



Remarks by David Tolbert
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“Transitional Justice and Long-term Impunity”

Thank you for the kind introduction. It is an honor to be with you here tonight and to speak on the subject of transitional justice. To state the obvious, it is a pleasure to be here in Barcelona, which is a place that I particularly enjoy. We are indeed fortunate at ICTJ to be able to hold our annual course on truth commissions in your beautiful city.

My remarks today will focus on transitional justice as a way to consolidate democratic transitions and address unresolved issues of the past in societies that have suffered mass human rights abuses and violations of international human rights law and international humanitarian law, primarily following repressive authoritarianism and/or armed conflict.

While my comments tonight will be of a general nature, I am quite cognizant of where we are and the contested nature of the “transition” in Spain as well as the significant questions that remain. As the UN Special Rapporteur for Truth, Justice, Reparations and Guarantees of Non-Recurrence, Pablo De Greiff, aptly noted in his report to the United Nations in July on Spain, the country has experienced “a consolidation of a robust and stable democracy.” However, he also found a yawning gap between the view of most state institutions—which hold that the claims of the victims have been met—and the victims themselves—who “feel insufficiently recognized and compensated.” Indeed, it is clear that the victims and society at large have seen a very limited amount of truth, justice, or reparations in response to abuses of the Civil War and the dictatorship periods that followed.

This conclusion is underlined by ongoing public discussion on truth and memory that has emerged with renewed force over the past decade, after a long interval when little heed was given to these matters. While much time has passed since these abuses occurred, there remain a number of steps and processes that can be undertaken to address the injuries that victims have suffered and respect their rights. The Special Rapporteur has set out some of these considerations in his report to the UN General Assembly, and I would refer you to that report for a full account of these very useful recommendations. In particular, I would note that

information related to enforced disappearances in Spain is sorely missing due to a lack of investigations, which undermines victims' right to know and the right to truth. One step forward would be to ensure that all victims are covered by the Preliminary Bill for an Organic Act on the Status of Victims of the Offence as well as addressing issues related to the Amnesty Act to bring it into line with current international law. I would also join the Special Rapporteur's call to broaden the laws that provide for reparations and compensation to include all victims. Here I would particularly underline the importance of ensuring that the impact of violations committed against women is fully addressed. Other steps include annulling the sentences handed down during the Civil War and dictatorship periods, which would be important symbolic redress for victims.

I would stress that there are a number of further steps that should be considered. These include the removal of symbols and monuments that glorify the military's role in the Civil War and Franco periods, strengthening education on the Civil War and dictatorship periods, the establishment of institutions of historical memory, and broadening access to archives. I would also note the important role that exhumations can play, and has played, for victims—I would note here the inspiring work of the “grandchildren's generation”—and the need to ensure that these are facilitated by the state.

Much more could be said on this subject, but this audience is well aware of the issues. I hope that my following remarks will resonate with some of your interests and concerns and contribute to the discussion of the necessities and options for Spain regarding justice, truth, and memory.

Transitional Justice: Its Role in Transitions and Peace Processes

There are a number of ways to define the concept of transitional justice. Some conceptualizations emphasize its political dimension: the need to consolidate a new social situation—peace—and the political regimes arising from a transition—namely, democracy. This consolidation requires a delicate balance between the need to address the grievances and scars left by authoritarianism and unbridled violence and the need for incoming political actors and those exiting the political stage to accept and respect the new order and the new rules. This latter condition requires some political and institutional compromises that in many cases have prevented full justice from being achieved.

Other conceptualizations of transitional justice, not necessarily in conflict with the former, emphasize the dimension of human rights and justice. This means that transitions are envisaged mainly as an opportunity, and an obligation, to address past wrongdoings that were tolerated and marked by impunity during the former political situation. Thus, transitions appear, among other things, as a moment for victims to be heard and for their rights to be taken into account by the new powers. Experience shows that truth, justice, reparations, and non-recurrence measures are critical elements for a transition to be seen as legitimate, both by victims and society at large. While it must be acknowledged that full accountability is unlikely to be accomplished, in view of the sheer scope of human rights abuses routinely involved, this

second proposition or argument places human rights and justice at the heart of the process and thus makes it essential to a transition that is considered legitimate and successful.

