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Transitional justice and aid

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Transitional Justice and Aid

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January 2012

Abstract

This paper examines the current security–governance–development nexus, something that is often also discussed under the concept of ‘transitional justice’ (TJ). The paper analyses how the ambiguous, evolving and expanding nature of the concept of TJ affects the planning, coordination, evaluation and assessment of aid given to conflict ridden, post-conflict or (post) authoritarian societies in order to strengthen their democracy. Special attention is paid to gender justice. Illustrations are drawn mainly from Africa where many TJ processes and mechanisms are currently taking place.

Keywords: transitional justice, post-conflict reconstruction, development, social justice, human rights, development aid

JEL classification: F5, O2, I3

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Acronyms

APRM	African Peer Review Mechanism
BRIC	Brazil, Russia, India and China
DDR	disarmament, demobilization and reintegration
GGP	gender and governance programme
GSBV	gender and sexually based violence
ICC	International Criminal Court
IDP	internally displaced person
MDGs	United Nations Millennium Development Goals
NAP	national action plans
PSR	public service reform
TFG	transitional federal government
TFV	The Trust Fund for Victims
TRCs	Truth and Reconciliation Commission
UN	United Nations

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1 Introduction

This paper examines the current security–governance–development nexus, something that is often also discussed under the concept of ‘transitional justice’ (TJ). It analyses how the evolving and expanding nature of the concept of transitional justice, and its normative dimensions, affect the planning, coordination, evaluation and assessment of aid given to conflict ridden, post-conflict or (post) authoritarian societies in order to strengthen their democracy. Special attention is paid to gender justice. Illustrations are drawn from Africa where many TJ processes and mechanisms are currently taking place.¹

The main issues that this paper focuses on include the questions: how can aid to TJ be properly targeted when the concept itself and the related mechanisms are ambiguous? What is meant by ‘transitional justice’ in various contexts? Is TJ ‘a special kind of justice’ that is needed during certain periods of political and social change, and in that sense an end in itself with particular in-built values such as human dignity and equality? Or does transitional justice simply refer to the means that are used in order to reach other ends, such as democratic political change? If the concept of transitional justice is inherently normative and promotes a particular type of ideological and political change, that is, liberal democracy, can its processes and mechanisms be globally accepted and adopted, or will TJ remain a politically charged term tied up with the western interests?

These questions are central in order better to plan why a certain type of external support (such as humanitarian assistance, military assistance or development aid) may or may not work during diverse transitional moments in different societies. These questions also help us find more effective ways to evaluate the impact of TJ mechanisms. This paper does not directly try to assess TJ mechanisms as such.² Instead it studies the underlying conceptual and theoretical issues related to transitional justice and development aid. The main arguments taken forward in this research are the following: (i) the scope of the concept of ‘transitional justice’ has become too wide and ambiguous leaving it open to political critique and rhetorical use; (ii) this conceptual vagueness makes assessment of the impact of the TJ tools difficult and prevents planning for realistic and effective assistance to transitional societies; (iii) while human security, human rights, development and good governance are clearly interlinked, it remains essential to distinguish between interim, relatively short-term aid for transitional mechanisms, and for longer-term reform support that enforces national ownership and helps transitional societies to find their own path of political and economic development towards democracy and social justice. In order to encourage sustainability, the international

¹ As the topic of transitional justice is very wide and extensive, it is necessary to limit the scope of this research to the main conceptual and practical problems in implementation of transitional justice processes and mechanisms. I also want to emphasize that the external aid discussed in this paper refers almost extensively to the Western development cooperation and other forms of assistance. Financial, political and military assistance coming from other sources (for example China, the Arab countries and/or through regional arrangements such as the African Union) may have very different goals and interests. There would be need for a study that focuses on the potentially conflicting impacts between the Western and the other sources of aid (particularly China). Thus, this research only scratches the surface related to the issues of transitional justice and aid and attempt to map the main areas for further study.

² For comprehensive studies on these see, for example, Thoms, Ron, and Paris (2008, 2010).

community also needs to better define its ‘entrance and exit strategies’ in relation to transitional justice interventions; (iv) finally, despite growing awareness of the prevalent gender injustice, TJ mechanisms still fail to tackle effectively long-term structural gender inequalities. Gender justice has to be better mainstreamed and fully integrated into all parts of aid for all TJ processes as well as other wider reform programmes or the value of the intervention is seriously undermined.

2 Support to transitional justice and its evaluation: emerging issues

During the past decades ‘transitional justice’ has become a popular term within conflict resolution, peacebuilding, post-conflict reconstruction and wider development cooperation. It appears to provide a new international development policy framework that ties together the different elements of human security and human development with those of democratic governance. Particularly during recent years vast funding has been channelled into TJ processes and mechanisms. Around 1.5 billion people live in areas affected by fragility, conflict, or large-scale criminal violence while no low-income, conflict affected country or fragile state has yet achieved a single United Nations Millennium Development Goals (MDG, World Bank 2011: 1–2)

However, it is almost impossible to know the exact amount used to support ‘TJ’ with this assistance interlinked with other peacebuilding and conflict management programmes. Much funding is channelled through the wider support to multilateral channels and international institutions such as the United Nations (UN) and the International Criminal Court (ICC) while a large component of TJ support goes either in parallel with, or through, wider development programmes under the development–security–governance nexus in which the strengthening of legitimate institutions and improving governance are the new core goals in development cooperation. Or maybe more accurately, these can be seen as an intermediate means in global attempts to alleviate absolute poverty and to narrow the gap between the rich and the poor. If military support and humanitarian aid is also included, the volumes would be extremely high³ (see, for example, World Bank 2011; UN 2004; Commission of the European Communities 2006; Council of the European Union 2006; IRG 2004).

Despite the high volume of assistance to support transitional justice, there are still relatively few empirical studies and firm evidence about the impact of TJ mechanisms on societies that have undergone radical political transformation and/or recovered from war, conflict and authoritarian regimes. There are some theoretical analyses and empirical studies on the appropriateness and/or funding of certain mechanisms in particular countries.⁴ However, comprehensive multi-country studies on the impact of different mechanisms (including special courts and tribunals, truth commissions, victims’ reparations, security sector reform, traditional mechanisms) are still

³ This article leaves out the detailed study of military and humanitarian aid, as in general they are seen to be outside the formal TJ mechanisms.

⁴ See, for example, Olsen, Payne, and Reiter (2010), Samset, Peterson and Wang (2007), Thoms, Ron and Paris (2008, 2010).

lacking.⁵and the overall and long-term impact of the various transitional justice tools is still not widely understood. Instead, the existing studies confirm that the impact can be very different to the expected one, and is not always positive.⁶ Measuring impact has been difficult in the absence of an ‘ideal’ against which measurement should be done. While the concept of TJ is inherently normative, it still evades providing its ‘ideal state of affairs’ against which the tools, their relevance and impact, can be assessed. Partly due to this conceptual reticence the processes and mechanisms used to support ‘TJ’ are rapidly increasing.⁷ As ‘TJ’ support is also a fairly recent phenomenon in development cooperation, there has not been enough time to learn about the long-term impacts of its different mechanisms. Despite, or maybe because of, the conceptual ambiguity and the lack of sufficient impact assessment, the use of, and scope of the support to, ‘TJ’ has expanded (see Thoms, Ron and Paris 2008).

3 The multifaceted nature of transitional justice and its place in global ethics and international relations

TJ is a multifaceted and often paradoxical concept. It embraces a multiplicity of elements from various justice frameworks without committing itself to any one particular approach. In general the concept is more functional and action-oriented than directly value based.

