

Creating Balance in Reconstruction States

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Combining Punitive Justice and Reconciliatory Measures during Post-Conflict Reconstruction

Introduction

In post-conflict states there is a need to balance punitive and reconciliatory measures during reconstruction of state institutions. The stabilization and growth of security, economic, political and civil services are key in facilitating the transition from post-conflict state to developing and functioning state; and those four services stand as the pillars of post-conflict reconstruction. Judicial competence during post-conflict transition rests in the ability of International Organizations (IOs), states and Non-Governmental Organizations (NGOs) to successfully divide the burden of labor and strike a balance between punitive and reconciliatory measures. The four pillars of post-conflict reconstruction work synergistically with each other to raise a state from the post-conflict stage to a stage of development and growing stability. Gaining legitimacy for the state institutions is an important step on the path of reconstruction and can be a difficult task to achieve without dealing with the crimes and policies of past regimes. In intra-state conflict, which has proliferated since the end of the Cold War, it becomes necessary to balance punitive measures with reconciliatory actions in order to create an environment for state growth which is both aware of past crimes by the state and accepting of the punishments which have been delivered to past perpetrators.

The question in post-conflict reconstruction scenarios is: What is the proper balance between punitive and reconciliatory measures in the pursuit of justice following the conflict? There are a variety of options which a successor state can attempt. These range from strictly punitive justice, including trials, executions and to a lesser extent lustration measures, to a totally reconciliatory stance that perhaps includes a Truth and Reconciliation Commission (TRC) or a simple acknowledgement by the government of past wrongs. Neither of these options alone seems to be a favorable choice for a government attempting to unify its citizenry and create a stable civil and political atmosphere for moving forward from conflict.

This paper will attempt to outline the challenges of striking the proper balance between the punitive and reconciliatory options in post conflict reconstruction. The United Nations (UN) Peacebuilding Commission concept note *Justice in Times of Transition* states

“while efforts to pursue accountability for past abuses can create tension, transitional justice processes can also actively contribute to stabilization efforts, advancement of the rule of law, and the reconstruction of civic trust” (p.1, 2008).

By outlining the punitive and reconciliatory measures available, and highlighting past attempts at both, this paper aims to find a middle ground which would be an acceptable balance to the state’s citizenry and the international community. This paper will also attempt to define what is the best division of labor between international institutions, states and NGOs for executing the measures of transitional justice as well as the reconstruction of civil institutions and political environments for a post-conflict society.

Punitive Justice

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Punitive justice seeks out retribution and aims to punish perpetrators of crime. In a post conflict society the best example of this would be the post-World War II trials of Nazi and Japanese war criminals. In Germany the allies tried 24 high ranking Nazi officials at the Nuremberg Trials; ten were executed and eleven received long-term prison sentences (Dobbins et al, 2003, p.13). Trials allow for a public display of justice to be the centerpiece for moving forward. By trying criminals of past conflicts the goal is to create a sense of closure and to show that punishment for crimes committed is delivered. This kind of black and white justice may not reconcile groups, but it does punish the losers of conflict and can end the possibility of political return for past abusers.

Part of the Allied plan for Germany was also the denazification of German civil institutions. The strategy behind this was to allow for a civil service and political system which was removed from the previous regime. Under the *Spruchkammern* a third of the 3.6 million former Nazis deemed eligible for prosecution on a sub-national level were prosecuted and 117,523 were convicted (Dobbins et al, 2003, p.14). A fear of permanently breaking German civil institutions prevented more prosecutions. This failure to follow through on a punitive approach to post-conflict justice shows one of the challenges that transitory justice faces. While it was originally believed to be in the state's best interests to try and convict as many former Nazis as possible, the resulting civil and political void which would have been left was more than the state and occupying powers were willing to live with. In Japan the US faced a similar situation during their occupation. There were not enough technocrats and local subject matter experts for the kind of ambitious restructuring of Japanese civil service institutions which General MacArthur (SCAP) desired. The decision to use the existing Japanese bureaucracy without punitive action was one that "would have profound implications for the type of democracy SCAP set about to instill" (Dobbins et al, 2003, p.40). Within punitive justice there are balances which have to be struck as well in order for the state to be able to recover.

