The Centre for Post-Conflict Justice, Trinity College Dublin

Inaugural Address

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on Thursday, 25 February 2010
at the Examination Hall, Trinity College Dublin

Post-Conflict Justice: An Industry or a Necessity?

When I was first approached over a year ago by Rosemary Byrne, on behalf of the Centre for Post-Conflict Justice at Trinity College Dublin, to deliver an inaugural address, I should have heeded the wise advice of Lewis Carroll's young man when he addressed his father:

> 'You are old, Father William', the young man said,
> 'And your hair has become very white;
> And yet you incessantly stand on your head,
> Do you think, at your age, it is right?'
>
> 'In my youth', Father William replied to his son,
> 'I feared it might injure the brain;
> But now that I'm perfectly sure I have none,
> Why, I do it again and again'

I think that the idea of standing on one's head is not to be recommended. Even without my embarking on this exercise, a further disqualification to be here was the recent description of me as a 'raving lunatic' by a newly-appointed junior minister, who, in the upside-down world which we seem to have recently acquired, considers himself to be more important than his minister, very much like the way snotty school boys may feel about their school teacher.

Between Lewis Carroll's young man's ill-mannered attack and the Deputy Minister's animadversions, I should have been disqualified from being here tonight.

The fact that I am here tonight reflects a *penchant* for confusing my detractors.

Also, I am excited by the terms of reference for the newly-established Centre for Post-Conflict Justice at TCD. This shows that young academics are innovative and desire to push the frontiers of research. When I started at the Law School in 1963, the idea of working with sociologists would have resulted in burst blood vessels, if not apoplexy. I could not therefore but applaud the idea of a multi-disciplinary approach, while some other universities and non-governmental organisations take a legal, if not a legalistic approach.

The Centre's work must be rigorous and driven both by the highest academic standards and by a deep commitment to human rights; the Centre must recognise that the context of the study is everything and, as its members of the Centre will, no doubt, act as consultants, that they must be servants of the people they serve and proposals for dealing with their particular pathology must come from them.

And I have a personal reason for being here. While I was undergoing treatment for cancer in 2008, Rosemary Byrne invited me to inaugurate the Centre. I could not, of course, and I thought this would be the end of the opportunity of paying tribute to Dr Byrne's scholastic and administrative talents. But as you see in front of you, Rosemary was hardly likely to accept a negative reply. My thanks to her.

I make these preliminary points as I have had a life-long interest in dealing with the past. The trials of the Nazi war criminals were an intellectual and moral benchmark for me as an international lawyer. In passing, I might mention that in the 80s I prepared a Nuremberg-type indictment of the leaders of the apartheid regime but I was quietly persuaded by that great lawyer and leader of the ANC, Oliver Tambo, that such a threat of prosecution before a settlement was reached would destroy any chance of progress towards such a settlement and towards ending apartheid.

During this period, I did a study of European countries and how they had dealt with the post-war and post-communist experiences. Since the present emphasis by researchers is largely on Africa and Latin America, I thought it might be useful if we cursorily looked at how European moves towards democracy took place.

After the war in France, there were large numbers of killings of alleged collaborators and hundreds were sentenced to death by courts; artists who collaborated, such as Simenon and Chevalier, were banned.

In Norway, capital punishment was briefly reinstated for the executions of Mr Quisling and his cohorts. In Belgium, civil rights and welfare benefits were forbidden to the collaborators and their families.

And so on.

There was absolutely no attempt at reconciliation. The emphasis was on revenge, especially in those countries with a very strong history of collaboration with the Nazi collaborators.

Of course, as we in South Africa were going through the process of negotiation, we were not aware that we were in transition country. The concept came somewhat later. We were though aware that the post-war settlement which led to democratic governance in Western Europe was based on vengefulness.

Similarly, with the downfall of Communist eastern Europe, a number of countries in the first glow of democracy embarked on a journey which we could not pursue, that is the prosecution and sometimes the persecution of former Communists, whether they were in the state service or in schools and universities.

In the old Czechoslovakia, a 'lustration' law was passed, conveniently avoiding the Kafkaesque word 'purge' with its historic undertones.

Even now, proposals are being made in Poland that officials or in some cases members of the old Communist Party should not be able to hold office or stand for election, as in the 'lustration' law.

