

Transitional Justice after War and Dictatorship Learning from European Experiences (1945–2010)

Final Report
January 2013

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Introduction

The project '*Transitional Justice after War and Dictatorship. Learning from European Experiences (1945–2000)*' was initiated by Luc Huyse, who for long years has been active in the area — both as an academic and a consultant. The project was made operational through a joint venture between the *Peace Building Division of the Belgian Federal Public Service of Foreign Affairs*, which provided the financial funding, and The *Belgian Centre for Historical Research and Documentation on War and Contemporary Society (CEGES/SOMA)*, which took on the role of project coordinator. These two partners reflect the dual nature of the project: it is a policy- and an academic-oriented project.

The project's first phase, predominantly academic, ran from April 2011 to January 2012. Nine European countries, producing ten cases, were selected and form the historical 'reference group'. Belgium, France, the Netherlands, and (West-) Germany cover the post-WWII context. Portugal, Spain, and Greece are the cases of the so-called second wave of transitions to democracy. Germany, Poland, and Hungary cover the post-1989 transitions.

This project has one major asset: it has the advantage of the lengthy amount of time that has passed since the examined policies were designed and executed. This enabled the team (the lead researcher, the other authors, and the project leader) to look at the long-term impacts of these policies, such as the intergenerational consequences, the long-lived effects of choices regarding recurring challenges, and the sequencing of operations. This much broader temporal space approach is precisely what is lacking in most 'lessons learned' experiments.

A case study depends to a great extent on the analytical frameworks that guide research and observation, especially if the goal is to make the output as comparative as possible. To this end the team worked with a common checklist of issues and topics. A draft of this list was first presented to the selected country study authors and revised. Draft versions of the national reports were discussed with the authors during a closed workshop (Brussels, 12–13 January 2012). Also discussed were a comparative overview of the reports and a 'lessons learned' paper (written by Luc Huyse).

The second phase was the confrontation of the considerably amended comparative overview and the 'lessons learned' chapter with the vision of carefully selected practitioners of the Global South. This happened at an international symposium (Brussels, 23–24 May 2012).

The ten European cases will be published in a separate academic volume. This is the policy-oriented report. It contains the comparative overview of the national reports as well as the 'lessons learned' chapter. It has benefited from the symposium discussions of May 2012 and from the comments made by the practitioners.

The English, French, and Spanish report versions are available as a freely downloadable PDF file through the website of CEGES-SOMA (www.cegesoma.be) or by sending an e-mail to cegesoma@cegesoma.be



Short Biographies of the Global South Practitioners

Juan E. Mendez (Argentina) was arrested by the Argentinean military dictatorship and subjected to torture and administrative detention for 18 months. He was expelled from the country and moved to the United States. In 1982, he launched the Human Rights Watch's (HRW) Americas Program and continued to work at HRW for 15 years. Mendez also served as the Executive Director of the Inter-American Institute of Costa Rica. In 2001, Mendez began working for the International Center for Transitional Justice (ICTJ) and served as its president from 2004 to 2009. He currently is its President Emeritus as well as the UN Special Rapporteur on Torture.

Habib Nassar has 15 years of experience working on human rights and democracy in the Middle East and North Africa (MENA). He worked at the International Center for Transitional Justice (ICTJ) for several years. For the past two years, he has managed the MENA program and led its expansion to the Arab Spring countries. Before joining ICTJ, Nassar worked for several local and international human rights groups.

Eugene Nindorera is a Burundian human rights activist and the former Burundian Minister for Human Rights, Institutional Reforms and Relations with the National Assembly. Between 1991 and 1993, he was the first president of Ligue Iteka, one of the most important NGOs in Burundi. He was chief of the Human Rights & Protection Section and Representative of the High Commissioner for Human Rights UN Mission in Liberia (UNMIL). He currently is the Head of UNOCI Human Rights Division and Representative of the High Commissioner for Human Rights in Cote d'Ivoire.

Yasmin Sooka is the Executive Director of the Foundation for Human Rights in South Africa. Prior to joining the Foundation, she served as a Commissioner to the Truth and Reconciliation Commission in South Africa. In 2002 she was appointed by the United Nations as one of three international commissioners to the Truth and Reconciliation Commission of Sierra Leone, where she served until 2004. She has assisted several governments in setting up transitional bodies such as truth commissions. She has also been a consultant to the UN on transitional justice in Afghanistan, Burundi, Kenya, Nepal, and Uganda.

Pat Walsh has recently returned to Australia after working in East Timor during the nation's first ten years since independence from Indonesia. In East Timor, he was seconded by the UN to help establish the CAVR truth and reconciliation commission, the first commission of its kind in the Asia-Pacific region, and served as its Special Advisor (2001–05). He subsequently worked as senior advisor to the Post-CAVR Technical Secretariat until 2010 and is now involved with the CHART (Clearing House for Archival Records on Timor Inc) archival project in Australia and with plans to publish the CAVR report, entitled *Chega!* [enough, no more] in English and establish an Institute of Memory in East Timor.

José Zalaquett is a Chilean lawyer with extensive international experience in human rights. He is a professor of human rights at the Law School of the University of Chile. After the 1973 coup in Chile, he headed the Human Rights Department of the Committee for Peace in Chile. For this work, he was imprisoned and expelled from Chile in 1976 and not allowed to return until 1986.



During his exile, he was closely involved with Amnesty International, as chairman of the International Executive Committee. He also was a member of the Inter-American Commission on Human Rights of the Organization of American States (OAS) between 2000 and 2005 and was its president during the period 2003–04. At present, he is a member of the International Commission of Jurists and a board member of the Chilean chapter of Transparency International.



Chapter 1

Comparing Transitional Justice Experiences in Europe

This comparative analysis of policies of dealing with the past is based on ten cases of transition to democracy: Belgium, France, (West-) Germany, and the Netherlands after WWII; Greece, Portugal, and Spain in the 1970s; and Germany, Hungary, and Poland in the post-1989 era. (Hungary and Poland after WWII experienced the rise of a dictatorial regime which puts these cases outside the current transitional justice paradigm. They are for the greater part left out of the comparison.)¹

This chapter first compares policies through the description of a number of recurring turning-points in transitional justice decision-making. All countries that are part of the research project have gone through episodes where crucial decisions had to be taken in extremely intricate matters. The challenges were common, but did the answers vary? Five such crossroad issues and the multiplicity of responses they generated are discussed. The second section then presents four contextual factors that have shaped both homogeneity and heterogeneity in policy making and implementation. The third section argues that similarities in content and form of policies are more prominent than has often been thought.

Section I. Same challenges, but different answers?

Since the 1990s, practice and scholarship have led to the conclusion that almost all cases of justice after transition are unique. This section tests the alleged diversity through the discussion of a number of recurring turning-points in European transitional justice decision-making. The primary choice bears upon the question of accountability: to punish or close the books. If a policy of prosecutions is developed, new options arrive. Dealing with the perpetrators of state crimes, of collaboration with an occupying army, or with the repressive order requires a choice between two logics: the first leads to their exclusion, the other to inclusion and/or reintegration. That is the second issue. Criminal justice after transition differs from ordinary justice because it addresses simultaneously a political and a legal agenda. Blending the two is a third challenge. Then, there is the question of who should receive privileged attention in tackling the pain of the past: those who are responsible for the sorrow, or the victims. Finally, finding an acceptable balance between forgetting and remembering is a fifth critical challenge.²

¹ The authors of the country case studies have made possible the writing of this report. They delivered essential information en thorough analysis. I also thank them for their critical an insightful comments on a first draft. The usual disclaimer applies.

² The list of the five recurring challenges is principally an analytic instrument. In the presentation, each issue has been isolated from the others. But in a real-world they are intimately interlocked. In addition, a certain amount of diversity among countries remains in the intensity in with which these dilemmas emerged.



1. A devil's choice: to punish or to let bygones be bygones

Those who emphasize the beneficial effects of accountability measures tend to bring forward two crucial reasons. Firstly, punishing the perpetrators of heinous crimes advances the cause of building or reconstructing a morally just order. The second reason has to do with the consolidation of the regime that succeeds the authoritarian order or of a just-won peace.