First, the term refers to two distinct and complex concepts: *transition* and *justice*. The normative relationship between these two remains unclear. While the concept of ‘transitional justice’ is not directly derived from any normative theoretical framework for justice, it has inherent values that are most at home within the liberal social contract approach, particularly in relation to the transition that is expected to be achieved. Because the concept and practice of ‘transitional justice’ historically goes hand in hand with the human rights approach, there is now a vague international consent that transitional justice *reacts* to gross human rights violations and promotes democratic change. In that sense, ‘transitional justice’ is an ethical concept with moral values of human dignity. However, similarly as the term ‘human rights’, TJ in practice often has political dimensions. Ethical values can easily be set aside when other interests of international politics take over.⁸ TJ justice also has a multidimensional approach to the

⁵ The most studied countries in relation to different TJ mechanisms appear to be Sierra Leone, Rwanda and Guatemala, as well as South Africa particularly on the effects of Truth Commission. In Rwanda the funding of transitional mechanisms and the timing of this funding has been studied extensively, as well as the different mechanisms used. Particularly the use of traditional Gacaca-courts has been of wide academic and practical interest. See Dancy (2010: 355–76; Elworthy (2004); De Greiff (1996: 92–111); Rotberg and Thompson (2000), Samset, Peterson and Wang (2007).

⁶ See Duggan (2010); Kaminski, Nalepa and O’Neill (2006); Pham and Vinck(2007); Samset, Peterson and Wang (2007), and Thoms, Ron and Paris (2008).

⁷ Some development analysts are even talking about TJ industry that is growing around ‘transitional justice’ research and practice. See Andrieu (2010); see also Graybill and Lanegran (2004) and Shapiro (2005).

⁸ The questions arise why does the international community get involved very rapidly and decidedly in some conflicts and bring in the transitional justice mechanisms and their support without delay—and stay away from others. The recent Arab world uprisings and revolutions have received very different reactions in Libya, Egypt, Yemen, or Syria. In Rwanda the 1994 genocide had already taken place

concept of justice in general. When we take a look at the key transitional justice mechanisms such as truth commissions, trials and tribunals, reparations and apologies as well as amnesties, transitional justice clearly has *backward and forward looking dimensions* that relate, for their part, to the theoretical frameworks of retributive/corrective justice, restorative justice and distributive/social justice, all at once. This further complicates the impact evaluation.

Second, while the term ‘transitional justice’ has only relatively recently been brought to wider international discussions on development and development cooperation, the terms ‘transitional justice’ and ‘development’ have always been conceptually close. Both refer to a change from one stage to another. This change has inherently normative nature as it is seen as a move from a worse to a better state of affairs; from an authoritarian regime towards democracy; from human rights violations to the rule of law; from poverty and marginalization to social justice and political participation. International intervention is justified as it improves human security, quality of life, and takes forward the democratic development of the target society.⁹ More and more clearly wider development cooperation policies and aid given to transitional justice processes, aim to take ‘democratic change’ and ‘human rights promotion’ forward. This model of development is directly drawn from the liberal democratic experience as it calls not only for respect for universal, individual human rights and inclusive political participation but also for strengthening the institutions that support a free market economy. The international legitimacy it has is then the same as that of human rights, and similarly—despite its claimed universalistic nature—has not gained global acceptance and support. (On the relation between development and transitional justice, see more detail in Dower 1999 and Van Gennip 2005).

Third, the multidisciplinary nature of ‘transitional justice’ looks at questions of justice from the point of view of domestic and international law, social ethics, political change, philosophical analysis, historical context, empirical experiences, and cultural environment. Different disciplines come up with different suggestions for assessment and evaluation that sometimes may appear incompatible or even contradictory. More interdisciplinary research would be called for: how can we, for example, include analytical theories of change and normative values and goals in programme assessment and evaluation? On the one hand, we do not know what we should evaluate before we have a common understanding of the desired direction of transition; on the other hand, if we do not clearly define what kind of change we are looking for (institutional, structural, or changing of individuals and their relationships) it is difficult to define the overall values. This, in turn, affects the empirical evidence needed to be collected depending, for instance, if we are looking at changes in policies and procedures, individual and intergroup relations, power structures, social systems, attitudes, knowledge or skills. Personal healing in a reconciliation process may need psychological approach to ‘change’, while reconstruction and related changes in the

before the international community seriously intervened. Afterwards, however, it has brought in vast support for transitional justice mechanisms. In Kenya after the 2007 election, the international interference was almost immediate while in Sudan reactions were slower again. What other geopolitical or economic interests lay behind bringing in the TJ mechanisms?

⁹ See, for example, Andrieu (2010); Crocker (1999); De Greiff and Duthie (2009); Elster (2004); Mani (2005a, 2005b); Miller (2008: 266-70); Teitel (2003); Walker (2006b: 12).

political system and power relations call for studies in political theory, wider social sciences and history (see Andrieu 2010; Shapiro 2005).

Fourth, and related to the previously mentioned issues, ‘transitional justice’ currently falls uneasily between a ‘global justice framework’ that focuses on (autonomous) individuals’ rights and duties across borders, and the practice of ‘international justice’ that deals more directly with the relations between sovereign states. Originally the concept of transitional justice was tied to the legal framework of international law and international criminal justice through human rights violations and crimes against humanity.¹⁰ After the Second World War and the Nuremberg and Tokyo military tribunals (1945-48), the Universal Declaration of Human Rights (1948) was agreed and various international human rights institutions and instruments to take TJ forward were established (see Elster 2004; Teitel 2003; Miller 2008). Thus, TJ should be seen as a part of the wider transnational human rights approach. The concept of transitional justice brought in new elements to the interpretation of international law through expanding the application of international law from *states* to *individuals*. Despite its supposedly complementary nature, TJ gives priority to international law over domestic law. While the International Criminal Court (ICC) established by the Rome Statute (in force 2002) is described as the court of the last resource to be used when national justice systems fail, in reality it has become the transnational source of justice that overrides domestic courts. In this *criminal justice* sense TJ can currently be seen to undermine the doctrine of state sovereignty that had largely guided international relations since the 1648 Treaty of Westphalia (Hinton 2010: 3; Koskenniemi 2005). While not every state has signed, ratified and/or domesticated all the treaties and agreements related to international law and transitional justice, the international community (of those who have done so) can still take action against these ‘outlaw’ states and against individual members of their regimes when international human rights standards are violated or crimes against humanity are committed.

This very situation was well-described and theoretically justified decades later in John Rawls’ *The Law of Peoples* (1999) which expanded the social contract framework of modern political liberalism presented in *Theory of Justice* (1971) and *Political Liberalism* (1993) from an internal arrangement of individual states to international relations. For Rawls, the representatives of reasonable and decent people (as the head of states) would be expected to agree on the key universal principles of international justice. These principles would entail national sovereignty, agreement with international treaties, non-intervention and human rights. Those who did not agree with these commonly agreed principles can be excluded as indecent people, outlaw states, or societies burdened by unfavourable conditions, and reluctant absolutism. Simultaneously these states/people have earned less sovereignty (here paralleled to moral autonomy) and thus, the rest of the (decent members of the) international community are justified to interfere in their affair. As the ‘difference principle in national political justice’, Rawls’ ‘principle of transition’ allows for external interventions and assistance to these burdened societies in becoming full members of the wider international society of decent people. Similarly the mechanisms under

¹⁰ While the concept of transitional justice can be traced even further back, it is better understood when applied to international post-Second World War period after 1945 and the world’s response to the Nazi regime’s crimes against humanity and severe violations of human rights. Since that time transitional justice has gone hand in hand with the wider human rights movement.

transitional justice tend to be based on social contract reasoning for the state legitimacy in a transition from ‘a state of nature’/‘violent anarchy’ towards well-ordered society and political order. The transitions should lead to respect for citizens’ rights and open political participation. Even if the structure of Rawls’ theory is abstract and its social contract settings hypothetical, it is directly relevant to political reality. On the one hand, it provides the core moral principles of justice that should be universally acceptable to all people. On the other hand, it simultaneously sets the prerequisite conditions for those ‘moral agents’ for accepting these principles. Thus, it cleverly justifies interference to the affairs of those who do not meet these conditions. In other words, in a sense it is simultaneously both a prescriptive and descriptive account of the ideals and practice of a liberal approach to political justice(see Rawls 1971, 1999).

