

Buddhist Perspectives on Transnational Restorative Justice

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The Dalai Lama has said, “In everything we do, there is cause and effect, cause and effect. In our daily lives the food we eat, the work we undertake, and our relaxation are all a function of our action: our action. This is karma. We cannot therefore, throw up our hands whenever we find ourselves confronted by unavoidable suffering.”² But, this leaves untold the strategies that we can pursue when confronted by such suffering.

As members of a global community, we often find that suffering at the macro, transnational level. It may also be generated from strife and insurgencies at the state or regional level of society and governance. It is incumbent upon us to find means and methods to reduce the use of reoccurring violence.

One such strategy that is consistent with a Buddhist world view and our emphasis on compassion is transitional justice and specifically restorative justice. In the United Nations Secretary General’s 2004 Report entitled, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, the concept of transitional justice was advanced. Defined as, “the full range of processes and mechanisms associated with a society’s attempts to come to terms with the legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation...”, discussions of transitional justice typically focus on the micro aspects of social conflict and the criminal justice system.³ However, transitional and restorative justice principles can be applied to the post *bellum* period of conflict on the macro level as well.

We are all too familiar with the imposition of “victor” justice in the post *bellum* period merely sowing the seeds of the next conflict – we only need to look to the headlines. To prosecute war crimes and acts of genocide may allow for the punishment of the actor and garner for the victims a sense of satisfaction that comes with retribution and retaliation masquerading as justice. But, such forms of justice are like giving a gourmet chocolate truffle to a starving child – it may taste good and provide momentary satisfaction, but the belly remains empty and the cycle of malnutrition is unbroken. Such it is with the post-conflict society that starves for justice. Prosecutions alone are an incomplete form of justice. Peacebuilding requires the utilization of transitional justice processes that afford multiple opportunities for accountability and justice.

Surveying source documents of international law and the United Nations beginning with Article 33 of the U.N. Charter, navigating ECOSOC Resolution 2002/12 and exploring the progeny of the Secretary General’s 2004 Report (UN Doc. S/2004/616) this paper briefly presents an introduction to restorative justice as a

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² As quoted by Lorenn Walker, Shambhala Sunspace, and accessed at <http://shambhalasun.com/sunspace/buddha-would-probably-like-restorative-justice/> on 13 October 2014.

³ *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, United Nations’ Security Council, S/2004/616, 23 August 2004.

peacebuilding tool in post-conflict societies and how it has been or could be used to impact the resolution of conflicts involving predominantly Buddhist populations. (i.e. Myanmar, Sri Lanka, Northeast India, Southern Thailand, Cambodia, etc.) Of course, this will only be the briefest of surveys, but its role will be to provoke thought and discussion. The exploration will not explore in depth the use of restorative justice in the traditional (street crime) criminal justice system. The focus will be on transitional justice in the post-conflict society.

Current Buddhist Armed Conflicts

Across Asia, peace is a fragile and delicate flower. While conventional wisdom may leave one to think that in those countries that consider themselves to be Buddhist, or which have predominantly Buddhist populations, peace would be the normative state. Unfortunately, Buddhist populations are not stranger to violence.

Country	Percent
Thailand	95.00%
Cambodia	90
Myanmar	88
Bhutan	75
Sri Lanka	70
Tibet	65
Laos	60
Vietnam	55
Japan	50
Macau	45
Taiwan	43

Figure 1: Percentage of Buddhist Believers by Country

Violence in Buddhist nations, and in those nations with predominantly Buddhist populations, can be based on a host of factors. The result is that in Sri Lanka to southern Thailand, Buddhists have been urged to take up arms.

Certainly a non-exhaustive list of such active regional conflicts would include:

Region	Conflict's Nature	Primary Causative Factor
Southern Thailand	Insurgency	Sectarian (Muslim v. Buddhist)
Myanmar	Insurgency	Sectarian (Muslim v. Buddhist)
South China Sea	Transnational	Chinese Border Disputes with, Vietnam, Brunei, Malaysia Taiwan, Indonesia, and the Philippines
East China Sea	Transnational	Chinese Border Dispute with Japan
Korean Peninsula	Transnational	North Korea/South Korea
India	Transnational	Border dispute between India and Pakistan
India	Insurgency	Multi-Ethnic
China	Insurgency	Sectarian (East Turkestan)
Nepal	Insurgency	Ethnic/Political

And, then, there are those conflicts which are simply simmering on the stove. These include stews like the Cambodian/Thai border disputes and Singhalese insurgencies. But, many, especially historic border clashes, are in a position of stasis

largely due to the influence of ASEAN and not any heroic peace initiative. In recent years, a surge of positive bilateralism has struck Asian neighbors with border disputes due to their common membership in Association of Southeast Asian Nations (ASEAN). However, the thaw in relations still leaves the boundary dispute between countries largely unresolved.