Putting back in place the moral order that has broken down requires, it is argued, that 'justice be done'. It is seen as a moral obligation to the victims of the repressive and brutal past. It serves to heal the wounds and to repair the private and public damage which the antecedent regime or a cruel conflict has caused. It also paves the way for a moral and political renaissance. It is a sort of ritual cleansing process through which national self-respect is restored. It allows the society to debate publicly and firmly establish standards in the area of the rule of law and of human rights. It can be a vast exercise in decoding codes of just political and judicial conduct. A country, it is said, in which such cleansing remains unfinished will be plagued by continuous brooding and pondering. Judicial and administrative action also serves very immediate goals. Between September 1944 and May 1945, when parts of Belgium and Holland were still occupied by the Germans, wholesale internment of suspected collaborators was seen as a necessary protection against sabotage 'from within'. In addition, the arrest of tens of thousands of suspects was considered to be an adequate measure for preventing summary executions and other unlawful and disorderly behavior. A further important goal of accountability actions is the consolidation of the new regime and/or a fragile peace. Screening and, eventually, punishing the collaborators of the defeated order is then greatly needed.

In contrast, opponents of systematic retribution argue that there will be no solid peace and democratization without a national reconciliation (and thus impunity or, at least, tolerance in the handling of past abuses). Purging the society of its bad elements can, they say, jeopardize the transition. In addition, punitive justice can considerably disturb other issues on the transition agenda, such as economic reconstruction.

At first sight the choices that have been made in the project countries greatly differ. At one end of the range is Spain, which, after the demise of the Franco regime, chose to definitely turn the pages. At the other end are the four post-WWII countries. Immediately after the war ended they gave priority to prosecutions. In the case of Germany, that decision was taken by the allied occupying forces. But in West-Germany it was soon reversed by domestic political leaders. Two, three years after their liberation, Belgium, France, and the Netherlands also changed track. Selective clemency replaced absolute severity. In the 1970s Greece decided to limit punishment to the main leaders of the Junta. The successor elite in Portugal first initiated systematic prosecutions but made a U-turn after some eighteen months. Poland, according to Klaus Bachmann, kept to the 'thick line between today and the past', the policy which was initiated by Tadeusz Mazowiecki, the first democratically elected president. That choice meant refraining from prosecutions. 'Subsequent governments', Bachmann writes, 'followed this line, and retribution actually remained restricted to a very few cases of middle-range officers of the Ministry of the Interior'.



In her report on Hungary, Renata Uitz notes that no definite decision has yet been taken. As for post-communist Germany, Annette Weinke concludes that in their breadth and intensity, the measures ‘(...) in the areas of prosecution (...) clearly differ from those of other post-1989 states. She sees this deviating position as ‘(...) a confession of the Federal Republic’s old elites that they had failed with respect to the Nazi past’.

2. Exclusion versus inclusion of perpetrators

With regard to the position of suspects and convicts, these societies have had to find a balance between two different scenarios. The first is the systematic expulsion of the perpetrators, based on the logic of exclusion. The other is directed towards their effective reintegration.

A striking similarity in the strategies of Belgium and The Netherlands was the outspoken desire, especially evident in the months before and shortly after the Liberation, to expel the perpetrators — including the rank and file — from their societies. A much-heard expression in political speeches was that ‘there was no place left for those who had betrayed their country’. Portugal, at least in the first months after the April 1974 coup, went the same severe way. Another resemblance lies in the initial tendency to judge the population under absolute standards of good and bad. Sensitivity to the many shades of grey between ‘black’ and ‘white’ was very low. The purges often implied one or another form of ‘national indignity’: a series of civic disqualifications, a prohibition on various kinds of professional activity, prohibition of residence. Belgium, France, and Holland also confiscated the personal goods of unpatriotic citizens. In France, in contrast, General ‘(...) de Gaulle faced a paradox when he seized power in liberated France. He knew France’s thirst for revenge and wanted to channel it through regular state justice.’ But he realized that ‘(...) overly-severe purges would (...) leave France beheaded, a very dangerous situation since the communist party might take this opportunity to fill the gaps’. (Marc-Olivier Baruch)

Post-Franco Spain is a case of total absence of purges. The velvet revolutions in post-communist Europe too have, with the exception of Germany, not been followed by a notable physical and/or social removal of the exponents of the old order. In Poland and Hungary, for example, lustration attempts have failed or were blocked by the Constitutional Court.

No post-WWII initial policy of exclusion was a success. The management of the operation was inadequate, uniform screening criteria were absent, politicization ran very high. The risks of keeping tens of thousands of citizens outside the realms of society soon became apparent. A first danger lurked in the creation of subcultures and networks which in the long run could turn out to be hostile to the newly reinstated democracy. In addition, an *en masse* expulsion of civil service and managerial manpower was felt to be counterproductive because it endangered the badly needed administrative and economic reconstruction. Less than three years after the purge process started, a battery of reintegration-oriented measures was introduced: provisional release, parole, conditional or selective amnesty, rehabilitation. This major policy shift was based on a variety of considerations. Some were of a politico-moral order. Governments viewed clemency as a way to correct and efface shortcomings of the judicial process. One such shortcoming was the considerable inequality that had arisen because punishment had been much harsher in the first months after the war than two or three years later.



But pragmatism and politico-strategic motives were dominant. The prisons had to cope with an overpopulation. The many thousands of convicts exerted an untenable pressure on public resources. And, the thirst for revenge in the population had waned. Other worries, such as the poor standards of housing, came to the forefront. The Cold War too modified the domestic political and public agenda. Communist parties, the most zealous supporters of systematic prosecutions, were expelled from government. Closing ranks in the face of a foreign enemy, the Soviet bloc, was now more important. In the meantime, some WWII countries became involved in colonial wars. In such a situation, internal divisions are a major concern. That too opened the door for a more clemency-oriented policy towards the perpetrators of wartime crimes.

The inclusion-oriented measures, however, were no guarantee for a swift and easy reintegration. Return into society was thwarted by the cumulative character of a cascade of administrative sanctions. Those were extremely difficult to neutralize. The long-term impact of this type of punishment turned out to be a much higher threshold for reintegration than prison time.

3. Blending *realpolitik* and respect for the rule of law

Once a post-conflict society has decided to pursue systematic prosecutions and purges, an additional challenge arrives. Annette Weinke presents it as follows: ‘By what means can the state assure that the rule of law is not derailed, that the fragile balance is kept between the victims’ expectations of justice and the principles of a legitimate legal system?’ The problem a new or reinstated democracy faces is to give prosecutions as much political impetus as possible while still conforming to the rule of law — especially when the successor elites have publicly and firmly condemned the legal derailments of the former regime. Tipping the balance in favor of politics very probably leads to legal transgressions. The outcome can even be victor’s justice. Undiluted respect for the rule of law may, however, considerably weaken the political effects of the fight against spoilers. It may, in addition, frustrate the victims. The country reports show how difficult it is to walk the thin line between biased and fair justice.

A first intricate problem arises when parts of the behavior which the courts or administrative agencies have to judge is of a purely political nature, e.g., publicly advertised approval of totalitarian ideas. The question can be illustrated by looking at the Belgian, Dutch, and French cases. Pre-war treason legislation did not cover the many forms of political action which only in the context of the total warfare of WWII took on a collaborationist dimension. Simple extension of the scope of penal law was not self-evident, since part of the political behavior in question could be seen as falling under the constitutional right of freedom of opinion, speech, or association. A second conflict arises between the legal legacy of the past and the newly enacted laws and/or reinterpreted existing regulations. It involves the *nullum crimen sine lege* principle. A third dilemma-like problem touches the principles of the separation of powers and of judicial impartiality. Who will man the courts and administrative tribunals? Two preoccupations have to be reconciled: respect for the traditional guarantees of fair justice, and the desire of the victims to play a role in the operation. A crucial question here is the eventual victim participation in the activities of tribunals. Such special courts can become instruments of partisan vengeance. They are also vulnerable to governmental control. A final problem arises out of a crucial characteristic of the criminal justice system: it tends to work in a dichotomous mode. Judges have to decide whether a penal law is valid or is not valid in a particular case.



