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## Rule of law, security and transitional justice in fragile and conflict-affected societies

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## ***Abstract***

Transitional justice and the rule of law are frequently expected, in conflict-affected societies, to be not only intertwined with one another, but to help to promote post-conflict or post-agreement stability. At the same time, a range of actors is engaged in rule of law promotion and the promotion of security sector reform. Over the past two decades, numerous processes have emerged to promote accountability, rule of law and security in fragile and conflict-affected states, developed by an ever-increasing number of actors at the local, national, regional and international levels. These actors have various and sometimes competing operational priorities, and operate simultaneously and sequentially in the context of situations in which change is both urgent, but necessarily long-term. This paper examines the interaction of transitional justice and rule of law and security sector reform, identifying key concepts, actors, processes, and challenges in pursuing multiple processes simultaneously.

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## 1. Introduction

In many conflict-affected societies, gross violations of human rights have occurred and/or are ongoing, and there are demands for accountability from domestic and international actors, from victims and the society at large. It is for this reason that transitional justice processes have been developed. At the same time, many of the structural elements that enabled or actively created these violations endure, and require reform. Thus, rule of law reform and security sector reform processes have also emerged in such conflict-affected societies. This paper examines the interactions amongst these processes, as well as the role of actors at various levels: locally, nationally, transnationally and internationally, to identify key challenges for practitioners.

Transitional justice processes developed domestically and internationally to address past abuses, including trials of perpetrators, vetting or lustration, commissions of inquiry, amnesties, memorials and reparations, and traditional or non-state justice. These were developed first, largely, in Latin America in the wake of transitions from authoritarian rule beginning in the early 1980s, but have increasingly taken place in the wake of violent conflicts and during ongoing conflicts, or in fragile, conflict-prone states.<sup>1</sup> As these processes evolved, so too did processes to resolve internal conflicts, with a rapid growth in multidimensional peacekeeping and peacebuilding operations accompanied by related development programming. These latter operations have included significant rule of law components addressing everything from constitutional and judicial reform to legal assistance and alternative legal dispute mechanisms. These conflict-mitigating activities have also promoted security sector reform (SSR), as well as ensure the disarmament, demobilization and reintegration of ex-combatants (DDR), with activities including vetting of members, particularly on the basis of past abuses, and retraining of those retained. This paper now turns to the interaction of these processes, before turning to potential challenges, a number of lessons learned, and conclusions including areas where further research is merited.

## 2. State of the art

### *2.1 Transitional justice rule of law and security in conflict-affected societies*

In conflict-affected societies, demands for accountability, often in the form of transitional justice (TJ) mechanisms, interact with processes and actors seeking to promote rule of law and the reform of the security sector. These activities take place from below and from above, but in most fragile societies there is a significant international component to such processes. Ensuring security and stability is often a pertinent desire of society at large. A common understanding of security is stronger than a common understanding of justice in conflict-affected environment.<sup>2</sup> Nevertheless, norms, standards, rules or laws can give significant guidance for lawmakers, courts and law enforcement mechanisms on how security and safety for individuals and the society at large can be safeguarded. Such rules, laws or regulations are sometimes manifested in military rules.

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<sup>1</sup> Ruti G. Teitel, "Transitional justice genealogy," *Harvard Human Rights Journal* 16 (2003): 69-94.

<sup>2</sup> Richard Zajac Sannerholm, *Rule of Law after War and Crisis, Ideologies, Norms and Methods* (Antwerp: Intersentia, 2012), 11-38.

Unfortunately, in conflict-affected societies, legislation and regulations for maintaining order do not have immediate effect on their own on behavioral changes and security in the short term.<sup>3</sup>

A range of incentives is needed to ensure that those in the security sector, from high-level officials or officers to the rank and file, accept reform. One incentive both for a society and the security sector is the avoidance of revenge, or arbitrary “justice”. Thus, alternative ways to govern and to establish and enforce rule are of highest urgency after conflict has ended. Other incentives may include maintenance of employment, some institutional prerogatives, salary, pensions or other material benefits such as housing. If incentives for security sector reforms are not provided, there may be significant resistance to these reforms and broader rule of law reforms.<sup>4</sup>

Competing priorities always exist between those who emphasize stability and security and ask for strict administrative reforms and those who emphasize rights and redress for the past abuse through other means of transitional justice such as trials, lustration or vetting, memorials, amnesties or commissions of inquiry. To reconcile both poses a challenge in post-conflict societies in particular. One can thus argue that it is not primarily a matter of priorities but rather the choice of parallel measures that mutually reinforce each other to reach a change from violent to non-violent behavior through coercion by the rule of law.

Complementarity and sequencing of TJ measures depends on time and the historical context of the conflict. It is much easier to issue reforms if a certain part of the population has been affected by violence and there is a strong sense of national catharsis.<sup>5</sup> If a large segment of society has been physically or otherwise unaffected by the conflict and institutions are more or less in place, which is the case in most contemporary low intensive civil wars or transition from authoritarian to democratic regimes, TJ measures will be much more difficult to apply. Thus the intensity and the severity of conflict determines partly the type of TJ measures to be introduced. Building on existing institutions and a more or less functional administration is an asset for transitional justice and allows also for quicker and deeper reforms which focus more on the exchange of old elites through vetting procedures for example in the security sector.<sup>6</sup>

## 2.2 Actors

A diverse set of international, regional, state and non-state, formal or informal actors have always played a role in security, accountability and rule of law in conflict-affected environments, operating at various levels. In terms of accountability, at the international level, international courts and tribunals such as the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the permanent International Criminal Court have adjudicated some of the most serious international crimes, such as genocide, war crimes and crimes against humanity. Trials for such crimes have also taken place transnationally, through the exercise of universal jurisdiction. Regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights address state responsibility for a range of human rights violations, and as such have not tried individuals but have rendered

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<sup>3</sup> Stéphane Beaulac, “Lost in Transition? Domestic Courts, International Law and Rule of Law ‘A la Carte’” in *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States*, ed. Edda Kristjansdottir, André Nollkamper and Cedric Ryngaert (Antwerp: Intersentia 2012), 17-34.

