

CHAPTER 27

Transitional Justice in the 21st Century: History, Effectiveness, and Challenges

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Abstract

This chapter examines the development, effectiveness, and history of transitional justice in the 20th and 21st Centuries. Then, it reviews some of the key issues facing transitional justice in the 21st Century. These include the emergence of a normative framework for the field of transitional justice, arising in the 20th Century in the shadows of World War II and the Holocaust. It then addresses a number of the key issues that have emerged in the 21st Century, including transitional justice and its relationship with criminal justice, gender justice, the role of victims, transformational justice, the template or ‘check the box’ approach and the role donors play in transitional justice efforts . This chapter thus suggests that practitioners and scholars alike are challenging the limits of transitional justice and moving past the approaches, dogmas, and conventional boundaries of the field as it arose in the mid-1990s.

Keywords

Transitional Justice; Victims; Gender; Criminal Justice; Transformative Justice; Socioeconomic Rights; Donor’s Justice.

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“This doubt of people concerning themselves and the reality of their own experience only reveals what the Nazis have always known: that men determined to commit crimes will find it expedient to organize them on the most vastest, most improbable scale. Not only because this renders all punishments provided by the legal system inadequate and absurd; but because the very immensity of the crimes guarantees that the murderers who proclaim their innocence with all manner of lies will be more readily believed than the victims who tell the truth.[...]. We attempt to understand elements in present or recollected experience that simply surpass our powers of understanding. *We attempt to classify as criminal a thing which, as we all feel, no such category was ever intended to cover.* What meaning has the concept of murder when we are confronted with the mass production of corpses?”

(Arendt, 1973, p. 239)¹

1. Introduction

This chapter reviews and examines the development, challenges, and effectiveness of transitional justice. It first surveys the emergence of transitional justice processes, tracing past steps and then closely reviews the development of transitional justice processes in the 20th and 21st Centuries (section 2). Thereafter, in section 3, it reviews key issues facing transitional justice, including questions of efficacy; its relationship with criminal justice; the role of victims; the “check the box” approach; gender issues; “transformative justice;” and “donors’ justice.” These appear to us as key issues and questions that practitioners and scholars alike are wrestling with—and will continue to debate—well into the 21st Century.

¹ Emphasis added

2. The “roots” of transitional justice

2.1 The Emergence of transitional justice as a concept

Human history is replete with “atrocities crimes.”² They occur during armed conflict and also are inflicted, in various circumstances, by states and others on a wide array of individuals, groups, and minorities. While humankind’s earliest histories describe war and mass killing, attempts to provide for accountability and redress for atrocity crimes have a long if quite uneven lineage (Elster, 2004). These include acts of apology, contrition, reparation, and other forms of accountability for what we now see as the most grievous of crimes.

Indeed, Jon Elster (2004) traces the emergence of “transitional justice” (if not the term) to the ancient Greeks. He also points to certain steps taken to address violations during the French Restoration following the French Revolution (Elster, 2004). While Elster’s research shows the underlying need of societies to address atrocities using various approaches, there is little evidence that these experiences from the distant past have had a direct impact on current transitional justice processes.

² According to the United Nations, “atrocities crimes” take on three forms: genocide, crimes against humanity, and war crimes. Nevertheless, in the context of “Responsibility to Protect,” the term “atrocities crimes” has been extended to include ethnic cleansing. While ethnic cleansing is not defined as an independent crime under international law, it includes acts that are serious violations of international human rights and humanitarian law that may themselves constitute atrocity crimes (United Nations, 2014). The crime of aggression, also an international crime, is usually treated separately and not considered an “atrocity crime.” For reasons of space, we cannot address the issue in this chapter. See also the chapter 1 of Hagan and Kuperberg in this volume.

In any event, the term “transitional justice” is very much of the 20th Century, with a number of claimants of first enunciating it (Arthur, 2009, pp. 329-330). Transitional justice became generally accepted and part of the vocabulary in the academy with the publication of *Transitional Justice*, edited by Neil Kritz with a foreword by Nelson Mandela (Kritz, 1995a; Kritz, 1995b; Kritz, 1995c). This multi-volume compendium covered a range of countries and processes, with contributions by many well-known figures, e.g., Jose Zalaquett (1995), dealing primarily with post-authoritarian societies. This treatise and its contributors began to define what has now become the “field” of transitional justice and did much to establish a paradigm of transitional justice processes, focusing on trials, truth-telling mechanisms, reparations, and reforms (now often referred to as “guarantees of non-recurrence”) (United Nations Human Rights, n.d.). However, they also narrowed a broad range of rich experiences in various countries to a more specific set of measures that were comparatively limited (Garton Ash, 1998; Elster, 2004). While an analytical approach is likely to categorize complex experiences into definable areas, it also is reductive in nature.

One of the chief criticisms of Kritz’s and his co-authors’ approach (1995b) was an almost singular focus on countries “transitioning” to democracy from authoritarian regimes which had massively violated human rights. This transition to democracy was, in Kritz’s book, linked to a commitment to respecting human rights. As discussed below, this focus raises several challenges that continue to bedevil the field of transitional justice. Although Kritz’s compendium certainly had the effect of both establishing and defining the term “transitional justice” at least for a time,

the redoubtable, if in this case lonely critic, Timothy Garton Ash, raised serious questions about the usage of those terms. As Paige Arthur (2009, pp. 331-332) noted:

[Garton] Ash was the only reviewer to call into question the utility of the linguistic invention of 'transitional justice.' For him, the book was 'too narrowly titled,' and in fact, no word or phrase existed in English that captured the full range of all of its attending processes... [He suggested German terms that:] translated as 'treating' the past,' [or] 'working over' the past, 'confronting' it, 'coping, dealing or coming to terms with' it; even 'overcoming' the past..., indicating the complexity of the matter at hand.

Garton Ash (1998) also argued that historians were better placed and skilled to make assessments of the records of the past and wrestle with the legacy of massive abuses. He was concerned as well with the authors' focus on "truth" in transitional justice, worried that "truth is a big word, so often abused," and was keen to place limits on it (Garton Ash, 1998). As Arthur (2009) noted, Garton Ash challenged the contents of what Kritz had presented as "transitional justice." In his view, the "historians' debate"³ in Germany in the late 1980s on how to understand the causes, and interpretation of, the Nazi era was a model for addressing the past, rather than legal or quasi-legal processes. Notably, historians did not play a major role in Kritz's book, and Arthur (2009, p. 333) argues that "transitional justice was presented as deeply enmeshed with political problems that were legal-institutional and, relatively, short-term in nature. So short-term, in fact, that they could be dealt with specifically during a 'transitional period.'"

³ "Historikerstreit" (in German) was a debate between conservatives and more progressive historians regarding German responsibility for Nazi Germany and the Holocaust (Bathrick et al., 1988; Maier, 1988; Baldwin, 1990).

Kritz's book shaped the discourse and agenda for transitional justice over the last decades, but Garton Ash's critique has had, at least in practice, some resonance. Over time, it is clear that transitional justice as defined in normative documents issued by the United Nations (2010), and a variety of other authoritative bodies, has broadened beyond countries transitioning to democracy.⁴ While there are current examples of countries moving from authoritarian regimes to democratic governments, e.g., Tunisia, the use of transitional justice measures in such countries are outnumbered by transitional justice processes in societies that have experienced atrocity crimes due to armed conflict (Abdoueldahab, 2017). Moreover, transitional justice processes have arisen in a range of situations, notably increasingly incorporated into peace agreements or negotiated in peace processes, as well as addressing historic violations not related directly to a transition *per se* (Arthur, 2009, pp. 361-362). Although the "democratic transition" paradigm Kritz established still overhangs the transitional justice discourse in several respects, practitioners and scholars have struggled against the strictures created by Kritz's book.

In another respect, Garton Ash's essential point still stands: historians play a minor role in transitional justice processes as compared, for example, to lawyers and judges (McEvoy, 2007).⁵ However, his hypothesis—that historians are better positioned to assess the past—is also too narrow: in the case of, e.g., truth commissions, commissions of inquiry, reparations processes, a wide variety of professionals have played important roles. For example, the Tunisian Truth and

⁴ International Center for Transitional Justice (n.d.) What is Transitional Justice?. Available at: <https://www.ictj.org/about/transitional-justice> (Accessed: 27 January 2019).

⁵ McEvoy criticizes the legalistic nature of the field, and in turn, the role of lawyers to the detriment of other disciplines.

Dignity Commission was chaired by a journalist (Moaveni, 2016), and the South African Truth and Reconciliation Commission was chaired by Archbishop Desmond Tutu.

