction

I am very grateful to FriEnt, the Working Group on Development and Peace, and its network of constituent and partner organizations for the invitation to speak to this important conference and very honored to be amongst you. I especially wish to commend the German government and its Ministry of Economic Cooperation and Development for their support for this initiative.

It is far too easy to say that Justice and Development should naturally work together because they both aim to achieve improvement in peoples' lives, and particularly in the lives of individuals and collectivities that have long been amongst the most vulnerable and least powerful. But we all know that, in practice, the efforts to pursue objectives of development and justice can present us with difficult choices and the need to establish priorities and resolve crucial dilemmas.

The fact itself that we can identify dilemmas is a sign of progress. We would not be meeting here in Berlin if it weren't for the fact that human rights and the pursuit of justice have now reached a level of centrality to international cooperation and more broadly to the international community such that the legitimate "right to justice" of victims of mass atrocity cannot be ignored. Conversely, the human rights movement does not now simply demand justice without regard to other potential effects of those demands; it is a sign of its maturity as a movement that it now has to reckon with the relationship of justice to the pursuit of other equally important values, such as development. At the risk of oversimplifying, the dilemma is as follows: How much should we insist in the realization of justice for the human rights violations of a recent past if such insistence puts in jeopardy our ability to execute programs of international cooperation that can raise the standard of living of huge masses of population that are not responsible for the atrocities and have themselves been victimized by that recent past, however indirectly?

In recent years we have discussed a very similar dilemma with regard to the pursuit of justice when it may affect the outcome of peace negotiations to put an end to a conflict. The apparent conflict between "peace and justice" (I always avoid the label of "peace versus justice") bears resemblance to the debates that occupy us today. In a way, peace and justice issues tend to be more focused and urgent because the outcome results in either the continuation of a bloody struggle in a specific territory – with the predictable cost in the lives of innocent



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civilians – or an unsatisfactory resolution to the conflict that literally allows mass murderers to get away with their crimes. And yet in the final analysis, both in peace-and-justice and in development-and-justice we ought to keep in mind that the obstacle to the realization of all three important values is the attitude of certain key actors who have a stake in the prevalence of impunity for major crimes and are willing to hold hostage both peace and development if that assures them of impunity. In that sense, we should do well to remind ourselves that what those leaders are doing is blackmailing the rest of us.

Of course, the basic fact that blackmail is at the core of this dilemma does not automatically mean that justice must prevail under all circumstances. If we were simply to walk away from blackmailers we would leave their innocent victims – as well as millions of other indirect victims -- to their own devices and even without protection. Besides, in each instance there will be a multiplicity of actors and the degree of good or bad faith in the pursuit of their objectives should not be reduced to a Manichean choice of pro- and anti-justice attitudes. Especially in transitional situations, successor governments and their supporters may have a variety of reasons to insist on letting bygones be bygones; we disagree with them also for many reasons, but that does not mean that we throw them into the category of blackmailers and perpetrators of abuse.

II.

In this context, I believe that Transitional Justice can offer some guidance towards creative solutions, if the goal is to find ways to reconcile the pursuit of justice with the pursuit of development. But first it may be necessary to define Transitional Justice, or at least to clarify what it is not. Transitional Justice has

become a term of art that describes the practices that societies put in place when they reckon with a legacy of widespread or systematic human rights violations; its purpose is to break the cycle of impunity, to seek and disclose the truth, to offer reparations to the victims and to reform institutions so that they will not in the future be the instrument of mass atrocities. Those societal experiences have, in the last quarter century, resulted in emerging norms in international law about what States owe to victims of war crimes and crimes against humanity. First and foremost, Transitional Justice is not “justice light.” Under its guise some leaders have proposed the avoidance of justice by rejecting entirely the criminal prosecution of major crimes and instead engaging only in truth-telling exercises or payment of reparations or some symbolic gestures. We do favor truth-telling and appropriate reparations, but when they are offered as *alternatives* to prosecutions they constitute thinly veiled mechanisms of impunity. When it comes to genocide, war crimes and crimes against humanity, the prosecution of at least those bearing the greatest responsibility for them is not a negotiable demand: it is an imperative of law, of morality and of sound policy.