But in extreme times, behavior is seldom of the black-and-white type. There are a thousand shades of grey. Borderline cases abound. In its early phases transitional criminal justice is often emergency justice, and that makes it blind to the many nuances. The climate is then seldom well suited for a scrupulous sorting out of all the gradations.

Most project countries have been well aware of the dual agenda in criminal justice after transition. Their official discourse often stipulates that trials and lustration must and will be ‘swift, severe and fair’. The reality is that political concerns of swiftness and severity initially received total primacy. France has, according to Marc-Olivier Baruch, been a postwar exception. The author says that it is difficult to deny ‘(...) the strong emphasis put on respect of strict procedural rules, and consequently on the important part played by professional judges in the process’. The reason, he writes, is clear: ‘Since post-WWII transitional justice succeeded the Vichy regime, which had made blatant exceptions to criminal procedural guarantees (*non bis in idem*, *nullum crimen*, *nulla poena sine lege*, etc.), it was of the utmost importance for the new legislators not to suffer the slightest suspicion of putting their feet in Vichy’s dirty shoes.’ They did, however, not always respect that intention — as will be discussed in the following paragraph. In the 1970s, priority for politics motivated the initial actions of the successor regime in Portugal and in Spain’s choice for closing the books. In post-communist Hungary and Poland, the Constitutional Court was a crucial actor in dealing with the dual agenda. Renata Uitz writes: ‘The legal framework adopted by the democratic (post-communist) regime in response to the crimes and injustices perpetrated by previous totalitarian regimes was passed incrementally (over an extended period) as a result of a continuing conversation between the political branches and the Constitutional Court.’ But here, just as was the case in Poland, transitional justice decision-making continuously risked infection by partisan interventions, even out of electoral tactics.

Politically motivated choices were driven mostly by the firm conviction that the chaos, caused by the transition, had to be replaced by order as soon as possible. Speedy restoration of the hegemony and legitimacy of state institutions was another strong motive. Thus, *force majeure* and intense time pressures were invoked to justify exceptional legal and administrative techniques that were, in the words of Weinke, judicially camouflaged reprisals. In most post-WWII countries, retroactive criminal legislation was introduced through interpretive modifications of existing laws and through newly created legislation. The death penalty was reinstated. The introduction in France of ‘national indignity’ as a sanction played with retro-activity. The principle of collective guilt was brought in. People were disqualified, not as individuals but for their membership in any organization that supported the former regime. The right of defense was curtailed through restrictions on access to appeal courts, on contacts between lawyers and their clients, and in the form of prolonged internments. The possibility of attenuating circumstances was strictly limited. Finally, lay judges sometimes participated in the activities of the tribunals that tried the collaborators.

The exceptional times argument has, however, a limited plausibility. The question of when these times ended could not be avoided. After two or three years, rule of law concerns gradually seemed to rise on the transitional justice agenda. This shift clearly lies in the line of what was noticed in the discussion of the two previous challenges: flexibility led to a reversal of the initial choices.



4. Perpetrator- or victim-centered attention?

Perpetrator-oriented policies were dominant. This is easy to understand for countries where trials were at the heart of justice after transition: that approach was embedded in criminal-law procedures.

True, all project countries developed a policy of financial and symbolic forms of reparation for victims. But, for a number of years the ‘(...) compensation policy was not treated as an important subject in the political debate’, as the report on the Dutch situation concludes. It was not different in most other cases. (Note that up to the late 1980s, specific victim-oriented instruments, such as truth commissions and public hearings, were not available.) And when measures were taken, they were often selective for many years. Scarce resources were one reason. Victim competition was another. There was, indeed, much rivalry in the market for sympathy and understanding. A great deal was at stake: compensation, positive discrimination in education and housing, appreciation in the form of monuments, medals, museums and commemorations, and a place in the collective memory. The most tragic outcome of such competition was the exclusion of Jewish, Roma, and homosexual victims — long after WWII had ended. Total absence of the gender dimension in victim policies also created discrimination.

In a number of countries, self-victimization of perpetrators became apparent soon after retribution operations started. In the Netherlands ‘(...) those who felt victimized by the purges developed a counter-narrative (...). They claimed that a certain amount of collaboration had been unavoidable in order to keep society running.’ In Belgium, even the notion of victimhood was hijacked. Convicted collaborators called themselves ‘victims of the post-WWII repression’. The phrase developed into an accepted expression in the Flemish region of the country. The same happened in Portugal. Those who were involved in the 1974–1975 purges also named themselves victims. And in Hungary, as Renata Uitz notes: ‘It is a common characteristic of both repressive regimes that in prevailing popular narratives (which do not necessarily portray historical facts adequately) both are often presented as ‘foreign imposed’ or ‘foreign inspired’ in their inception. In such accounts Hungary appears as a helpless victim in the web of world events, and key Hungarian decision-makers are portrayed as doing their best in the circumstances.’ Annette Weinke writes: ‘Until the 1960s the discourse of national victimhood, of “German suffering” from the Allied bombing campaign and displacements of German populations in Eastern Europe prevailed, while the problem of active and passive complicity in National Socialist crime was usually ignored.’

It would take almost twenty years before the public and political acknowledgment of comprehensive victimhood in its many forms became a reality.

5. To forget or to remember?

The past is an extremely complex and chaotic universum of facts and events. Historical myths structure, bring order and give sense to that intrusive legacy.

Some myths are officially fabricated. The report on France shows how such tales originate: ‘(...) France’s official memory of WWII and the Resistance was entirely shaped by the Gaullist vision, related both to the legend (“Self-liberated France”) and to political instrumentalization.’



They also are often accepted by the population, because they are in tune with its own interpretation of what has happened. Sometimes, however, myths miss the ingredients essential to serving their expected function. That was the case in Germany. Annette Weinke says: ‘Unlike countries like France or Italy, early postwar West Germany had no national heroic myth of resistance to draw upon in building a new positive identity, or to serve (despite all the legal problems) as the memorial anchor for a successful historical and judicial “self-investigation”.’ In some of the project countries, narratives have been utterly divisive. The authors of the Belgian report write that the country ‘(...) is characterized by a strong fragmentation of collective memory and remembrance regarding WWII and by the lack of a unifying national narrative. Flanders and Wallonia developed radically opposed narratives.’ The report on Portugal concludes that the memory of the hectic transition years (1974–1982) is a ‘(...) much more divisive issue in contemporary Portuguese society than the history of the dictatorship itself’.

Selective remembering is a crucial component of any historical myth. The hagiographic legend of a ‘self-liberated’ France is one example. For the Netherlands, Peter Romijn refers to the ‘(...) well known image of a nation united in resistance, at least in the spirit of resistance, which had managed to purge itself from the anti-national elements’. But selective forgetting is even more important. It eliminates unpleasant memories: the derisive defeat of the French army during the German invasion, the collaboration of Dutch civil servants and entrepreneurs, the widespread passivity of the Belgian population towards the German occupier, the part the military played in the rise of the authoritarian regimes in Spain and Portugal. According to Tony Judd ‘(...) Europe’s astonishing post-war recovery would not have been possible (...) without a considerable amount of forgetting in the way war and after-war were remembered’ (pp. 61–62).

A narrative, thus, is a negotiated mix of selective remembering and selective forgetting. That compromise is continuously changing because of the never-ending confrontation with later societal experiences and with the output of historical research. That is what Marc-Olivier Baruch hints at when he writes: ‘And the Nation, for de Gaulle, was the State — even at the price of forgetting all the compromises of principle that had been commonplace in the higher ranks of the civil service from mid-1943 onwards. Who could imagine in 1944–1945 that this “realistic” choice would be dearly paid for half a century later, with France struggling with her past through the Papon trial?’