2.2. The normative framework: Pre-20th century developments

Before turning to transitional justice in the 21st Century, two different bodies of law frame and influence the concept and practice of transitional justice. One is the development of human rights law, which has its modern roots in the Universal Declaration of Human Rights in 1948 and the International Covenants.⁶ The other primary source for the protection of individuals is international humanitarian law.⁷ International humanitarian law has evolved considerably over time and is set forth in the Geneva Conventions, The Hague Regulations, other treaties, and customary international law.⁸

⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) (UDHR).; International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966 entry into force 3 January 1976) 993 UNTS (ICESCR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷ “Universal codification of international humanitarian law began in the nineteenth century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare” International Committee of the Red Cross (2004) What is International Humanitarian Law. Available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf. (Accessed: 15 December 2018).

⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention);

Prior to the violent 20th Century, the adoption of the Lieber Code (Lieber, 1863) by the United States set forth elements of humanitarian law, which had limited impact during the American Civil War, i.e., the prosecution of Henry Wirz, the commandant of the infamous Confederate Andersonville prison (Finkelman, 2013).⁹ There were also nascent attempts following the war to address massive abuses suffered by African-Americans as a result of slavery, including some very limited elements of what might be characterized as reparations, in particular the proposal of distributing “40 acres and a mule” to ex-slaves and other forms of redress as well as, notionally, political participation (Gates, Jr.).¹⁰ However, these steps were stillborn and little was done to

Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention).

⁹ Wirz was found responsible for multiple violations of the Code and was executed, following conviction by a special military tribunal.

¹⁰ For a historical overview see Blight (2002, pp. 98-139), Foner (1988). Redress measures included economic measures such as land allocation. Establishment of “Freedmen’s Bureau” in 1865 “promised every male citizen, whether refugee or freedman, forty acres of land at rental for three years with an option to buy.” 1866 Homestead Act. Note the ultimate failure of any redress measures regarding land (Mitchell, 2001; Marable, 2011).

address the violations of basic rights of African Americans either *de jure* or *de facto* for almost a century (Foner, 2012; Coates, 2014).

World War I, while technically in the 20th Century, had some characteristics of a 19th Century conflict. It mirrored the previous century's approach to a dearth of accountability and justice, but with a hint of what would come. The Versailles Treaty provided for the prosecution of Kaiser Wilhelm, although he fled to The Netherlands and never faced any form of justice (Willis, 1982). In the wake of that conflict, the focus of the post-war settlement was on nationalities with the creation of, in some cases, small states (Steiner, 2005, pp. 256-313). The defeated states were required to pay significant "reparations" (Sagi, 1980; Kent, 1992). However, these reparations served a punitive purpose, imposing payments on the losing country..¹¹ As such, they were quite counterproductive and bear no relation to reparations processes in the current era (Falk, 2006, p. 486).

There are other examples of processes that have echoes of modern-day transitional justice as well.¹² Nonetheless, while there is some foreshadowing of an approach to addressing the past in what would be later characterized as "transitional justice," it is difficult to identify any pattern of

¹¹ And as counter-argument, MacMillan (2001, p. xxx) argues that the reparations did not lead to WWII: "People said at the time, as they have ever since, that the peacemakers took too long and that they got it wrong. It has become commonplace to say that the peace settlements of 1919 were a failure, that they led directly to the Second World War. That is to overestimate their power". Furthermore, "Hitler did not wage war because of the Treaty of Versailles, although he found its existence a godsend for his propaganda" (MacMillan, 2001, p. 493).

¹² : International Center for Transitional Justice (n.d.) What is Transitional Justice. Available at: <https://www.ictj.org/about/transitional-justice> (Accessed: 27 January 2019).

addressing violations prior to the middle and latter parts of the 20th Century. Clearly “transitional justice” as a field only began to develop in the latter part of the 20th Century (Teitel, 2003; Arthur, 2009). Thus, turning to the question of what transitional justice in the 21st Century may look like, it is the bloody 20th Century that is the point of departure.

2.3. The 20th century: Overview of developments

Transitional justice developed as a response to the many atrocity crimes committed in the 20th Century rather than to human rights violations *per se*. These crimes are clearly defined by international law and include war crimes, crimes against humanity, genocide, and arguably, aggression.¹³

There are several factors that are worthy of note. One element was the technological advances in weapons that dramatically increased the number of victims. Moreover, the advance of communications increased attention and publicity of atrocity crimes within the international community. This trend has already increased exponentially in the 21st Century with the development of social media and other media platforms, which have also become a key tool in documenting atrocities (Rajagopalan, 2018).¹⁴

¹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute). In particular, see Part II, Articles 6-8.

¹⁴ However, social media and other communication tools have also been used to foment atrocity crimes and stir up hate, as has been the case in Rwanda and a number of other countries. (Singer and Brooking, 2016; Zeitzoff, 2017).

A litany of atrocities occurred during the 20th century. Due to the wide-reaching nature of World War I and II, as well as the subsequent proxy wars orchestrated by the great powers, combined with the development of weaponry, the number of atrocity crimes was staggering (Leitenberg, 2006; Nagdy and Roser, 2018; Roser, 2019). These include e.g., the Holocaust; the genocide of the Armenians; massive repression in Latin America; colonial abuses by the European powers, particularly during the systematic repression of the civilian population in Madagascar, Kenya, Indochina, and Algeria during the 1940s and 1950s (Arthur, 2009, p. 342); segregation and racism in the United States; the slaughter of two world wars, including wide scale violations of even the rudimentary laws of war at the time (Roberts, 1995). These were followed by systematic repression and mass murder in the then Soviet Union (Medvedev, 1989), widespread killings and state inducted starvation in China (Ashton et al., 1984, p. 624 et seq.; Yang, 1996), and the Khmer Rouge's brutal tactics in the "killing fields" of Cambodia, where in the range of 25–40% of the population perished (Roberts, 1995). Other atrocity crimes occurred in Viet Nam with the American use of napalm and indiscriminate killing by all sides (Falk, 1972; Greiner, 2010), among many others.

In the face of these abuses, some states took steps to address them (Kiernan, 2003, pp. 586-590). In reckoning with wide-scale atrocities, it is simply impossible to bring all the perpetrators into a criminal justice process, and other mechanisms or approaches began to emerge. Arguably, these approaches developed organically, in some cases relying on national experiences other than criminal justice (Roberts, 1995). The Nuremberg Trials as well as other trials conducted by the Allies were a seismic event for accountability and were later accompanied by other non-punitive measures that developed in the post-World War II period, as attitudes and the political context

changed substantially (Frei, 2002; Niven and Paver, 2010). Although the term “transitional justice” had yet to appear in academic parlance, transitional justice as a set of formalized processes began to emerge, particularly in Germany in the post-war period (Elster, 2004), and again after the fall of the Berlin Wall. These processes included important domestic trials, e.g., Frankfurt (Auschwitz) (Pendas, 2013),¹⁵ extensive memorialization, opening of archives, revision of the curriculum, awarding of reparations, and Willy Brandt’s “Kniefall,” the latter being an important form of apology and acknowledgment (Rauer, 2006).

In the 1980s, further developments emerged, notably in Latin America. Of particular importance was Argentina’s Truth Commission’s report, *Nunca Más* (Sikkink and Booth Walling, 2006), which by “naming names” of perpetrators, including former high-level officials and politicians, had a seismic effect on the country and became a nationwide best-seller (Hayner, 1994, pp. 614-616). Later, Chile and Uruguay also established truth commissions and implemented other transitional justice mechanisms (Lessa, 2013, pp. 131-161).

¹⁵ Although the trial is considered controversial, its “significance came from the vast public attention it captured” (Pendas, 2006, p. 288-306). Further, “the Auschwitz Trial had a paradoxical result. On the one hand, it illuminated the crimes of Auschwitz for a public that was almost completely—and often deliberately—ignorant of them. The extensive press coverage forced Germans to confront Auschwitz.... On the other hand, the public also gained a skewed understanding of Auschwitz.... The limitations of the law obscured more than they revealed, by making the prosecution dependent on the same standards of illegality the Nazis themselves had used to investigate criminal activity in the camps. The reliance on the letter of the law legitimated the criminal Nazi state and set a standard for illegal behaviour in the 1960s Frankfurt courtroom that eerily echoed the laws of the Third Reich” (Wittman, 2012, pp. 271-272).

The much heralded South Africa TRC (Davis, 2016) was an important milestone as well, shining a light on the many violations of the state authorities, as well as providing other measures to address the legacy of *Apartheid*, some implemented and some not (Chapman and van der Merwe, 2008). The proceedings were telecast to the nation at large and exposed the long and bloody reign of the *Apartheid* regime, which was thoroughly discredited (Mamdani, 2002, p. 33-34; Chapman and van der Merwe, 2008). While from a scholarly point of view, the South African experience is an important if somewhat flawed process, “in the popular mind” it is a paradigmatic example of transitional justice (Daly and Sarkin, 2010, p. 8).