So while there have been strides in peace-making in Buddhist influenced Asia over the last several years, this post-bellum period still requires intensive nurturing and development if the advance of peace is to be maintained.

Restorative Justice

Restorative justice programs are most often seen through the prism of the state's criminal justice system. Popularized in the 1990's and 2000's, the concept sought to have criminal offenders take responsibility for the harm caused and victims to find closure to the suffering inflicted upon them. By 2000, the United Nations Congress on the Prevention of Crime was claiming some 400 programs existed in Canada. Its growth within the United States' criminal justice system has been exponential. But, it is not just a North American concept.

Restorative justice programs are being implemented across Asia in Hong Kong, Indonesia, Japan, Malaysia, Philippines, Singapore, Taiwan and Thailand. But, predominantly, these programs focus on the criminal justice system and interpersonal relationships impacted by criminal acts on the daily/street crime level.

The implementation of restorative justice in such settings clearly is consistent with Buddhist thought. Buddhism rejects extremism in all its forms. Retribution, retaliation and revenge are often the backbone of a criminal justice system and would be rejected in focused Buddhist analysis. Rather, Buddhist justice, in its pure and theoretical form, would favor mercy, compassion and wisdom. We look to the difficult moral solutions, not merely the solution that is reasonable.

Where and how is restorative justice in Asia being implemented at a more macro level? Two primary examples are in Cambodia and Sri Lanka.⁴ In many ways, these programs follow the successful model of the Truth and Reconciliation Commission in South Africa. It is here that the juxtaposition of restorative and transitional justice occurs.

Transitional Justice

Transitional justice encompasses restorative justice. It is a collective term which refers to those judicial and extra-judicial measures that are implemented in countries to bring redress and closure to cases of genocide and other massive abuses of the human rights.

Transitional justice (TJ) is a set of temporary mechanisms, such as prosecutions or tribunals, that improve access to justice and help states and societies respond to widespread human rights violations after periods of conflict or political disruption. TJ is built on the assumption that a lack of justice is a cause of conflict and instability and that there must be responses to injustices if peace is to be achieved and for it to be long-lasting.⁵

How a Buddhist should fight a war and then conduct operations in the *post-bellum* environment is entirely consistent with the concept of restorative and transitional

⁴ See, Manning, Peter (2011). *Governing memory: Justice, reconciliation and outreach at the Extraordinary Chambers in the Courts of Cambodia*. Memory Studies. Published online DOI: 10.1177/1750698011405183 and <http://www.srilankaguardian.org/2010/05/new-commission-for-restorative-justice.html>, accessed 25 February 2015.

⁵ <http://asiafoundation.org/in-asia/2015/02/25/can-transitional-justice-bring-peace-to-thailands-deep-south/>

justice. This is equally true for transnational conflicts as it is for insurgencies, such as that in Southern Thailand where the implementation of transitional justice principles is contemplated.

When we look to Just War in the post bellum period, a doctrine of human rights is central to one's understanding.⁶ When we win a just war it does not necessarily follow that there will be a just peace. Many a just war has been followed by the subrogation of the defeated and wholesale violations of human rights – to the extent that claims of genocide and other crimes against humanity become prevalent and sow the causes for the next conflict.

In the book, *Seeds of Peace: A Buddhist Vision for Renewing Society*, Sulak Sivaraksa tells us that, "...[t]o create a Buddhist model of society, we must first look into traditional Buddhist notions of social order and social justice. It is worthwhile to begin by examining the Buddhist scriptures." And, there is a starting point for that examination in transitional justice.

The *Ārya-satyaka-parivarta* appears to be the clearest and most focused discussion of ethical warfare in Buddhist thought, though is remarkably brief. The *Ārya-satyaka-parivarta* gives little guidance as to how to end hostilities. It does tell the righteous ruler to view his enemies as having been created by their causes. Specifically, it recommends that "...a ruler should dispel the causes of enmity and should make friends even with his enemies..." (*Satyaka 6:73*)

Once the war is over and the armistice has been signed, the justifications of military necessity are no longer present...without war there can be no military necessity. It is postulated that the overarching concepts of justice in the post hostility period should be fashioned after a restoration of human rights. (Williams, 2006: 309) In a 2008 interview with His Holiness the Dalai Lama there was concurrence:

Then after the violence has come to an end, as you mentioned, the defeated nation is hurt and in ruins. It is now that the victor has the moral responsibility to provide assistance and to restore the defeated's quality of life. After the Second World War, the Marshall Plan did just that. The Allies, Europe and the United States, rebuilt Germany. As a result, today, generally I don't find any hatred or anger towards the United States in their collective mind. Similarly, is the case with Japan.