I would argue that these two propositions or conceptualizations are complementary, rather than contradictory. They combine the essential elements of human rights and justice in the context of political and social change.

First, the set of mechanisms and practices that constitute transitional justice are conceived of as elements oriented toward the consolidation of a particular type of social change, which can be broadly described as the establishment of democratic regimes. These include: the rule of law; the protection of citizens' rights, particularly those of the victimized population; and the establishment of institutional arrangements. To meet those high goals, political maneuvering is not sufficient. Some critical tasks are indispensable, principally those that are often referred to as coming to terms with a traumatic past.

Second, addressing that legacy of abuse and violence involves several tasks. It is possible to see those tasks as closely related to the rights of victims to truth, justice, reparations, and non-recurrence measures, as has been clearly recognized on the international level, for example, by the UN Secretary-General's 2004 Report on Transitional Justice. Considering those specific rights helps us to grasp the rationale of the more typical transitional justice mechanisms, such as truth commissions, criminal justice processes (including in some cases specialized or international tribunals), reparation programs, vetting programs, and institutional reform. All of these measures are devised as mechanisms or practices to address problems that ordinary state institutions would not address. They are mechanisms and practices that coexist with, or work alongside, typical democratic institutions and make them more feasible and sustainable in the long term.

There is also an essential cultural dimension to the notion of transitional justice. Addressing the legacy of past abuses and providing responses to the victims' plight is a means to build trust between the state and society, and among the citizens themselves. This is often referred to as "civic trust," which arises from the experience of having institutions committed to protect citizens' rights and provide various measures of justice when those rights have been grossly violated. However, "civic trust" is not only a result of state action regarding past abuses; it is also an effect of new social ties that are made possible when members of society know their shared responsibilities.

Acknowledgement of past deeds and recognition of aggrieved citizens are two pillars needed to establish civic trust, and these processes take place through transitional justice mechanisms, both in the official sphere (state actions) and the social sphere (individual, family, and community actions). Transitional justice appears thus as a process of democratic consolidation through some specific institutional actions—truth seeking; criminal justice processes/prosecutions; reparations; and reform of the military, police, and other institutions—aimed at developing a new political, legal, and ultimately social situation.

Many examples could be cited of attempts to come to terms with the past through transitional justice mechanisms. The South African Truth and Reconciliation Commission might be the best known. In some cases it is presented as a model for future transitional justice processes, despite growing and trenchant criticism of the approach and disappointment with a number of its results and its lack of follow-through. Notwithstanding the virtues and strengths of that particular effort, it is useful to acknowledge its limitations in terms of creating a sense of justice and giving satisfaction to a wide spectrum of victims. In a number of cases, we will find that expectations are unrealistic about these processes, thus leading to frustrations about the transition. In other cases, more modest approaches might lead to more successful experiences in terms of generating a sense of justice among victims and society. Truth commissions in Argentina and Chile had a rather narrow scope of investigation. They focused primarily on enforced disappearances: identifying the victims, recommending reparations, and calling for official recognition of responsibilities, with a number of important results. Thus, these examples may be a good starting point on the road to justice after a period of violence or authoritarianism.

Even though these truth-seeking mechanisms have been adopted in the last four decades mainly in societies that have recently emerged from conflict or authoritarian rule, in recent years it has been understood that they can be necessary and applicable in other situations, wherever a legacy of widespread abuses has not been properly addressed. For example, commissions have been established in the context of historic abuses or oppression or marginalization of native peoples, as in Canada and the United States, or where grievances over long past abuses reemerge decades after a transition—even though a successful transition by strictly political measures has taken place.

Challenges in Societies Where Impunity Is Entrenched and/or Where It Is Considered a Condition of Political and Social Stability

This leads us to consider the situation of transitions that, even if they have been successful in broad institutional terms, have failed to revisit the past with a critical perspective in order to give an adequate response to lingering grievances and to fill the void of public acknowledgement about past abuses and victims. Ultimately, this failure can and should be understood in legal terms. The fact is that, although a transition and emerging new regime might appear politically sound, the lack of a proper response to past abuses means that some fundamental international obligations have not been met and, consequently, that some fundamental rights of the aggrieved population have not been addressed by the new legal, institutional, and political order.