In the latter part of the 20th Century, a much stronger understanding developed regarding certain vulnerable groups and the abuses that they suffer related to their gender and/or age (Machel, 1996; Rehn and Johnson Sirleaf, 2002). There has been growing recognition that these vulnerable groups seek their demands for justice addressed on their own terms (Sullivan, 1994; Rubio-Marín and De Greiff, 2007). Thus, for example, the UN recognized the widespread sexual violence in conflict as deserving particular focus, leading to a number of protocols and the creation of both a high-level representative on sexual violence and another on children and armed conflict (Sullivan, 1994).¹⁶ In this regard, countries such as Tunisia took steps to ensure the participation of women in both consultations on the direction of the process and as principals

¹⁶ UNSC Res 1888 (30 September 2009) UN Doc/RES/1888; UNGA Res 51/77 (20 February 1997) UN Doc/A/RES/51/77: The Rights of the Child.” Available at: <http://www.un.org/documents/ga/res/51/ares51-77.htm> (Accessed: 30 January 2019).

in the measures themselves (e.g., the Chair of the Tunisian Truth and Dignity Commission (TDC) is a woman as well as a number of the commissioners) (Warren et al., 2017).¹⁷

Considerable attention has also focused on the child soldier phenomena, which raises questions on how to address children and young people who are both victims and perpetrators of atrocity crimes, as there have been in many countries, e.g., Sierra Leone. There is a difficult question of agency, as young persons will be of varying degrees of maturity and subject to influence (Aptel and Ladisch, 2011). While some bright line or definitive tests have been developed around the age of child soldiers and their accountability—for example, the ICC lacks jurisdiction over individuals under the age of 18—¹⁸many other issues are being wrestled with in terms of addressing their trauma and integrating them into their communities (Aptel and Ladisch, 2011).¹⁹ Given the on-going spread of the child soldier phenomena, this will be a continuing issue in the 21st Century.

3. Where do we stand: Challenges for transitional justice in the 21st century

¹⁷ International Center for Transitional Justice (n.d.) Tunisia Available at: <https://www.ictj.org/our-work/regions-and-countries/tunisia> (Accessed: Jan. 27, 2019).

¹⁸ Article 26 of the Rome Statute provides that the “Court shall not have jurisdiction over any person under the age of 18 at the time of the alleged commission of the crime.”

¹⁹ The New Humanitarian (IRIN News) (2011) Should Child Soldiers be Prosecuted for their Crimes? Available at: <http://www.irinnews.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes> (Accessed: 30 January 2019).

In turning to the 21st century, the context has changed drastically. Much has been written about the seemingly constant rise of populism, with the advent of e.g., Trump, Bolsonaro, Orban, Duterte, Erdoğan, and a range of “strongmen,” highlighting the related fragility of international law, international criminal law (Reydams, 2010), and human rights law (Alston, 2017). The current context is undoubtedly one of the challenges that advocates of human rights and transitional justice—which in many ways has become a global project²⁰ (Teitel, 2005; Nagy, 2008)—must contend with in the 21st century.

However, the developments in the last decades of the 20th Century continue to be debated today and inevitably inform the discussion below, where we address the principal issues facing transitional justice. While there are many challenges, we focus on those that, in our view, are the most pressing for the field, some of which have been foreshadowed above. We begin with the question of transitional justice’s definition, goals, and effects (section 3.1.), the relationship between transitional justice and criminal justice (section 3.2.), and the place of victims within transitional justice (section 3.3). We then discuss some challenges relating to the “check the box

²⁰ By “global project,” Nagy refers to “the fact that transitional justice has emerged as a body of customary international law and normative standards. I call it a ‘global’ project rather than an ‘international’ one in order to capture the three-dimensional landscape of transitional justice (local, national, global) and its location within broader processes of globalization. It is a ‘project’ by virtue of the fairly settled consensus—a consensus that has largely moved past the initial debates of ‘peace versus justice’ and ‘truth versus justice’—that there can be no lasting peace without some kind of accounting and that truth and justice are complementary approaches to dealing with the past. The question today is not *whether* something should be done after atrocity but *how* it should be done. And a professional body of international donors, practitioners and researchers assists or directs in figuring this out and implementing it.” (Nagy, 2008, p. 276).

approach” (section 3.4.), gender (section 3.5.), socioeconomic rights and equality (section 3.6.), and donors’ justice (section 3.7.).

These challenges come from what earlier approaches to transitional justice left unaddressed. As discussed above, the context in which the language of transitional justice arose—the early 1990s—played an important role in shaping transitional justice claims: it initially determined what was included in transitional justice, by defining its boundaries in relation to the practical dilemmas post-authoritarian societies were facing (Leebaw, 2008, pp. 101-102; Arthur, 2009, p. 343, 347). Thus, some of the challenges in the current century continue to test the limits of the field.

3.1. Transitional justice: What is it “for” and does it work?

What is transitional justice for? This is a hotly debated question, not because of disagreement about what the goals are but due to disagreement about the relationships between them and about what transitional justice is, its impact, and success.

Widely shared transitional justice goals by scholars include preventing future atrocity crimes, achieving reconciliation, contributing to a successful transition, and rule of law, state, and peace-building. Less far-reaching goals—though ambitious nonetheless—are providing victims with some form of redress, acknowledging the crimes, seeking truth, and achieving some form of accountability.

The debate lies principally on the relationship between these goals. The first question is whether transitional justice goals are complementary or whether they stand in tension to each other, as most transitional justice advocates seem to have thought at the beginning of the 1990s (Zalaquett, 1992; Van Zyl, 1999; Leebaw, 2008, pp. 97-98). While some argue that the dilemmas have been overcome, Leebaw (2008, pp. 97-98) has suggested that they may have become harder to evaluate to the extent that the goals have been reconceptualized in apolitical terms (Daly and Sarkin, 2010).

There is an air of paradox in the goals associated with transitional justice. There are conflicts between substantive and procedural justice and between reconciliation and nation-building; there is the challenge of achieving criminal accountability when violations have been committed by thousands of perpetrators; achieving reconciliation while “opening up old wounds”; and promoting a transformative agenda that at the same time is meant not to imperil the transition (Leebaw, 2008; Buckley-Zistel, 2015, p. 155). Nonetheless tensions may arise in practice, there is nothing in the goals that makes them incompatible: a complementary approach is sustainable (Roht-Arriaza, 2006) and desirable when weaving different transitional justice mechanisms into a coherent web (De Greiff, 2012). Moreover, the evidence seems to support complementary approaches: as Olsen, Payne, and Reiter (2010) have shown, specific combinations of mechanisms, rather than individual mechanisms alone, impact positively on human rights and democracy.

These varying goals have led scholars to view the field through different prisms. Even though some think that there are few theoretical attempts at conceptualizing transitional justice (De

Greiff, 2012, p. 32; Buckley-Zistel, 2015, pp. 1-2), a more accurate statement would be to say that there is no consensus on any conception of transitional justice. Some think transitional justice is just a form of ordinary justice (Posner and Vermeule, 2003), while others emphasize the particularities of pre-transitional states (Gray, 2006). Teitel (1997; 2003) has focused on the particularities of transitional justice and its relation between law and political transformation, while De Greiff (2012, p.59) has argued that transitional justice is a “principled *application* of justice in distinct circumstances.” More recently, Colleen Murphy (2017) has provided a theoretical account of transitional justice and its demands, which contests the idea of transitional justice as a mere compromise between different familiar kinds of justice and underlines transitional justice’s special nature. Others emphasize restorative justice, which aims for reconciliation by seeking to re-establish the relationships between victims and perpetrators and involving the wider community (Buckley-Zistel, 2015, p. 158; Furlas, 2015). Initially thought of as only applicable to lesser violations, some now argue it should extend to the most serious crimes (Braithwaite, 2002; McEvoy and Mallinder, 2012). Finally, there is the most recent transitional justice canon, which has been called the “fourth generation of transitional justice scholarship” (Balasco, 2018, p. 368): transitional justice as transformative justice.²¹ This idea is driven in large measure by Rama Mani’s work on reparative justice (Mani, 2002; Balasco, 2018, p. 369), as further discussed in section 3.5.

Thus, there is no consensus on any conception of transitional justice nor on the relationships between transitional justice’s goals. This makes the second question—on which there is not much consensus either — even more challenging: does transitional justice deliver on what its

²¹ The “fourth generation of transitional justice” has also been employed to refer to the turn towards local or grassroots justice (Sharp, 2013).

advocates promise? Empirical research exists, both on the impact of transitional justice (Pham and Vinck, 2007; Thomas et al., 2008; van der Merwe et al., 2009; Thomas, et al., 2010; Pham et al., 2016) and of international criminal law (Bass, 2008, pp. 240-241; Orentlicher, 2018).