So, the paradigms before us from the home of democracy were not very enlightening as to what we in South Africa should do.

As one commentator has put it, 'the key to the success of the South African transition lay firstly in the agreements that were struck between former conflicting (sic) parties, following years of painstaking negotiations. The glue that held the transitional programme together was the presence

of a new constitution based upon agreed principles that would provide enforceable rights for all, inclusive of minorities.'

So, the lesson for your Centre is that a political agreement for the future, with necessary safeguards for all, appears to be a vital ingredient for creating a bridge from violence and authoritarianism to democracy.

Thus the architects of our transition rejected the route followed in Europe after their two catastrophes. Our bridge to the future also encompassed an approach which became a benchmark for other countries dealing with their previous pathologies, though not always with a happy conclusion.

The proposal for a truth commission in South Africa came from the African National Congress, following an investigation into events in its own military camps. This followed my inaugural lecture as professor of human rights law at the University of the Western Cape in May 1992 when I presented ten reasons for a truth commission, following the example of Chile, though Chile had a rather limited mandate.

In addition, I pointed out that serious offenders could not enjoy impunity as this would be a betrayal of the victims and the draft ANC Bill of Rights which could be the basis of the negotiations.

In the negotiations, it became clear that the apartheid regime sought a general amnesty, *tout court,* for its criminal perpetrators. We resisted this as the ANC had no authority to agree to such a proposal which we considered only a democratically elected parliament was entitled to do.

In the event, one of the first acts of the democratic parliament was to pass legislation establishing the Truth and Reconciliation Commission. Let me draw attention to certain details as the South African Commission has iconic status in what Judge Richard Goldstone unhappily described as 'the transitional industry'.

The objectives of the Commission were fourfold, and the preamble set the tone by referring to the Commission's remit to promote national unity and reconciliation. The Commission had to investigate, first, the gross violations of human rights under apartheid, second, the granting of amnesty to persons who made full disclosure, etc., and finally, to propose reparations and provide recommendations of measures to prevent future violations of human rights.

I shall not now discuss in detail the extent to which the TRC met its mandate. One writer has opined that the efforts to deal with the past, via truth-seeking, conditional amnesty and reparation, played a significant – but not central – role in South Africa's transition. It is his view that the 'insurance policy' of amnesty was the single most important benefit of the South African amnesty programme.

My own view was that while the TRC process failed to receive what we all wanted – an acknowledgement of past misdeeds by the privileged whites, - the report and the disclosures allowed breathing space for the democratic parliament to take measures to undo the work of apartheid.

Let me look at a few basic issues:

Point 1: Conceptualising the dilemma

The term post-conflict justice is often used to refer to both punishment and building the rule of law, without making a distinction between them, or making explicit the links (causal or otherwise) between these very different endeavours, one looking back and the other primarily forward. We assume that punishment of war crimes deters future abuse, and we know it removes trouble makers from the scene; but how much do we really know about the ways in which tribunals and the International Criminal Court assist fledgling countries to rebuild the rule of law and to create 'post-conflict justice' for their citizens? Which international NGO cared that nearly all the judges and prosecutors had been murdered in Rwanda in the genocide of 1994?

We must all agree that the movement to strengthen international law through the ICC deserves support. And yet some argue that justice-as-punishment-of-war-crimes may in fact *in certain cases* impede future justice (understood in the holistic sense of a more equitable socio-economic dispensation).

For example, it might be 'just' to indict Bashir, the President of Sudan, in terms of his role in Sudan, but how is this indictment related to efforts to make peace (and create justice for all) in Darfur? When does post-conflict justice become an elite project? If the Zimbabwean generals are indicted, and yet refuse to leave office, what implications does this have for post-conflict justice in that country? (Mr Tsvangirai says that it is the fear of

sanctions, loss of pensions, and the ICC that prevent the generals from leaving!)

With this question in mind, post-conflict justice calls for careful conceptualisation.

Also encapsulated in the often-cited tension between "justice" and "reconciliation" or in the classic "peace versus justice" debate, the tension between punitive post-conflict justice and reconstructive forms of justice relate to two truisms of international peacemaking: peace agreements which contain fundamental injustice, or which paper over historical injustice, will not last; but on the other hand, agreements where justice in its fullest sense is aimed for, may end up setting the bar too high, forgetting that yesterday's warlords often hold the key to tomorrow's peace. Without shaking hands with the devil, it is often impossible to tame the devil and end the conflict.