Section II. Contextual factors that shaped policies

This section discusses four contextual factors that have shaped both homogeneity and heterogeneity in policy making and implementation.

1. The preceding regime

The pre-transition regime in the project countries varies indeed considerably. In some it was imposed by way of a military occupation (Belgium, The Netherlands, and Poland during WWII). In others, such as Nazi-Germany, Greece, Portugal, and Spain, it was indigenous. The third type is a mixed one: imported by domestic elites in collaboration with a foreign regime (France, Hungary both during and after WWII, communist Poland).



Judging a political system of the second and third brand is an intricate and complex operation. It usually permeates large segments of the political and civil society, both in terms of the institutions and of the population. A full purge becomes almost impossible. An additional problem is that the judiciary, a major actor in transitional justice, too has been wholly or in part closely associated with the outgoing regime.

A second distinction is based on the duration of the previous order. An important consequence relates to the survival of pre-totalitarian, viz., democratic structures. This is clearly visible in the case of

Belgium, France, Greece, and The Netherlands. Pre-war institutions and their personnel were shattered, but not eliminated. Once the war was over, they were revived very quickly. Moreover, the occupation was too brief to install an authoritarian political and legal culture. In contrast, in Portugal, Spain, and the former Soviet-dominated countries, almost none of the institutions of the pre-totalitarian past had survived after what was a very long-lived regime. Collaboration or, at least, accommodation pervaded most of the population and did so for at least generations, making it extremely difficult to draw the line between good and bad citizens.

A final factor is the kind and the gravity of the committed crimes and how far in the past they occurred. One relevant example is the fact that the repression in the communist countries was, from the 1970s on, more psychological than physical in nature. The passage of time may have blurred the memories and may have led to a more moderate attitude towards those held responsible for what happened during the last two decades of the system.

2. Earlier experiences

Preceding experiences with accountability for state crimes, reintegration, and patterns of remembrance form a legacy that may be expected to interfere in transition justice decision-making. The way such a legacy was present in the project countries varies. Belgium, France, and Holland mobilized prewar legal codes and frameworks. According to Annette Weinke, the Western successor regime revived pre-Nazi legal principles. In Spain, Hungary, and Poland, earlier experiences with sectarian accountability measures caused extreme cautiousness with regard to trials.

3. The type of transition

The regime transitions in the project countries were affected in a variety of ways. A rupture through a military coup or victory is a first type. That was the case in post-WWII Belgium, France, Germany, Holland, and Poland and, later, in Greece and in Portugal. A second type is a negotiated compromise between governing and opposition groups as in Spain, after a few months in Portugal, and in the post-communist countries. Each type created a different balance of power between the former and the new political forces. Rupture guarantees the largest choice of strategies, as it opens the widest windows of opportunity. The consequence of a reform or compromise type of transition is that the agreement between the old and the new forces implicitly or, more rarely, explicitly promises the outgoing authorities a safe passage in return for their total or partial abdication. One significant rationale for such policy of clemency is the need to avoid confrontation with the still present leaders of the former regime. Constraints on decision-making are then very extensive.



4. The international context

The international context at the time of the transition is another influencing factor. The post-WWII policies were developed in an age when supranational codes and institutions with respect to human rights and the rule of law were either weak or absent. The range of tested transitional justice mechanisms was limited; it was still so at the time of the Greek, Portuguese, and Spanish transitions. This has changed considerably since then.

Yet, the Nuremberg tribunal had set a huge precedent. One major step, compared with the approach in the past, was that guilt and punishment no longer affected an entire society but was aimed at individuals. After 1918, the responsibility for atrocities had fallen on Germany as a nation. In addition, an obstacle in the battle against impunity was partially removed. Until 1945, criminal law answered to an exclusively territorial logic. Every country was master of the decision as to who was guilty or innocent within its borders. That situation now changed. It was to be expected that national tribunals in Belgium, France, Germany, and Holland would operate under the influence of that double development.

On 9 December 1948 the General Assembly of the United Nations adopted a convention providing for the punishment of genocidal acts. A new step was taken on 12 August 1949. On that day, under the auspices of the International Red Cross, the four Geneva Conventions saw the light of day. Simultaneously another set of normative standards was created through the Universal Declaration of Human Rights (December 1948). The European Convention on Human Rights followed in November 1950. All these developments came too late, however, to exert decisive influence on the initial design of transitional justice policies in post-WWII Western Europe. However, Spain and Portugal will demonstrate in the 1970s, by preferring reconciliation to punitive measures, that the effect of transnational laws and conventions overall remained limited.

Since the late 1980s a full-fledged transitional justice paradigm, including a set of international hard and soft laws and, more importantly, implementation-oriented institutions and techniques, has been put in place. In addition, the Latin American experiments with truth and reconciliation commissions had broadened the choice of instruments. This created an international context for the post-communist countries that was utterly different from the one in the preceding decades. The pressure of the outside environment was both direct and indirect. Governments, parties, judges, and legal scholars have regularly invoked international conventions on human rights when preparing or reviewing criminal or lustration laws. In Poland, for example, a local Helsinki Committee has been set up, and its proposals for procedural guidelines have received great attention in the first debates on screening. In Hungary the Constitutional Court has been asked to review two articles of the February 1993 law (on the lifting of the statute of limitations) for their conformity with article 7.1 of the European Convention of Human Rights and with article 15.1 of the International Convention on Civil and Political Rights. A strong motive for not neglecting the signals coming from abroad was the possibility that violations of rule of law codes might compromise the countries' membership in the Council of Europe.



Section III. Similarities listed

What follows is a tentative list of matching choices, strategies, and processes in European experiences. The first five cover the time of the transition and the years that come immediately after it. The remaining three touch upon the whole life cycle of transitional justice policies in Europe.³

1. A chaotic start

The way policies were discussed in section II may lead to a misunderstanding. The impression has perhaps been created that decision-making regarding the five challenges was reasoned, rational, and led to a planned execution. The reality is different. Most country reports speak about improvisation, indecision, ad hoc measures, failing legislation, extrajudicial executions, uncontrolled purges, and problematic military and political ‘domestication’ of former resistance movements — at least in the early years of the post-transition period. A recurring problem, particularly in the purging operations, was the absence of a clear framework for coordinating programs and actions undertaken on the ground. It critically undermined the impact of later reintegration measures.

These shortcomings are easy to understand. War and repressive regimes leave a society, its (state) institutions, and its population vastly damaged. Furthermore, the end of a violent conflict creates a complex and evolving agenda — achieving a stable peace, recovering the political space by re-installing internal legitimacy and the monopoly of force, restoring the political machinery and the civil service, holding free elections, drafting a new constitution, guaranteeing a minimum of physical security, stabilizing the currency, rebuilding the economic infrastructure, demobilizing the former armed resistance, helping the victims, keeping the international community on-side, and finally tackling the transitional justice questions of accountability, reconciliation, and reparation. All of this had to be done. It was impossible to take on everything at once. Time and scarce resources imposed painful choices. Adding complexity was the unavoidable conclusion that decisions in one area would impact on others. A confused decision-making was unavoidable.

2. Pragmatic and adaptive decision-making

There was, however, no shortage of pragmatism. In less than three years after the transition, seven of the project countries had, confronted with organizational failures and the fast changing national and geopolitical context, partially or wholly adapted their policies. Several of these societies had travelled full circle in their reaction to critical challenges.

3. Perpetrator-centered policies

Procedural criminal law at the time of the transition entailed, given its focus, a *de facto* marginalization of victims. Another common feature is the badly organized return into society of those who were punished.

³ The proposed catalogue should be read as a list of hypotheses



4. Selectivity in accountability and reintegration measures, and in reparation policies

Official discourses promised fairness and equity in the implementation of punishment of perpetrators. However, retribution impacts on macro-processes that are crucial in any transition from war or repression, such as the reconstruction of the state apparatus and the economy. Considerable leniency in the dealing with suspected administrative and economic elites permeated the actual policy, leading to grave inequality in punishment. Selectivity in designing victim policies was the product of the inevitability of scarce resources, the outcome of victim competition, and self-victimization.