I have actually asked some of my friends in Japan, "Are there substantial Japanese who still have negative feeling toward United States because of nuclear weapon that was used on them?" No one has indicated that they harbor ill-will or negative feeling. In both these cases, although there was war and great destruction, after the hostilities ended there was no discrimination, no hatred, only consideration for our human brother/sisters and a desire to come to help them build a nation. Now, today, Germany, specifically in what was previously West Germany, the economy, education, everything, appears to be much better. Eastern Germany, which did not receive the same attention, remains backward. North Korea – tremendous suffering, tremendous destruction, and it continues to this day. But South Korea, not only safe, but much more developed...And Japan, I think with the new constitution. America helped there Japanese, German brothers after the war. So I think after the victory, I think the moral responsibility of the victor is to help the defeated. That help is also very important to eliminate their grievance.

⁶ See generally, Walzer, Michael. *Just and Unjust Wars*, 4th Ed. 2006.

(Gyatso, Tenzin, Personal Interview, 27 March 2008) Throughout this discussion, His Holiness decried the need to eliminate the causes that created the conflict in the first instance. This need to eliminate the ill-will and enmity inherent in the world is a focus of the Dalai Lama's thought.

The Dalai Lama: I feel instead of us using force, closer contact and assistance – some part of the military budget should be spent in education and to build schools and hospitals and economy. Educate the Iraqi people with more modern education. I think the result will be much better. That also is a long-term solution for the elimination of terrorism. That's my feeling.

John Scorsine: So to go to the causes of terrorism.

The Dalai Lama: Yes. Terrorism comes from hatred. The only way to eliminate hatred is through compassionate acts. Help them. Give them education. Give them economy. And reach out occasionally for some criticism, well, construction criticism. That is the way to reduce hatred. And so that's the only way to eliminate terrorism. Or, use force. Kill a few individual terrorists in the market among his other friends and their community will respond against you.

John Scorsine: It creates a cycle.

The Dalai Lama: So I often express today with bin Laden. If he is handled the wrong way, next time, ten bin Laden. Then hundred bin Laden.

(Id.) Hence, it would appear that if a return to armed conflict is to be avoided, success in the reconstruction of the former enemy is paramount. This would seem to be the lesson of the First and Second World Wars.

After the First World War, Germany was subjugated to the victors. It was forced into poverty. Basically, the Treaty of Versailles with its onerous reparation requirements and territorial forfeitures had sown the seeds for the raise of the Nazi party, the fervor of Nationalism, and ultimately was the cause of World War II. It can clearly be argued that the lack of *jus post bellum* was the causative factor for World War II.

Transitional justice and restorative justice has the potential to alter that dynamic. By allowing for the dialogue between the parties to transpire, the beginning of the healing process is initiated. However, this undertaking requires political will and courage.

For example, in Thailand, restorative justice as in many Asian cultures is engrained in the societal fabric for street crime. Rural areas, with deeply entrenched concepts of communal justice, find the "Big City" idea of restorative justice perplexing. Locals ask, "And, this is different how?" Yet, as Kittipong Kittayarak observed in 2005, it was being reintroduced in the urban areas.⁷

Yet, when restorative justice is applied in the more macro setting of Thai disputes and resolutions in the Deep South implementation of the principals of transitional justice become more problematic. For transitional justice to be effectively implemented, as Patrick Barron of the Asia Foundation has observed, there must be a strong political will; policies which limit new grievances; and, a "new deal" between the former belligerents.⁸ Barron concludes that the former Thai government lacks the

⁷ See: <http://www.restorativejustice.org/articlesdb/authors/4338> - accessed on 15 April 2015

⁸ Barron, Patrick. *Can Transitional Justice Bring Peace to Thailand's Deep South*, 25 February 2015.

political will (in its failure to consider amnesties); there is no cessation of hostilities, so counter-insurgency operations continue and new grievances arise; and, peace talks, the source of a new deal, have stalled. Overall, the implementation of transitional justice is seemingly impossible at present in Southern Thailand. (So if not in the South, the question then is could these principles be brought to bear in the long term resolution of conflicts with Cambodia?)

International Legal Basis for Transitional Justice

Transitional Justice is engrained in the Charter of the United Nations. Of course, when chartered in 1945, the concept of transitional and restorative justice had yet to evolve. Yet, within Article 33 the ideal of dialogue over violence is firmly established.