Important to note is that while the social contract framework of political liberalism can give moral justification for the goals of transitional justice, that is, the legitimacy of the political institutions and the transition from ‘the state of nature’ to a ‘well-ordered’ society, it can as easily undermine these core ethical ideals when applied to political practice. Because the social contract framework focuses on the moral autonomy and rationality of the agents of political change that are allowed to the negotiation table, it tends to be a top-down structure between those in power, despite its own calls for individual freedom, equality and impartiality. In other words, in practice the contracts are negotiated between the leaders, both at domestic as well as at international levels.¹¹ Thus, when the *transitional justice* arrangements and their support are discussed in the international forums, it is not always clear what the aim is: to build trust between the citizens and the legitimate leaders of the transitional/post-conflict society, or merely to build trust between the various members of international community. This top-down structure of social contract reasoning has led to the formation of various types of ‘transitional governments’ or ‘coalition governments’ which do *not* necessarily enjoy the trust of the people in conflict, post-conflict or fragile states. Thus, they are usually not functional in the longer run. However, they provide at least ‘formally acceptable’ partners to the international community and maintain structures through which the funds to support TJ and other aid can be channelled.

In Kenya and Zimbabwe in 2008, for example, the coalition government arrangements suited the international community and provided continuity of a government with whom TJ support could be arranged. In reality, in neither country have these ‘inclusive’ governments proven to be fully committed or able, to take forward serious democratic change towards social justice, equality and respect for individuals’ rights. In Somalia the transitional federal government (TFG) is by its very definition a transitional political arrangement that has not been able to gain public trust or take peacebuilding, political and social reform forward. Instead, it has fallen apart several times due to its internal disputes. In Afghanistan the international recognition of the legitimacy of the most

¹¹ The element of *political transition* is the core of the social contract framework. Social contract is needed in order to democratically move from the (usually seen as disorderly, chaotic and violent) state of nature to harmonious and well-ordered society in which ‘rational and autonomous individuals govern themselves’ through political representation. Social contract theory formed a central pillar in the historically important notion that legitimate state authority must be derived from the consent of the governed. The social contract method promises to promote democracy, respect for individual rights and freedoms, to enhance tolerance and mutual participation. It is based on universal values of impartiality, reciprocity and inclusiveness. However, it is a hypothetical agreement by the governed on a set of rules by which they are governed, not practical reality (Hellsten 2009a: 83–4).

recent presidential elections in 2009 and the leadership of President Hamid Karzai has not significantly helped to bring either political *transition* or *justice* to the country. Similar cases can be found in various parts of the world. Despite its core values of freedom and equality, transitional justice arrangements can easily be used to support the wider political and economic interests of the international community tied together with the narrow self-interest of the local political elites.

While post-conflict states with bad and poor governance are easily ‘captured’ by the interests of the political and business elites, the international community can, for its part, easily become a hostage of a dysfunctional and corrupt government that it has helped to form during peacebuilding or post-conflict reconstruction. Even if the new regimes may not be (always and fully) committed to democratic reforms, they are still the only formal partners that the donor community can cooperate with in taking ‘transitional justice’ forward. Only states where national systems have clearly failed can be by-passed. While civil society is usually an important partner in TJ, it can only perform a limited scope of work in building national unity or strengthening the state institutions. Whoever the partners are, the impact of external interference is always two-fold. While it may be impossible for biased governments and self-interested political elites to deal with past injustices in which at least some of them have been involved in, relying on external solutions may delay even further the (re)building of public trust. When transitional justice mechanisms, and particularly those of criminal justice, are introduced in a post-conflict/transitional country, strengthening the local justice system and courts may become of secondary interest and importance. On the other hand, the international criminal trials (such as those by the ICC, or other related interim hybrid arrangements like the international criminal tribunals for Rwanda and former Yugoslavia and the special court for Sierra Leone) are drawn-out processes. The local perpetrators may hope that they will never have to be accountable and take their chances with international arrangements. Simultaneously this can detract attention from national legislation and urgently needed justice sector reforms.¹²

If the TJ mechanisms succeed in taking the cases forward, the perpetrators can always accuse it of favouring western interests. The vagueness of the TJ concept as well as the *ad hoc* nature of the support of its mechanisms leaves room for this criticism. Various African states have taken this root; recent examples are Kenya and Sudan.

It is indeed difficult to convince the global community that transitional justice is politically and culturally impartial, as the concept itself has always been tied with political liberalization following the western model. In the first comprehensive theoretical account on transitional justice, Ruti Teitel (2000: 5) emphasized that transitional justice aims to ensure democracy, constitutionalism and realization of the rule of law. Teitel focused on the *legal responses and processes needed in political*

¹² Kenya, for example, was first openly calling for international assistance and even the ICC investigations after its 2007 election violence. Once the key suspects from all sides of the political elites, however, realized that the ICC process was going forward with relatively swift speed, they turned their views around and were aggressively critical of the external interference. In the meantime, no cases related to the post-election violations have been taken forward in the local courts. A comprehensive reform of the justice system is gradually taken forward with the implementation of the new constitution agreed on in 2010. However, the comprehensive donor support towards these local reforms has now fragmented and been split between the external mechanisms support and the reform of the national institutions.

transitions from illiberal rule towards liberalization and democratic rule. Interestingly, rather than trying to find any universalistic theoretical justification, according to Teitel this normative direction was inductively derived from historical evidence collected from Latin America, East Europe and the Soviet Union, as well as some African states, which had overthrown military dictatorships and totalitarian regimes to move to a multiparty democracy (see Teitel 2000: 3–6). At this point TJ was defined in functional terms as a concept of justice that is *intervening* in a *period of political change*, characterized by a juridical answer to the wrongs of past repressive regimes. However, the forward looking perspective was also brought in when it was recognized that a wider legal framework was needed in order not to relapse into autocracy or other type of power grabbing by the political elites (Teitel 2000: 5; Teitel 2003: 69, see also Koskenniemi 2005).

Originally TJ clearly focused on criminal justice and legal procedures against impunity. However, after the cold war and the collapse of socialist states, issues of TJ have been more directly associated with a wave of democratic transitions and the liberalization of politics and economy in the historical context that Huntington (1991) called ‘the third wave’¹³ (see also Collier 2011: xvi). The international community, and particularly the western block, now needed to consider more comprehensive TJ measures that did not deal only with ‘the evil past’, but also provided means to enhance constitutionalism and more impartial socioeconomic distribution policies and mechanisms for future stability. It also became evident that merely changing institutional structures does not necessarily bring about social justice or alleviate poverty but that the wider culture of bad governance and impunity also needs to be targeted.^{14,15}

4 Transitional justice, social justice and good governance

¹³ In general the third wave of democratization is seen to have started with Portugal’s *coup d’état* in 1975. The first wave is seen to have taken place 1820-1926 and to have its roots in the French and American Revolutions. The second wave started after the Second World War. Samuel Huntington (1991) sees reverse waves against democracy in between that build up for the next wave.