5. Politico-strategic concerns dominated

Authorities claimed that their decisions were built both on strictly political and moral grounds. In reality, particularly in the early years of the process, choices were predominantly based on politico-strategic deliberation.

6. A long-term process⁴

'Like in a magnifying glass', the report on Germany notes, the trial (in 2011) of former concentration camp guard Ivan Demjanjuk '(...) allows us to focus on issues that continue to connect the Second World War with the postwar era down to this day'. In Spain, the authors of the country report write: '(...) from 2004 until 2007, the drafting process and later approval of a crucial reparation law aimed at addressing the most important pending issues of the Civil War and the dictatorship has led to the adoption of a series of measures that (...) have opened many controversies and brought the issue of memory to the public sphere.' The two citations are exemplary for what appears as the main similarity in the experiences in Europe: dealing with a painful past is a process that stretches over several generations. The continent still struggles to leave WWII behind. Spain is nowadays literally and figuratively exhuming its past of civil war and repression. Accountability questions, the core business of transitional justice, are being asked in almost all countries. Reconciliation, truth seeking, and reparation — the other faces of the process — also remain unfinished. Annette Winke speaks of '(...) a secular, transnational transformation process that began immediately after the war and continues today, more than 65 years later'.

The process never came to a standstill. But the pace of its course accelerated brusquely from the mid-1960s on for the post-WWII countries, and in the late 1990s for Spain. History started to take revenge. In both cases the leap came some twenty-five years after the transition period. At first sight, Portugal and Greece look like the exception to the rule. According to the report on Portugal, occasional memory eruptions do arise. They are provoked by unresolved cases or by new revelations. But the authors write that these are '(...) however ephemeral and do not involve the general public'. Nonetheless, the future of the Salazar period archives has led to bitter debates. And the memory of the chaotic transition years is still a divisive topic in Portuguese society. In Greece, sections within the society are unhappy with the way accountability was dealt with after the Junta regime.

Two questions arise. What were the core manifestations of what looks like a never ending looking back? And why did they happen?

⁴ Of course, it may seem a bit too early to predict an analogous life cycle for the post-communist countries. But a number of signs are already there.



6.1 What?

Substantial issues are at the heart of the return of the past. Marc-Olivier Baruch writes that in France ‘(...) the crack was in the metal from the beginning. Post-WWII transitional justice’s failure mainly comes (...) from the incapacity (or the refusal) to give answers to key-questions.’ Indeed, quite a few of the challenges that immediately after the transition had been on the political and public agenda were revisited.

Then the initial preference for a perpetrator-centered approach, a first example, came under heavy fire. The German Federal Republic only very slowly developed ‘(...) a climate of empathy that allowed to the until-then ignored and traumatized victims a public acknowledgement as “moral witnesses” (Annette Weinke). It was the birth of what this author calls a ‘universalist discourse on victims’. In other post-WWII countries, part of the publicly voiced criticism in the 1960s and 1970s was directed at the selectivity of the erstwhile victim policies. Compensation and the acknowledgment of the suffering of Jews, Roma, and homosexuals would at last follow. What started a quarter of a century after WWII is in certain ways still present. Marc-Olivier Baruch notes that in February 2009 the French Council of State ‘(...) officially recognized the willful participation of France’s collaborationist Vichy government in anti-Semitic persecution that had long been attributed to Nazi occupying powers. It was 65 years after WWII was over.’ It took the political elites in The Netherlands almost sixty years to present apologies for the postwar Dutch governments’ treatment of the Jews. In Spain the identification and exhumation of mass graves today provide visibility to victim’s claims.

Another issue dealt with the question of accountability. Several aspects of the initial policies were now criticized: the lack of respect for rule of law principles, the clemency for certain categories of perpetrators (e.g., captains of industry), or, in the case of Spain, the total absence of punishment. In Belgium an eventual amnesty for those who collaborated with the Nazis still regularly appears at the political agenda. Also, the search for a proper balance between forgetting and remembering the past was reopened.

Such continuous resurgence of challenges even seems already to mark memory politics in post-communist societies.

6.2 Why?

A number of factors have played a role. Epochal change in generations, the report on Germany says, ‘(...) influenced the society’s relationship to the past. By the 1970s at the latest, as the former Nazi functionary elites left the stage and a new, less compromised group took charge of business (...)’. A similar development occurred in Spain. Many witnesses who experienced the greatest excesses of the dictatorship at first hand are now in their seventies and eighties. They have always remained silent, saying nothing, for example, about where the mass graves were located. Now that their end is in sight, they are willing to share this information.



Then, there is the generation of young forty-somethings. Their attitude to the legacy of the old regime is more distant, freer. Now that their cohorts are occupying the political arena, the bars built by the authorities around the past are gradually disappearing. Was it still necessary to keep the collective memory locked down? Was Spain not mature enough to confront its past without fear? Had the time not come to hunt down some of the myths that had grown up? ‘Intergenerational justice’, a recently coined expression, justly characterizes these developments.

Other causes transcend age groups. They are linked with global changes in the area of justice after transition, such as the effect of evolving international human rights norms and visions on fair trial; the availability of a critical mass of profound historical research and media reporting; the coming of a new transitional episode in the post-communist countries; new trials of WWII perpetrators (Eichmann in Israel, Barbie and others in France) as catalysts; and the echo-effect of similar developments in neighboring countries.

Some of the wide-ranging societal changes since the 1960s and 1970s are another source of the shifts in the vision of transitional justice. The time’s tendency to call for far-reaching political, social, and economic reforms led to critical questions about the complete failure of the postwar successor elites to realize such radical transformation. In addition, elite-inspired and -induced silence on the way the initial challenges had been tackled had kept the immediate post-WWII episode out of the public debate for many years. The rising demands for transparency in political life were retroactively projected on the past. Holland is a remarkable example. The authors of the Dutch report show that the early policy choices were taken mostly in silence, hidden from the public. An open debate was avoided by restricting the flow of information and by emphasizing the urgent need to close ranks. Those who had sympathized with the enemy were ‘treated’ by professionals: judges, civil servants, professors of criminal law or criminology, probation officers, and psychiatrists. From the 1970s on, though, the forced silence could not be kept intact. The foundations, on which the postwar verdicts were based, had not become part of the collective memory, which again and again led to questions of ‘how’ and ‘why’.

7. Common challenges

The issue of justice after transition confronts a society with a set of unavoidable and recurring challenges, which in some cases are almost dilemmas. No project country has escaped these crossroad choices: prosecute or forgive, exclude or include perpetrators, prioritize political rationale or respect for the rule of law, develop a perpetrator-centered or a victim-oriented approach, forget or remember.

8. The considerable impact of the outside world

The role of international interference has been continuously apparent during the whole period that the research project covers (1945–2000). This may be surprising for what are called the first (post-WWII) and second waves (the 1970s) in the history of justice after transition. But, as Annette Weinke concludes, in the case of (West-) Germany of the late 1940s national ‘...trials of Nazi crimes, reparations and restitutions, and delayed personnel purges were never strictly domestic issues.



The operative German actors always had an eye on the special “German” situation, which was manifest in the obligations of international alliance and integration with the West and in the constraints of the German-German system conflict.’ The obligations of alliance that resulted from the Cold War situation were a factor of influence in other project countries too. Involvement in colonial wars, as in France and The Netherlands, was another source of external influence. In Portugal and Greece the regime transition and its immediate aftermath were affected by the military engagement in Southern Africa (Portugal) and in Cyprus (Greece).



Chapter 2

Lessons Learned

This part of the report is the most ambitious one: the identification of experiences in Europe that might be relevant for current and future cases of justice after transition. A ‘lessons learned’ approach is a complex way of dealing with facts and figures. Pitfalls abound. The chapter therefore first raises two preliminary questions: *whether* such approach is justified, and *how* we should bring the (eventual) message. A second section discusses a list of predictive findings, our version of ‘lessons learned’.⁵

Section I. Lessons learned: a problematic approach

Whether?

