



# NON C'É PACE SENZA GIUSTIZIA NO PEACE WITHOUT JUSTICE

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## Transitional Justice in brief...

Transitional justice refers to any kind of mechanisms or processes that can be used to “**ensure accountability, serve justice and achieve reconciliation,**” especially following periods of **massive violence or widespread abuse**.

The main purpose of transitional justice is reaching the **end of impunity** and **national cohesion** by addressing past violations and assuring a transition towards a peaceful future.

Transitional justice mechanisms include both **judicial and non-judicial approaches**: accountability can be sought by criminal prosecutions, but also by other strategies such as truth-seeking, reparations, memorials and a range of other initiatives.

In order to assure a more effective result, transitional justice processes tend to **include** as much as possible the **society** in general and the affected **stakeholders** in particular (especially victims and perpetrators).

The possible mechanisms are very **diverse**: there is *no one size fits all*, as each situation will require specific solutions. Transitional justice allows – and even requires– creativity in its implementation. The variety of processes includes, for example, criminal prosecutions, truth-commissions, compensation, public apologies and institutional reforms.

Transitional justice values both the **process** and the **outcome** of the chosen mechanisms, as both are interrelated (the *quality of the process itself* -transparency of the process, participation of stakeholders, due process, etc- affects the *quality of the outcome of the process*).

## Basic assumptions of Transitional Justice\*

### 1. What is Transitional Justice?

The most commonly accepted definition of transitional justice comes from the 2004 report by the United Nations Secretary-General on the rule of law and transitional justice. It defines transitional justice as:

“The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. 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.”†

Transitional justice follows **systematic or mass violations of human rights**. It is meant to help societies in their **transition** from an authoritarian regime, dictatorship or period of widespread

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\* This article has largely been inspired by Alison Smith, « Basic assumptions of Transitional Justice and Children », in *Children and Transitional Justice. Truth-Telling, Accountability and Reconciliation*, ed. S. Parmar , M.J. Roseman, et al. (Harvard University Press, Cambridge), pp 31-65.

† The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General , UN Doc. S/2004/616, 3 August 2004 (available from <http://daccess-ods.un.org/TMP/1690798.55084419.html>).



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abuses **towards a democratic and peaceful society**. Transitional justice mechanisms are therefore designed to be temporary, to provide a bridge from the past and present to the future, and generally conclude or lapse after they have fulfilled their objectives.

The main assumption is that restoring social unity and peace is more effective when a transitional justice process is employed. Non-judicial mechanisms are, in that respect, **complementary** to judicial mechanisms, as they both seek accountability and justice. Non-judicial mechanisms can also reach other goals since they have a broader scope.

### 2. Why Transitional Justice: Identifying the goals and objectives

Each situation requiring transitional justice mechanisms has a different objective. Understanding what the real goals are is essential, as it will **determine the nature of the mechanisms to implement**. The first step is therefore to think *why* transitional justice processes are needed.

The idea is not to consider general objectives of transitional justice (increase the rule of law and contribute to peace), but rather **to identify concrete goals**.

The potential goals can be very diverse, such as:

- ending impunity
- ending ongoing violations
- identifying those responsible for violations
- ensuring national reconciliation and unity
- providing redress for victims
- restoring integrity and dignity of victims
- breaking cycles of violence
- providing compensation
- establishing a record of the past (clarification and disclosure of information)
- removing violators from State institutions or government
- preventing private justice or revenge
- reforming institutions and restoring society's confidence in them.



Identifying clearly the aims and purposes is critical in determining the choice of mechanisms and how they should operate.

*Example:* If the purpose is to avoid perpetrators holding official posts, it is necessary to organise inquiries *naming* the offenders. Inquiries about the root causes of the conflict or public apologies won't meet the stated purpose.

### 3. Who participates in Transitional Justice Processes: Identifying the stakeholders

Unlike domestic justice processes -where the beneficiary is primarily the victim and the State- transitional justice mechanisms have a wider range of stakeholders (both **individually and collectively**). Potential stakeholders can vary from individuals to whole communities or countries and can be identified by specific sub-categories, such as gender, geographic location and age group.



Finding out the relevant stakeholders and beneficiaries is essential in order to:

- ensure their **involvement in the process**, including during the design stages
- **understand and consider their specific needs and demands.**



Failing to identify accurately the relevant stakeholders can yield negative consequences.

*Example:* Providing redress for victims from one entire community if not necessary can provoke a feeling of resentment among different communities.

Don't forget that victims can also be involved in the commission of violations against others.

#### 4. What Transitional Justice mechanisms should be employed: Identifying the right process

A large **variety** of processes and mechanisms exist and which ones should be used will **depend on the identified goals** that are pursued, alongside the stakeholders and the political, social and cultural context. Therefore, a prior assessment of objectives is essential before determining which processes and mechanisms should be used, including whether they need to be State-driven or not.

The definition of transitional justice does not cover a predefined closed list of mechanisms. Rather, its diversity allows, and even requires, one to be **imaginative and flexible** in the implementation of transitional justice: there is *no one size fits all*, as each situation will require specific solutions.

