Report of the II Closed-door Workshop of the Essex Transitional Justice Network

By Patrick Timmons and Ronda Cress

The Mandate of the Special Rapporteur: Knowledge Challenges Faced

By Pablo De Greiff
United Nations Special Rapporteur on the Promotion of Justice, Truth, Reparation, and Guarantees of Non-recurrence

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1. Special Rapporteur’s Presentation
Summary by Patrick Timmons

Pablo De Greiff visited the University of Essex to discuss the knowledge challenges he faces as U.N. Special Rapporteur in promoting Justice, Truth, Reparation, and Guarantees of Non-Recurrence, commonly known as Transitional Justice. For many years, De Greiff has served as Director of Research Programs at the International Center for Transitional Justice in New York. A leader in the field, his academic and practitioner’s career includes, among other achievements, drafting the Stockholm Initiative on Disarmament, Demobilization, and Reintegration, authoring the UN Office of the High Commissioner for Human Rights handbook, The Rule of Law Tools for Post-Conflict States on Reparations Programs, and publishing ground breaking studies in the theory and practice of transitional justice. This was his second visit to the University as guest of the Essex Transitional Justice Network.

In 2011 De Greiff took on the three-year mandate as the U.N.’s first Special Rapporteur in the areas of the “four pillars”: justice, truth, reparation, and guarantees of non-recurrence. In recommending his candidacy for Special Rapporteur, the UNOHCHR praised his “clarity of vision and skill at articulating the issues facing the special rapporteur.” At Essex, in a closed-door workshop, De Greiff displayed both of these qualities in his clear, astute questioning of the challenges faced by transitional justice, and the ways scholars and practitioners can support the work of the Special Rapporteur. His remarks reflected on the state of the field.

The U.N. Special Rapporteur exists because of a mandate created by U.N. Human Rights Council’s Resolution 18/7 of September 2011. De Greiff explained that the Special Rapporteur exists as a thematic area of interest at the U.N., in a context where the institutional realities are “tough” partly stemming from the weaknesses of the UNHRC’s special procedures. De Greiff stated that the mandate based on the “four pillars” has brought challenges: the resolution is broad, the linkages between the areas clear in theory but difficult to implement in practice, and with inherent tensions as states choose some elements of the mandates overs others. This problem of states choosing between the different mechanisms, for example a truth commission over a court, would never disappear, but the success depends on crafting the right relationships. He provided the example of Sierra Leone, with the links between the Special Court and the Truth and Reconciliation Commission. Similarly, with the absence of clear, proper measures between truth commissions and the vetting process for state officials, or between vetting and judicial measures, he predicted further complications for the Special Rapporteur’s mandate. De Greiff emphasized that the success or failure of transitional justice “depends on systematic collaboration with those who work in the field,” an observation that helped explain his work with the ETJN.

De Greiff continued to explore the relationships between the “four pillars” underpinning transitional justice. He turned to the links between policy making and security and development to confront the explosion of expectations between these two objectives in programs that seemingly work at cross purposes. Peacemaking and development required functional analyses, in specific country contexts, to show that the claims that transitional justice can achieve these goals are “overblown”.

The U.N. Special Rapporteur turned to the importance of contextual, country-specific analysis. He observed that transitional justice goes from place to place with the same recommendations. However, De Greiff drew crucial distinctions between transitional justice in post-authoritarian and post-conflict settings with examples ranging from Latin America to Eastern Europe and South Africa. In post-authoritarian states law regulated institutions, legal vacuums did not exist and civil society was strong. In post-conflict situations, state institutions were much weaker, law existed in a vacuum, and civil society was less effective. The types of human rights violations varied according to the different contexts: in a post-authoritarian state, the majority of the violations could be attributed to the state, but in a post-conflict setting most of the violations occurred because of social chaos. These fundamental factors affect policy tools that must accommodate such differences. Thus, De Greiff asked the question, “is the implementation of [transitional justice] measures indifferent to these contexts?” De Greiff requested that members of the ETJN try to make these linkages.