¹⁴ See, for example, Teitel (2000: 3); Ghani and Lockhard (2008), UNDP (2011); UN Women (2011); World Bank (2011).

¹⁵ In legal and political practice there is now also more focus on the victims, their narratives, preparations and compensation. The recognition of those who have suffered most in the conflict situations is important. However, there are many practical differences that raise further questions: How to decide who the main victims are when the whole nation is victimized by violence, oppression and disorder? Whom to compensate, how much and on what criteria? How to deal with the most vulnerable groups like women, children and minorities? Where to get the funds for truth commissions and compensation in the first place? The domestic resources during the reconstruction period tend to be used for other, ‘more urgent’ processes. International donors are usually willing to provide emergency assistance and humanitarian aid, for example, to internally or externally displaced persons, but to put more funds towards direct compensation of victims is not as popular, partly due to the above mentioned unsolved questions. The multilateral efforts through the ICC Trust Fund for Victims (TFV/ICC) have received relatively small amount of funding from the Roman Statute signatories and other donors since its establishment in 2002. According the TFV/ICC 2010 Annual Report (March) only 5.1 million Euros had been received altogether from Germany, Finland, Belgium, Denmark, France, Ireland, United Kingdom, Spain, Sweden, Switzerland, Norway. According to the 2011 Report, an addition of 1.7 million Euros was donated to the Trust Fund and presently only around 80,000 victims benefit from the Trust Fund’s projects—most of whom are from Northern Uganda, Democratic Republic of Congo and Central African Republic. Other countries are complaining about being left aside, or not given the same priority. For details, see *The Trust Fund for Victims Progress Reports 2010 and 2011* at www.trustfundforvictims.org/.

The development community has learnt through trial and error that law and order do not guarantee democracy. Neither do democratic processes, such as multiparty elections, guarantee peace and human security. Above all, a market economy with the aim of economic growth does not necessarily bring about economic justice, reduce poverty and narrow the gap between the rich and the poor. Thus, peacebuilding and conflict resolution programmes have recently been brought closer to development assistance under the fairly recent requirement of ‘good governance’. All this is now brought together also under the concept of TJ (Collier 2009; Collier 2011: xvi-xx, see also Hellsten 2009a, 2009b). The requirement of good governance is seen to set a new condition for development aid, as again it is seen to refer to the western conditions on governance, which may not be seen as a desired alternative in all transitional societies. Good governance in itself is an ambiguous term that leaves room for wider interpretations. Its set criteria are also not certain. The term in general is used as the opposite of bad, weak and poor governance, all of these being different matters. Poor and weak governance may entail corruption, and mismanagement or at least inefficient use of the state resources, but ideally it can be remedied by targeted aid to capacity-building, technical assistance, training, better legislation and resources. Bad governance, for its part, refers more directly to the lack of political will, dictatorship, impunity, and deliberate misuse of public resources and wide spread grand corruption. To move from bad governance, impunity and corruption to good governance needs much more than external support for institutional and structural changes. In most cases, changes in leadership are called for as the state is captured by bad leaders and political elites in their inner circle, as seems to be the case in the recent uprisings and *coup d'états* of the Arab spring.

For example, the 2011 Arab Spring revolutions in the Middle East and in Africa in Egypt, Libya, and Tunis were against ‘bad governance’ rather than any particular political ideology. New, alternative directions in political transitions will be a challenge to the TJ framework in development policy as sometimes changing the leader, whether through transitional mediations, *coup d'état* or democratic elections, may not end structural injustices if the wider governance culture is not changed. In Egypt demonstrations have continued after the change of power as the transitional military government has not delivered what the people hoped for. The work for ending socioeconomic inequalities, long-term injustices and biased and partial power structures—including gender inequality—has to go hand in hand with other transitional justice measures. However, even with good governance the final goals have to be tied to the core values of equality and social justice, from merely helping to set up the processes of democracy. For example in Libya, it is still very uncertain what direction the country will take in the end. Right after the demise of Gaddafi, it already looks as if his regime would be replaced by a more clearly Islamic political system. Whether this is a turn towards democracy or not remains still to be seen. If any of these states take a strong turn to radical political Islam or any other radical political ideology, equal participation by the people may not be around the corner after all.

Many riots, revolutions and conflicts stem from ‘greed’ of leaders and ‘grievances’ of the people. The narrow interests of political elites, corruption and the general abuse of power and biased (re)distribution of resources, historical social and economic inequalities, ethnic hostilities and competition, all cause instability and unrest. Bad governance is also often tied in with international organized crime (such as trafficking drugs, arms and people) making it even more difficult to break the cycle of violence and insecurity. When political class works together with organized crime, it is very difficult

to end the culture of impunity (Addison and Brück 2009; Murshed 2002). If the state is captured by the business interests of the political class and their international and national partners, enhancing democracy even in a ‘post-conflict’ situation may fail. The other result might be the appearance of a ‘pseudo-democracy’ where all the democratic institutions are in place, but the state is captured by the interests of the political and economic elites.

In order to reconstruct societies after conflict and to avoid future clashes, the socioeconomic conditions that cause poverty, exclusion and inequality have to be taken into account. Besides legal procedures that are used to end impunity at all levels, it is important to enhance also social and economic justice that relates to the fair and impartial distribution of resources and power. As noted earlier, experience shows that most protests start with people not being content with their economic conditions and having grievances about socioeconomic inequalities, unemployment and food prices (Addison and Brück 2009; Laplante 2008; Murshed 2002; Miller 2008; World Bank 2011).¹⁶

Here again TJ and human rights go hand in hand. The scope of both is expanding from negative, political and civil rights to positive economic, social and cultural rights. Indeed, as Laplante and Miller argue: if the socio-politico-economic origins of the conflicts are not examined and recognized, building a more just and stable society is not likely to succeed. If the TJ mechanisms that deal with past injustice (such as truth commissions and tribunals) do not properly take into account the actual role of the political elites in looting resources as well as maintaining unequal and partial distribution of the public resources, particularly land, the transition will only be taken forward half-way.¹⁷ Without serious requirement for improvements in governance, impunity will continue or take new forms and adding volumes of aid will not have the desired changes. If the countries supporting political transition do not take a consistent stand on governance issues and impunity, underlying conflicts will not be solved. Mozambique is a good example of a country that, after long-lasting conflict, has succeeded to maintain a relatively substantive economic growth. However, poverty reduction in the country has stalled and social inequalities continue to grow while the human rights situation in general remains a concern. It is evident that its macroeconomic indicators do not reflect the lives and experiences of ordinary citizens and a transition towards social justice is still wanting.¹⁸

The requirement of ‘good governance’ has to be a cross-cutting theme as TJ processes and mechanisms and their impact are interlinked; either enforcing or undermining each other. For instance, organizing multiparty elections may demonstrate that a society is on its way towards democratic processes. However, the elections themselves may cause further conflict and violence if not considered to be free and fair. Free and fair elections

¹⁶ In the most recent 2011 uprisings and revolutions in northern Africa (Tunisia, Egypt, Libya, Algeria) and Middle East (Bahrain, Syria, Jordan, Yemen, Saudi Arabia, etc.) thousands of ordinary citizens organized (largely through social media) protests against unemployment, low living standards and high living costs, and the looting of public resources and corruption. These protests turned into uprisings that aimed to overthrow the ruling autocratic and kleptocratic regimes with more and less successful results (see also Collier 2011, 2009; Laplante 2008; Miller 2008: 268–9).