There are many instances of well-established democracies failing to address their own historical faults. As an American originally from the South whose primary school was racially segregated, I am often struck by the failure to address the history of slavery, one of the deepest and gravest human rights abuses committed in the United States. For example, in Washington, DC, there are museums or memorials to virtually every war, cause, and prominent statesperson (including

many slaveholders), but virtually nothing about slavery or its millions of victims. In addition many other historical injustices still await an encompassing and profound official recognition, critical reflection, and response for the victims: the violation of the rights of people of Japanese descent who were interred in camps in the United States during World War II is particularly relevant in this regard.

Indeed, it is difficult to attain widespread consensus to revisit the past with a critical eye because doing so means challenging some strong assumptions that have become “received wisdom” over the decades. One of those assumptions relates to the acceptability, and even the convenience, of impunity as a “price to pay” to guarantee political stability. Democracies founded or re-founded on amnesty laws, for instance, tend to harbor deeply entrenched notions of impunity as a “fair price” for peace and order. Challenging those assumptions means initiating a bitter public discussion among political collectivities. The opportunities to advance the demands of justice depend on the possibility to extricate the discussion from the political merry-go-round and frame it in terms of the legal rights and obligations arising from universal principles of human rights.

In situations of massive past violations, the principles and mechanisms of transitional justice do apply. They are not intended to have a disruptive effect on the government or society, but rather an ameliorating one. This means that the democratic consensus and the democratic arrangement can be made more inclusive and more compliant with the state’s international obligations through good faith efforts to provide truth for victims or their surviving relatives. This means undertaking justice not only in judicial terms but also in terms of memory and setting the record straight.

Obligations of government in such situations include an array of measures that, notwithstanding the passage of time, can be put in practice as a means to show respect to victims and address a public that likely bears the marks of a distorted version of history. Thus, acknowledging the facts and the deeds and giving recognition to the victims as individuals involve both truth and reparations measures, but it can also include actions by the judicial system. This is particularly true in situations where enforced disappearance has been widespread and the fate of thousands of people remains unaccounted for several decades. Forensic investigations, exhumations, identification of human remains, and dignified burials are a big part of fulfilling obligations to truth and justice. They require the commitment of many different institutions, including the judiciary.

Challenging entrenched assumptions about the legitimacy of impunity and placing the need for truth at the center of public discourse are the first steps in the process of delivering justice in the context of a consolidated transition that, although stable and successful, still lacks an adequate response to a traumatic past. In transitional societies the decision to address the past are usually brought about through peace agreements or after the collapse of an authoritarian regime. Making those decisions in a well-established democracy inevitably demands different approaches, marked by typical democratic processes that go beyond official channels to encompass the media and the broad participation of civil society and victims’ groups.

Truth Seeking Mechanisms: Truth Commissions and Their Complementary Role

Truth seeking is a central piece of every transitional justice process. It must be emphasized that these processes should be conceived as integral, meaning that the different rights of victims are complementary. In other words, while various transitional justice measures do different things, they are all aimed at the same goal of ensuring accountability. Therefore, they should not be conceived as separate or, even worse, alternate options. Correspondingly, the different mechanisms in a transitional justice process are mutually reinforcing. Justice relates to truth in the same way that truth relates to reparations.

In some respects, truth seeking or establishing the facts is clearly a judicial process. Nevertheless, without undermining the obligation to judicial responses, in contexts of massive human rights abuses and violations of international humanitarian law and human rights law, societies may resort to nonjudicial mechanisms, in order to provide a response to victims that may otherwise be deferred. Truth commissions are now the most typical form that large-scale truth-seeking efforts take in transitional societies.

Truth commissions have a complementary role; they cannot be seen as substituting for the action of the judiciary system. Truth commissions are put in place to account for large numbers of human rights violations and violations of international human rights or humanitarian law through investigations that include fact finding (determining the fate of the victims, demonstrating the types of crimes committed, and identifying the perpetrators if possible) and an explanation of the context in which the violence took place (root causes, political contexts, organizations responsible for mass violence or repression, the role of international actors, etc.). They also assess damages and provide recommendations on reparations, justice, institutional reform, and guarantees of non-recurrence.