De Greiff requested assistance in at least three specific areas:

1. Transitional justice has often targeted official state institutions but has left out the critical factor of effective transitions and civil society’s role in those transitions. As Special Rapporteur, De Greiff has been “totally committed” to exploring the role of civil society in transitions because where civil society reinforces norms, transitional justice has been able to articulate and disarticulate groups. The two must work together.

2. A comprehensive civil society agenda must exist in transitional justice processes. Little work currently documents this challenge and the attention paid must be systematic, especially with regards to the role of business in conflict, and its contribution to the emergence of conflict.

3. Transitional justice offers a mostly dismal follow up on its own reports and recommendations.

2. Question and Answer Session

Summary by Ronda Cress

Following the Special Rapporteur’s remarks, the floor was opened up to the group for questions and discussion. Questions were raised surrounding the following topics: expansion of the transitional justice field; prioritization of, and expectations regarding, transitional justice measures; and reparations.

Expansion of Transitional Justice

Given that De Greiff’s first report to the Human Rights Council focused on development and security and their link to transitional justice (TJ), a question was raised whether TJ should be expanded to deal with violations of economic, social and cultural rights (ESCR) and what is needed to do this. In response, De Greiff noted his concerns with the relative effectiveness of the current TJ measures to cope with ESCR violations. There is an increasing and important familiarity with ESCR by people who are classically human rights and prosecution oriented. However, ESCR encompasses a wide area that will likely require mechanisms beyond those that we are currently
familiar with in the TJ field. Trying to determine where to draw the line between TJ mechanisms and other types of mechanisms is not a fruitful discussion because the boundaries will constantly change and become more porous.

In fact, De Greiff questioned whether the risks that the TJ field faces will lead to the breakdown of the field altogether. For instance, criminal justice measures are core to the work in TJ and the international community says that it likes truth and reconciliation commissions, yet it weakly funds and supports them. Reparations programs are another example – these programs tie directly into responsibility for past abuses, but there has not been a single reparations program that has garnered heavy support from the international community. If this trend continues, then 20 years down the line, the field could be back to where it was in the early 1980s – basically nonexistent. In the context where the four pillars arose, those particular measures made perfect sense. But perhaps now there is a great incentive to open up or modify the catalog of measures to incorporate ESCR. Establishing the links between development, security and TJ may include ways of extending the TJ field that could encompass a broader array of policies to enhance transition.

Relatedly, questions were asked about the extent to which De Greiff has space to expand the notion of TJ (and how we think about it) given the mandate is so focused on the four pillars/measures, or whether the mandate prevents him from going beyond the traditional TJ boundaries. De Greiff explained that if he strays too far from the mandate’s terms, he could be accused by the Human Rights Council of politicizing the mandate, which the Council has been increasingly prone to do. While this fact presents some constraints, there is still some room for expansion because the resolution authorizes consideration of other measures that may contribute to the aims of the resolution. Additionally, he has some leeway through selecting the themes of his reports and using the reports as vehicles to focus on strategic questions and themes.

Prioritization and Expectations of TJ Measures

An observation was made about two sets of holism with respect to TJ – one regarding the four pillars and the other regarding peace and democracy. But is TJ at a place now where ‘good governance’ was a few years ago where we need to move to “good enough” TJ instead of saying all good things go together?

De Greiff responded that this question relates to issues of policy coordination and institutional centralization. There tends to be a delusion of competence of organizations, when there really needs to be a functional distribution of labor across institutions. For instance, the Tunisian draft law for the Truth and Dignity Commission assigned a multiplicity of functions to the Commission, such as handling corruption investigations as well as an arbitration program to settle cases. Concentrating multiple functions in a single institution like this is troublesome because not every human rights investigator is capable of carrying out a corruption investigation, and not all reparations programs are capable of dealing with these cases. So the very same Commission tasked with handling over corruption cases for prosecution is also entrusted with investigating and settling corruption cases through the arbitration mechanism. This creates a conflict, because arbitrators are tasked with being pragmatic and hard-nosed to achieve settlement that satisfies both parties, whereas human rights investigators are charged with ensuring cases can be prosecuted to the greatest extent possible. This is worrying
not only in terms of competency, but also from the reputation that may result if it is unsuccessful. It would be wiser to have separate but coordinated commissions dealing with separate topics. There are concrete ways to achieve institutional coordination, such as institutional separation and division of labor. De Greiff’s role is to strengthen the field, not to guide or direct to a particular outcome, so he can only ask states to be mindful of the challenges likely to arise with the way they are structuring these bodies.