Second, Transitional Justice is not a highly specialized corner of the human rights movement dealing with constructive efforts to realize some of its goals. It is rather the effort at the realization of the movement’s ideals of justice in specific, context-laden, culturally relevant circumstances. It follows then that Transitional Justice practitioners are in the difficult business of recognizing and addressing all the obstacles laying in the path of justice without giving up on the ultimate goal of realizing it. Third, we have struggled with the inadequacy and even misleading nature of the term “Transitional Justice.” It does not attempt to qualify the nature of the justice to be obtained; and its reference to transition is mostly historical. In fact, the principles to be implemented are universal and always present, and the State obligations that we seek to uphold apply equally to transitional regimes as well to all other governments.

The practices and policies that we now identify with Transitional Justice emerged in the context of societies abandoning repressive regimes and struggling to recover democracy, and that has had a definitive impact on the doctrinal background of Transitional Justice. We aim to build a strong foundation for democracy and the rule of law by dealing effectively and honestly with a past that has been the antithesis of democracy and the rule of law. By preserving the memory of the abuses and by holding perpetrators accountable we signal a clear break with that past and we set our fledgling democracy on a strong foundation. Eventually, these principles were applied to different transitions: those from conflict to peace rather than from dictatorship to democracy. The principles still proved useful, especially if what was sought was not a temporary lull in the fighting but a lasting peace, because in the latter case it seemed important to

develop institutions and mechanisms that we identify with proper distribution of power and therefore with democracy and the rule of law.

The rule of law is not only the proper functioning of institutions and an adequate balance of power between branches of government. It represents the achievement of the democratic ideal if it provides the framework for participation by all in the affairs of common interest. The rule of law creates and sustains a framework for the creation and flourishing of independent organizations of civil society that channel participation in the pursuit of the common good on a daily basis and far beyond the electoral exercise. In this fashion, the rule of law – favored from the start with a healthy reckoning of legacies of abuse – generates expanded participation not only in politics, but also in the economy: a key goal of human development initiatives.



Discussed the points of the Keynote Speech: Prof. Josef Sayer (Misereor), Dr. Rama Mani (Oxford University), State Secretary Hans-Jürgen Beerfeltz (BMZ), Moderator Dr. Constanze Stelzenmüller, George Wachira (Nairobi Peace Initiative), Ambassador Georg Birgelen (German Foreign Office)

But undoubtedly transitions from conflict to peace added other dimensions. One was the urgency of silencing the guns and of offering the possibility to insurgents of pursuing their political objectives through peaceful means, and that was not easily done if they perceived the outcome of negotiations to be that after signing they would be marched off to jail. Secondly, if the conflict had pitted ethnic, religious or racial communities against each other, it was necessary to conceive of additional mechanisms of inter-communal reconciliation so that the blame for crimes committed against one community in the name of another was not attributed to innocent descendants in an ever-expanding cycle of revenge. In those cases, some have felt that doing justice was insufficient or worse: counterproductive. Instead, reconciliation should be

pursued in various ways that excluded criminal accountability. We beg to differ; reconciliation through inter-communal talks is undoubtedly necessary, but it will not be achieved without a measure of reckoning with the abuses committed in the name of ethnic rivalry. In fact, genuine reconciliation is only possible after atonement from the culprits, recognition of shared responsibilities, and an honest coming to grips with the painful legacy of abuse. The third new dimension is even more germane to our conversations today: the need to engage in the reconstruction of war-torn societies and to create conditions for that reconstruction to engage the international community in successful development cooperation.