<sup>4</sup> Erik G. Jensen, “Justice and the Rule of Law” in *Building States to Build Peace*, ed. Charles T. Call and Vanessa Wyeth (New York: Lynne Rienner, 2008), 126-127.

<sup>5</sup> Pierre Hazan, “Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional Justice” *International Review of the Red Cross* 88 (2006), 19-47.

<sup>6</sup> Anja Mihr, “Transitional Justice and Quality of Democracy” *International Journal for Conflict and Violence* 7 (2013): 298-313.

views regarding state violation of core human rights obligations, or failure to protect human rights. State actors may also pursue trials as well as a number of other processes, discussed below. Meanwhile, in many contexts, it is traditional or non-state providers of justice that may be the most active or relevant to local communities.<sup>7</sup> There may be tensions amongst these levels of actors in terms of priorities and jurisdiction, which may be heightened because actors dealing with accountability are not the only ones active in post-conflict societies. So too are those promoting rule of law and security, which again may be international actors such as UN peacekeeping and peacebuilding missions, bilateral and multilateral aid agencies, international and local nongovernmental organizations, and traditional or non-state providers of justice and security, all of which may have competing priorities.

### 2.3 Processes

There are myriad types of transitional justice processes, each of which operate rather differently legally, politically, and socially. Commissions of inquiry, for example, need thorough engagement by state and non-state actors such as lawyers and representatives of civil society organizations (CSOs) as well as by victims and victimizer. So do domestic or international trials. Vetting and lustration procedures need careful administration by technocrats that apply relevant laws and regulations, and they need to safeguard files and evidence regarding individuals' involvement in crimes. All these measures aim at the same objective: namely to make society safer and more secure for individuals as well as for groups. These activities are essential, as prosecutions alone will not provide security or strengthen the rule of law. To purge, vet or lustrate those who have been the master minds behind a terror and violent regime, may be important tools not only to provide more security but also to avoid recurrence of abuses and regain confidence and trust of citizens in a rule of law abiding regime.

Formal and informal institutions including tribal and religious leaders have become indispensable actors in those transitions, but they are and can be both promoters and spoilers of any process of transition, in particular in the security sector. They are often politically biased. Traditions, experience and the lack of experience of alternative behavior, i.e. in peaceful conflict resolution, can significantly impact the way forward on security-sector reforms. Even so, institution-building is a complex, long-term, dynamic, if not open-ended process in which capacities are built and the civic trust of citizens is restored in order for society to function effectively. The first task of institutions in transition, however, is to develop a rule-based, consensual and participatory political system.<sup>8</sup>

Keane's discussion of monitoring successful institution-building that includes the reform of the security sector highlights the fact that effective institutional performance of any post-transition regime, depends not only on governments and courts, but also on many other influences that monitor, survey, and determine decision-making processes, such as social networks, civil society groups or international organizations.<sup>9</sup> This nevertheless can lead to security sector reform based on human rights norms and rule of law-abiding behavior, which can engender greater legitimacy of the security sector. The sequencing of all transitional justice measures in transition processes has to

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<sup>7</sup> Rosalind Shaw and Lars Waldorf, eds., *Localizing transitional justice: Interventions and priorities after mass violence* (Palo Alto, CA: Stanford University Press, 2010).

<sup>8</sup> Laurence Whitehead, ed., *The International Dimensions of Democratization, Europe and the Americas* (Oxford: Oxford University Press, 2006), 27.

<sup>9</sup> John Keane, *Life and Death of Democracy* (London: Simon & Schuster, 2009).

be taken into account in order to provide an intelligible context for understanding the character of the new regime.<sup>10</sup>

## 2.4 *The passage of time and sequencing*

However, as Teitel argues, such transition can take years if not generations.<sup>11</sup> Transitional justice measures are often used as incentives and to launch tactical political concessions that are necessary to change behavior and attitudes not only of security sector actors but of the society at large. But before seeing any significant impact and change of society in the first 10-20 years of a transformation process medium and long term reform in the legal and political system have to take place.<sup>12</sup> Many of them emphasize the longer-term change of individual behavior, i.e. in the next generation of members of the security sector, and are thus not part of any immediate success stories that politicians are desperately waiting for in transition processes. Regardless of this, political concessions, for example in military reforms, become less tactical but more emotional, moral and behavioral after 20 years, i.e. after a generation. This is when they impact the political culture. Hazan goes on to divide the process into short term, medium and long-term post-conflict phases during which transitional justice measures have different impact or effect. The latter can take one generation; that is to say 20-25 years or more. The overall aim is to legitimize the new government and democratic institutions and foster the democratic process and quality of democracy at the same time.<sup>13</sup> Spinner-Halev has looked at a number of other country cases around the world and adds to Hazan's observations when highlighting that if past injustice and harm is not dealt with, it becomes enduring injustice.<sup>14</sup> However, as discussed below, this temporal element can be problematic given the strength of demand for immediate justice.