The OECD Development Assistance Committee’s *Glossary of Key Terms in Evaluation and Results Based Management* defines ‘lessons learned’ as: ‘Generalizations based on evaluation experiences with projects, programs, or policies that abstract from the specific circumstances to broader situations. Frequently, lessons highlight strengths or weaknesses in preparation, design, and implementation that affect performance, outcome, and impact.’ In the area of justice after transition, a number of factors hinder the search for such relevant generalizations. They are linked to the fact that, since the late 1980s, transitional justice has developed in a context that is vastly different from the one in the preceding decades.

1. Far-reaching institutionalization is a first factor

‘Rather than successive episodes unfolding in relative isolation from others’, Jon Elster writes, ‘processes of [transitional justice] now find their place in a pre-established pattern’ (p. 325). Trials in their different formats, truth commissions, reparation and reconciliation programs, and vetting are today highly developed and fully accepted instruments in the toolbox. They are the vehicles of the current practice-oriented paradigms. In addition, this process of institutionalization is multi-faceted. National and international state-initiated, -organized and -controlled transitional instruments are now more and more seconded by techniques that are civil society-initiated and -organized, e.g., various forms of truth seeking, and tradition-based forms of justice, reconciliation, and reparation. Up to the post-1989 era, the European cases have had no relevant experiences with civil society-driven policies and formalized relations with local stakeholders’ communities, nor with the mobilization of a heritage of traditional formats of dealing with the past.

2. Extensive expansion of the concept and the practice

The field now seeks to include a very broad range of transitions. It started, *José Zalaquett writes, ‘...to be shaped in South America, in the 1980s, around political transitions that aimed at the recovering of democracy’.

⁵ A draft version of this chapter has been discussed during an international symposium (Brussels, 23–24 May 2012). As indicated in the introductory part of the report, six practitioners from the South have been asked to present their remarks. Their interventions have been extremely helpful, as the content of chapter 2 demonstrates. The name of these critics will be preceded by an asterisk when they are cited.



Then it expanded to include: ‘the attempts at the fresh foundation of a serious democratic regime, rather than at restoring a defunct democracy (El Salvador, Guatemala); political change that brings to an end a regime that disenfranchised a majority of the population (South Africa); the disintegration or disappearance of a former State (former Yugoslavia, the German Democratic Republic); national situations in which there is a still unresolved civil war (Uganda, Sierra Leone) or one in which an internal armed conflict coexists with the adequate functioning of democratic institutions in most parts of the country (Colombia); the reform of a political system to make it more benevolent or more respectful of human rights, but without turning it into a democracy (Morocco); situations in which a peaceful or armed revolution has brought to an end a dictatorial regime, but the respective nation has no traditions of democratic rule to draw from, or at least, it has none in living memory (Central and Eastern Europe, starting in the late eighties; Egypt and Tunisia, starting in 2011).’ And, he says, the notion of transitional justice has been further inflated and now even covers ‘...centuries-old practices against aboriginals or other once- disenfranchised and still vulnerable minorities’. *Juan Mendez adds that, in certain Latin American countries, ‘(...) the legitimacy of transitional justice principles has also resulted in “hijacking,” in the sense of attempts to use the language of transitional justice not to pursue accountability but instead to ensure impunity.’

3. (One-sided) professionalization is another issue

Widespread expertise on trials, lustration, truth finding, reconciliation, and reparation has been developed and quasi-monopolized by specialists in various UN bodies, in development agencies of donor countries, in international NGOs such as the International Center for Transitional Justice, Amnesty International, Human Rights Watch, and Avocats sans Frontières, and in academic circles.

Kofi Annan, the then-UN Secretary-General, in his 3 August 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* deplored the dominant role of ‘(...) foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity’. In the case of recent transitions in the Middle East and in North Africa, *Habib Nassar says, international experts tend to promote standardized and ‘fast food type’ solutions. He adds that such formulas ‘(...) are not only unsuited to the realities of each situation but their parachuting into the region signifies that policy- making is no longer in the hands of the concerned parties but is being gradually controlled by international technocrats’.

4. The state of the transitional society

Following their liberation in early 1945, Belgium, France, and the Netherlands faced an enormous challenge. Hundreds of thousands of buildings had been laid to ruin or damaged, thousands of bridges destroyed. The railway network was completely disrupted; more than half the merchant fleet had disappeared. Factories lay idle or ran at half capacity. It was only years later that these countries returned to the economic levels of 1939. But most of their political, judicial, and social machinery was for the greater part intact. This was also, with the exception of Germany, the case in the other project countries.



The difference with many transitional societies in the South is blatant. The devastation caused by genocide, a civil war, or a dictatorship is incalculably greater there, mostly because their conflicts, often ongoing when transitional justice policies are being prepared, tend to happen in the context of weak, even failed states. This particular contrast has a major politico-ethical consequence when learning lessons from the experiences in Europe. According to Mark Freeman: ‘States like Spain and France that relied on broad amnesties in earlier and more fragile times in their histories should of course bear those histories in mind when offering advice to states that remain mired in the abyss. In particular, they might refrain from insisting on standards that, if applied in their own years or decades of transition, would have risked massive political and social destabilization’ (p.30).

*Habib Nassar sees additional differences in the MENA region. The rupture here often has not been clear — with Egypt as the most demonstrative example. There and in neighboring countries an intense power struggle has erupted between the army and the successor elites, but also inside the new order. Finally, widespread corruption has afflicted and damaged these countries and has added an important aspect to the legacy of the past.

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So what?

Learning lessons from the experiences in Europe is, given the many thresholds, a complicated academic and practice-oriented enterprise. This project and its report have, however, one major asset: they have the advantage of the lengthy time span that has evolved since their policies were designed and executed. This much broader temporal space approach is precisely what is lacking in most learning lessons experiments today. The reason is that, since its start in the early 1990s, research on justice after transition has had an uneasy relationship with history and with historians. Its focus has been directed, almost entirely, on current and/or relatively recent policies. A 2010 US Institute of Peace publication (*Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*) is a convincing demonstration. It proudly presents itself as based on an analysis of 854 transitional justice mechanisms in 161 countries. But its first case dates from the 1970s, as if the post-WWII period in Europe is no source at all of intriguing experiences. An uneasy relationship has also existed with historians. Transitional justice research has been dominated by law school trained experts. It has taken 10 to 15 years to open the windows and to look outside for expertise, such as in history departments.

How?

In its first chapter this report was predominantly descriptive. In theory, the time has now come to present a set of policy recommendations. Lists of do’s and don’ts, the usual suspects, are *prescriptive* in substance. The question is whether it is possible to offer that type of lessons without creating the deontological problem that is raised in a report of the Centre for International Policy Studies. The authors write: ‘Risky advice by transitional justice advocates is irresponsible, especially when foreign experts are not themselves accountable to affected populations. The potential costs of transitional justice-related miscalculation are high, but they will be borne exclusively by local populations, not Northern experts’ (p.19). Moreover, ethnocentrism and the (unconscious) reference to moral superiority are a real risk. They are like nature: chase them away through the front door and they come back through the window. These are the reasons why section II of this chapter will avoid as much as possible presenting the findings as prescriptive recommendations.



Predictive lessons are our preferred alternative. James McAdams presents a good example of that type of findings when he writes that the best we can do to lessen the disappointments and frustrations with regard to transitional justice is ‘(...) to accept the existence of three factors that arise in every attempt to come to terms with past wrongs: the power of precedent; the illusion of resolution; and, the possibility of a continuous return’ (p. 304).

The lists that follow are based on the similarities in decision-making processes, challenges, policies, interfering contextual factors, and sequences in the life cycle of justice in transitions in Europe — as discussed in section III of the preceding chapter. The starting point is the hypothesis that there are, given these significant parallels, grounds to deduce a set of useful propositions. Of course, their range is limited, as they rely on no more than ten case studies. We believe, nonetheless, that *what* happened in these countries and *why* it happened is relevant; that there is, in other words, a strong eventuality that it may and likely will occur again. This may invite stakeholders to react proactively.