The usual answer to this dilemma is often glibly given as that 'peace versus justice' is not either/or but *both/and*. This is all well and good, but concrete experiences suggest that achieving this balance (including all adversaries of conflict in one comprehensive deal without selling out the aspirations of the majority of the population) is immensely complex.

Point 2: Illustrating the tension: the case of South Africa

Looking back at the origins of the TRC, say from the early days until the conclusion of the TRC in 1998, I would argue that we had very few alternative choices to the road that we took. My view is that the SA transition was handled responsibly, that the 'deal' of 'justice for truth' was not so much a moral compromise as a moral innovation which met with approval from victim communities and ensured perpetrator communities a stake in the new society. It was, by all accounts, a notable achievement.

There is no doubt that the South African transition was very delicately balanced. I could not continue to advocate a Nuremburg-type solution. I soon came to favour a TRC-type mechanism to deal with the past, for which I argued in my inaugural lecture at the University of the Western Cape (I remember vividly how I once remarked: 'Why spend valuable and very limited national resources on prosecuting a senile old man "in the wilderness", when there are so many more pressing concerns, not least in the area of building the rule of law and human security?')

It may be worth pondering what the case would have been if the ICC was in existence during South Africa's transition. Would the international community have accepted the settlement as it eventually materialised, and if they had not, would it have mattered? Would the apartheid generals have settled with an ICC indictment hanging over their heads – as indeed is the case for the Zimbabwean generals right now? Did South Africa have any option but to follow the wisdom of Judge Mohammed's ruling, namely that it would be prudent to sacrifice the rights of a few for the sake of the right of the majority of South Africans to a better life? Whatever shape and role the international post-conflict institutions assume, they should not prevent transitions such as that of South Africa from recurring in the future.

The bottom line for South Africans, I would argue, is that our transition from apartheid to true democracy and a real chance of a better life was largely successful. What we have done subsequently with our freedom is another matter, but our subsequent shortcomings were not inevitable consequences of the structure of our transition, rather contingent mistakes, shortcomings and failings. We could have done much better since 1994, but we did succeed in negotiating a real power shift without a major civil war – resulting in a massive justice-dividend for the traditionally disempowered majority.

For many of us, the success of the South African transition was also determined by two essential factors. Firstly, we worked out provisional ground rules for the organisation of society, leaving no doubt about the role of human rights and the establishment of a constitutional court: a real break from the past.

Secondly, we recognized the absolute need for free and fair elections conducted by an independent electoral commission: the result of the election must be respected, and there were to be no forced governments of national unity as in Kenya and Zimbabwe, where the actual results were rejected in favour of those who refused to accept the will of the people.

Legitimacy of institutions is vital if there is to be sustainable peace.

Point 3: Implications of the SA transitional justice process for subsequent efforts to build the rule of law.

Subsequent to the TRC closing its doors and handing its report to President Mbeki in 2003, South Africa's efforts at post-conflict justice have taken unexpected, less desirable turns – with concomitant implications for the post-conflict justice in the broader, forward-looking sense.

Here, I would attempt to provide a causal link between the two modes of post-conflict justice identified earlier – with the help of another well-known distinction between formal and substantive modes of the rule of law. This paragraph will be the crux of the argument. For a post-conflict society to develop justice as a reality for its citizens, it needs two ingredients: laws with a substantive commitment to the content of international human rights instruments, and vitally too, the capacity and will to apply these rules without fear or favour, consistently and transparently.

Emerging from war or oppression, a country will do well to develop political consensus on the substantive content of its law as human rights oriented, but it also needs to be able to apply these rules consistently. Whereas the international community often promotes post-conflict justice as once-off, impressive exercises in human rights law, it typically fails to empower societies to repeat these exercises consistently thereafter. So, if a tribunal in The Hague tries Charles Taylor, how does this empower courts in that country to follow suit?