¹⁷ Collier (2011); Hagg and Kabwanja (2007); Laplante (2008: 331–55); Miller (2008: 266–91).

¹⁸ For details of the Mozambique current situation see for example UNDP (2011).

are only possible if electoral bodies are independent enough to do their work impartially and professionally. Such commissions can be built only if there is a separation of powers, and in general, the state is clearly detached from the government and public service officers can work effectively and without corruption. Similarly, truth commissions may bring out past injustices and reveal the perpetrators of human rights violations. Justice, however, will only be achieved if tribunals and courts have the autonomy and capacity to deal credibly and impartially with emerging cases; for instance, if the security organs are prepared and capable to provide witness protection where needed; and if the state has set mechanisms to provide at least some type of reparation for the victims. Reparation is only possible if there are funds and services (psychological and medical support, (re)training and education, etc.) available and the related institutions can manage them properly and impartially. Without the emphasis on good governance, the danger is that, if one pillar or aspect fails, the results can be either new conflict from continuing underlying tensions or ‘pseudo-democracy’ which appears to follow democratic procedures, but fails to correct structural injustices and bad governance and thus allowing impunity to continue (see Collier 2009; Collier 2011: xvi-xx; Hellsten 2009a, 2009b.) Thus, as the studies (2008 and 2010) by Thoms, Ron, and Paris show, the overall impact of individual TJ mechanisms is still very difficult to evaluate.

5 Transitional justice in Africa: when does transition start and where does it end?

It has also been argued that using just one or few of the mechanisms alone might have negative rather than positive impact. Thus, a specific combination of mechanisms—such as trials and amnesties; or trials, amnesties and truth commissions—generate wider improvements in the rule of law and help to bring an end to the culture of impunity. For example, the TJ trials provide accountability, truth commissions show transparency, while amnesties can bring about stability. Constitutional reform is often needed to guarantee a more just future. This combination of mechanisms can together advance democracy and respect for human rights, better than relying strictly on one mechanism only. Often, however, there is tendency to evaluate the impact of one or the other mechanism at time. For example, evaluations tend to focus on what are the results of the use of a particular, externally funded mechanism, such as truth commission in South Africa or in Sierra Leone, trials in Rwanda and Liberia, etc. This evaluation does not give a comprehensive picture of the overall impact of TJ processes and mechanisms.¹⁹

We have earlier seen that while the concept of transitional justice does not openly draw from any one philosophical or ideological normative framework of justice, it is most at home within the liberal and social contract setting. Simultaneously, however, it appears—maybe even inadvertently—to use utilitarian calculations in relation to ‘entrance’ and ‘exit strategies’. How many victims are allowed to die before the

¹⁹ For studies on the topic, see Olsen, Payne, Reiter (2010: 980-1007) and Thoms, Ron and Paris (2008).

international community should step in? When has transition reached far enough for the international community to step out?²⁰

The inherent normativity of the concept of *transitional justice* has raised several objections internationally. First, transitional justice is criticized for legitimizing social engineering in development cooperation (see Duffield 2002, 2005; Hinton 2010: 1-10). Second, the transitional justice agenda is seen as a form of neocolonial imperialism that undermines state sovereignty by allowing, or even calling for, external interference (and particularly that of the ICC) by categorizing particular states as weak, fragile, failing or failed and thus unable to manage their own affairs (see Manga Fombad 2011: 1–13; *New African* 2008; Scanlon and Muddell 2009). Third, as transitional justice is based on western ‘false’ universalism going hand in hand with an individualistic approach to human rights, it is claimed not to leave enough space for cultural interpretations, national ownership of local or traditional mechanisms to deal with conflicts and punishment. Fourth, issues of justice are sometimes seen to conflict with other goals, such as peace and social harmony. Transitional justice systems are seen to prevent reconciliation and moving forward with their strict legalism and insistence on punishing ‘perpetrators’. The critics of transitional justice note not only that it is difficult to pinpoint all who should be punished and how, but some new regimes would like to move their countries forward to a new political order without having to ‘go after’ their former colleagues.²¹ It is debated that sometimes agreeing to amnesty, the transition can happen faster and authoritarian leaders may be more willing to give up their power. The argument is that in order to maintain peace and harmony, it is better not to open ‘old wounds’, but try to move towards a more just society in the future. Supporters of transitional justice processes, for their part, claim that there can be no ‘peace without justice’; if injustices are not corrected and perpetrators not taken to justice, the culture of impunity will continue and new violations will be likely.²²

The debate between peace and justice is partly practical and partly political. Sometimes the new regimes of some transitional countries seem to be all too willing to let former leaders ‘off the hook’ when it comes to economic crimes and corruption. The networks of corruption are so deep and strong, that it is likely that some of the leaders who have promised to take the nation in a new direction would themselves be implicated in various old scandals. Neither do they want to leave that option open to those who will

²⁰ Thus, the mechanisms of transitional justice are not based on any one, traditionally recognized basic standard of justice (such as needs for socialism, individual rights for the different forms of liberalism, entitlements for some forms of neoliberalism/liberalism, human capabilities for the capability approach, or overall utility or maximum happiness as the different forms of utilitarianism). Instead, the term transitional is usually used to refer to functional or operational aspects of justice; as an active response to injustices—and its mechanisms draw little bit from the various above-mentioned theoretical frameworks to justice.

²¹ See, for example, *New African* (2008) on various responses of the African leaders. See also Huysse and Salter (2008), and Manga Fombad (2011).

²² On these arguments see, for example, Ghani and Lockhard (2008); Graybill and Lanegran (2004: 1–18); Manga Fombad (2011), and Mani (2005a, 2005b).

follow them, as they might indeed want to enrich themselves while in power since they know how easily the tables can turn.²³

This criticism has been particularly loud in the African context. The universalistic values and individualistic concept of human rights are seen to represent the western neocolonial political agenda of liberal market democracy and western profit maximization, rather than making African states equal partners in global markets and political forums. Particularly the ICC is seen as a mechanism that is used to remove those leaders from power who dare to stand up against western powers. Thus, the western push for transitional justice and good governance is not only seen as paternalistic and violating state sovereignty, but it is seen as proof of continuing imperialistic interests (Manga Fombad 2011: 1-13; Huyse and Salter 2008; *New African* 2008).²⁴

Due to continuing cross-border as well as internal violent conflicts, Africa has indeed had its share of various international processes of transitional justice: the ICC proceedings, the ICC warrants (in Uganda, Sierra Leone, Democratic Republic of Congo, Kenya, Sudan, Libya) special tribunals (ICTR/Rwanda and Special Court for Sierra Leone), victims participation, truth commissions and other truth telling processes (Sierra Leone, Kenya, South Africa, Rwanda, Liberia, Morocco, Ghana, Central African Republic and Nigeria), disarmament, demobilization, and reintegration (DDR) (Angola, Burundi, Democratic Republic of Congo, Liberia, Mozambique and Uganda). African authoritarian regimes have seriously violated agreed human rights standards and been involved in continuous ethnic clashes, even genocide. Gender based violence and women's rights violations are also part of structural and traditional injustice in Africa (see, for example, Graybill and Lanegran 2004: 1-18; Manga Fombad 2011: 1-13). International support for TJ tools in Africa, however, has not always been consistent. This is partly due to differing political and geo-political country contexts, levels of aid dependency, differing governance assessments of the target country and the

²³ In Kenya, just to give one example, after the 2002 'revolutionary elections' that moved authoritarian President Daniel arap Moi and brought in power the NARC's ethnically more inclusive Rainbow Coalition, one agreement with President Moi was that he would not be taken to court on injustices he might have been engaged in, but that he would continue to receive state benefits like any other former president in the country would. Similarly Zimbabwean President Mugabe and Libyan Gaddafi were offered amnesty and an easy way if they were to give up their power peacefully. Similar cases are many; for more details on Kenya, see Hellsten (2009b).