Nevertheless, various theoretical issues need to be grappled with so that transitional justice's impact can be measured accurately. If we do not know what transitional justice is, and what it is for, it is difficult to determine whether it works and what these processes can accomplish (Bell, 2009). Indeed, some of the difficulties in assessing the impact of transitional justice are due to the elusiveness of defining success and over which period of time transitional justice's impact should be measured. Is the rule of law and democratic backsliding in Poland a failure of transitional justice or something else? There are additional methodological difficulties as well, such as the interactions among different transitional justice mechanisms operating simultaneously and their impact on the overall success of the process (Sikkink and Booth Walling, 2007, p. 435), and the significant variation of the same mechanisms across different societies (Kritz, 2009, p. 15).

Other issues, besides the difficult question "does transitional justice work," also require empirical assessment. These include whether the threat of prosecution hinders or helps peace processes (Ginsburg and Shaffer, 2010, p. 224); the impacts of testifying and of reparations on victims' well-being; which mechanisms are better suited to make international and domestic crimes known to victims; which participation mechanisms work better for victims; what the "downstream consequences" of peace agreements are (Aoláin and Brown, 2014, p. 130); which mechanisms make reconciliation between perpetrators and victims more likely; and the

effectiveness of guarantees of non-recurrence on victims but also on society generally (Mayer-Rieckh, 2017), among many others.

Ultimately, it is unclear to what extent the value of the transitional justice project depends on its results (and on which ones). If it were proven that transitional justice does not prevent atrocity crimes, would we be less committed to the project? It is an open question, though perhaps reflecting along these lines may help distil what is essential to transitional justice, what are the outcomes that matter most, and which mechanisms we value for their own sake even when/if they don't have any impact.

3.2. Transitional justice and criminal justice

A fundamental challenge for transitional justice results from the uneasy relationship between transitional justice and criminal justice. If we consider the Nuremberg trials as the birth of transitional justice (Teitel, 2003),²² we could say that, since its origins, transitional justice has been deeply intertwined with criminal justice. However, as discussed above, the term “transitional justice” was coined in the mid-1990s (Arthur, 2009, pp. 327-329; Bell, 2009, p. 6). At the time, the relationship between transitional justice and criminal justice was principally a dilemmatic one, for in some cases offenders remained as active political or military actors, and criminal trials threatened the consolidation of the transition itself (Zalaquett, 1992; Arthur, 2009, pp. 322-323).

²² However, as noted above, Jon Elster traces it back to Athens, in 411 B.C. and again in 404-404 B.C. (Elster, 2004).

Hence, the first tension between criminal and transitional justice relates to the goals of the transitional justice project—such as consolidating democracy or peace—and criminal justice. This is the well-worn “peace vs. justice” debate (or democracy vs. justice) (Sriram, 2004), which also dovetails with the discussion on whether there is a duty to prosecute offenders (McEvoy and Mallinder, 2012) even when prosecution can jeopardize the transition (Hayner, 2018). Though some think that this debate is over and that the consensus is that peace and justice are complementary (Michel and Del Mar, 2014), it seems that with the ICC as a permanent institution, the debate is only beginning. There is now no escape from the practical dilemma of whether the threat of prosecutions will hinder an ongoing peace process, as can be seen in the Northern Uganda and Darfur cases (Rodman, 2009, p. 111-120; Oette, 2010; Freeman, 2011), and thus, scholars and practitioners must take on this challenge. Rodman (2009, 2014), for example, has suggested that the prosecutor of the ICC should consider both the political context and the impact of her actions on peace-making when exercising her discretion, especially when insistence on prosecution may deter important actors from cooperating with peace negotiations. In this regard, the ICC Statute does contain a provision that provides the Prosecutor discretion to forgo an investigation not “in the interests of justice.” While some thought that the Prosecutor might consider foregoing a prosecution due to ongoing negotiations, this provision has been interpreted narrowly, to wit:

there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor (ICC, 2007).

Thus, it is unlikely that the Prosecutor will utilize the “interests of justice provision” with respect to peace agreements. On the other hand, under the Rome Statute, the UN Security Council can defer a prosecution for up to one year renewable in accordance with Article 16. While there have been proposals to utilize Article 16, this step has not been activated thus far.²³ Finally, as this article was going to press, in a controversial decision, a Pre-Trial Chamber of the ICC applied a new standard in interpreting the “interests of justice.”²⁴ It gave weight to factors such as the unlikelihood of cooperation by the relevant parties, changes in the “political landscape both in Afghanistan and in key states,” and the “complexity and volatility of the political climate still surrounding the Afghan scenario.”²⁵ Thus, in this controversial decision to reject the Prosecutor’s request to open an investigation of crimes committed in Afghanistan, the Pre-Trial Chamber essentially recast the “interests of justice” (Whiting, 2019).

Related to the peace and justice debate is the question of amnesties, granted extensively in, e.g., Northern Ireland, South Africa (McEvoy et al, 2015). However, with the establishment of the ICC, there is a strong legal argument that amnesties are “off the table” for atrocity crimes (Freeman, 2011, pp. 50-54; Michel and Del Mar, 2014, pp. 866-872). Nonetheless, amnesties for other crimes are not prohibited by international law, and in some cases, such as under Protocol II of the Geneva Conventions, which covers non-international armed conflicts, authorities are encouraged to grant amnesties to certain actors. This provision was utilized for some members of

²³ However, Article 16 was raised in the context of the Darfur debates (Oette, 2010, p. 346).

²⁴ *Situation in the Islamic Republic of Afghanistan* , (Decision, Pre-Trial Chamber II), ICC-02/17 12 April 2019, para. 33-35; 87-96.

²⁵ *Id.* para. 94.

guerrilla groups in resolving the conflict in Colombia (Alto Comisionado Para al Paz, 2016).

Broader amnesties have also been granted in other countries, including, e.g., Uganda (Uganda Legal Information Institute, 2000).

Indeed, if we look at the numbers, they tell an interesting story: since WWII, there have been some 420 amnesty processes in different countries. Sixty-six of those occurred between 2001 and 2005 (Hamber, 2012, pp. 333-334). Although the more accepted view of amnesties is that they are a form of impunity and likely to lead to more abuses (Pensky, 2008), a controversial proposition emerges from these numbers: amnesties themselves can be a transitional justice mechanism (Freeman, 2011, p. 19; Hamber, 2012, pp. 333-334).

Mark Freeman (2011), for example, argues for a broader use of amnesties, positing that, properly deployed, they are a key element in peace processes and in combatting violent extremism (Slye and Freeman, 2018). Some have also suggested that amnesties might be effective in curbing abuses when implemented in a credible way (Snyder and Vinjamuri, 2003/2004, p. 6).

Additionally, amnesties may be employed either as part of a restorative justice framework, i.e., as part of a process aimed at encouraging previous offenders to offer truth in return for non-prosecution or as part of a process of reconciliation between previous combatants and their community (McEvoy and Mallinder, 2012). This was the case in South Africa, where the TRC utilized amnesties in a number of cases “in exchange for” truthful testimony about crimes and abuses committed.²⁶ Ultimately, this process proved controversial, as noted above (Stanley, 2001).

²⁶ Nevertheless, the TRC failed in a number of important respects (Stanley, 2001).

Nonetheless, the question of amnesties is one that no doubt will continue well into the 21st century, and one that is worth exploring empirically and theoretically. In this century, amnesties face a very important challenge: they are no longer within any individual state's control. With the rise of international criminal law and the principle of universal jurisdiction and the increasingly important role of regional courts, it is uncertain whether amnesties adopted at the domestic level will be upheld by other actors in the global arena (Freeman, 2011, pp. 3, 28-29).²⁷ At least in the American continent, the answer seems to be negative (Binder, 2012).²⁸ Additionally, except where an amnesty falls within the confines of international law, as in Colombia, it is unlikely that the ICC Prosecutor or the Court will defer to national reconciliation programs that involve amnesties (Robinson, 2003, pp. 482-483).

Another aspect in which the relationship between transitional and criminal justice is troubled is in the emphasis on criminal justice. Scholars and practitioners alike have rightly complained about the disproportionate attention that criminal justice, and in particular, international criminal law, have received over other transitional justice mechanisms (Megret, 2014, p. 43). This focus is troubling: while many practitioners and advocates for transitional justice believe it is important

²⁷ Freeman (2011) refers to this challenge as the potential “undoing of amnesties.”

²⁸ The Inter-American Court of Human Rights for example has been consistently opposed to amnesties. See *Almonacid-Arellano et al. v. Chile* (Judgment) (26-09-2006) and *Gelman v. Uruguay* (Judgment) (24-02-2011), *Barrios Alto v. Peru* (Judgment) (14-03-2001). In *Gelman v. Uruguay*, the Court declared that Uruguay's amnesty law, which had been passed democratically and later reaffirmed two times by popular referendum, ought to be annulled. On this, see Gargarella (2015).

to bring those most responsible for atrocity crimes to justice, the limitations of criminal justice are clear. These tensions come into even sharper focus with the establishment of the ICC, which has largely developed in the 21st Century.