In South Africa this tension has become evident in a series of failures since the TRC. Impressive as the TRC was, South Africa has failed in a number of ways to follow up and utilise the exercise in order to strengthen the rule of law, and institute a more comprehensive form of justice that would address the root causes and consequences of the conflict, not only politico-judicial but also socio-economic, including violence. These failures include:

- Not responding adequately to reparation recommendations of the TRC. The details are well known, but by effectively ignoring TRC recommendations for community reparations as well as its (belated) findings on the role of big business in human rights violations, the SA government failed to utilise the momentum created in order to create a more comprehensive form of justice

for all. This does not mean to say government has been all bad – far from it. But in this specific area it seems to have missed an opportunity, something that may explain the uncritical relationship between some top ANC leaders today and big business.

- There have been three flawed efforts to deal with the prosecutorial backlog, (once through the National Prosecuting Authority guidelines and once through the special dispensation for political pardons – and a third attempt by simply offering the mass murderer, De Kock, and a few others a once-off pardon without any pretence of a process). In each case civil society has either put a stop to the process by successfully challenging its constitutionality, or vowed to fight it.

What this illustrates is that the link between post-conflict justice looking back and post-conflict justice which is looking forward, can be identified in terms of the following principles: *Transparency, public* (victim) *participation* and *consistent application*. If these principles are built into the initial initiatives (as I argue they indeed were in South Africa's TRC), they provide a yard stick to measure the extent to which these initiatives result in genuine, long-lasting justice for all. If entrenched in the backward looking punitive action during the transition, these principles can become the new guidelines for building justice beyond these once-off events into true post-conflict justice for all.

Point 4: Addressing the dilemma

- At the heart of the debate about international post-conflict justice is the *political* question of how to manage post-conflict justice. Africa, perhaps more than other regions, stands to benefit from international institutions of justice, but it should be justice that is *consistently applied globally*, and with the requisite political discretion. The debate about how these institutions should look and what their mandate must be has, to my mind, only just begun. And it is a debate too important to rush. An interesting suggestion recently was to consider reopening the Rome ICC treaty discussions,

not only to get the US on board, but also to address ongoing African concerns.

- It seems that unless the ICC institutes a whole range of investigations, not only into the misdeeds of the heads of poor African states, but also into more powerful nations elsewhere where human rights are consistently flouted, and unless it finds ways to synergise its work with regional initiatives and national jurisdictions, the court will continue to lack the public credibility in Africa it needs in order to do effective business.

- While we continue to work towards credible international institutions that can provide justice to victims in societies where the state itself is unwilling or unable to do so, the international community would do well to invest more vigorously in supporting post-conflict societies themselves to develop the capacity to pursue post-conflict justice.

- But also nationally, countries that embark on post-conflict initiatives ought to take seriously the principles of transparency, participation and consistency of application. If these are adequately demonstrated in once-off transitional justice mechanisms, such mechanisms can indeed become important building blocks in moving from post-conflict justice for war crimes to post-conflict justice for all.

What are the some of the lessons from the last twenty years?

I want to refer to the proceedings of a conference held in Cape Town a couple of years ago which cogently described the lessons to be learnt from our experience in South Africa. Before I turn to the brief extract let me refer to a matter that expert commentators have ignored. Thousands of ordinary men and women appeared before the Commission to describe their experiences as victims and survivors, and this in itself had an extraordinary impact.

The following is a brief extract from the executive summary of the report of the conference:

> "The development of peacebuilding initiatives in Africa in the last decade is reflected in the proliferation of numerous models of transitional justice. Recent experiments on the continent range from judicial to nonjudicial approaches, including United Nations (UN) tribunals, "hybrid" criminal courts, domestic trials, and truth and reconciliation commissions (TRCs). War crimes tribunals and TRCs have been in operation in Africa since 1974, with varying degrees of success. At an international level, the Hague-based International Criminal Court (ICC), which came into existence in 2002, was established as a court of last resort to prosecute offences where national courts failed or were unable to respond. An analysis of the variety and relative success or failure of these approaches can add much to our current and future understandings of peacebuilding in Africa. A key concern for the Cape Town seminar was to analyse the dilemmas posed by peace without justice, as opposed to justice without peace."

The seminar came up with a set of nine recommendations which I commend to the Centre:

1. If there is to be lasting peace in a society emerging from conflict, justice for victims must be incorporated into any peace and justice mechanisms, and this requires that instruments established ensure that the voices of victims are heard.