Dealing with the past over a period of time is important not only for rule of law and transitional justice but also for restructuring security forces. In Germany and Japan, for example, security sector reform was required by their post-war constitutions. Each constitution dictated that the country's military could only be used in the defense of the state, in an effort to prevent future wars of aggression. In consequence, all training in the military sector of each state included historical education regarding their own imperial pasts and atrocities, as well as education regarding peace and conflict resolution.<sup>15</sup>

The fact that in many countries in which grave human rights abuses occurred, they were largely committed by state security forces with or without the permission of the judiciary means that rule of law extends well beyond questions of legislation and the judiciary to the governance of the security sector. In many conflict-affected countries, therefore, it is not enough to seek to address the rule of law within the judicial sector. Rather, reforming and training the security sector, whether police, military, intelligence or other services must address the abuses committed by these actors in the past and the appropriate role of them in a post-conflict society. Transitional justice can

<sup>10</sup> David Beetham, Ernesto Carvalho, Todd Landman, and Suzanne Weir, *Assessing the Quality of Democracy, A practical guide*, (Stockholm: International IDEA, 2008), 30.

<sup>11</sup> Ruti Teitel, *Globalizing Transitional Justice*, (Oxford: Oxford University Press, 2014), 45.

<sup>12</sup> Nicole Deitelhoff and Klaus Dieter Wolff, "Business and Human Rights: how corporate norm violators become norm entrepreneurs" in *The Persisting Power of Human Rights, From Commitment to Compliance*, ed. Thomas Risse, Stephan C. Ropp and Kathryn Sikkink (Cambridge: Cambridge University Press, 2013), 227-230.

<sup>13</sup> Pierre Hazan, "Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional Justice," *International Review of the Red Cross* 88 (2006): 19-47.

<sup>14</sup> John Spinner-Halev, "From Historical to Enduring Injustice," *Political Theory* 35 (2007): 574-597.

<sup>15</sup> Masako Shibata, *The education reform in Japan and Germany under the American military occupation after World War Two: A comparative study* (London: Institute of Education, University of London, 2001).

potentially help to foster the above-mentioned process ensuring more political engagement with institutions and thus the public willingness to face the past regardless of how painful it is. However, as discussed below, the relationship between the security sector and transitional justice can be a complex one.

The mutual benefit between legal and political reforms and change of behavior--not only in the security sector--is an ongoing process. It is often driven by victims and subsequent generations and citizens or alleged perpetrators that seek justice or rehabilitation after generations have passed. The art is to balance the demand for truth and condemnation of perpetrators on the one hand, and that for impunity and amnesties, on the other. Executive and legislative powers of all these countries believe these claims and challenges will be directly relevant to the quality of democracy.<sup>16</sup> When Teitel<sup>17</sup> or Hayner<sup>18</sup> analyzed transitional periods in the 1990s in Africa and Latin America, they came to the conclusion that transitional justice processes are crucial for social and political stability which become the foundations for stable democracies. Both argue that none of the concepts of rule of law, constitution building, and institution making can be understood without drawing at least some links to TJ.

### 3. Challenges for implementation of TJ and RoL processes in fragile and conflict-affected states

In fragile and conflict-affected environments, there are multiple demands for, and challenges to, building or re-building the rule of law, as well as accountability for past abuses. While these are often assumed to be mutually reinforcing, this is not always the case, and the situation is more complex because rule of law promotion requires the engagement of not only judicial institutions and legislative and constitutional instruments, but also the security sector, including the military, police, and prisons. There are at least two types of challenges in addressing rule of law and transitional justice in conflict-affected societies, the one conceptual and the other operational. First, there are continuing disputes amongst academics and practitioners as to the appropriate content and scope of both rule of law and transitional justice. Second, operationalizing the two together, particularly in conflict-affected situations where the security situation is fragile, itself presents challenges.

#### 3.1 Conceptual issues

Both transitional justice and rule of law have thinner or thicker versions, with concomitant strengths and weaknesses, and relatively little consensus regarding their appropriate form and content. Thinner versions of the rule of law require simply the presence of an authorized creator of law, or formal legality, while thicker versions tend to emphasize rights of citizens and duties of government, with the thickest specifying the core content of rights including human rights, or the requirement of democratic rule of law or provision of social welfare.<sup>19</sup> Similarly, thinner versions of

<sup>16</sup> James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997), 15.

<sup>17</sup> Ruti Teitel, "Transitional Justice Globalised," *The International Journal of Transitional Justice* 2 (2008): 1-4.

<sup>18</sup> Priscilla B. Hayner, *Unspeakable Truths, Facing the challenges of Truth Commissions* (New York/London: Routledge, 2002).