Section II. Predictive findings

Each suggestion is to be read as ‘an event, a fact, a process, a development that can be expected’. The intended addressees are local and international actors.⁶

1. Local stakeholders

The local parties involved are national policymakers (governments, parliaments, civil servants, army, and police) and civil society groups (local human rights and victim associations, churches, media). The first seven points in the list cover the time of the transition and the years that come immediately after it. The remaining two touch upon the whole life cycle of dealing with the past.

1.1 The likelihood of a chaotic start

Disarray and confusion have characterized the initial policies of most of the project countries. Causes were the political, social, and economic damage set off by the war or by the preceding regime; the size and complexity of the broader transition agenda; and/or a considerable knowledge deficit with regard to dealing with a painful past.

There is no reason to think that transitional countries in the South are or will be better equipped to tackle these handicaps.

1.2 The prospect of coordination problems

Decision-making on justice after transition was, as the report learns, closely linked to the successor elites’ desire to assert the state’s hegemony over the process. Control over the various accountability, truth seeking, and reparation instruments was anxiously sought. But the rate of success was relatively poor, especially in the early months of the operation. The cause was weak coordination.

⁶ Our predictive lessons have led to both critical comments and recent examples by the referees from the South. Their remarks have been extensively included in this section.



This provides another critical lesson: the absence of a clear framework for coordinating the actions and programs can at best complicate their impact, at worst critically undermine it. *Habib Nassar discusses the example of Egypt where a succession of commissions of inquiry has been established since the fall of Mubarak. They have similar mandates, and no coordination whatsoever exists between them.

1.3 A problematic reintegration may be expected

After less than two years, Belgium, France, The Netherlands, and Portugal exchanged a policy of exclusion of perpetrators for a policy of inclusion. In that matter, Hungary and Poland have regularly followed a zigzag course. The problem is that these countries were all badly prepared to develop constructive measures.

Reintegration is a blind spot in transitional justice practice and research today. A reoccurrence of past failures is very probable. A recent example is the haphazard de-Baathification process in Iraq and the resulting failing reintegration efforts.

1.4 The need for provisional measures

The reports on Spain, Portugal (in its second transitional phase), and the post-communist countries show that in the case of a negotiated transition systematic prosecutions and extensive truth seeking are not likely. Formal accountability measures are then perceived as threatening to the former elites. They are also seen as a considerable threshold on the way to the consolidation of peace and/or of a fragile democracy. The reports also demonstrate that the need for accountability and truth never dies. But it very often happens that, when the time is 'ripe' for a more accountability-oriented confrontation with the past, crucial documents or other sources of proof have disappeared. Memory resources of the state and civil society are damaged or even erased.

Thus, every measure that prevents the destruction of evidence is of crucial importance. Safe storage of archives, particularly incriminating documents and testimonies, is one of the possibilities. Small scale truth-seeking initiatives, for example, taking statements from survivors or by identifying local heroes, are also feasible. East Timor, Pat Walsh says, has devoted systematic effort to these points, e.g., sections of the archives of the Commission for Reception, Truth, and Reconciliation have been digitalized for offshore storage and access in the British Library in London.

In addition, the pain of victims does not disappear when the pages are temporarily turned. Building memorials and monuments are some of the ways that can give victims recognition and satisfaction. But preserving images, signs, and symbols of a civil war or a repressive regime can also be important. They may become educational tools. Another option is the identification of mass graves and the reburial of those who were dumped in them. All cultures have respect for the dead, which is why reburial and the accompanying rituals are so important. At the same time, exhumations may provide information for later use. 'Bones', forensic anthropologist Clyde Snow said, 'are often our last and best witnesses: they never lie, and they never forget' (cited in Eric Stover and Gilles Peress).

In sum, interim measures are the product of creative approaches to the problem of accountability in negotiated transitions.



1.5 The confrontation with critical challenges

The issue of justice after transition confronts successor elites and their society with a set of unavoidable challenges, which in some cases are true dilemmas. No project country has escaped these crossroad choices: prosecute or forgive perpetrators, exclude or include them, prioritize political rationale or respect for the rule of law, develop a perpetrator-centered or a victim-oriented approach, forget or remember. A striking finding is that some societies often have, especially in the early phases of transitional justice decision-making, meandered between opposite choices to finally arrive in what can be called a third, more or less balanced policy.

Our hypothesis is that the same challenges and the trajectory of the policies they provoked will, with high probability, appear in current and future cases of justice after transition. *Habib Nassar, however, notes that the content of one of the crucial issues has changed: rather than asking ‘to punish or to let bygones be bygones?’ the question now being posed in the MENA context is ‘who, when and how to punish?’.

1.6 The prospect of selectivity in programming accountability, victim acknowledgment, and reparation measures

The factors that caused selectivity in the past have not disappeared in recent times. We anticipate a similar negative impact on fairness and equity.

1.7 Expected influential outside factors

The report documents the high quantity and diversity of factors that co-shape decision-making. International interference was the most prominent one. There are ample reasons to assume that such interventions will reoccur today. They can come in a number of ways. They can be close (as in the domino effect of events in neighboring countries or in the form of UN-facilitation) or remote (e.g., through the reports of international NGO’s). They can be direct (in, for example, the pressure that international criminal law exerts) or indirect (via aid conditionality). In a number of Latin American countries, *Juan Mendez notes, measures applied to reckon with the past were genuinely local, ‘(...) in the sense that they were fashioned and executed by local actors.’ But, he notes, there was quite a measure of imitation between neighboring actors. There was, in other words, intense exchange ‘(...) of experiences within the region, favored by what was already a strong and active network of human rights organizations’. In El Salvador and Guatemala, in contrast, the influence of international actors was greater, especially because the peace process was brokered by the UN: ‘It was largely due to the influence of the international community as mediators that explains that some measure of transitional justice became part of the peace process’. In East Timor, says *Pat Walsh, the ‘(...) UN had a major influence on the design, terms of reference, and resourcing’ of the first reconciliation commission and the Serious Crimes Panels. However, according to *Habib Nassar the succession of international interventions and the approach adopted has ‘(...) pernicious effects on local justice efforts. (...) national actors have been receiving contradictory advice in the area of transitional justice’.

1.8 The return of the past

The country studies demonstrate that coming to terms with a tragic past looks like a process that is never complete, even after many decades.



The impact of war and dictatorship continuously requires additional, corrective, and new measures and narratives. This long-lasting looking back is regularly colored by outbreaks of heated emotion and bitter controversies. Sometimes the course reminds one of malaria: brief moments of high fever following years of relative quiet. In other cases it appears as a societal neurosis which refuses to be cured. The expression ‘that all things pass, except the past’ can be qualified as a generic and, consequently, recurring reality.

As was the case in most of our project countries, the recent successor elites in East Timor ‘(...) moved quickly to address its immediate past in the belief that a quick process could decisively put this difficult past and its legacy behind it and allow the country to focus on pressing development priorities’ (*Pat Walsh). It is, in the words of James McAdams, the illusion of definite resolution (p. 304). The demands for accountability, truth telling, reconciliation, and reparation never die. *Juan Mendez says: ‘They cannot be put to rest by attempts to bury the past. In Latin America, ongoing processes of transitional justice refer to events that took place three and four decades ago. Brazil has just appointed a truth commission, in the country that has been the most resistant to the idea of reckoning with the past. In Argentina, Uruguay and Chile there are ongoing trials against perpetrators of state crimes. Hundreds have been convicted and are serving time, and hundreds more are awaiting trial. (...) In Peru, former President Alberto Fujimori has been sentenced to 25 years in prison for crimes committed by a secret army unit he created and commanded, in an exemplary trial with full respect for his defense rights.’