The first obvious difficulty is that the sheer number of crimes and perpetrators is beyond the capacity of any judicial system. For example, in Rwanda, as of 2005 it was estimated that bringing all the remaining accused—10,000 already had been through some type of criminal justice process—to justice would take 80 years (Schabas, 2005).²⁹ In the former Yugoslavia, the ICTY tried 121 alleged perpetrators out of a pool of at least 10,000 persons who committed atrocity crimes in Bosnia-Herzegovina alone.³⁰ One practice that developed to address this issue was limiting prosecutions to the perpetrators who committed the most serious crimes, which has various formulations but relies on the level of the perpetrator in the political or military structure who committed the crimes as well as the number of victims (and in some instances, the heinousness of the crimes) (Nizich, 2001). This was certainly the case of the ICTY and the ICTR and was followed by the ICC as well as domestic justice efforts, e.g., Colombia (Tolbert, 2014).

²⁹ Straus (2006) estimates that around 200,000 individuals were perpetrators in the Rwandan genocide.

³⁰ 161 individuals were indicted, but only 121 were tried (the remainder were transferred to other courts, died during the proceedings, etc). ICTY (n.d.) Key Figures of the Cases. Available at: <http://www.icty.org/en/cases/key-figures-cases> (Accessed: 30 January 2019). Many more were tried in national courts but still fell far short of the estimated perpetrators.

As a result, criminal prosecutions—domestic or international—are generally limited to some senior figures.³¹

Another limitation of criminal justice comes from the nature of the trial itself. With its many formalities and unclimactic dynamics, as well as its focus on the individual, it has been criticized by many for being reductive (Anderson, 2009, pp. 336-337) and unable to capture in any meaningful way the context of mass atrocity—or “criminal normality”—in which atrocity crimes are usually committed (Koskenniemi, 2002, pp. 12-14; Drumbl, 2007). A second kind of “reductivist” charge goes further: it is not just that the crimes are judged individually and in abstraction from the context of mass atrocity, but also that the material circumstances in which these crimes are rooted, the systemic violence of the contemporary social order (Krever, 2014, pp. 130-131), and “forms of structural or slow violence” as well as gender hierarchies (Nesiah, 2006a, pp. 21-22) and the context of colonialism (Gevers, 2014), that may have contributed to the commission of the offenses, are left unaccounted for (Burgis-Kasthala, 2016, p. 936; Nesiah, 2017, p. 98).

These “reductivist” charges are compounded by the selectivity of the criminal process (Gevers, 2014, p. 235). The problem is not only that the vast amount of crimes that are left unpunished, but also the types of violence excluded from transitional justice. In this regard, the failure to

³¹ There are exceptions, however, for instance the prosecution of “rape camps” in Bosnia Herzegovina. See, ICTY (n.d.) Landmark Cases. Available at: <http://www.icty.org/en/features/crimes-sexual-violence/landmark-cases> (Accessed: 30 January 2019).

address colonial crimes (Arthur, 2009, p. 342; Balint et al., 2014, p. 196),³² and colonialism's legacies and neo-colonial forms of governance in the Global South (Burgis-Kasthala, 2016, p. 935), which are related not just to criminality but also to grave material inequality, are particularly salient.

Third, some worry about the trial becoming a “show trial” (Koskenniemi, 2002, p. 1) or being perceived as “victor’s justice,” being unable to escape politics, or serving as an instrument to mask power and politics (Simpson, 2007; Bass, 2008; Krever, 2014). Nevertheless, the issue of “victor’s justice,” which raised serious questions in Nuremberg and Tokyo, has been largely addressed by the establishment of a permanent international criminal court. Yet, the failure of the United States, China, and Russia to join the ICC and the fact that as UN Security Council members they can vote to refer other states to the court, has led to criticism for lack of universalism. The ICC has been called “an African court” (Bass, 2008, p. 233), meting out punishment against less powerful states. So even if not victor’s justice, as traditionally understood, some see it as justice of the Great Powers against the powerless (Bloxham, 2010, p. 630) and as instrumental in perpetuating the image of Africa as a “site of political savagery” (Megret, 2014, p. 35-36). The recent prosecutions at the ICC do little to address these worries (Schwöbel-Patel, 2016), though some of the criticisms are overblown and politicized themselves: the countries that have complained the loudest are states that have ratified the Rome Statute, and the first three cases were referred by the affected states themselves (Bloxham and Pendas, 2010,

³² Balint et al. (2014, p. 196) note that “the extensive and enduring harms caused by settler colonial practices and policies in countries such as Australia, New Zealand, Canada and the US have not constituted the traditional focus of transitional justice discourse and practice.”

pp. 630-631; Lugano, 2017, pp. 10-11, 26). Nevertheless, the backlash in Africa has made the Court appear ineffective and politically weak.

Turning to the question of “show trials,” Lawrence Douglas (2005) posits that the term “show trial” masks an important educative purpose of trials. He examined the Eichmann trial, arguing that this, and other trials of Nazi leaders, were “show trials” in the broadest sense: they aimed to do justice both to the defendants and to the history and memory of the Holocaust (Douglas, 2005, pp. 97-182). While he admits flaws in these trials, he sees them as an attempt to “reconcile the interests of justice and pedagogy,” defending them as imaginative responses to extreme crimes. In line with Douglas’s view, we should not exaggerate the weight of the “show trial” objection. Although atrocity crimes test “the plasticity of the trial form,” it is worth remembering that there are “good” and “bad” show trials (Douglas, 2005, p. 3). There is a significant difference between a trial that aims to preserve the integrity of the justice system and is committed to due process (even if the nature of the crimes puts pressure on the trial form) and a true “show trial,” reminiscent of Stalinist fraud and miscarriage of justice (Shklar, 1986, pp 144-145; Douglas, 2005, p. 3). And, certainly, a trial constitutes moral progress to simply summarily executing those deemed responsible, as was entertained by the British after WWII (Douglas, 2005, p. 111).

Finally, as a tool of transitional justice, there are doubts about the goals and effectiveness of criminal punishment. Some have noted that no punishment could ever be proportionate to the nature of the crimes (Gevers, 2014, p. 235). And there is no consensus on the justification and goals of punishment, which vary among deterrence, retribution, rehabilitation and incapacitation

(Gevers, 2014, p. 234), moral pedagogy (Bloxham et al., 2010, p.618), didactic legality (Douglas, 2005), and an expressive account (Sloane, 2007).

Ultimately, underlying all these critiques, there is the tension between the “ordinary” criminal approach and the extraordinary nature of the crimes themselves, as emphasized by Arendt (1973). Moreover, criminal trials by themselves are inadequate to fully address the injuries of the victims. In light of this, we would argue that although criminal justice has an important role to play and is a key element of transitional justice,³³ the limitations of criminal justice are clear, and the importance of other mechanisms essential.

3.3. Transitional justice and victims

That victims should be at the heart of the process is a generally accepted tenet of transitional justice. Ideally, the process should consider victims’ interests and give them a voice in the design of transitional justice mechanisms. Yet, it must be acknowledged that social movements and victims’ groups too often remain on the margins of transitional justice scholarship, discourse, and practice (Gready and Robins, 2017, p. 958).

Within the international criminal process, the place of victims has only recently been emphasized. Previously, the Nuremberg and Tokyo tribunals, as well as the tribunals for Former Yugoslavia, Rwanda, and Special Court for Sierra Leone, adopted more common law-oriented

³³ International Center for Transitional Justice (n.d.) Criminal Justice. Available at: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (Accessed: 30 January 2019).

approaches, which limited victims' participation to appear primarily as witnesses (Ferstman, 2010, p. 407). This has changed, with the ICC's statute providing for a more victim-centered procedure and for the possibility of reparations and the establishment of a Victims Trust Fund (Ferstman, 2010, p. 407). Yet, these advances cause some to worry that strengthening victims' role in criminal proceedings may harm the rights of the defense, while others are troubled by the practical difficulties posed by their involvement (Ferstman, 2010, p. 407).

However, the role victims should play in transitional justice processes goes beyond the confines of the criminal trial. The underlying idea is that we should be wary of transitional justice *for* the victims when it is transitional justice *without* the victims: the latter brings continuity to their previous marginalization. As discussed below, we think that one of the main challenges of transitional justice in the 21st century is moving away from the "check the box" approach.

Transitional justice mechanisms should be designed and implemented with the contribution and input of victims and those affected: what is called a "grassroots approach" to transitional justice (Lundy, 2008). The shift to restorative justice is one way in which this can be done, particularly in promoting local mechanisms, which have found expression in the Gacaca tribunals in Rwanda, Mato Oput in the Acholi region of Northern Uganda, and similar approaches in Timor-Leste, Sierra Leone, and Guatemala (Nouwen and Werner, 2014; Buckley-Zistel, 2015, p. 155).