One of the elements of these examples which ultimately lead to the success of these strategies despite the inability of the occupiers to fully prosecute the crimes was that the societies were homogeneous. Because the German and Japanese states had existed as unified and coherent entities before the outbreak of conflict they had national and societal norms which they could fall back on once their defeat was official on the battlefield. The fact that they were forced to surrender to Allied forces unconditionally also had an effect on their ability to recover. There was no negotiated settlement and no chance for another uprising once the conflict was concluded. The occupying forces held the ability to carry punitive justice as far as was necessary to pacify the populations and to create an environment in which stable post-conflict reconstruction could take place. In contemporary conflict, especially those of an intrastate nature, this option of total control and ethnic and national norms to rally around are absent. The lack of these elements makes punitive justice in intra-state post conflict reconstruction difficult to achieve on the state level. IOs and international tribunals are better suited for this kind of justice.

Reconciliatory Measures

On the opposite end of the justice spectrum from punitive actions are reconciliatory measures. These actions are designed to bring justice about in a different way; namely to avoid punitive punishment in favor of reconciling group differences and acknowledging perceived wrongdoing. Reconciliatory measures can take the form of a TRC or reparations to past victims. Reconciliation between groups is designed to bring a consensus on the nature of the conflict. Understanding why conflict occurred, and what crimes occurred during the conflict should help to build a foundation for unified action in post-conflict reconstruction. The most favored method of reconciliatory justice is the TRC; since 1971 there have been approximately 27 TRCs (Brahm, 2004), and each has met with a varying degree of success.

A TRC is useful when "the consequences of the past injustice persist into the present; the bad things that happened in the past continue to burden some groups in the present" (Little 2010). The prologue to *Guatemala: Memory of Silence* states that the Commission for Historical Clarification (CEH) was established "in order to clarify with objectivity, equity and impartiality...The Commission was not established to judge." The idea behind reconciliatory measures is not judgment or punishment but consensus building through truth and recognition of past crimes in order to create a more unified society for the future. TruthComission.org studied five TRCs and found four of them (Chile, El Salvador, Guatemala and South Africa) had a focus on healing past damage while only Argentina had a focus on delivering justice. While there is an emphasis on healing past damage, there were only two which received

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widespread public support: Chile and South Africa. A reason for this may be because those commissions were of a domestic nature resulting not from a civil war, but past infractions of human rights from a previous regime. Through a focus on healing the larger group and reconciling differences between conflicted parties TRCs have a goal which is very distinct from punitive justice and even other forms of reconciliatory measures.

Reparations stand as another form of reconciliatory measures which may be pursued in a post-conflict environment. While some may see reparations as a form of punitive justice because they involve the loss from one group for the gain of another, when established in a proper manner reparations can have a very reconciliatory effect on a victimized group. Reparations

“are, in some way, oriented toward the future. It is impossible, however, to restore or establish relationships based on mutual respect without acknowledging past abuses and their consequences in the present” (Correa, 2009, p.289).

Because of the focus is on the future, reparations can be designed to bring about societal change. In a post-conflict setting a formerly disenfranchised group could be awarded reparations, which would help them become economically stable, or competitive with a larger or more resource enabled group. Another way reparations could benefit a victimized group would be through increased educational or political opportunities as the state is rebuilt. By giving a minority or disenfranchised group ownership in a new state structure the civil and political institutions are strengthened because that group, which was formerly against the government or oppressed by it, now has an opportunity to create a state which is more stable because of their participation.

Something in Between

Lustration deserves its own section here when discussing punitive and reconciliatory measures. Because lustration keeps people from being eligible for certain positions in civil administrations because of ties to former regimes, it can be considered a punitive measure in transitional justice as it punishes former actions. “Lustration laws do not impose criminal punishment on former collaborators. Instead, lustration means that they cannot hold political and other public or quasi-public positions...” (Kaminski & Nalepa, 2006, p.384). Because lustration denies a prospective citizen their ability to acquire employment or service in the new government it has a punitive element despite its non-criminal nature. Lustration can also be seen as a reconciliatory measure because it shows the public that previous actions are not above the law and will not be tolerated under the current regime.