Several factors, experiences in Europe demonstrate, play a role as triggers of the return of the past. They may be expected to return in current and future cases. *Pat Walsh thinks that intergenerational justice in Indonesia and East Timor may come ‘(...) when institutions are stronger and a fresh generation of leaders, less beholden to the past and more accountable to an educated electorate and non-state actors, are the leaders’.

1.9 Revisited challenges

In Europe the confrontation with the five core challenges was at its peak in the first three years of the process. But a quarter of a century later, most countries reviewed the initial choices. It appears that during that later episode a lot more attention was given to considerations of a politico-moral nature: loud calls were heard to finally restore fairness in the distribution of punishment of perpetrators and in reparation for victims. There were critical remarks on the absence of far-reaching political, social, and economic reforms at the time of the transition. This reweighing of the past was, and in the case of Spain is, a retroactive implementation of values and codes that exist since the late 1960s. Its impact has been partly real. It led to new trials and explicit forms of truth seeking and truth telling, and to long due victim-centered measures. But it was and is also partly symbolic, as most of the legacy was no longer accessible for wanted corrections.

Such twists will very probably reappear in present and imminent dealings with the painful effects of war and repression. According to *Yasmin Sooka transitional justice, ‘(...) which has emerged over the past two decades as a global response to massive or systematic violations of human rights after a period of repression, requires re-evaluation.



The experience of South Africa and of other African countries lays bare the shortcomings of some of its premises and mechanisms and suggests the need for new criteria in selecting an appropriate justice option.' She adds that the need is felt to focus much more on the rights of victims and on a broader understanding of justice that '(...) includes socio-economic rights, redistributive justice, development and the need for reparations and redress, which transitional justice practitioners, particularly in the North, tend to avoid. '

2. International actors

International governmental and non-governmental organizations become more and more involved as third parties in local transitional justice policy-making. Most of the predictive findings that were discussed in the previous paragraphs may simultaneously be mobilized as route-indicators for external interventions.

2.1 Points of awareness:

- The likelihood of a chaotic start in new cases of justice after transition and the need for pro-active international reaction;
- The prospect of coordination problems at the local level, and in internationally designed programs which are often confused and scattered;
- The risk of a continued perpetrator-centered approach. The donor preference for DDR programs often leads to a situation where perpetrators are better off than victims and refugees;
- The negative effects of victim competition. *José Zalaquett warns the international community about a surge of would-be victims (made in good faith or directly fraudulent): 'It is not uncommon', he says, to find among human rights practitioners, particularly in countries of the Northern Hemisphere, the impulse to consider as a victim anyone who claims such status';
- Reintegration as a vacuum on the agenda, both in domestic and transnational planning;
- The factors that make accountability and reparation measures selective;
- The case-specific contextualization of policies;
- The need, as *Juan Mendez notes, to '(...) distinguish between transitional justice measures that attempt to break the cycle of impunity to the largest extent possible from those that hijack the language of human rights and transitional justice but in fact are meant to guarantee impunity for human rights crimes';
- Capacity building: both local and international understanding of the various critical challenges, the full range of available strategies to tackle them, and their expected return may be increased through common outreach programs;



- The need for provisional measures. Countries from the South, in particular those that come out of a devastating civil war or repressive regime, lack even the most elementary resources to record the past. Here is a domain where donor countries, even small ones, can play a great role with a minimum of costs. They can train local people for record-keeping, develop digital techniques for the storing of data, provide provisional 'housing' for vulnerable documents to secure their survival, initiate audits of archives, and sponsor local NGO's that compile data inventories or map human rights violations. *Pat Walsh says: 'East Timor struggles on the key point of utilizing these resources as the evidentiary basis

for messages and values regarding non-violence, human rights, accountability and rule of law, that are fundamental to the new nation and its future; considering how sites of memory can be transformed into sites of conscience; and making use of history as a resource and asset rather than using it selectively, triumphal or not at all.'

Several donor countries work together in a justice rapid-response team. Its specific functions are to assist post-conflict countries with forensic mapping, documentary evidence investigation, visual image collection, identification of potential witnesses, and identification of massacre sites. The initiative has reached a point where practical steps have been set with regard to the training of experts, standard operating procedures, and so on.

Of course, all these initiatives are best seen as short-term assistance — that is, until local policymakers and civil society have the ability to go on their own. A number of local NGO's in the South already have expert knowledge and experience and could, in the context of a south-south flow of expertise, take up a capacity building task. The South African History Archive is one example. In Cambodia, a non-governmental organization has collected hundreds of thousands of documents on the Khmer Rouge regime, thousands of photographs, and information on some 200 prisons and 20,000 mass graves. The Desmond Tutu Digital Archive (200.000 pages of Tutu's letters, speeches, personal writings and more than 1000 audio and video recordings) is designed to enable people inside and outside South Africa to learn about the most dramatic period in the country's history. The digitalization of Tutu's archive could be turned into an exercise field for the development of a standard methodology and of technical tools for the digital storing of records about human rights violations.

2.2 Looking in the mirror for Europeans

The post-war trials of Belgian, French, and Dutch citizens who had gone astray in WWII did not proceed according to the book that is today prescribed: a firm fight against impunity, fairness, and equity in the implementation of punishment and of compensation for victims. In addition, post-1947 Germany, and later Spain and Portugal, decided against systematic prosecution after years of dictatorship. Yet most political leaders in Europe expect countries in the South to do what was not done during and after their own transitions.

*Yasmin Sooka and *Pat Walsh have evoked another paradox. Six of the nine project countries have a heavy colonial and postcolonial heritage of human rights violations. They have succeeded in isolating this legacy from their long-lasting questioning of their domestic transitional justice history and from their emphasis on the duty to prosecute elsewhere in the world.



The time has come to include this unfinished business in their vision of justice after transition, both in terms of academic research and political practice.

Moreover, several European countries were, for geopolitical reasons, providing military and economic aid to parts in the world which were plagued by civil war, dictatorship, and brutal repression. ‘(...) leaving them open,, as *Pat Walsh notes with regard to East Timor, ,to the justifiable double charge of hypocrisy and complicity’.

There is, finally, the ongoing war on terror. *Juan Mendez says that it has resulted ‘(...) in very serious human rights violations committed by highly developed and long-standing democracies, often in cross-border illegal cooperation in repressive actions. Extraordinary renditions, the use of black sites, torture and other ill-treatment, and *refoulement* of individuals to places where they will be tortured have been the result (...). And most actions continue to be mired in secrecy, despite pleas from European and international human rights protection organs to investigate the episodes and disclose the circumstances and responsibilities to the public. This is a useful reminder that the principles that transitional justice aims to realize are really universal standards to which all States are bound, regardless of whether they are in transition or not.’

There is something touching in the arguments of the European guardians of justice. The cause for which they are fighting is of the greatest importance. It is good that they consistently point the finger at the culture of impunity, the disrespect for the rule of law, the lack of attention for the fate of the victims. But, as the preceding paragraphs suggest, a healthy dose of modesty will do their arguments no harm and will make their policy demands more convincing. The reflections of the practitioners of the South are at the same time a tough and solid reminder of Europe’s duty to assist all countries that wrestle with an awfully hurting past.



Bibliography

Annan, Kofi, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, report of the UN Secretary-General to the Security Council, August 3 2004

Centre for International Policy Studies, *The Effects of Transitional Justice Mechanisms. A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (University of Ottawa, 2008)

Elster, Jon, *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press, 2006)

Freeman, Mark, *Necessary Evils. Amnesties and the Search for Justice* (Cambridge University Press, 2009)

Judt, Tony, *Postwar. A History of Europe since 1945* (New York: Penguin Books, 2005)

McAdams, A. James, 'Transitional Justice: The Issue that Won't Go Away', *The International Journal of Transitional Justice*, 5-2, (2011)

OECD Development Assistance Committee, *Glossary of Key Terms in Evaluation and Results Based Management*, 2004

Olsen, D. Tricia, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington: U.S. Institute of Peace, 2010)

Stover, Eric, and Gilles Peress, *The Graves, Srebrenica and Vukovar* (Zurich: Scalo, 1998)