This factor has brought into sharp relief that Transitional Justice is primarily a way to deal with major attacks on the right to life, liberty and the security of the person, precisely because the abuses it covers are torture, extrajudicial execution, disappearances and prolonged arbitrary detention. If committed in the course of armed conflict, such acts and others like targeting civilians are war crimes. If they are part of a pattern of repressive action against the civilian population outside of conflict they are crimes against humanity. It is in relation to those crimes, if they have been widespread or systematic, that international law has developed precise standards regarding the obligation to prosecute and punish perpetrators, to seek and disclose the truth about them, to offer reparations to their victims and to reform the institutions used as their vehicle. Transitional Justice does not seem to have answers for the violations of economic, social and cultural rights – the rights that are generally fulfilled with appropriate and effective development policies. It would be unfair to conclude, however, that Transitional Justice practitioners are oblivious to the socio-economic background against which crimes against humanity take place. One should only read some of the major documents now known as the various Truth

Commission reports to note a clear effort to link those crimes to the policies of exclusion and negative income distribution that are always at the root of violations of economic, social and cultural rights. As those reports show, often the killings and atrocities are committed precisely to impose on the population economic policies that deny them the enjoyment of economic, social and cultural rights or to install a program of economic development based in regressive distribution of wealth.

It is undeniable, however, that the techniques and mechanisms (prosecutions, truth-seeking, reparations, institutional reform) associated with Transitional Justice were designed to deal with murder, imprisonment and torture on a large scale. Such mechanisms are probably inadequate to understand and eventually revert practices of socio-economic exclusion and marginalization, because these mechanisms are designed to identify culpable individuals who, at the helm of institutions, commit those atrocities in order to hold them accountable. Violations of economic, social and cultural rights, in contrast, are attributable to policies and practices, sometimes deliberate but often based on neglect and irresponsibility, not direct personal blame. Nevertheless, because all human rights universal, indivisible and interdependent (Vienna Conference 1994) there is an important discussion going on today among Transitional Justice practitioners as to how to better account for violations of economic, social and cultural rights in our initiatives and practices. This is a gap that we all acknowledge. In any event, the good intentions behind these efforts to bridge it do not obscure the difficulty of simply applying mechanisms that are tried and true for violations of civil and political rights to the legacies of neglect and abuse of economic, social and cultural rights. Since development theory aims precisely at finding the best way to realize economic, social and cultural rights for those segments of the population deprived of them, we can certainly hope that constructive discussions like the one that gathers us here today can help in this endeavor.



III.

Even with those weaknesses, Transitional Justice can offer some way out of the conundrum of development and justice, just as it does – in my view – contribute some solutions to the dilemmas of peace and justice. Its vision is for a

comprehensive, holistic view of justice without losing sight of the need to break the cycle of impunity for the most serious crimes. Its mechanisms for truth-telling, reparations and institutional reform are complementary to the efforts at criminal prosecutions that will always be limited and perhaps unsatisfactory, especially when there are many victims whose cases will never be completely covered by judicial means. The combination of judicial and non-judicial approaches is “holistic” not only in the sense that it diminishes the “impunity gap,” but also in the sense that it can cover more aptly the multiple ways in which victims have suffered. In addition, by definition Transitional Justice mechanisms are to be designed and executed in consultation with all stakeholders and in a participatory, inclusive approach. Because of this, reckoning with the past under the principles of Transitional Justice is potentially more conducive to social peace and to building a strong foundation for democracy than a dogged insistence in criminal punishment as the sole answer.



It goes without saying that Transitional Justice is a rich and diversified series of responses to mass atrocities, but it will also require some concessions and compromise, at least in those places where the future of development initiatives may be at issue. It is, however, a mistake to see mutual concessions as a “trade-off” because this term carries the connotation of one side or the other having to abandon its objectives and principles. Or perhaps we can think of a “trade-off” in which both sides have something to gain and something to lose, rather than absolute defeat. If so, the question is not whether there should a “trade-off” between justice and development. Rather, we must ask ourselves what it is that will be traded off and in exchange for what. At such a stage, in any event, it may be necessary to recall that there is no reason why development and justice cannot go hand in hand and in fact reinforce each other. Reasons for the dilemma, if there is one, are always contingent and context-specific, not absolute. Therefore, it is better to think of ways to remove the contingent obstacles rather than to start from the premise that the twin objectives of development and justice are incompatible. The point of departure must be the presumption – certainly rebuttable or defeasible – that development and justice ordinarily do sustain and reinforce each other, not that they are in principle opposed. If the analysis of plausible trade-offs focuses on the contingent and contextual, it is possible to envision a constructive debate about priorities, sequence of policy options, and timing of different measures. In that fashion there will not be a complete trade-off of justice for the sake of development nor vice-versa. There will be, however, options to do things in as harmonious a manner as possible between the exigencies of development and justice. This will include some delayed expectations and some reconciliation of competing demands for the sake of policies that benefit the largest numbers of the poor and vulnerable without ignoring the legitimate demands of justice of the victims of crimes against humanity.