This led to a follow up question about whether there needs to be prioritization among the four pillars instead of trying to focus on all of them. De Greiff explained that his strategy for his reports is to focus on those pillars that are less developed. Because of the word limits on his reports, he cannot repeat issues that he raised in previous reports or else he will not be able to address multiple topics. Part of the difficulty is the way the mandate is framed, in terms of the four pillars and without any reference to TJ. The four categories also pose problems because the first three pillars are measures, while the fourth (guarantees of non-repetition) is not. Rather, ‘guarantees of non-repetition’ is a broad umbrella category under which the first three pillars can fall because they all contribute to non-recurrence. Nevertheless, given the huge disparity in the development of the four pillars (e.g. justice is highly developed) De Greiff will pay particular attention to the guarantees of non-repetition because there is not much work on this. Similarly, he wants to address and further develop the reparations measure. These are two areas where more research is needed and would be helpful to his work.

The topic of the Special Rapporteur’s next UNGA report is TJ and development. Part of the objective of this report is to introduce the relevance of the justice debate to development goals. De Greiff voiced concerns that the human rights community and TJ groups will be left out of upcoming conversations about the environment, jobs/economic opportunity, and security because of their complete unwillingness to discuss goals and indicators in relation to the post-2015 development goals. Though there are problematic aspects about the goals and indicators, it is better to be included in the conversation.

Reparations
A question was raised about the international community’s dislike toward reparations and what the special rapporteur can do about it under the mandate. De Greiff explained that the international community is largely reluctant to financially support reparations (beyond the small support provided by the World Bank and USAID) for several, complicated reasons:

- Most countries that would be potential supporters are countries against which reparations claims could be made, so there is no incentive to support a legal obligation for financial compensation.
- Financial compensation as reparations has a very important role under the overall rubric of reparations, which symbolic reparations should complement. Financial reparations are fundamental to the reparations measure because words alone are not an adequate measure of redress. But part of the commitment to reparations is the ability and willingness of States to mobilize resources on behalf of victims, and this may be lacking.
The history of the establishment of reparations programs has not been favorable. For example, South Africa had all sorts of incentives to be very aggressive in its reparations program but it was a huge disappointment – the recommendations were very comprehensive and well put together in many ways, but most of them have not been implemented. El Salvador is another example where reparations recommendations were never even considered for implementation. The results of the Rwanda reparations program were largely ambiguous.

Regarding what can be done about this, De Greiff reiterated that more thought has to be given to the ways to design and implement reparations more effectively and realistically. Relevant stakeholders and States must be reminded again and again that reparations are neither optional measures nor measures to be traded off against one another, and that over-reliance on any one measure creates problems. There must be a comprehensive approach to TJ.

Another question arose about how to implement reparations recommendations more effectively. De Greiff pointed out the problems with reparations recommendations, namely that they typically are not legally binding, they are often not issued by experts, and may be too narrow in scope. Truth commissions are increasingly expanding their recommendations, often into areas that should be the subject of democratic contestations rather than the recommendations of politically appointed individuals who may have no knowledge of the subject. Because there is nothing keeping the thematic expansion of truth commissions in check, they are becoming more undisciplined. This is especially problematic because people who are not promoters of TJ are increasingly encouraging use of truth commissions.

The lack of discipline by truth commissions has also manifested in the way resources are spent and truth commissions are staffed. One way to improve recommendations is by understanding the way that the various State ministries work and what is realistic. Truth commissions have to learn to speak in the vocabulary that States can understand, i.e. budgets, planning, policy making and sectorial reform, if the recommendations are to be taken seriously. This approach will also help the follow-up of the recommendations to be more effective.