2. The decision about the kind of transitional justice approach must be made taking local needs into account, while learning from other experiences. *Each country's post-conflict needs are distinct, and transitional justice mechanisms such as truth commissions should respond to each country's specific set of circumstances*.

   One size will not fit all exigencies.

3. It is important to have a clear idea of what the injustice was, who the victim was, and who the perpetrator was in order to implement the appropriate transitional justice mechanism.

4. Peace and justice initiatives need to address the democratic deficit in a way that restores civic trust. Citizens must be able to have civic trust in their institutions of government. They must also believe that justice

works for them irrespective of political affiliation, ethnic persuasion or other differences.

5. Agreements and undertakings made to victims and perpetrators by truth commissions must be fulfilled which I regret to say has not always happened, even in South Africa. This should also involve a more developed understanding of the various forms that reparations and healing can take, be it through financial, symbolic, individual or collective means. The amnesty process was not completed by the time the final report was made in 2003. In breach of the agreed TRC formula the Government is now considering proposals for providing pardons for those who did not appear before the TRC or who failed to receive amnesty.

6. The United Nations needs to pay attention to future Disarmament, Demobilisation and Reintegration (DDR) programmes, and recognise the multiple roles that women play during conflicts. Post-conflict power relations must also be considered so that women are fully integrated into these programmes.

7. There is a need to broaden the ambit of peace, justice and reconciliation strategies from legal instruments to be sensitive to wider considerations such as symbolic gestures, memorials, monuments, heritage, and indigenous forms of reconciliation and justice.

8. In the African context, the cultural constructions and format of Commissions need to be considered. This involves the physical arrangements of hearings, as well as a recognition of indigenous forms of communication, dialogue, and customary practices.

9. In order to achieve sustainable peace, peace processes must address the root causes of conflicts as well as the injustice which victims suffered. This requires a more complete assessment of the political economy and socio-economic factors that have fuelled these conflicts.

Although these are African solutions to African problems, they are applicable to any country emerging from conflict.

I should add that neither foreign governments nor non-governmental organisations may decide how a people deal with the past.

The position in the North of Ireland presents difficulties e.g. as to which legal authority may take a decision and how to sift opinion in a divided society.

One of the tasks that the Centre should undertake is to question the reticence concerning the way that the past should be approached in Northern Ireland. I recall meeting a former NI Secretary of State, Paul Murphy, in South Africa when he was trying to advance the idea of a truth commission in the North. My view was that unless all sectors of a deeply divided society agreed on the terms of reference, the composition of the Commission and the areas of enquiry – into the role of the British army, para-militaries and other private organisations – the process would be tainted and doomed to failure. I think this view prevailed.

While there have been sectoral areas of investigation which remain incomplete, the Centre should investigate the reasons why the very modest proposals of the Eames-Bradley report, otherwise known as the Consultative Group of the Past, received such a lukewarm reception. In fact, the House of Commons Committee on Northern Ireland has even cast cold water on the Group's central recommendation, the Legacy Commission.

The question that must be answered is whether the most important political consideration is the need to maintain the unity of the power-sharing executive? Or to put the matter in a different way, should we eschew any cause or proposal, even the proposal for a Bill of Rights for Northern Ireland, which I support, that may lead to inter-communal differences in the Executive? Is that what the Minister for Foreign Affairs Micheál Martin meant when he spoke in the Seanad Eireann in November 2009:

> 'Looking back at the scars and divisions of the past is difficult and raises many sensitivities. However, I believe that the best way we can honour the dead and serve the living is through building a peace which respects the suffering of the past and which contributes to the construction of a better future for everyone on these islands.'

Let me conclude with the following observations which are really challenges to the Centre:

The focus of transitional justice is not only retrospective but also concerns the future. Noting that Archbishop Desmond Tutu described the TRC as 'a way of putting the past behind us', let me ask whether it is not actually about putting it in front of us.

Many challenges face civil society operating in the area of transitional justice on the continent today. The South African case is now treated as an iconic case globally. This model has played a central role in the evolution of the transitional justice industry. Truth commissions are gaining popularity, despite the contrary tendency of postmodernists to question the very value of 'truth'.