Proponents of justice for past atrocities cannot ignore the requirements of development for the whole country, nor expect that such requirements can be postponed until a later date while they settle accounts with the perpetrators. The holistic approach to justice pays attention to all different forms of victimization from the recent past; it should not limit itself to giving satisfaction to the direct victims of murder, imprisonment or torture. Even if recognition of the indirect victimization of the totality of the poor and vulnerable in society cannot immediately be translated into specific interventions, the actions that are actually taken must be designed with them in mind as well as with the rights and interests of the direct victims. For example, reparations programs for the families of the murdered and disappeared should also include the larger numbers of those forced into exile or into internal displacement; and the quality and quantum of the reparations offered to all of them should be designed so that they do not give rise to new inequalities and perhaps resentments that may eventually lead to violence or delay the moment of reconciliation. Ultimately, Transitional Justice cannot ignore the requirements of development because initiatives to reckon with legacies of abuse need to have long term effects and sustainable outcomes, and without the material basis that development can provide those interventions will be short-lived and ineffectual and could well be counter-productive in the mid-term.

Of course, there are also good reasons why development initiatives in conflict or post-conflict situations should not ignore legitimate demands for justice. They were eloquently and at length spelled out in the 2004 report of the UN Secretary-General, *Transitional Justice and the Rule of Law in Conflict and Post-Conflict Situations*. The key words here are “Rule of Law.” The rule of law is a *conditio sine qua non* of effectiveness in development assistance because juridical security is indispensable to guarantee its success. Everywhere, development policies need to build credible, independent, impartial institutions to protect citizens, to resolve conflict, to prevent crime and capital flight. Development economists have recognized that cooperation assistance can easily be wasted if expenditures in infrastructure, in hospitals, in schools are not accompanied with an effort to establish institutions of governance that are credible, trustworthy and functional. In turn, those institutions – courts, police, prosecutors – cannot expect to build their independence and credibility if they turn a blind eye to the gaping open wound in the fabric of society represented by impunity for the serious crimes of the recent past.

There are many ways in which development practitioners and Transitional Justice proponents can nurture each other. I will mention one here: for years now we have tried to meet the challenge of how to measure the effectiveness and true impact of Transitional Justice initiatives. As in all matters related to human rights,



measuring impact is quite complicated. In addition, actions in pursuit of justice may be morally justified even if they do not reach the desired objectives. We have to be careful not to make claims about outcomes that we are not in a position to either document or empirically demonstrate. All the same, we recognize that Transitional Justice must demonstrate its worth and be subject to rigorous scrutiny by policy-makers and stakeholders, both nationally and internationally. It seems to me that on this matter we can borrow a page from development practitioners and their experiences with the difficult but essential task of evaluating performance at different levels, and adjusting policies in consequence.

IV. Conclusions

Is it possible to obtain convergence between justice and development? Is it a pipe dream to think that they are mutually reinforcing? The answers may be easy in the abstract, but our first duty is to recognize exactly how difficult convergence can be in practice. In the end, the only possible answer is that we do not have a choice to part company and go in our own ways; we *must* make convergence between justice and development a reality, and we *must* find ways to make them reinforce each other. The reason is that legitimate demands for both will coexist in the same territory and in the same time frame when war-ravaged States struggle towards reconstruction. On those occasions, a confrontational path could be ruinous for both development and justice.

Perhaps we need to stop thinking of justice as short-term and development as long-term. What we do today in terms of justice will be legitimate if it has enduring effects in the creation of a basis for understanding and peaceful coexistence of communities previously engaged in armed conflict. For its part, even if development initiatives will only bear fruit in the long term, they will not be successful if they try to ignore the specific obstacles of the political contingencies of the here and now. In post-conflict situations, the legitimate justice demands of victims of war crimes and crimes against humanity are always at the center of the politics of the here and now.

Thank you!

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