²⁴ While much of this criticism is coming from those who might have concerns that they will be affected by transitional justice mechanism, various African leaders and scholars also claim that the values on which many of the traditional transitional justice mechanisms are based on are incompatible with African social ethics. The former Nigerian Foreign Minister A. Bolaji Akinyemi, for example, has criticized the ICC activities in Africa by noting that 'African civilization does not emphasize revenge. It emphasizes conciliation and forgiveness'. This has been amply demonstrated in post-colonial attitudes towards former colonizers and in the most dramatic case, in the attitude of Nelson Mandela towards his persecutors. Western civilization, on the other hand, with its roots in the "eye for an eye syndrome" emphasizes vengeance in the name of justice. While few African societies have blood feuds going back centuries, European culture is noted for such blood feuds. Getting this distinction right is important as Africa and the rest of the world square-off over Darfur and whatever African conflicts may be in the pipeline' (*New Africa* 2008).

various political, economic and security interests of the international donor community (natural resources, security/terrorism, immigration, etc.).²⁵

Different countries have different histories related to the conflicts they are going through, and there is no one size fits all solution, but there still does not appear to be any clear globally normative approach to transitional justice support or comprehensive programming in post-conflict/transitional countries. In some countries external mechanisms are supported, while elsewhere the national institutions are strengthened. Yet elsewhere, there have been attempts to combine both approaches, but the timelines for transition remain blurred.

One of the most difficult task is to decide when a political transition starts and when it ends, if ever. We can illustrate this problem by looking at two rather different cases where external support and aid have been used for transitional justice purposes. Both Kenya and Mozambique have had their share of violence and conflict, though at very different levels. As there have been continuous ethnic tensions in Kenya, as well as terrorism and organized crime, we could say that the country has been in some type of political transition since gaining independence in 1963. One significant transitional moment was in 1991 when Kenya amended its constitution and moved formally to multi-party politics. In 2002 the country moved again further towards democracy after the authoritarian rule of President Daniel arap Moi ended with the victory of the opposition coalition. The donor community supported various comprehensive reforms which aimed to speed up democratic development. One major reform supported by donor basket funding that could be seen as TJ support was governance, justice, law and order sector (GJLOS) reform as well as public service reform (PSR). However, the reforms under this programme were slow and while there was some institutional strengthening, the governance culture did not change. Economically Kenya has been relatively strong, but poverty has not gone down. Thus, the final set-back that launched the use of more traditional justice mechanisms (political mediation, reconciliation, formation of coalition government, truth commission, electoral system reform, and finally the ICC investigations) was the violence after the December 2007 elections. The externally 'forced' coalition government could not end the ethnic tensions. However, Kenya succeeded in passing a new, fairly progressive constitution in 2010, again with heavy external aid to the new interim electoral commission, civic education and constitution drafting. Corruption, however, still has not been reduced significantly and interests of the political elites rather than the common-good run the country's politics. Poverty levels remain high and so do ethnic tensions, creating fears that the 2012 elections will repeat the violence unless ethnic manipulation comes to an end and underlying socioeconomic inequalities are corrected.

A key question is what is the final goalpost for Kenya's democratic transition? After all, currently it has all the formal institutions and processes necessary for a democratic system. It no longer has an autocratic government *per se* but active multiparty politics.

²⁵ Ironically, while not appealing to different values as such, the USA was one of the few (13) countries that originally refused to sign the Roman Statute on the same justificatory basis as the African leaders now refuse to follow it. The Bush administration claimed that the concept failed both ideological and pragmatic tests. Ideologically, it was seen to lack political accountability, and its application was seen as uncertain. The ICC's pragmatic flaw is that it will always be a tool of the 'overdog', without which it cannot impose justice. But as a court of the victors, it will never be considered politically fully impartial.

It has a new constitution with better checks and balances, and new institutional structure and rules. However, impunity in its governance culture remains high and thus even the ‘democratic reforms’ still benefit mainly the few in power rather than the citizenry as a whole. State mechanisms are not strong enough to enhance impartiality, end ethnic competition over power and resources, to significantly narrow the gap between the rich and poor or alleviate absolute poverty. In other words, the changes in institutions and structures have not succeeded in guaranteeing changes in attitude and governance culture.

Mozambique, for its part, had a long liberation war against Portugal and soon after its independence (1975), suffered from a violent and an externally-supported civil war (1977–92). After the peace agreement and its first multiparty elections on 1994 and its rather simultaneous turn from socialism to market economy, Mozambique has often been considered as a post-conflict success story as it has maintained peace and a degree of political stability. However, the underlying tensions related to social and economic inequality have never been solved and Mozambique has remained as one of the poorest countries in Africa (despite all its natural resources, the use of which is gradually becoming under a more public debate).²⁶ After the violence of the civil war, no formal TJ mechanisms (except the DDR) were set up or seriously pushed for by the international community. Neither the government nor the side of the former rebels offered any apologies or reparations to the victims, no trials were set to punish the violators of human rights from either side. No truth commission was set up; only the traditional reconciliation methods were used.²⁷ The opposition has since had little chance to balance the political centralization of power and resources. The current constitution gives the president almost unlimited powers, and the relationship between the ruling political party (FRELIMO), state, government as well as considerable business enterprises is blurred. According to international governance indices such as the Transparency Corruption Perception Index, Mo Ibrahim Index and APRM 2009 Mozambique Country Report, corruption and governance problems are widely spread. Despite all these problems, Mozambique continues to receive general budget and sector budget support from a large number of western donors (so-called G19 group).²⁸ Has justice been sacrificed in Mozambique for relative stability? Have the conflicts been merely brushed under the carpet? Is Mozambique really turning into a post-conflict society or is it still merely a post-war country? Mozambique may have changed from socialism to capitalism, but has it really made the transition from authoritarian governance to democracy and social justice? If so, what criteria have the international community and the development partners used? How do the BRIC feature in ‘the bigger picture’ as their aid or cooperation partners usually are not asking for democratic chance or realization of human rights.

The rhetorical question is whether there exists any society or country that is *not* in continuous transition.²⁹ The financial crises in the western world, in the USA and the

²⁶ See, for example, UNDP (2011).

²⁷ See details in Hall and Young (1997) and Igreja and Dias-Lambranca (2008).

²⁸ Almost half of Mozambique’s budget still comes from external sources.

²⁹ In history of political theory there has also been a determinist view on political transition that inevitably leads towards a certain type of political order. For Hegel the absolute or the world reason was leading towards free and rational political order that is represented by constitutional monarchy.

Euro zone have recently brought out serious protests and demonstrations, and in general a conflict, between various countries, their citizens and international monetary policies and systems. We can say that also Europe and ‘the wider western world’ are going through another transitional period just now.