Truth commissions can have a positive impact on the clarification of history, dismissing outright self-serving falsehoods, rendering visible people who have been erased from the public discourse, and setting the record straight. They also challenge conventional wisdom on the root causes of the violence, calling attention to the responsibilities of institutions and the cultural orientations that allowed for abuse and impunity (such as historical racism or gender discrimination). Moreover, they transform our understanding of past violence by putting the emphasis on the victims. Thus, a truth-seeking exercise can be enlightening about a past that has been forgotten or downplayed for the sake of political stability or democratization. These investigative bodies can lead to a more critical understanding of that past, and they can open the door to legal and institutional reforms aimed at giving an official response to crimes that remain unaccounted for and victims who remain unheard. The large amount of direct and documentary information collected and the public conversation fostered by a truth commission can lend authority to the necessary revision of the past. This revision will not appear to be the result of political fractiousness but a necessary reflection arising from a universal normative standpoint—human rights doctrine, principles, and norms.

I have just mentioned that transitional justice mechanisms cannot be considered as isolated and self-sufficient measures but rather as inter-related components of an integrated approach to justice in extraordinary situations. Therefore, when considering the role that truth commissions can have in a broader transitional process, it is important to consider how establishing the truth has allowed for, or encouraged, other institutional developments, particularly in the realm of criminal justice.

The truth commissions of Guatemala (1997–1999) and Peru (2001–2003) provide useful examples of this relationship. In both cases, many years after their truth commissions concluded their investigations and released their final reports, the judicial branch has used their findings to prosecute former dictators bearing serious responsibility for mass human rights violations. In Guatemala, one key truth commission’s finding, namely that genocide had been committed against the indigenous Mayan population, had considerable relevance in the conviction of former dictator José Efraín Ríos Montt (even if the sentence was later struck down by another court under suspicious and murky circumstances). In Peru, the truth commission afforded a thorough explanation of the systematic and/or widespread nature of some crimes committed by state agents, which was invoked as relevant contextual information by the tribunal that judged and sentenced former authoritarian ruler Alberto Fujimori. These examples show that even while truth commissions do not have a judicial role (and even though their findings do not have direct judicial effects), the evidence that they produce and the historic explanations that they provide can and should be used by judicial systems that are committed to respecting the standards set by international human rights law and international humanitarian law.

Having highlighted these connections between the findings of truth commissions and other institutional results in terms of justice and accountability, I would underline that establishing the facts, identifying victims and perpetrators, explaining the enabling context, and assessing the nature and gravity of the harms are an end in themselves. This is because they are linked to the distinct rights of the victims—the right to know, the right to the truth—and because acknowledging the past is a good starting point for future institutional and social transformations. It must also be said that official acknowledgment and public recognition have a dignifying effect on victims and society.

Final Remarks

Transitional justice is often seen as exclusively related to and relevant for societies emerging from social and political turmoil (armed conflict, authoritarianism, harsh repression of insurgent groups), societies where peace and democracy are tasks to be achieved in the near future through broad institutional reforms aimed first and foremost at reestablishing the rule of law and leaving behind unstable or arbitrary state power. Nevertheless, it must be emphasized that even when a democracy is consolidated, as the Spanish democracy is, it can always be improved on to make it more inclusive and more respectful of international law and its own founding principles. Knowing the truth, paying respect to victims, responding to the expectations and just claims of survivors are part of the civic dialogue that can strengthen

democracies like Spain's and make them more legitimate, more enduring, and more stable. A democracy can always be made more inclusive through the expansion of its legal and institutional capabilities to protect the rights of ever-more citizens, including rights related to a troubled long-ago but never forgotten past. A society can always become more just—a good in and of itself—and more transformative through an enlightened and critical examination of its own traumatic past.

Those are challenges and opportunities that lie ahead for Spain. I remain hopeful that these important issues will be addressed in new and creative ways in the near future.