<sup>19</sup> Erik G. Jensen, "Justice and the Rule of Law," in *Building States to Build Peace*, ed. Charles T. Call and Vanessa Wyeth, (Boulder, CO: Lynne Rienner Publishers, 2008), 122-124; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

transitional justice may entail “only” specific measures to respond to past serious human rights abuses (e.g. genocide, war crimes, crimes against humanity, or torture) including trials, reparations, truth-telling etc., while advocates of thicker versions have increasingly suggested that transitional justice should address a wider range of economic harms, violations of economic, social, and cultural rights, or should address structural inequality.<sup>20</sup> In conflict-affected societies, both rule of law and transitional justice promotion processes are often focused upon visible, public harms, and large-scale institutional responses; however for many people everyday violence and injustice is experienced differently, whether it is ordinary crime and disputes, gender-based violence, or localized power-relations.<sup>21</sup>

### 3.2 Operational issues

Operationalizing transitional justice alongside rule of law promotion is essential but not simple. Transitional justice and rule of law promotion are frequently developed in parallel or in tandem in conflict-affected societies. In 2004, the UN issued its first report on transitional justice and rule of law in conflict-affected countries, linking the two to one another and to recovery in conflict-affected states. A number of activities are considered central to developing the rule of law and addressing past abuses in fragile and conflict-affected societies, both for the purposes of developing functional legal systems and to address and limit some underlying causes of conflict in order to prevent its re-emergence.<sup>22</sup> These include support to judicial, legislative, and police reform, reform of the closely-related security and corrections sectors, and the support of transitional justice and criminal prosecutions, truth-telling mechanisms such as truth commissions, vetting, and reparations.<sup>23</sup>

In the 2004 UN report, and subsequent development of UN policies, the two concepts, rule of law and transitional justice, are considered together, and they have developed in parallel and sometimes jointly.<sup>24</sup> While this may have had some positive effects, it may also have created some confusion over the distinctions between the two, not just in theory but in practice. In some cases rule of law promotion and transitional justice may not be complementary, but rather may have the potential to undermine one another. Transitional justice processes may divert resources, both capital and human, that might otherwise be dedicated to rule of law promotion. Critics of transitional justice have argued that the resources invested in the development and assistance to national courts should have been equivalent to those committed to processes such as the International Criminal Tribunal for Rwanda (ICTR) or the Special Court for Sierra Leone.<sup>25</sup> However, it is yet to be demonstrated that investment in the national judiciary to the same extent as internationalized transitional justice processes would have made a greater contribution to promoting the rule of law and encouraging reconciliation.<sup>26</sup>

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<sup>20</sup> Chandra Lekha Sriram, “Liberal peacebuilding and transitional justice: What place for socioeconomic concerns?” in *Justice and Economic Violence in Transition*, ed. Dustin Sharp (New York: Springer, 2014), 27-50.

<sup>21</sup> Jensen, “Justice and the Rule of Law,” 127-128.

<sup>22</sup> United Nations, *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* UN Doc. S/2004/616 (23 August 2004), paras. 14-18 and 27-37.

<sup>23</sup> Louis Aucoin, “Building the Rule of Law and Establishing Accountability for Atrocities in the Aftermath of Conflict,” *The Whitehead Journal of Diplomacy and International Relations* 8 (Winter/Spring 2007): 34.

<sup>24</sup> See for example, UNDP, “Strengthening the Rule of Law in Conflict/Post-Conflict Situations. A Global Programme for Justice and Security,” 10.

<sup>25</sup> Jose Alvarez, “Crimes of State/Crimes of Hate: Lessons from Rwanda,” *Yale Journal of International Law* 24 (1999): 466; Mark A. Drumbl, “Juridical and Jurisdictional Disconnects,” *Finnish Yearbook of International Law* 12 (2001): 119-141.

<sup>26</sup> Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *American Journal of International Law* 95 (2001): 25.

There are other ways in which transitional justice processes can present challenges to early rule of law building. First, transitional justice processes might further destabilize severely damaged justice sectors in the short-term, making it more difficult to promote longer-term rule of law in several ways. They can provoke responses from perpetrators or elements of the old regime, which could destabilize a fragile peace in nascent democracies, as they might question its legitimacy or actively seek to undermine the authority of public institutions.<sup>27</sup> In a conflict-affected or fragile state, where judicial personnel and resources may be limited or subject to accusations of corruption, judging former perpetrators, particularly high-level accused, may be particularly difficult.<sup>28</sup>

Secondly, the attempt by national courts to prosecute perpetrators can put excessive pressure on judicial systems, which may be severely damaged after conflict. Processes to try those accused of genocide in Rwanda, where the national judicial system was completely destroyed, put great stress on the judicial system and left many accused detained in crowded prison conditions which may have violated international human rights standards.<sup>29</sup> For this reason, hybrid or internationalized tribunals with international and national legal staff are often created. In Sierra Leone and Timor Leste, there were few or no judges, and relatively few trained legal professionals remaining in the wake of conflict. Thus in each country, internationalized processes were set up to address serious crimes.<sup>30</sup>

### 3.3 External imposition

A significant criticism of transitional justice and rule of law promotion has been that many measures are both externally imposed and culturally inappropriate. In particular, transitional justice measures have been criticized for being overly legalistic and focused on criminal punishment, when in some instances affected communities respond to harms through non-retributive, in some instances communal and restorative, means. Thus another alternative to the challenges of pursuing domestic justice has been the use of traditional or non-state justice. In Rwanda, the most serious cases were heard by the International Criminal Tribunal for Rwanda or by national courts, but many more were heard by the so-called *gacaca* courts, which were intended to provide decentralized and participatory processes to help try the more than 100,000 backlogged cases.<sup>31</sup> However, the *gacaca* approach has been subject to the criticism that it fails to genuinely provide justice or reconciliation. Further, governments may abuse accountability processes in a way that delegitimizes not only such processes and therefore jeopardizes the chances of reconciliation, but also may delegitimize the

<sup>27</sup> Chandra Lekha Sriram, *Globalizing justice for mass atrocities: A Revolution in Accountability* (London: Routledge, 2005), 54.