Good governance requirements follow the general thinking that corruption and economic crimes are also human rights issues. ‘Goodness’ of governance is a very wide qualitative requirement (and open to various interpretations). Thus, the quality of governance *per se* is difficult to measure objectively. Various attempts to create governance profiles or governance assessment criteria usually end up looking at legislative and institutional changes. As earlier shown, these alone do not necessarily indicate changes in governance culture, while they may indicate the direction of the commitments of the leadership.³⁰ However, the impact of better/good governance can be quantitatively measured with statistics on inequality, absolute poverty, maternal health and education. The challenge, then again, is to find ways to combine assessments of different types of desired change to the overall evaluation of the transitional process and its impact in achieving (social, criminal and political) development as justice for all.³¹

6 Gender justice and transitional justice mechanisms

Issues around gender justice and women’s rights need special emphasis in TJ support. While much theoretical and empirical research has been done on the role of women in war and conflict situations, as well as in peacebuilding and post-conflict reconstruction, the TJ mechanisms that bring long-term gender justice while abolishing structural violence, bias and injustice still are not fully established. This is partly due to unbalanced starting points: women all over the world, in every society, are still struggling to break free and bring about holistic political transition that would leave behind authoritarian and gender violent patriarchal social order.

Even in countries where women’s rights are widely recognized in law, women often still have to struggle twice as hard to achieve the same leadership positions, salary and recognition as men. Thus, the transitional struggle for full gender equality and women’s freedom and rights is still going on globally—even in the most liberal and democratic societies. In conflict situations the gender bias becomes extreme and small gains on the way towards gender equality are lost as society is ‘re-patriarchalized’ further. As

Marx turned Hegel’s views upside down by replacing Hegel’s idealism to materialist realism and argued that the determinist end-state of political freedom was the classless communist society. Both theories also then focus the preferred order to be ‘the world order’ (Hegel 1840; Marx 1848).

³⁰ See EU governance profile, available at: www.acp-programming.eu/wcm/en/programming-process/governance-profiles.html as well as the WB governance indicators, available at: info.worldbank.org/governance/wgi/index.asp.

³¹ The donor support to TJ has not been consistent or coherent in its timing or wider content. Rwanda had to wait several years before transitional justice aid came in significant volumes, while in Guatemala, aid was readily available right after the end of the war. In Sierra Leone and Liberia, the transitional justice processes have been lauded as one of the most successful of the UN, but realizing nevertheless that the values of social justice and equality are still far off (see Samset, Peterson and Wang 2007).

Albanese (2001) shows, particularly nationalist and ethnic conflicts are related to supremacist ideology and supposedly ‘normal’ hierarchies in human nature. Nationalistic or ethnically based ideologies also lead to women’s categorization—not only as ‘the weaker sex’—but also as the biological producers of ethnic heritage and continuity of a nation or ethnic community.³²

The same ideology places many women at risk of gender-based violence at the hands of the ethnic ‘other’. Sexual assaults, particularly rape, come to be interpreted as a means of humiliating the ‘other’ (that is, enemy) and destroying the competing society’s/ethnic community’s cultural, traditional, ethnic and religious integrity. Women become victims of gender-based violence not only because they are women, but also because they are female members of an ethnic group. According to Albanese (2001) this nexus of gender and ethnicity is typical to all nationalist ideology, as nationalist propaganda in general is based on ethnic supremacy and purity and it accentuates differences and promotes rivalry and violence. Militarization of society, on the one hand, promotes hierarchy and male virtues, and on the other, control and obedience. This is repeated in private relationships. Consequently, patriarchal themes are reinforced and men are expected to protect ‘their women’ in their role as mothers and parents of the nation/ethnic community. Women, for their part, are expected to obey the orders of their male ‘guardians’ who should be considered their superiors (Albanese 2001: 45–147).

In open conflict situations, this ideology ‘justifies’ gender based violence as an effective weapon. Historically women have not only been treated as spoils of war, or booty, but have also been (ab)used by men to humiliate their opponents—deeming their opponents impotent in their inability to protect their women (Albanese 2001: 147). It also disintegrates ethnic purity and communal unity. As chastity and ethnic purity are promoted, raped women remain even after war the victims of domestic violence, and are stigmatization by the community. Various cases are reported in Uganda, Sierra Leone, DRC, and former Yugoslavia, just to mention few places.

As was noted at the beginning of this section, even during periods of peace, law or other formal state institutions do not always protect women. Instead, they can sometimes be used to victimize and oppress women even further if they are based on an individualist approach to human rights. Bringing these mechanisms of transitional justice to different cultural settings can worsen the situation. Individualistic approaches assume women’s moral autonomy and agency, but do not necessarily provide the necessary social networks and adequate reparation and compensation after the formal justice process has reached its course. For example, when truth commissions, domestic courts or international tribunals address sexually based violence, they can easily re-victimize women. If transitional justice aims towards ethnic integration and social harmony, the testimonies of women could be considered to destabilize the situation. Women who dare to take their violators to justice can at times then be seen as enemies of reconciliation and peace, further embarrassing men on all sides. In post-conflict societies domestic

³² The domestic sphere, then, becomes the prime way of preserving cultural traditions that are perceived to be threatened in times of ethnic competition and conflict. Simultaneously the structures of either aggression or resistance are militarized in attempts to revive traditional, authoritarian, and patriarchal social forms and relations. This creates an ‘archaized’ social environment or culture, and leaves women at an increased risk of violence and subordination. Ethnic inheritance and continuity of the community may be promoted to such a degree that policies, laws and traditions are used to scrutinize and restrict women’s rights such as, for example, the right to an abortion (Albanese 2001: 143–4).

violence may, in fact, increase after conflict, and women who were victims of gender and sexually based violence (GSBV) during conflict may be abandoned by their male relatives, or their whole communities.³³ While new ways to deal with SGBV have been introduced, the focus on women and their suffering may sometimes separate gender injustices from wider human rights violations/crimes against humanity related to other structural injustices. For example, establishing special courts to deal with sexual violence—as has been done in the Democratic Republic of Congo—may bring more perpetrators of SGBV to be convicted. It is nevertheless an unsustainable answer as it easily turns SGBV into a ‘woman’s affair’ to be dealt with through special ‘gender mechanisms’ and does not guarantee that women are taken any more seriously in front of the ‘mainstream courts’ once the transitional and interim external interference is over.³⁴

If there is more focus on the fact that sexual violence also exists prior to, and after, conflicts, this structural injustice can be better acknowledged and corrected. Let’s take just one example from Sierra Leone. According to truth and reconciliation commission’s (TRC) report, gender based violence, including rape, had been widespread prior to the conflict, and it continued after the judicial system. This relates also to the lower respect for women’s position in that society, which in part is connected to the violation of women’s economic and social rights. In Sierra Leone, over 80 per cent of those forcibly displaced by war and conflict were women and children. In their displacement they continue to be vulnerable to risks of further violence, including rape, torture and sexual slavery because of cultural attitudes and deeply rooted gender inequality. Similar statistics can also be found in IDP camps across the African continent and elsewhere (Scanlon and Muddell 2009: 9-14).

New TJ processes are trying to be culturally more sensitive and not be seen to directly promote western individualism and universalism. However, this may create more challenges to gender equality. Under the umbrella of particularistic and culturally sensitive approaches to justice it is easy to allow the suppression of women’s rights and gender injustice to continue.

The various international initiatives that can also be seen as part of transitional justice mechanisms, such as UNSecurity Council Resolution 1325, *Women, Peace and Security*, and UNSCR 1820, which condemns sexual violence in conflict, have had varying successful results. While there has been external support for the national action plans to take SCR1325 forward, the process tends to be parallel to other reforms that are taking place at the same time. It gives an ‘ideal’ that the nation should aim towards, but at the same time it may ignore this ideal when working on the constitution and other reforms. In Africa several countries have received assistance to develop their national action plans (NAP), but the implementation has not been effective. The way to change the situation is not to build a separate UNSCR 1325 action plan, but to integrate gender justice element in all on-going reforms. In Kenya the donor community attempted this by providing funding for a gender and governance programme (GGP), which holistically attempted to enhance women’s political participation. However, even within the programme women had to negotiate their way against the patriarchal cultural

³³ See, for example, Scanlon and Muddell (2009: 9–28) and Eade (2004).