The variety of processes include, for example:

- truth commissions
- investigative commissions
- individual criminal liability and prosecutions
- compensation, reparation or restitution
- institutional reforms (including political, educational, health institutions)
- reforms of security system, vetting (including military, police and secret services)
- memorials, national day of remembrance
- public apologies.

The identified objectives of the country in transition will determine both the **choice of mechanisms** and their **implementation process**.



*Example:* If the aim is to assign individual responsibility, criminal justice procedures will be the most appropriate mechanism. However, a wide range of possibilities are available: international courts, hybrid courts, national courts, but also local solutions or *sui generis* mechanisms.

It is important to note that independently of the country's freedom to choose the most appropriate mechanisms, it is still bound and thus restricted by **international legal obligations**.



Such obligations include:

- aut dedere aut judicare (obligation to extradite or prosecute): the obligation not to allow impunity
- establishment of effective remedies
- reparation for victims
- prohibition of amnesties for acts of genocide, war crimes or crimes against humanity.

#### **5. When should Transitional Justice mechanisms take place: Identifying the right moment**

Mechanisms of transitional justice can take place **before or after the cessation of hostilities**. Practically, it might be difficult to start the process if an actual conflict is taking place or massive violations of human rights are continuing. The fact that those responsible for the violations might still be in power is an important element in determining the feasibility and effectiveness of proposed measures.

However, initiating measures can **facilitate a transition towards peace**. This is especially true in situations of ongoing conflict, as such measures can have a deterrent effect on the commission of further violations. It also sends a strong signal against impunity.

Starting the mechanisms as soon as possible is desirable for the signal of justice and rule of law it gives out. Avoiding delays will also ensure a better quality of the collection of data, testimonies and evidence. Above all, the decision of “when” will depend on the goals and objectives for transitional justice.

#### **6. Where should Transitional Justice mechanisms take place: Identifying the right location**

The choice of the location will depend to a great deal on the chosen mechanisms and the identified objectives. If the principal goal is redress for victims and their involvement in the process, this is more likely to be realised when transitional justice processes take place in the country where violations of human rights have occurred. Similarly, decentralisation of actions within a country (of courts, hearings, inquiries, etc) will increase the chances of meeting that goal.

When deciding upon the location, factors such as security (of the victims, witnesses and alleged accused), participation of stakeholders, budget and the efficiency and effectiveness of the process should be taken into account. The involvement of the international community or any other State will also have an impact on the decision as to which location should be chosen. The paramount consideration, however, must be “why” and “for whom” when seeking the answer to “where”.

#### **7. How should Transitional Justice mechanisms proceed: Identifying how to reach its goals**

In order to reach the stated goals, it is necessary to **link the aims and the operational means** of the mechanisms. It is not enough to pursue an objective, but rather it is essential to ensure that all the practical aspects of the process, and the combination of mechanisms themselves, will also allow for the realisation of the overall objective.



*For example:* amnesties for perpetrators after they have testified can facilitate the disclosure of information, increase their participation and yield more testimonies (which can be very important for inquiries and truth commissions) but might generate a feeling of impunity and injustice (and thus fail if one of the goals is redress for victims). In this case, taking into account the attitude or level of cooperation might be useful.

*For example:* if involving the local population is a major objective, organising local trials may be a necessary, but not sufficient step: it is indeed equally important to assure *practically* that the processes allow for and facilitate the involvement of the population (by being sufficiently transparent, accessible, secure, etc).

## 8. Conclusion

Transitional justice includes a large set of possible mechanisms and refers more to a **general process** rather than to a pre-determined list of specific tools.

Determining the **exact objectives** of the transition is essential in order to identify the most adequate processes to establish and the manner in which they will be implemented. Similarly, **identifying the affected stakeholders** is important to consult them about their needs and goals and to involve them in the whole process.

Finally, an **articulation of the goals and their implementation mechanisms** is imperative as a suitable operation can generate negative consequences if the *modus operandi* is not in concordance with the other goals.

## 9. Further reading

*Closing The Gap: The role of non-judicial mechanisms in addressing impunity,*

No Peace Without Justice, 2010

<http://www.npwj.org/sites/default/files/documents/ClosingTheGap120510Web.pdf>

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11, 19 April 2005

<http://www2.ohchr.org/english/law/remedy.htm>

The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2004/616, 3 August 2004

<http://daccess-ods.un.org/TMP/2328012.73465157.html>

The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2011/634, 12 October 2011

<http://www.unrol.org/doc.aspx?d=3096>

UN Rule-of-law Tools for Post-conflict States: Amnesties, HR/PUB/09/1

<http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx>

UN Rule-of-law Tools for Post-conflict States: National Consultations on Transitional Justice, HR/PUB/09/2

<http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx>

*Closing The Gap: The role of non-judicial mechanisms in addressing impunity* No Peace Without Justice, 2010 <http://www.npwj.org/sites/default/files/documents/ClosingTheGap120510Web.pdf>



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