We need to reflect critically on the South African truth process, through several lenses, including the hidden liabilities of political negotiations, the challenges and dilemmas that negotiated transitions present for civil society organisations (CSOs) and the implications of who owns the transitional justice mechanisms that are put in place. Constitution-making, for example, is often not considered to be a mechanism of transitional justice. In a way, it is believed that this is the terrain of politics and policy. Is this a misconceived approach?

In relation to transition processes, let me posit that it is important to consider who is in and who is out. During the South African negotiations, 23 political parties were at the table; there is never talk of who was not present. If civil society is not proactively organized to shape what is happening at the negotiating table, it will not be heard. We must be mindful of the fragility of a state in formation, which does not necessarily have the capacity to implement recommendations which flow from transitional justice processes. The same things cannot be expected in fragile states as in established states. Transitional justice started in specific post-totalitarian contexts, not post-conflict ones. In the latter, for instance, states are much more fragile than they were in Latin America and Eastern Europe.

It is necessary to decipher what is possible and what is not possible in the peace-building process. Transitional justice is not only about political negotiations and constitution making, but also about how to redefine the social fabric and rebuild relationships, both between citizens and between citizens and their state. Therefore the exclusion of CSOs and specifically victims' groups from negotiations is problematic. Civil society acts as an intermediary between vulnerable groups and the government; thus, it

must not forget this role and become purely focused on lobbying and advocacy. The big challenge for CSOs and non-governmental organisations (NGOs) is to remain close to the social groups and movements on behalf of whom they speak.

Is there any substance to the observation that an over-emphasis on reconciliation may in fact result in impunity?

Over the last 20 years, dramatic changes have occurred in the global and legal environment. Transitional justice has become an embedded framework, both in law and in human rights. However, a gap still exists between this normative legal framework and the implementation and practice of local actors confronting the messiness of very frail peace processes on the ground. Too many CSOs are focused on naming and shaming at the expense of grappling with the dilemmas of such messy contexts. This is also linked to the sometimes tense relationships between international and local organisations.

The challenge that we face today is in identifying the taxonomy of crimes and assigning priorities. The ICC talks of crimes against humanity, war crimes and genocide only, not about economic crimes or environmental injustices or the continuation of non-political violence. The transitional justice agenda should engage with the fault lines of conflict and its root causes. We need to be asking how a truth commission can be better equipped to deal with historical and structural injustices – or if not to deal with these questions, which may rather be a government function, at least to consider them and point a way forward. We need to enquire too as to what traditions in the global human rights discourse can shape transitional justice tools in the task of expanding jurisdictional boundaries.

It is very easy for activists and institutions to focus on violations that are the symptoms of conflict or repression. It is important to also focus on the root causes. This is not always easy, and lines must be drawn, but do remember to understand the entire story – and not just the most obvious, easiest parts of it.

There have been more than two dozen national truth commissions or fact-finding inquiries into past conflict established around the world, such as in Argentina, Chile, Guatemala, South Africa, Peru, Sierra Leone, Ghana, East Timor and, more recently, Indonesia and Liberia.

So, what do they do?

Truth and reconciliation commissions typically focus on the larger patterns and trends and not just specific instances of human rights violations. They are often victim centred in that they provide a platform for victims to address the nation with their personal stories. Commissions organise events to promote reconciliation and tolerance between former enemies at the individual, community and national levels. A truth commission makes findings and in some case it publicly names factions and individuals responsible. In so doing it advances the cause of accountability. A truth commission report may include recommendations aimed at addressing the underlying causes of conflict, which may include institutional reform measures. Many truth commissions have recommended the institution of a detailed reparations programme to redress the wrongs suffered by victims. Some commissions even recommend criminal prosecutions of specific role players in the conflict. Thus the mandate and objectives of typical truth commissions are considerably wider than those of typical war crimes tribunals and special courts.

With the necessary caveats, it appears that in certain circumstances, they are a necessity. The 'industry' tag would rather apply to some of the institutions which have been set up to investigate and/or promote truth commissions, without any real roots in the countries they are concerned with; or to self-interested NGOs who make hurried proposals regardless of the context. This, I know, does not apply to your Centre here, which I am honoured to have addressed tonight.

You are, I believe, in tune with Bertolt Brecht's famous statement about reconstruction at the end of the Second World War:

> 'When the battle of the mountains is over
> Then you will see
> The real battle of the plains will begin'.