Even if widely shared among scholars and practitioners, there is a danger of the idea of a victim-centered approach to transitional justice becoming a mere platitude (McAuliffe, 2017, pp. 231-232). A major challenge is to come up not with a theoretical argument in defense of victim-

centered approaches, but with ways of putting the theory into practice while being responsive to different social circumstances.

The initial challenge is determining what victims want. Victims' wishes and goals vary significantly across different countries,³⁴ according to cultural differences, age, gender, over time, and among victims themselves (McKay, 2013, p. 924). Additionally, different contexts pose different challenges: sometimes there will be an enormous number of perpetrators, e.g. Rwanda, and some individuals will be both victims and perpetrators (e.g., child soldiers).

A second challenge is to develop a rigorous conceptualization of civil society and of the local (Nyseth-Brehm and Golden, 2017; Gready and Robins, 2017) that does not equate civil society with non-governmental organizations and does not exclude nor marginalizes victims' groups and non-governmental institutions.³⁵

Finally, the tension that some think is rising between the preferences of the international community and the preferences of victims, who may favor mechanisms that have little to do with the liberal international ones (Goldstone et al., 2007; Moyn, 2016, p. 87) is also worth exploring.

³⁴ In post-authoritarian regimes, like Chile and Argentina, accountability seemed key to the victims. Yet, some think that this doesn't hold in post-conflict situations: here, it has been suggested that the key concern of people on the ground is access to material goods. See: Vinjamuri's remarks in Goldstone et al., (2007). Other studies suggest otherwise (Bass, 2008, p. 239).

³⁵ The Catholic Church, for example, played an important role in Latin America and Eastern Europe in transitional justice processes. On the role of religion and religious organizations in transitional justice (Philpott, 2007).

For example, transitional justice initiatives that fail to prosecute those culpable due to a conscious choice of the domestic society would be in tension with states' duty to prosecute, and it is unlikely that forms of accountability different from the criminal trial would be enough (McAuliffe, 2017, p. 231-232), unless they worked within the framework of international law (e.g., Colombia).

These concerns acquire renewed urgency when we consider societies where the transitional processes have been administered and sometimes also triggered by outside actors—e.g. UN peacekeeping troops, international NGOs, the EU, US troops—as has happened in East Timor, Sierra Leone, Afghanistan, and Iraq (Brooks, 2003). These situations will present new challenges for transitional justice, especially concerning the place of victims in the transition.

3.4. Transitional justice and the “check the box” approach

As transitional justice has evolved into a field, there have been normative developments that have both defined the term and its deployment. Perhaps the most significant development in this regard was the UN Secretary-General's Report on the Rule of Law and Transitional Justice (the “Report”),³⁶ which defined transitional justice primarily around certain mechanisms:

³⁶ UNSC ‘The Rule of Law and Transitional Justice in Conflict and post-conflict Societies: Report of the Secretary-General.’ (23 August 2004) UN Doc S/2004/616. Available at <https://www.un.org/ruleoflaw/files/2004%20report.pdf>

The notion of ‘transitional justice’ discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) *and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.* (ibid, emphasis added).

The Report, issued in 2004, reflected the prominent developments of the time, e.g., the South African Truth and Reconciliation Commission, the *ad hoc* Tribunals. It is noteworthy that the Report focused on the “rule of law,” rather than other issues, e.g., reckoning with the past, reconciliation, and that it failed to emphasize sufficiently the role of affected communities in these processes.

Despite these shortcomings, the Report helped solidify and define transitional justice as a field. In some ways, it set its parameters in what the Report itself refers to as the “four pillars” of transitional justice: truth commissions and memorialization, criminal prosecutions, reparations, and guarantees of non-recurrence.³⁷ At the same time, there is a tendency for this approach to contribute to transitional justice becoming a kind of template, particularly utilized in the aftermath of violent conflicts:

³⁷ Pablo de Greiff (2012 p. 31) writes that the Report reflects a “growing common sense about [the notion’s] general character”. On reparations (de Greiff, 2006); on truth commissions (Hayner, 2010).

Transitional justice efforts are often criticized as being understood and implemented as a template or a toolkit—that is, a narrow set of measures to be applied uniformly wherever widespread human rights violations have occurred (Duthie and Seils, 2017, p. 9).³⁸

Thus, an implicit hypothesis has emerged in some quarters that if these measures are implemented and sequenced properly, progress is likely if not inevitable, and it appears that some processes have applied the “four pillars” in a mechanistic manner. South Sudan is perhaps the more recent example, as an internationally facilitated peace agreement provided for a hybrid court when there was, e.g., no capacity to create or staff such a court in the country (Rule of Law Initiative, 2014).³⁹ Considerable time was spent on establishing a court that is unlikely to “get off the ground,” much less have any impact (Kumalo and Lucey, 2017; Babiker, 2018).⁴⁰ Other processes have failed to fully understand or consider the political context. For example, following the post-election violence in Kenya, a peace agreement was agreed upon, providing a range of transitional justice measures, including, e.g., a specialized court, reforms, a truth

³⁸ Expressing the same concern (Herman et al., 2013)

³⁹ “Unanimous interviews indicate that there is no current or near-term capacity in the [South Sudan] national justice system for accountability proceedings concerning atrocity crimes involving relatively major political or military figures. Multiple interlocutors identified the same three basic factors: (1) lack of competence to carry out such trials; (2) lack of the necessary independence from the Government; and (3) lack of public trust. South Sudan’s justice system, which has long been underdeveloped, has ground to a halt in the wake of the current conflict.” (Rule of Law Initiative, 2014, pp. 6 - 9. (footnotes omitted).

⁴⁰ Human Rights Watch (2017) South Sudan: Stop Delays on Hybrid Court: Four Years Into Conflict, Rampant Abuse. Available at: <https://www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court> (Accessed: 30 January 2019)

commission, and reparations.⁴¹ The Kenyan process has had a number of setbacks, including the dropping of ICC cases largely due to witness intimidation,⁴² and deep issues of political interference with the Truth, Justice and Reconciliation Commission (TJRC), as documented by international TJRC commissioner Ron Syle (2018). While the problems suffered in these cases are attributable to many factors, they represented very ambitious processes arguably linked to the

⁴¹ See: “Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government.”

(2008) Available at:

https://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080228_Acting%20Together%20for%20Kenya-Agreement%20on%20the%20Principles%20of%20Partnership%20of%20the%20Coalition%20Government.pdf

(Accessed: 30 January 2019); “Kenya National Dialogue and Reconciliation: Statement of Principles on Long-term Issues and Solutions.” (2008) Available at:

https://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080523_Kenya%20National%20Dialogue%20and%20Reconciliation%20Statement%20of%20Principles%20on%20Long-term%20Issues%20and%20Solutions.pdf

(Accessed: 30 January 2019); “Kenyan National Dialogue and Reconciliation: Truth, Justice, and Reconciliation Commission.” (2008) Available at:

https://peacemaker.un.org/sites/peacemaker.un.org/files/KE_080304_Kenyan%20National%20Dialogue%20and%20Reconciliation-Truth%20Justice%20and%20Reconciliation%20Commission.pdf (Accessed: 30 January

2019); “Kenyan National Dialogue and Reconciliation: Commission of Inquiry on Post-Election Violence.” (2008)

Available at: <https://www.hdcentre.org/wp-content/uploads/2016/06/6-Commission-of-Inquiry-of-Post-Election-Violence-Kenya-National-Dialogue-and-Reconciliation-4-March-2008.pdf> (Accessed: 30 January 2019).

⁴² Open Society Initiative. (2016) Witness Interference in Cases Before the International Criminal Court. Available at: <https://www.opensocietyfoundations.org/sites/default/files/factsheet-icc-witness-interference-20161116.pdf>

(Accessed: 2 February 2019)

kind of “standard menu” or “check the box” approach employed in creating the measures in the first place.⁴³

This “check the box” approach appears to arise particularly when the international community takes the lead and defines the processes in peace agreements, when the voice of the victims may be less likely to be heard and/or drowned out by international experts. Interestingly, this tendency towards a formulaic approach is hardly limited to the transitional justice field, and Thomas Carothers (1999) makes a similar observation regarding rule of law assistance.

Yet, such an approach loses sight of the fundamental importance of the national context. As noted by Mutua (2015, p.5):

Dogmatic universality is a drawback to an imaginative understanding of transitional justice. In matters of social transformation, close attention must be paid to context and location. That is why it is intellectually indefensible to create a transitional justice blueprint ready for export.

Moreover, there is evidence that transitional justice processes are more effective for affected communities and long-term stability when context is taken into account when designing them (Douglas, 2005; Duthie and Seils, 2017). The inclusion of victims and affected communities in consultations appears to improve the understanding of the national context by all concerned (Duthie and Seils, 2017). The Kofi Annan Foundation and ICTJ have made an important contribution in this regard, by pointing out the importance of assessing certain factors when

⁴³ International Center for Transitional Justice (2014). Can Truth Commissions Strengthen Peace Processes?.