Lustration was most noticeably used in the former communist countries of Eastern Europe following the end of the Cold War. Poland, The Czech Republic and Hungary incorporated lustration into the rebuilding of their civil institutions following the collapse of communist governments. The results have been mixed; Kaminski & Nalepa (2006) see it as a successful tool for keeping possible communist collaborators from office in Eastern European democracies, therefore cleansing the civil and political institutions of the injustices and demons of the past. Choi and David (2012) also see success in lustration laws as long as they result in the dismissal of officials or confession of past crimes. Simply exposing criminals through lustration does not create greater trust in a new government (p.194). It is therefore safe to believe that lustration is a punitive measure that can have a reconciliatory effect on citizen opinion of government; it can also act as a means to cleanse the civil and political administrations of a post-conflict or developing state through the exclusion of officials and administrators from the previous government.

Striking the Balance

The challenge in post-conflict state building is to find a balance between punitive justice and reconciliatory measures in order to create strong civil and political institutions which will help facilitate reconstruction. Like nation and state building itself, there is no one size fits all approach to striking a balance between punitive and reconciliatory measures. A mix of state entities, NGOs and International Organizations has worked to reconstruct post-conflict societies. Kosovo can be seen as an example of an IO, in this case the UN, setting up an interim administration and successfully rebuilding rule of law institutions to the benefit of the state. Today the Kosovo police force operates independently from United Nations Interim Administration Mission in Kosovo (UNMIK) management and has created a security and civil institution pillar for the rebuilding of the state (Greene, Friedman & Bennet, 2012).

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IOs can provide a framework and experience with post-conflict reconstruction in a “big picture” sort of way. Andrew Rathmell (2005) points to the inability of the United States to secure a UN mandate for the 2003 invasion of Iraq as a reason for difficulties in post-conflict reconstruction. “The coalition was unable to draw on tested mechanisms and experienced individuals, either in the UN system or among a wider range of states” that had more experience in successful post-conflict reconstruction and state building than the US (p.1025). What the UN and other IOs are experienced in doing is creating the frame of the house: the basic structure of government and institutions which can begin to support the substance of the new state government.

At this stage of state-building the punitive justice of war crimes trials for the highest leaders should be pursued. Amnesty in these cases should not be given, and the punishment should be severe enough that the political reality and perception given to the citizens of the state is that the leaders of the former regime are not going to be able to return and their influence in future state actions will not be feasible. With the establishment of an operation under the auspices of the UN or another impartial IO, the regional and local leaders within the state can begin to see that regime change and stability are possible. Impartiality at this level is a key to success. The managing organization needs to be able to appear impartial to either or all sides of the previous conflict in order to legitimate the process. This is especially true in the prosecution of punitive justice. As in the case of post-war Germany and Japan, there may be a need to cut short prosecutions or to change the strategy in order to better incorporate indigenous experience into the state building process. Impartiality of the managing organization can make these changes run smoothly.

States rarely find themselves in a truly impartial position; therefore it is better to rely on IOs to manage the state building process. As we have seen in Iraq, Afghanistan, and sub-Saharan African state building projects, if a great power becomes involved there is almost automatically an assumption that neo-imperial or geo-strategic forces are at play. This increases the likelihood that a state-managed post-conflict reconstruction would not be viewed as impartial and would therefore run the risk of being illegitimate to the citizens in the long term. An important role for states to play may be an initial establishment of security, as the British in Sierra Leone in 2000 and the European Union peacekeeping force involved in *Operation Artemus* in the Democratic Republic of Congo during 2003 were both able to accomplish. Due to the command and control structures of IO peacekeeping forces as well as their rules of engagement, it is often easier for state militaries to pacify a conflict and set up security in the form of robust peacekeeping early in a post-conflict scenario. Once stability is secured states can withdraw their troops in favor of a UN or other impartial regional organization that may have a better understanding of the local situation, such as the EU, the African Union or the Russian dominated Collective Security Treaty Organization (CSTO). At this point it would be the role of the states to contribute funding and civilian personnel and knowledge to the reconstruction process.