Further, a point was raised that the distinction between post-authoritarian and post-conflict contexts regarding TJ measures is often lost, and that the relationship between development and reparations is a prime example of this. For instance, there is often a tradeoff between development and reparations and what results in drafting reparations are largely development initiatives with only a bit of reparations mixed in. This leaves victims feeling as if there is no recognition of what they have been through. Another example of this is where a judicial order of reparations is made, but never implemented and then the international community makes a symbolic gift. Victims are angered by what they view as a tradeoff.

De Greiff expressed emphatic agreement that development should not be mixed with reparations. He stressed that there is a major issue of conflation of initiatives and of States trying to provide reparations under the guise of development. This highlights an underlying question of what it means to establish reparations under one context as opposed to another. It’s difficult to determine what legitimate reparations should look
like in a particular situation because it will vary depending on the context. For example, compare the Colombian pension scheme where the State had the capability of funding it versus the DRC where the majority of the funding comes from international organizations.

**Recommendations to the Special Rapporteur**

Useful suggestions and comments were made to De Greiff by Professor Paul Hunt, the former UN Special Rapporteur on the Right to Health, and Dr. Clara Sandoval. Professor Hunt agreed that the audience formally receiving the special rapporteur reports – the Human Rights Council and the UN General Assembly – is important to keep in mind. But he suggested that the reports are also a platform on which to stand while speaking to others outside of the UN machinery, such as those individuals or groups wrestling with the concepts of TJ, including scholars, NGO’s, ministries of justice, judicial and quasi-judicial bodies, etc., that may require a somewhat different approach and vocabulary. Professor Hunt echoed De Greiff’s point on the critical importance of the context in which TJ processes are occurring. For example, moving from general constructs or ideas to specific application can only be done contextually. Professor Hunt also suggested that in order to ensure the sustainability and broaden the reach of his TJ work, De Greiff needs strategic allies at both the national and international levels. At the international level, particularly within the U.N., the OHCHR is a natural ally, but the OHCHR is small and relatively weak, necessitating engagement with other U.N. entities. This engagement is within the De Greiff’s mandate as part of the goal of mainstreaming human rights, though it takes a lot of time, energy, patience, and the appropriate sectorial vocabulary.

De Greiff agreed with these comments and suggestions, and reiterated that report writing is not enough. He indicated that potential allies for TJ work within the U.N. system are the Rule of Law coordinating unit in the office of the Secretary General that coordinates across all agencies (the OHCHR is the focal point for Rule of Law issues solely related to TJ). Other possibilities include: the UNDP, which has Rule of Law and TJ initiatives; the DPKO, which now has human rights and TJ mandates in several countries, such as Libya; and special advisors to the Secretary General on topics that overlap with TJ, such as the prevention of genocide and the use of child soldiers. Of course, longstanding and familiar turf wars between agencies have to be navigated.

Dr. Sandoval requested that the Special Rapporteur undertake two tasks for stakeholders in his reports. First, that he reinforce the existence of victims’ right to a remedy, even where a reparations program is in place. This will help victims to be aware of their rights to challenge the adequacy of the reparations, and this can also empower victims. Second, she requested that De Greiff emphasize the fact that statutes of limitations should not apply to reparations. Just as certain crimes are not subjected to statutes of limitations, reparations cannot be either because doing so renders the right to reparation nugatory. This is also an important issue for victims.

**Future steps**
The Special Rapporteur highlighted the following areas as needing further research:

- Reparations: In general, the area of reparations needs to continue to be developed. One specific area where more work needs to be done is on how to
accommodate the difference in context between post-authoritarian and post-conflict transitions and how to do this systematically. Implementation of measures cannot be indifferent to the context in which violations occur.

- Business: more attention and research need to be devoted to the role that businesses play in transitional processes

- Follow-up recommendations for truth commissions: This needs more attention and the TJ field needs to be more concerned with the generally dismal record of follow-up

- Guarantees of non-repetition: This is the least developed area of the four TJ pillars and needs significant research