Available at: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (Accessed: 30 January 2019).

thinking about the establishment of a truth commission within a particular peace agreement.⁴⁴

The challenge in this century is to break away from the confines of the Report—and orthodoxy generally—and pay closer attention to national context and victims.

3.5. Transitional justice and gender

Absent from early conversations on transitional justice was a gender perspective (MacKinnon, 2013, p. 117; Megret, 2014, p. 36). This is particularly troubling given that, in many places, women have been the driving force of transitional justice initiatives from civil society. These include the Grandmothers of the Plaza de Mayo in Argentina, the Mothers of Srebrenica, and victims' groups in Chile, El Salvador, and Guatemala, to name a few.

Women's presence in transitional justice has been traditionally reduced to their participation as witnesses to their own victimization or to the victimization of their loved ones (Nesiah, 2006a, p. 804). Otherwise, their experiences of conflict and their demands have been largely excluded from transitional justice projects (Bell and O'Rourke, 2007, p. 23). Moreover, the process by which transitional justice mechanisms have been negotiated and produced have been almost entirely elite and male-dominated (Bell and O'Rourke, 2007, p. 25; Arthur, 2009, p. 347). It is unsurprising that as a result, transitional justice mechanisms themselves did not include women's concerns for far too long.

⁴⁴ International Center for Transitional Justice (2014) Can Truth Commissions Strengthen Peace Processes?

Available at: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (Accessed: 30 January 2019).

Nevertheless, already in the 1990s the major focus of feminist demands on transitional justice was on the need to end impunity for violence against women (Bell and O'Rourke, 2007, p. 26). Among the advancements of this time was the inclusion of rape as both a war crime, a crime against humanity, and a form of genocide in the jurisprudence of the ICTY and ICTR (Bell and O'Rourke, 2007, p. 27).⁴⁵ Similar gains have been made more recently in other areas: truth commissions have acknowledged gender or sexual violence as part of their mandates (Bell and O'Rourke, 2007, p. 28; Fischer, 2011, p. 412). In particular, the Colombian peace process included a sub-commission on gender that integrated both women and LGBTI organizations (Céspedes-Báez, 2017; Langlois, 2017, pp. 165-166). In Tunisia, a similar approach was adopted with a Gender Sub-commission as part of the TDC. Moreover, the UNSC has issued several resolutions on gender and the aftermath of violent conflict;⁴⁶ and the Office of the Prosecutor of

⁴⁵ Also see the landmark decisions of the ICTY in *Mucic et al.*, in which it considered rape to be a form of torture, and *Furundzija*, where the Trial Chamber stated that rape can be prosecuted as a grave breach of the Geneva Conventions and that it may be used as a tool of genocide; and *Kunarac et al.*, where the court dealt with sexual enslavement (International Criminal Tribunal for the former Yugoslavia. Available at <http://www.icty.org/en/features/crimes-sexual-violence/landmark-cases> Accessed: 1 April 2019).; as well as the ICTR *Akayesu* case (*Prosecutor v. Akayesu*, (Judgment) No. ICTR-96-4-T (September 2, 1998)), where it concluded that rape constitutes genocide.

⁴⁶ The principal one is UNSC Res 1325 (31 October 2000), UN Doc S/RES/1325. Although it has been criticized for conflating gender with women (Langlois, 2017, p. 155-160).

the ICC as well as the UN High Commissioner for Human Rights have embraced expansive notions of gender-based violence and crimes (Office of the Prosecutor, ICC, 2014).⁴⁷

However, some of these advances have been criticized from a feminist and gender perspective (Bell and O'Rourke, 2007, p. 33; Megret, 2014, p. 37).⁴⁸ Importantly, most of the work on sexual violence within transitional justice has focused on women, and as a result, violence against gender and sexual minorities remains largely unexamined both in practice and in scholarship (Bueno-Hansen, 2017, p. 127). A more expansive conception of gender-based violence is needed, which includes violence against women but also some forms of violence against males (Kapur and Muddell, 2016) and persons perceived as not conforming to gender stereotypes—such as homophobic and transphobic violence—without at the same time obscuring the violence committed against women (Langlois, 2017, p. 150).

Despite these important critiques, the establishment of sexual violence as an international crime and its prosecution in international courts are significant breakthroughs, particularly in a world

⁴⁷ UNGA 'Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the Office of the United Nations High Commissioner for Human Rights' (30 June 2014) UN Doc A/HRC/27/21.

⁴⁸ Campbell (2007), for instance, has analysed how international legal rules and practices on the prosecution of sexual violence that took place during armed conflict can instantiate and reiterate, rather than transform, existing hierarchical norms of gender. See also, Bueno-Hansen, 2018. And Kapur (2002) has examined how the international women's rights movement has reinforced the image of the woman as a victim, thereby reinforcing gender and cultural essentialism.

where sexual violence is pervasive in the everyday lives of women and rules on sexual violence are often not enforced (MacKinnon, 2013).

Nonetheless, perhaps the most important challenge lies in incorporating women in the decision-making process. Some advances have been made in this regard, as can be seen in recent peace agreements (Bell and O'Rourke, 2007, p. 32). However, it is important to emphasize that gender balance alone is an insufficient indicator of whether transitional justice mechanisms will properly address gender-related violence (Nesiah, 2006b, p. 10), and of whether it will translate into effective participation and influence over the process. Women may encounter resistance, marginalization, or exclusion in these very same mechanisms (Aoláin and Brown, 2014, p. 134). Although training on gender sensitivity may be a partial solution to some of these issues (Nesiah, 2006b, p. 12), the dynamics inside transitional justice mechanisms might be influenced by the pre-transition power and gender structures (Aoláin and Brown, 2014, p. 135; McAuliffe, 2017, p. 262). There are ways to ameliorate their replication (Aoláin and Brown, 2014, p. 135), but this is related to transitional justice's limited ability to deal with some background societal conditions, such as gender discrimination, that sometimes might shape the transition itself.

3.6. Transitional justice as transformative justice: Socioeconomic rights and equality (ESC)

The fissure between civil and political rights ("CPR") and ESC has a long history, perhaps best illustrated by the decision to divide the key normative document(s) on human rights into two separate Covenants—one devoted to ESC rights and the other to CPR (ICESCR; ICCPR).

Indeed, the United States and some of its allies have not ratified the ESC Covenant,⁴⁹ which relates to these countries' adoption of neo-liberal economic agendas during the post-war period. However, in other countries, both in Latin America and in Europe, ESC rights not only became law, but have also been enforced in courts (Rodriguez-Garavito, 2011).⁵⁰

In the 21st century, criticisms have been made against the “human rights movement” for failing to take ESC rights seriously, most prominently, by Samuel Moyn. He argues that the human rights movement has failed to address issues of economic inequality, only giving haphazardly rhetorical support to economic subsistence efforts. In some of his writings, Moyn (2016) goes further, implying that the human rights movement is linked to the rise of what he calls the “neo-liberal maelstrom.”

While Moyn's claims of a link between neo-liberalism economics and the human rights movement is off the mark (De Búrca, 2018), we agree there has been a failure to address

⁴⁹ While Jimmy Carter signed the ICESCR in 1977, the United States has yet to ratify the Covenant. For more in depth understanding of the United States' position on economic, social and cultural rights, *see generally* William Mozdzierz, Head of the U.S. Delegation to Geneva: US Mission to International Organizations in Geneva (2017) U.S. Explanation of Position on the Realization of Economic, Social and Cultural Rights. . Available at: <https://geneva.usmission.gov/2017/03/23/u-s-explanation-of-position-on-the-realization-of-economic-social-and-cultural-rights/> (Accessed: 28 January 2019).

⁵⁰ *But cf.* ECSR-Net (2013) How do we make economic, social and cultural rights a reality in Latin America? Available at <https://www.esr-net.org/news/2013/how-do-we-make-economic-social-and-cultural-rights-reality-latin-america> (stating that “the judicial enforcement of [economic, social and cultural] rights has advanced considerably in Latin America ...”) (Accessed:9 October 2019).

economic rights. This is glaringly obvious in the context of the United States, particularly compared to, e.g., some countries in Latin America and Europe. Philip Alston (2017, p. 269), who has served as the Special Rapporteur on ESC rights, has criticized Moyn on his overall view on the human rights movement, but he agrees that “mainstream human rights advocacy addresses economic rights in a tokenistic manner at best, and the issue of inequality almost not at all” and has called for a renewed focus in the human rights agenda.

Moyn (2016, p. 186) focuses on human rights and gives little attention to transitional justice, except to dismiss it.⁵¹ However, the most recent candidate for the transitional justice canon—transitional justice as transformative justice—focuses precisely on how transitional justice has historically excluded issues of economic inequality, structural violence, redistribution, and development (Miller, 2008), and what can be done to change this.