<sup>28</sup> Luc Huyse, "Amnesty, truth or prosecution," in *Peacebuilding: A field guide*, ed. Luc Reyhler and Thania Paffenholz (Boulder, CO: Lynne Rienner, 2001), 325.

<sup>29</sup> Stephen Brown, "The rule of law and the hidden politics of transitional justice in Rwanda," in *Peacebuilding and rule of law in Africa: Just peace?*, ed. Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman (London: Routledge, 2011), 7; According to Human Rights Watch, in October 2008 the prison population was approximately 64,000, in a system designed for 43,400. Human Rights Watch, *2009 Country Reports on Human Rights Practices - Rwanda* (HRW: New York, 2009), available at <http://www.unhcr.org/refworld/country.COL...RWA..4b9e52c6c.0.html>.

<sup>30</sup> Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Cambridge: Cambridge University Press, 2004); Sriram, *Globalizing Justice for Mass Atrocities*, 8.

<sup>31</sup> See Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79 (2006):48-49.

judicial system as a whole.<sup>32</sup> In Rwanda the national judicial system has been described as largely subordinated to the executive and even to elite unofficial actors who enjoy both economic and partisan political power.<sup>33</sup> Critics of *gacaca* have raised serious concerns about government co-optation and manipulation of these processes.<sup>34</sup> Rule of law promotion has been subject to related criticisms: first that it may focus excessively on state structures, where people mistrust them or prefer to access local non-state justice and security providers, and that the content of the rule of law promoted is Western, with a range of norms including international human rights norms which may not be in line with local justice norms. For this reason, many rule of law promoters have sought to identify ways in which they might engage non-state providers without supporting practices inconsistent with international human rights standards, and also support wider access to justice through promotion of community mediation and legal aid.<sup>35</sup>

States may also set up specialized local courts to address serious crimes, but these have had their own difficulties. Government co-optation of accountability processes may contribute to objections that both international and national justice offer “one-sided” justice.<sup>36</sup> Governments may also seek to manipulate or create localized courts for other reasons, such as avoiding the ICC, as arguably has been the case with the creation of local courts to address abuses in Darfur, and the International Crimes Division (ICD) in Uganda and a similar ICD proposed in Kenya.

### 3.4 Linking justice to security

Any discussion of rule of law and transitional justice in fragile and conflict-affected states necessarily entails a discussion of their connections to the wider security situation, and in particular to the SSR and DDR, yet these activities often proceed in parallel without recognition of their interaction and potential tensions.

Following, or in the context of, attempts at accountability and reconciliation during which victims, victimizers, political elites, and citizens are asked to leave the past behind and build or re-build a stable and democratic state, guarantees of security are essential for people to remain committed to change. Significant, rapid changes of customs and practice may be difficult for citizens to accept, particularly in unstable situations.<sup>37</sup> SSR can be an essential element in enabling transitions. It can thus involve any of a range of policies and programs that support institutions and individuals responsible for internal security and oversight of security institutions, which may include the police and corrections, as well as related judicial and ombuds offices.<sup>38</sup> Activities may include the vetting of

<sup>32</sup> Anja Mihr, “Transitional Justice and the Quality of Democracy – From Democratic Institution Building to Reconciliation”, in *Transitional Justice: Between Criminal Justice, Atonement and Democracy*, ed. Anja Mihr (Utrecht: SIM Special Issue 37, 2012), 11-50.

<sup>33</sup> Human Rights Watch, *Law and Reality. Progress in Judicial Reform in Rwanda* (New York: Human Rights Watch, 2008), 44.

<sup>34</sup> Scott Straus and Lars Waldorf, eds., *Remaking Rwanda: State Building and Human Rights After Mass Violence* (Madison, WI: University of Wisconsin Press, 2011).

<sup>35</sup> Chandra Lekha Sriram, “(Re)building the rule of law in Sierra Leone: Beyond the formal sector?” in *Peacebuilding and rule of law in Africa*, ed. Sriram, Martin-Ortega, and Herman.

<sup>36</sup> Only genocide-related crimes, but not crimes allegedly committed by the RPF, have been tried within Rwanda or before the International Criminal Tribunal for Rwanda.

<sup>37</sup> Christopher R. Mitchell, “Conflict, Social Change and Conflict Resolution. An Enquiry” in *Social Change and Conflict Transformation*, ed. David Bloomfield, Martina Fischer and Bernd Schmelzle (Berlin: Berghof Handbook Dialogue Series, 2010), 20.

<sup>38</sup> OECD DAC *Handbook on Security System Reform: Supporting security and justice* (2007 edition), available at <http://www.oecd.org/dataoecd/43/25/38406485.pdf>; OECD DAC, *Security Sector Reform and Governance DAC Guidelines and Reference Series* (2005), available at <http://www.oecd.org/dataoecd/8/39/31785288.pdf>; *Securing peace and*

members of security forces for past human rights abuses, reduction in force size, institutional restructuring and mandate reform, and in some cases may involve the merging of members of former opposition forces with state forces, including as part of DDR provisions in peace agreements and processes embedded in peacekeeping and peacebuilding missions (discussed below). In many conflict-affected and fragile states, state-provided security may have been limited or absent, in which case non-state security providers may have stepped in. As with non-state providers of justice, these non-state security providers may have been used as a last resort by citizens, or may be viewed as more local and legitimate, but in many cases they may also utilize measures which are not consistent with international human rights standards.<sup>39</sup> The role of non-state providers, as well as the continuation of elements of previous security providers, can pose a challenge for those seeking to promote justice and rule of law in the wake of conflict.