States can also contribute legal and institutional reconstruction experts in order to best determine the state-specific balance between punitive and reconciliatory measures. Hybrid courts are one example of this. “The perceived legitimacy of domestic judicial institutions in post-conflict situations is often in question” (Dickinson, 2003, p.301) and leads to a need for outside experts to assist in the creation of a legitimate and objective judicial branch of government capable of delivering punitive justice in an unbiased manner. This is difficult following intra-state conflict because there was ultimately one group in charge of the government and another group that did not agree with its practices and principles. In order to insure that these efforts provide benefits, there needs to be an increased coordination effort between state funding and IO management as well as communication between IO management and state provided experts. The International Center for Transitional Justice (ICTJ) highlights the fact that “the donor community has poured significant funds into the DRC, yet coordination and competition among donors remains a challenge” (2011, p.3) and therefore the reconstruction of government judicial and civil institutions remains an incomplete task.

To aid in the coordination of donor funding and IO management, NGOs can have a very effective role in state building and balancing punitive and reconciliatory justice. NGOs have a unique ability to be effective local-level players. The local level is where legitimacy of a program begins and builds to higher levels. Groups such as the ICTJ, Human Rights Watch and Amnesty International are larger and could take on a coordination role in managing projects such as a TRC, which would be formatted and overseen by the IO managing reconstruction. Smaller NGOs

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or teams from bigger agencies could be placed in the local communities in order to bring a personal element to information collection from the local level to the state government and distribution from the government level to local leaders.

“Aid agencies also increasingly recognize that the long-ignored question of psychological healing must be addressed to promote reconciliation within countries and to consolidate peace” (Lie, Binningsbø, & Gates, 2006, p.5).

By having a local presence, the NGOs not only add legitimacy to IO-managed operations, but also add a sense of local ownership. This translates to national ownership of the reconstruction, something that the UN Peace Building Commission recognized in their 2008 lessons learned working group as key to success in peace building (p.1) One problem with execution of a successful reconciliatory campaign, whether it be reparations, which need to actually be delivered upon, or a TRC which is gathering information to provide the collective memory, is that they are unable to reach various individuals because their task is so immense. By delegating responsibility of these tasks to smaller NGOs or teams, there is a greater chance of success. The larger NGO agencies and IO managers can ensure the delivery of reparations from indigenous and outside state donor sources, while the small local teams can see and adjust to needs on the ground as necessary.

Conclusion

A balance between punitive and reconciliatory justice needs to be found in each specific state-building situation. The division of labor between IOs, states and NGOs is a crucial element to this balance. By combining punitive justice measures with reconciliatory actions there is a greater chance of the reconstructing state being able to move forward after conflict.

In summary, division of labor between IOs, states and NGOs can greatly aid in the reconstruction process of post-conflict states when divided in a manner which will play to the strengths of each entity and work to create legitimation on the part of the reconstructed government. If IOs, managing the overall reconstruction, can apply punitive justice to the very upper levels of the former regime, they will send a strong signal that political and civil institutions are being repaired and crimes against the people will not go unpunished. At the same time states can be providing security, funding and judicial experts. By providing small pieces of the overall project, such as security forces and judicial experts, as well as funding toward the overall goal of reconstruction and stability, states can contribute in a meaningful way without being tied into a politically untenable situation. NGOs should be tasked with ensuring that legitimacy for the reconstruction occurs on the local level. By handling TRC and reparations allotment NGOs can build the kind of good will which will greatly aid in the healing process. NGOs hold a special place in the state-building process because they can best advocate for local populations, down to the individual, and can best distribute information to the population from the central government and managing IO authorities. The World Bank Development Report 2011 stressed that states in transition should not seek a “transitional moment” but should instead pass through a “succession of transitions over time” (p.2). By placing shorter term goals on reconstruction and stabilization progress will not only be more appropriate for each specific situation, but national ownership of the reconstruction process can be developed in a grassroots manner.

A successful transition from post-conflict society to developing state will hinge on the ability of the state to balance effectively the need for punitive justice with the need for the conflicting parties to reconcile their differences and be unified in future dealings. Intra-state conflict in contemporary settings makes this kind of balance difficult to achieve and maintain. Through the help of IOs, states and NGOs, post-conflict societies can foster growth in their civil and political institutions, which will lead to stability and a transition to becoming a developing state in the future.

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