The idea of transformative justice is just developing. A plethora of definitions have been offered, but the common ground seems to be the goal of achieving societal transformation by utilizing transitional justice tools in order to account for long-term structural injustices, and in particular, socio-economic injustices and inequality (Lambourne, 2013, p. 20; Gready and Robins, 2014, p. 340; Moyo, 2014; Evans, 2015, p. 5; Balasco, 2018, p. 368). It is unclear whether transformative justice aims to replace transitional justice by providing a new approach to achieving justice for violations rooted in structural causes (Evans, 2015; Evans, 2018), or whether it aims to work

⁵¹ Moyn (2016, p. 186) briefly mentions transitional justice: "An entire field of "transitional justice" theorizing pathways to democracy was founded that, with rare exceptions, disregarded or marginalized distributive questions and paid no mind even as the conditions for inequality were laid."

within the field of transitional justice (Lambourne, 2013; Gready and Robins, 2014; Balasco, 2018, p. 368). Most of the proponents of transformative justice believe that reparations have the greatest potential to achieve transformation, by expanding transitional justice beyond corrective justice and encompassing distributive justice and thus transform the circumstances of poor victims (Mani, 2008, p. 256; Uprimny Yepes, 2009, p. 637; Lambourne, 2013, p. 29; Gready and Robins, 2014, p. 347). The potential of truth commissions to acknowledge and investigate structural inequalities has also been noted (Mani, 2008, p. 256).

Yet, transformative justice has been criticized for lacking a clear definition and a theory of change and for its uncertain relationship to transitional justice (Baldasco, 2018, p. 370), as well as its lack of attention to the different types of post-war states and their circumstances, and the lack of an account of how the theory can be put into practice (McAuliffe, 2017, pp. 21, 34). The idea of transformative justice also brings new tensions to the goals of transitional justice. This issue requires careful exploration: particularly due to the scarcity of resources, achieving the goals of transitional justice will often come at the detriment of the goals of transformative justice and vice versa (Baldasco, 2018, p. 371). It is not clear where the priority should be.

We agree that inequality and the structural causes of violence need urgent attention and action, and that little attention has been paid to them by the human rights movement—particularly in neoliberal economies—and in transitional justice processes where the context clearly demanded it. As noted by Miller (2008, pp. 280-281):⁵²

⁵² Miller, however, acknowledges that both South Africa and Rwanda have addressed or engaged with questions of land and resource distribution in realms other than transitional justice mechanisms and institutions. See also, (Buckley-Zistel, 2015).

[A]partheid in South Africa after the TRC can become a story about racism or about specific, individual rights violations rather than about long-term, systemic abuses born of a colonial project with economic objectives.... The genocide in Rwanda can become a story of historic ethnic hatred between Hutu and Tutsi rather than a narrative of decades-long resource inequity, unequal land distribution and colonial constructions.

However, although inequality and poverty are often linked to victimization, not all atrocity crimes are directly or primarily related to inequality or ESC rights, and thus, these issues will not always fall within the ambit of transitional justice and will have to be addressed on a broader plane. Moreover, poverty and social injustice should be alleviated and hopefully eliminated across society *as a whole*. The transformative approach to transitional justice has the danger of becoming social justice for victims while excluding the rest of society. This is a troublesome implication, though not a necessary consequence of the transformative justice project.⁵³

We would also argue that there is an important difference between finding ways to address ESC rights and inequality within transitional justice projects (when pertinent) and trying to achieve societal transformation through them. Although social justice is a worthy goal to pursue, and some transitional justice mechanisms may be useful in advancing it, there is limited empirical evidence to support this proposition. Moreover, not every goal worth pursuing is, or in any case should be, pursued through the transitional justice project. Other institutions/processes, such as taxation, for instance, may be more adept at accomplishing this goal, or different political

⁵³ Uprimny Yepes (2009), for example, has made a significant effort in putting content to the idea of transformative reparations.

systems, e.g., social democracy, may more broadly address these issues. The transformation of society and the achievement of social justice require tremendous institutional efforts: they require a system of taxation, well-functioning judicial systems, a social welfare network, and so on. All of these go well beyond anything a theory of transitional justice may offer.

The reality is that systematic violations of ESC rights and grave material inequality do not constitute atrocity crimes. It remains an unanswered question whether they should, and one worth debating. And whether transitional justice can be expanded coherently to include these issues remains to be seen. Truth commissions and reparations may indeed contribute to fill these gaps, as has been done in some countries (Arthur et al. 2012; Correa, 2015). Moreover, the ICC Victims Trust Fund/reparations program has recently moved towards a more expansive notion of reparations, by including the construction of community centers, providing housing, etc.,⁵⁴ which can be seen as a move towards acknowledging, if in a limited way, the importance of ESC rights. In any event, this debate needs to be taken seriously, particularly with rising inequality in many parts of the planet.

3.7. Transitional justice and “donors’ justice”

One element that strongly shapes the transitional justice agenda is the role of donors. Transitional justice processes and the national or international groups that support them require funding (Arthur, 2018). Most of that funding comes from Western countries, whether from

⁵⁴ ICC (n.d.). The Trust Fund for Victims. Available at <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> (Accessed: 30 January 2019).

governments, foundations, or individuals. This is usually a collaborative relationship, with civil society actors, the UN, and other international organizations seeking support from a variety of funders. Although this relationship is symbiotic in some sense, in the final analysis, funders shape the field in deep and complicated ways, as they hold the “purse strings” and are thus able to shape NGO’s agendas. Yet, little attention has been paid to this.

Ab initio, most funders are from the global North, as are many practitioners and scholars, while the demand for transitional justice processes comes in large measure from the global South. Transitional justice, both in its practice and in the way the scholarship around it is produced and consumed (Fletcher and Weinstein, 2018), has a general tendency to travel north to south, thereby perpetuating the hegemonic relationship between north and south (Burgis-Kasthala, 2016, p. 932; Balasco, 2018, p. 376). This creates underexplored tensions, although an important dialogue held recently by Berkley Law School has explored them in depth (Fletcher and Weinstein, 2018).

Second, transitional justice processes respond to funders’ agendas in important ways. To the extent that NGO’s agendas are influenced by funders, transitional justice might become “funders’ justice.” Related to the discussion in the above section, a question arises as to what impact donors’ values have had in transitional justice’s (and human rights) neglect of ESC rights. Interestingly, the Ford Foundation, which has strongly supported transitional justice measures for well over a decade, has recently re-focused its strategy on inequality (Walker, 2015). This is a commendable step and it also shows a very different approach than Ford’s decision to, in a

sense, create ICTJ in 2001,⁵⁵ as Ford's focus is now on a broad systematic issue rather than on a narrower technical approach to addressing human rights abuses.

4. Conclusion

We have explored some key challenges for transitional justice, most of which are an attempt to test and expand the limits of the field. Although we agree that transitional justice must go beyond its 1990's confinement to democratic transitions, there is also the danger—particularly in the reparative and transformative justice movements— of expanding its limits to the point of rendering transitional justice incoherent or useless practically by encompassing too much. Thus, the challenge must be not only in the expansion of the field, but also on a careful exploration of its practical and theoretical limitations.

The current populist momentum—international in scale—poses challenges and risks to the transitional justice project for some time to come. The playing field is quite different from what it was at the beginning of the 1990s, as the winds of politics have turned against transitional justice and human rights more broadly (Luban, 2013, p. 508).

There is reason for concern, particularly because most—if not all—of the atrocities discussed in this chapter were related to the rise of ideologies with nationalist, xenophobic, and nativist features. Has humankind forgotten what happened in the past century? If so, the rise of populism should give us pause on the future of human rights and correspondingly on the effectiveness of

⁵⁵ International Center for Transitional Justice (n.d.) About Us. Available at <https://www.ictj.org/about> (Accessed: 30 January 2019).

transitional justice. The current path appears treacherous and the future uncertain for transitional justice initiatives and for human rights generally.

Nonetheless, it is worth remembering that the transitional justice project has always been a struggle (Al Hussein, 2015; Tolbert, 2015; Alston, 2017, p. 4), and its vision has always been contested. It is not a coincidence that the human rights and transitional justice projects arose “out of the ashes of the deepest authoritarian dysfunction and the greatest conflagration the world has ever seen” (Alston, 2017, p. 3).

Ultimately, the goal of the transitional justice project is moral transformation (Luban, 2013, p. 510). In particular, transitional justice aims for the transformation of society so that atrocities become less common and transitional justice efforts less in demand. This sort of transformation requires time, most likely over generations, with a road that will be paved with obstacles and setbacks. The imperative is, as Zalaquett (1992, p.1438) once said, “to learn how to live with real-life restrictions, but to seek nevertheless to advance one’s most cherished values day by day to the extent possible. Relentlessly. Responsibly.”

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