Those seeking to promote transitional justice and rule of law in fragile states will frequently find that their activities not only relate to, but are in tension with, efforts at SSR. Their simultaneous operation may be all the more challenging because SSR is itself a contentious process. Reform processes present a challenge to the often previously unfettered powers of security forces, given their effects on size, mandate, and autonomy, and that they may involve vetting. Transitional justice processes may also include vetting even if SSR does not, compelling the exclusion of members of one or more fighting forces from new security structures, which they are likely to resist. At the same time, accountability processes which might result in the imprisonment of some security actors or in the naming of specific abusers through commissions of inquiry are also likely to generate resistance. Thus, for example, in El Salvador, a military that had begun to accommodate significant efforts at reform and civilian oversight protested strongly when a report of a truth commission threatened to name members as perpetrators. Police officials were less vocal but did express concern.<sup>40</sup> Yet, in countries emerging from conflict, where corrupt or abusive security forces may have helped to provoke the conflict, or the absence of security may have enabled the perpetuation of conflict, rebuilding and/or reforming these forces is essential.

The distinction between DDR and SSR in conflict-affected countries is often rather fine, and many of the issues raised above regarding SSR similarly apply to DDR activities. DDR processes often precede and overlap with such SSR processes, with even less recognition of the degree to which they may affect or be affected by rule of law and transitional justice processes, and may themselves have significant limitations.<sup>41</sup> Most obviously, DDR and transitional justice processes may be in tension because most transitional justice processes inevitably challenge the status, perquisites and potentially the freedom of fighters from state and non-state forces, meaning that such forces are likely to resist such processes and threaten to disrupt peace processes. However, transitional justice processes and DDR can also be linked, even if unintentionally, as in Colombia, where truth and reconciliation processes, trials, and reparations have been tied to DDR processes for former members of paramilitaries, self-demobilized of the Fuerzas Armadas Revolucionarias de Colombia

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*development: the role of the United Nations in supporting security sector reform. Report of the Secretary-General* UN Doc. A/62/659-S/2008/39 (23 January 2008).

<sup>39</sup> Bruce Baker, "Who do people turn to for policing in post-war Sierra Leone?" *Journal of Contemporary African Studies* 23 (September 2005), available at [http://www.c-r.org/our-work/west-africa/documents/Sierra\\_Leone%20policing2005Baker.pdf](http://www.c-r.org/our-work/west-africa/documents/Sierra_Leone%20policing2005Baker.pdf); Bruce Baker, "Post-War Policing by Communities in Sierra Leone, Liberia, and Rwanda," *Democracy and Security*, 3 (May 2007): 215-236; UK Department for International Development, *Safety, Security and Accessible Justice. Putting policy into practice*, (London, July 2002).

<sup>40</sup> Sriram, *Confronting past human rights violations*, 78-106.

<sup>41</sup> Chandra Lekha Sriram and Johanna Herman, "Transitional justice and DDR: Bridging the divide?" *Conflict Security and Development* 9 (2009): 455-474; Robert Muggah, "No magic bullet: A critical perspective on disarmament, demobilization and reintegration (DDR) and weapons reduction in post-conflict contexts," *The Round Table* 94 (2005): 239-252.

(FARC) and may be linked in any ultimate peace agreement or implementation process with the FARC.<sup>42</sup> While some practitioners and scholars have come to recognize the connections between the two sets of processes, both positive and negative, much programming remains partitioned even as advocates seek to make the case that transitional justice can contribute to both DDR and SSR.<sup>43</sup>

### 3.5 Spoilers of justice

In conflict-affected and fragile states, there are furthermore numerous potential spoilers to stabilization, peace implementation, and rule of law and accountability or transitional justice. The concept of ‘spoilers’ introduced by Stedman in the context of conflict resolution and peace implementation, speaks of actors that may undermine peace agreements from the outside or the inside, with a range of demands about which they may or may not be willing to negotiate or compromise.<sup>44</sup> A modified version of this concept may apply to rule of law and transitional justice in conflict-affected situations: spoilers of justice.<sup>45</sup> State and non-state actors may resist transitional justice or rule of law reform for a range of reasons. Certainly, and most obviously, those who may have committed serious human rights abuses will fear accountability, as discussed above. They may also resist a range of rule of law reforms that could engender accountability in the future, including constitutional and judicial reforms. However, it is also worth noting that some ‘spoilers’ may not fear accountability, but have other vested interests, whether it be maintaining prerogatives as part of a protected state elite or protecting status and income which may attend being a provider of non-state justice and security. These actors may invoke, alternatively, state sovereignty and local appropriateness or ownership as reasons to resist advances in transitional justice or rule of law. Depending on their relative strength and status in a fragile society, they may be able to disrupt such activities, or threaten to disrupt wider stabilization efforts. However, many spoilers are not, to use Stedman’s language, “total”, which means that they may be willing to compromise, and allow a degree of reform or accountability, so long as their core interests remain relatively unaffected.