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Restorative justice is first specifically addressed in 2002 by the United Nations, and then in the context of the criminal justice systems of its various member states.

Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programs to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties.

Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programs. The results of research and evaluation should guide further policy and program development.

ECOSOC Resolution 2002/12, *Basic principles on the use of restorative justice programs in criminal matters*. But, this resolution focused on criminal justice applications for restorative programs at “street crime” levels. It failed to address applications at the transnational level or as it may apply to insurgencies.

That application would come two years later in the Report of the Secretary General on “*The rule of law and transitional justice in conflict and post-conflict societies*”. There the establishment of commissions is endorsed.

The establishment of independent national human rights commissions is one complementary strategy that has shown promise for helping to restore the rule of law, peaceful dispute resolution and protection of vulnerable groups where the justice system is not yet fully functioning. Many have been established in conflict and post-conflict societies with mandates including quasi-judicial functions, conflict-resolution and protection programs. Recent examples include the national human rights institutions of Afghanistan, Rwanda, Colombia, Indonesia, Nepal, Sri Lanka and Uganda, each of which is now

playing an important role in this regard. Exceptional fact-finding mechanisms have also been mobilized by the United Nations with increasing frequency, such as the ad hoc international commissions of inquiry established to look into war crimes committed in places such as the former Yugoslavia, Rwanda, Burundi and Timor-Leste.

Secretary General's 2004 Report (UN Doc. S/2004/616). In other sections of the document, the UN recommends that in the implementation of these commissions that local traditional justice mechanisms or mediation models be utilized.

The 2004 Report was then revisited in 2011. Exploring the developing maturity of transitional justice models, the Secretary General noted that,

Experience reveals that truth commissions can quickly lose credibility when not properly resourced, planned and managed, thereby undermining the very confidence they are intended to build. Truth commissions will likely falter where they are introduced too early in the political process, are manipulated for political gain or involve insufficient efforts to solicit stakeholder input, including such hard to reach populations such as displaced persons and refugees. Strong national ownership is essential. Unfortunately, Governments have a mixed record of compliance with truth commission recommendations, evidencing the need for follow-up mechanisms and active and long-term political engagement from the international community and civil society. United Nations support for the implementation of recommendations needs to be incorporated early in planning processes. There is growing recognition that truth commissions should also address the economic, social and cultural rights dimensions of conflict to enhance long-term peace and security.

Secretary General's 2011 Report (UN Doc. S/2011/634) In many ways this revision noted Barron's three criteria for implementation success – political will, cessation of new grievance creation, and “a new deal” between former belligerents.

It should be noted that some commenters, notably Dr. Eric DeBrabandere of Leiden University, sees nothing new here. Rather, he would argue that there has never been a void of legal processes for the resolution of *post bellum* conflicts; only a failure to apply the legal frameworks and principles that have already been present. Moreover he would argue that, “*jus post bellum* theories linking post-conflict reconstruction to the legality of the intervention, or changing the rights and obligations of actors in post-conflict reconstruction according the (il)legality of the intervention are not only unacceptable, they also run contrary to current international law and practice. Any attempt to transpose or impose legal obligations to intervening states implicitly or explicitly aims at evaluating the legality of a military intervention in function of the potential positive outcomes of the *post bellum* effects, thereby reintroducing ‘just war’ ideas in international law.”⁹

Yet, Dr. DeBrabandere seems to be the figurative finger in the Dutch dike. The clearer trend is to place greater emphasis on the resolution of conflicts in the *post bellum* period through transitional justice mechanism. Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, presented

⁹ De Brabandere, Eric. ‘The Concept of Jus Post Bellum in International Law: A Normative Critique’, in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014)

his report to the UN General Assembly on Monday, 28th October 2013. There he said, "Furthermore, the post-2015 development agenda should shed the timidity which has characterized discussions about the role of justice and rights in development. The new frame-work has to take on board a significant global achievement, the institutionalization of binding legal obligations recognizing as a matter of rights many of the questions that discussions about development goals (the Millennium Development Goals as well as a good part of the debates about the post-2015 goals) have treated merely as desirable ends."

Conclusion

Buddhism has at its core an adherence to the virtues of compassion and mindfulness. They are the same underpinnings as exists in transitional and restorative justice programs. These principles stretch from the individual practitioner's pillow to the worn-torn fronts of the conflicts that besiege our World. Buddhist nations and world leaders, being in possession of the fundamental knowledge, should be on the forefront of not only the application of transitional and restorative justice within their own spheres, but should be championing the implementation of these programs as a key component to conflict resolution in all sectors of endeavor.