³⁴ See Greenberg and Zuckerman (2009: 101–33); Hellsten (2010), and Scanlon and Muddell (2009: 10).

structure of Kenyan society to make any small gains. For instance, during the drafting of the new constitution, Kenyan women, and the international community, had to give in on significant improvements in women's rights in order to make small gains. The right to abortion, for example, was abandoned for cultural and religious reasons, even though illegal and unprofessional termination of pregnancy kills thousands of women and girls every year.

Despite the fact that women have often been active in taking transitional efforts forward, they are still not accepted as equal partners at the negotiation table that decides on a the new political order and its key principles of justice and practical measures for its legitimacy. It is evident that while women may have been vital in 'winning the war', they still tend to 'lose the peace'. In the recent northern African and Middle East uprising, women protested alongside men, even in the Islamic countries where women have culturally often had less rights and freedom. However, once the struggle for *freedom* was settled, women were expected to return to their normal roles. Even during the struggles and street protests in Egypt and elsewhere, women were at the forefront. But in a country where they have faced rampant discrimination and received little legal protection against widespread violence and sexual abuse, the women largely kept quiet about their gender rights. While liberation transitions are for freedom and democracy, women have often been careful not to display any intention of wanting to advance their own rights—one group's rights over those of another. On behalf of the Egyptian women who were interviewed after the uprising, Hala Kamal, an assistant professor at Cairo University and a member of the Women in Memory Forum, said: 'We did not speak of our gender rights during these protests because it was not the right time. We spoke for the political and social rights of all Egyptians. If we were to campaign for our rights as women in parallel with the revolution's national goal, that would have been called political opportunism' (Atassi 2011). However, even if women were rallying under the national umbrella where the slogan was democracy, equality and freedom for all Egyptians, it now looks like they are left out and behind in democratic participation. Besides the one woman in the cabinet, no women were selected by the military council to be among the 10-member constitutional committee responsible for making constitutional revisions. New violations against women's rights are reported to have taken place and particularly by the new military leadership. This is just one reminder that efforts of political transition that calls for democracy, more equal participation, freedom and good governance, do not guarantee any change in women's rights and women's position. Small gains are usually made, but the structural gender injustice remains unless they are taken on the reconstruction agenda from the beginning. The aid to transitional justice should focus on this issue and not let the gender justice to become an agenda of secondary importance

The main problem is that women's rights continue to be 'yielding rights' that have to give way to the goals of peace and justice even when radical political changes take place. Gender equality remains the 'moving target' that will never be fully achieved. It is often argued that if women's rights are set to be a part of the reconciliation and reconstruction 'package', it may be impossible to achieve mutual agreements between the fighting parties due to their cultural, religious or other views that maintain the suppression of women in one way or another. Other interests will have priority over gender equality—such as 'religious or cultural rights'. In building post-conflict and/or post-transition justice, it is often argued that women's rights are better introduced step by step: there is a need to bring peace after violence and authoritarianism. As the Egyptian and Kenyan examples show, in order to keep all parties content, gender issues

will be set aside—or postponed till ‘better time’ and after other types of structural injustice have been dealt with (Hellsten 2009b: 90–3, 2010:37–57). However, women’s rights should not be seen as ‘yielding rights’ that give way to all other categories and priorities of justice. Instead they should be in the forefront of building a more just democratic political culture. If this means leaving certain cultural traditions behind or changing ways of life, this should not matter as radical political transition is about change and progress—from suppression to freedom, from human rights violations to their protection and promotion, from structural injustice to equal, impartial and just society. If social justice is the goal of the political transition, it needs to be acknowledged that change in political systems will not be enough unless there is a willingness and real commitment to change the underlying structural injustices that will maintain gender injustices (Hellsten 2010: 37–57).

7 Conclusion

Development aid and support to transitional justice both focus on the move from (what is considered) a worse state to a better one: from war to peace, conflict to harmony, authoritarianism to democracy, poverty to increased human well-being, insecurity to security and inequality to social justice. TJ is now widening scope to take into account the socio-economic roots of conflicts and the remedies of the victims. In doing this it is directly interlinked to long-term social, political and economic reforms, such as the reform of electoral systems, constitution, social and distributive institutions (education, health, employment) including the general financial management of public funds. In order to balance ‘justice during the transition’ and justice in ‘post-transition, normalized’ society, there is a need to make a clear account on what ‘justice’ measures are needed during the transition period and what measures are needed in continuing to build a stable and more impartial state that can deal with its own issues of political, economic and social justice in the future.

While it is too early to tell the effects of the various TJ mechanisms and the impact of the funding of these, there is a need for a more consistent approach. The development community has clearly linked security, governance and development together in its policy agenda.³⁵ This is a result of the lessons learnt: (i) conflicts and violence prevent development goals and maintain poverty and inequality; (ii) democracy alone does not bring security, if economic well-being and social equality is not increased; (iii) a market economy with structural adjustments together with democratic processes (such as multi-party elections) do not succeed in narrowing the gap between the rich and the poor, if the state is not politically committed to social justice, equal rights and impartiality and ready to end the culture of impunity. Changes in institutional structures or legal

³⁵ The EU new communiqués on development cooperation emphasizes that development; human rights, peace and security are indivisible and mutually reinforcing. In an increasingly globalized and interdependent world, peace and security are seen to hang to a great extent on the political will and ability of governments and institutions to pursue policies geared to the rule of law, the protection of human rights, democratic governance, eradicating poverty, promoting sustainable development and reducing the inequalities that lie at the root of the main challenges facing the world. As these are identified as integral to the process of sustainable development they are also major objectives of the EU development policy. The World Bank has also changed its emphasis from economic governance to wider good governance.

frameworks alone do not bring about wider social justice, if there are no changes in leadership and governance cultures and wider attitudes towards structural injustices. The call for more qualitative criteria for development aid in the name of good governance is the first step forwards.

However, while the importance of these connections needs to be recognized, the overall TJ agenda becomes blurred. A concept of TJ that covers human rights violations and righting past wrongs may now have too broad scope. While development policy in general focuses on the security-governance-development nexus, TJ can have a special but short term role in dealing with the most serious human rights violations and in ending impunity. However, the wider socio-economic-cultural changes are not the task of TJ mechanisms. Other reforms are needed to take conflict ridden and transitional societies forwards to new directions.

Social, economic and cultural dimensions of the conflict, its causes and solutions need to be acknowledged. Social justice for the future must aim for impartial and fair distribution. Thus, it is important that social, economic and cultural 'rights' and 'wrongs' are discussed on the wider agenda of reconciliation and reconstruction of societies that have gone through radical political changes. Gender justice has to be fully integrated to all mechanisms and wider reforms. These, however, should be permanent elements of the new stable political order. They cannot be left in the hands of TJ mechanisms as these are meant to be temporary and in place only during the period of transition. If TJ tries to deal with many aspects of justice its processes can be prolonged indefinitely. As there is no clear definition of the timeframe of transition to start with, the danger is that TJ mechanisms become incorporated into the development plan of the country *ad infinitum*. As long as external mechanisms are used to deal with internal problems of impunity and governance, there is a chance that the institutional structure of the countries in question will not be strengthened enough to take over. Capacity-building that aims to produce long-term reforms needs also be part of any transitional justice mechanisms. Otherwise they remain detached and parallel processes to the national development. In some cases they may even hinder the national justice mechanisms.

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