### 3.6 Other challenges

Determining the correct timing and sequencing is an ongoing challenge in delivering transitional justice, the rule of law, and security sector reform in fragile and conflict-affected societies. People in conflict-affected and post-conflict societies want immediate change and overall security and safety. Yet without functioning institutions and a security sector which respects human rights and the rule of law, this remains wishful thinking. However, as noted above, the process of addressing past abuses can take a generation or more. The challenge is not only to address multiple competing urgent demands, but to address demands that may not be immediately resolvable and to rationally sequence responses given limited resources.

However, as Isima argues in the context of security sector reform, the multiplicity of actors in post-conflict contexts results in poor coordination and frequently “turf wars”. The most obvious dimensions of this tussle include duplication of efforts, parallel chains of command, competition

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<sup>42</sup> Jemima García-Godos, “Colombia: Accountability and DDR in the pursuit of peace?” in *Transitional justice and peacebuilding on the ground*, ed. Sriram, García-Godos, Herman, and Martin-Ortega (London: Routledge, 2013).

<sup>43</sup> Ana Cutter Patel, “Transitional justice, DDR and Security Sector Reform,” *ICTJ Research Brief* (February 2010), available at <https://www.ictj.org/sites/default/files/ICTJ-DDR-SSR-ResearchBrief-2010-English.pdf>.

<sup>44</sup> Stephen John Stedman, “Spoiler problems in peace processes,” *International Security* 22 (1997): 5-53.

<sup>45</sup> Chandra Lekha Sriram, “Spoilers of Justice,” *Nordic Journal of Human Rights* 31 (2013): 248-261.

over funds and an unclear division of labor in the field.<sup>46</sup> Newly established institutions will have difficulty building confidence if local, national or international level security forces cannot agree on common goals, let alone practice. Armed groups often operate within the state's boundaries but outside the control of the government. Institutional reforms of the security sector involve both regulation of the state sector, but also management of armed groups, including through disarmament, demobilization, and reintegration of ex-combatants into civilian society and in some cases into the state security apparatus.<sup>47</sup>

## 4. Ways forward and options for practitioners

In this section, we will reflect upon debates and questions about the mix of actors and institutions and approaches that need to be in place in order for transitional justice to potentially positively affect the rule of law and security in conflict-affected environments. In so doing, we must consider the diversity of actors and their preferences and agendas, and potential positive incentives to enable not only that transitional justice be possible, but that it enable rather than undermine rule of law and security sector reform. In section 2 of the paper, a number of significant challenges, and the risk of spoilers, were addressed. However, there may also be incentives which policymakers can use to encourage greater compliance with accountability norms in the future, which this section will explore.

Given the vast range of activities comprising transitional justice and rule of law in fragile states, and the significant challenges that have emerged in practice, what are the options for policymakers? What mix of institutions, actors, and incentives may help to ensure that rule of law and transitional justice measures can be pursued while promoting stabilization, recovery, and peacebuilding? There are no easy answers, and as many studies have observed, there is truly no one-size-fits-all solution.<sup>48</sup> There are no templates for actors, although there are many useful tools. Both the 2011 World Development Report and the report by the UN Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies highlighted the justice-security-nexus and the indispensability of rule of law and security sector reforms.<sup>49</sup> As Porter et al. argue, the best way to address a real shift in the justice-security nexus is through legal and political reforms and immediate capacity building initiatives by state and non-state actors.<sup>50</sup> Such initiatives inevitably include some mix of transitional justice measures such as vetting procedures and trials, commissions of inquiry, reparations and memorials and apologies and public debate. In most instances, these processes are linked to SSR, whether by design or not. Clearly, no single measure is the most effective in any situation or across situations. Thus there is a tendency to utilize several measures simultaneously or sequentially.

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<sup>46</sup> Jeffrey Isima, "Scaling the Hurdle for Muddling through Coordination and Sequencing Implementation of Security Sector Reform in Africa" in *The Future of Security Sector Reform, The Center for International Governance Innovation*, ed. Mark Sedra (GIGI, Ontario, 2010), 328.

<sup>47</sup> Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction, A contentious relationship*, (London: Routledge, 2013) 12. Sriram, García-Godos, Herman, and Martin-Ortega, eds., *Transitional justice and peacebuilding on the ground*.

<sup>48</sup> Yasmin Sooka, "Dealing with the past and transitional justice: Building peace through accountability," *International Review of the Red Cross* 88 (June 2006): 311-325; Sriram, *Confronting past human rights violations*.

<sup>49</sup> World Bank, *World Development Report* (2011), available at: [http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011\\_Full\\_Text.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf); United Nations, *The rule of law and the transitional justice in conflict and post-conflict societies. Report of the Secretary-General*, UN Doc S/2011/634, (12 October 2011).

<sup>50</sup> Doug Porter, Deborah Isser and Louis-Alexandre Berg, "The Justice-Security-Development Nexus, Theory and Practice in Fragile and Conflict-Affected States," *The Hague Journal on the Rule of Law* 5 (2013), 311.

## 4.1 Institutions

It is critical that policymakers attend to the interconnectedness of domestic institutions: it may be evident that promoting trials in the context of a weak judiciary may limit the long-term effects of the former. Similarly reforms of penal systems and of the security sector are essential to implement accountability processes.

This means that reform processes must not be stovepiped, and left to interact without appropriate planning. Nor must it be assumed that because there are tensions between processes such as promoting accountability and reforming security forces, it is impossible to program them alongside one another: policymakers should look for complementarities and shared incentives amongst actors in specific contexts.

## 4.2 Actors

Myriad actors are engaged, in positive, negative, or ambiguous ways with transitional justice and rule of law in fragile states, including international actors such as the UN, IFIs and bilateral donors,<sup>51</sup> states themselves, non-state actors including NGOs, armed groups, and the private sector as well as wider civil society. Only some of these actors are “drivers” of justice, while many others may be spoilers.<sup>52</sup> However, both sets of actors should be engaged, as should those which are somewhat overlooked and may play positive and negative roles, such as corporations. International supervisory bodies and independent commission of inquiry (often of hybrid nature), advocates and lawyers may help to identify these actors. The importance of lustration of private and public actors is often underestimated. Opening of files and evidence can contribute to the search for “truth” and justice, even though most measures are more symbolic than systematic. In order to establish a somewhat rule of law in a country, people, law and policy-makers alike, need to learn to self-reflect past situation, in order to be convinced to act in different manners in the future. Needless to say that can take generations, but it begins with legal reforms, vettings, trials, reparations and acknowledgement of past injustice in any sector of society. The security sector, albeit the most sensitive, is no exception. Identifying the preferences of such actors beyond simple labels will enable policymakers to better understand their preferences and offer incentives that may shape their behavior. At the same time, the multiplicity of external actors can generate competing or incoherent programming, and better coordination is needed.

## 4.3 Incentives

Incentives will vary by context, group, and sometimes the individual, so policymakers need to attend to their specific interests and demands. Thus for example, some actors who may fear prosecution will be satisfied with promises that any trials will be limited to a small number of perpetrators, or may alternatively seek to ensure that trials are ‘even-handed’, addressing accused from all groups. Some who fear truth-telling processes may accept them if only victims, not perpetrators, are named. And many who fear reform processes including vetting may accept them if they are relatively limited or other promises or protections are offered. Transitional justice measures such as trials, reparations, truth commissions and vetting may appeal evidently to victims, addressing their demands for recognition of their suffering and some form of accountability for abusers. Yet carefully tailored versions of these measures, as well as amnesties or de facto

<sup>51</sup> Porter, Isser and Berg, “The Justice-Security-Development Nexus,” 310-328 .

<sup>52</sup> Elin Skaar and Eric Wiebelhaus-Brahm, “Drivers of Justice after Violent Conflict: An Introduction,” *Nordic Journal of Human Rights* 31 (2013): 119-126.

amnesties, may also serve as incentives for those who might have been perpetrators, including members of the security sector.<sup>53</sup> They may also accept vetting if they are offered incentives such as early retirement and pensions which allow them to leave public service without significant penalty. Further, it may be the case that actors not always consulted in these processes, whether the private sector or wider civil society, have incentives to offer which may shape preferences of key actors. Another example for issuing transitional justice measures in post-conflict and post-military environment is the ‘tool’ of retirement and pensions for military officials and members of the security sector. It is a way to replace those responsible for crimes and violence without purging them. Senior officials who have been largely been involved in alleged violence, torture or atrocities, parallel to reforms and trainings for younger servants of the same sector. Although these ‘retirements as transitional justice’ are highly disputed, in particular among those who had to suffer atrocities, it is widely used in post-military dictatorships. Policy makers have to carefully balance the interest of the victims and victimizers and if the military or gendarmerie or civil guards had executed power and arbitrarily for decades in a country, massive vetting or trials against victimizers might seek another act of violence by those who seem loyal to them. The early transition process, up to ten years, can be easily spoiled by either too many of these measures or too little.<sup>54</sup>

#### 4.4 Local knowledge

The foregoing means that local knowledge is essential. Policymakers need to understand the full constellation of local actors, rather than focusing only on evident drivers or spoilers of justice, and to understand their interests and preferences in order to design appropriate incentives. While there have been extensive discussions in peacebuilding and transitional justice circles about the importance of local participation and ownership, these need to be made real not only to ensure that mechanisms have legitimacy and local traction, but to ensure that they are designed in a manner sensitive to local practices and demands. This does not, however, mean that international programmers can support any local preference, such as practices that may openly violate international human rights standards.

## 5. Conclusions

In short, while transitional justice, rule of law promotion, and the promotion of security sector reform are linked on the ground in many conflict-affected and fragile states, and in the programming of many actors from the local to the international, there remain significant challenges. Some of these arise from inherent tensions between the goals of these processes, others from competition or failures of collaboration amongst various actors in the field. Still others arise from the necessarily long-term nature of transition in the fields of justice, rule of law, and security in states where failures of any or all of these goods may have been long-term, and formed the foundation for conflict. Practitioners and scholars have increasingly recognized these linkages, but more remains to be done. Future research could examine questions such as:

- Where have specific types of transitional justice process been linked to specific rule of law programs, and to what effect?
  - E.g., does vetting in the judicial help to generate improved judicial performance and independence?

<sup>53</sup> Porter, Isser and Berg, “The Justice-Security-Development Nexus,” 328.

<sup>54</sup> Sannerholm, *Rule of Law after War and Crisis, Ideologies, Norms and Methods*, 92-100.

- E.g., do human rights trials enable domestic judiciaries through capacity-building to ensure future due process?
- Where have specific types of transitional justice process been linked to specific security sector reform programs, and to what effect?
  - E.g., does linking trials or commissions of inquiry to DDR change the performance of the latter and if so how?
  - E.g., does vetting have a significant effect on the performance of future security forces?

These questions are illustrative rather than exhaustive, but are indicative of areas in which further scholarly research, in collaboration with policymakers, could provide insights to improve future practice.

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