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Transitional Justice: Toward a Differentiated Theory

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The presumption in much of what has been said about transitional justice is that we can speak in general terms about these real-world practices. Some commentators have spoken explicitly of *one* common theory of transitional justice,¹ while many others have implied that generalizations can be made across continents and cultures. These generalizations concern the dilemmas of dealing with massive human rights abuses and *ways* to assess and evaluate the practices utilized when confronting such legacies of violence and injustice. Surely, without attempting to make comparisons across borders, we would miss the opportunity to learn from past experiences, and without looking for patterns in the challenges faced by transitional justice throughout the world, many important lessons would remain unnoticed. Nonetheless, in a diverse world, one risk of constructing a general theory is that it can lack sensitivity to different and nuanced circumstances. In particular, it is

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¹ See, e.g., RUTI G. TEITEL, TRANSITIONAL JUSTICE 213 (2000).

problematic to utilize a common normative framework that presupposes the liberal democratic nature of an incoming regime, or law's ability to generally further such values. While some case studies of transitional justice have argued that law can also serve to restrict democratization,² and while objectives such as reconciliation, peace, and victims' healing are now increasingly examined in the general literature,³ the fact remains that the scholarship is dominated by the conception that transitional justice is about applying a number of legal and quasi-legal processes in democratic political transitions, and that dealing with the past will help consolidate liberal values.⁴

Yet, an institutionalized approach to dealing with grave rights violations can be recognized in societies as diverse as Haiti, Canada, Uganda, Colombia, Nicaragua, Kenya, Iraq, Rwanda, Australia, and many more. When considering how we should approach and evaluate these practices, it is important to keep in mind that transitional justice, if understood as a set of practices that deal systematically with grave human rights abuses,⁵ no longer exclusively concerns societies in transition to a liberal democracy. Rethinking the way we approach measures of transitional justice, therefore, seems to require some elaborations on how the use of transitional justice processes in diverse contexts affects our understanding of *whose interests* transitional justice serves and what, in fact, these interests are. One key concern to such discussions is the question of what makes up *legitimate interests*.

² See, e.g., Brian Grodsky, Justice without Transition: Truth Commissions in the Context of Repressive Rule, 8 HUM. RTS. L. REV. 281 (2008).

³ See, e.g., Phil Clark, *Establishing a Conceptual Framework: Six Key Transitional Justice Themes*, in AFTER GENOCIDE 191 (Phil Clark & Zachary Kaufman eds., 2008).

⁴ See, e.g., TEITEL, *supra* note 1; CARLOS NINO, RADICAL EVIL ON TRIAL (1996); 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: COUNTRY STUDIES (Neil J. Kritz ed., 1995); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997); THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahoma de Brito et al. eds., 2001).

⁵ This process-oriented understanding has been endorsed by a number of scholars. See, e.g., JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 1 (2004). Usually these practices are said to include criminal trials, vetting processes, reparation programs, and truth-seeking measures. However, the field of transitional justice increasingly examines a number of other practices, including legal and institutional reforms and below-the-state-level reconciliation, reintegration and accountability efforts. Most commentators maintain definitions of transitional justice, which would seem to require that these practices are employed in the context of a fundamental political transition. Some, however, have implied that we can also speak about transitional justice when societies deal with civil war and other forms of mass atrocities, even if there is no transformation at the political level. See, e.g., Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) (defining transitional justice as the "set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law").

Rather than offering one consistent answer to these questions, this Article proposes that the answer depends on a number of important factors that differ between particular cases in which transitional justice is applied. In other words, if we understand how the use of transitional justice in contexts radically different from “transitions to democracy” impacts our view of whose interests are being served, we are likely to see that operating with one single theory of transitional justice is problematic. In short, relying on a normative framework formed in the early 1990s, which is heavily influenced by conceptions of justice in democratic transitions, may not be sufficient when attempting to understand what purposes contemporary processes of transitional justice actually serve, and it may pose serious challenges to our attempts at appreciating the character of and challenges to these practices.

In this revision of theory, this Article makes several important distinctions. These are not dichotomies, but reflect important variations and differences. First, a distinction is made as to whether a transition has taken place. The first section of this Article examines transitional justice in cases of fundamental political transitions while the following section examines transitional justice in the context of “non-transitions.” There are, however, some significant differences between the cases in each of these two categories and this Article elaborates on some of them. At the same time, it should be noted that there are important similarities between cases in these different categories and that the question of transition is not the only relevant distinction that can be made when analyzing the cases of transitional justice.⁶ The present analysis thus presents *one* important way in which to “update” general transitional justice theory, much more than it attempts to provide a final answer to how we should approach diverse cases.

I

TRANSITIONAL JUSTICE IN TRANSITIONS

Instances where a fundamental political transition takes place and the new regime employs transitional justice to deal with rights violations committed under a prior regime represent the orthodox case studies of transitional justice scholarship. There may be good reasons, however, to distinguish between different scenarios within this category of cases. One important distinction that can be made is to divide cases according to the nature of the transition. On one extreme of the continuum are those instances

⁶ Distinctions can, for example, also be made by focusing primarily on what transitional justice is meant to address: international conflict, civil war, state-sponsored repression, etc. This Article touches upon such central questions in the discussions below.

where an authoritarian or violent regime is replaced by a new regime committed to ideals of liberal democracy and the rule of law, which then pursues justice for the prior regime's crimes. This Article refers to this model type of transition as a "liberal transition."⁷ The other extreme is characterized by a transition where a prior non-democratic repressive regime is replaced by yet another non-democratic and repressive regime, which nevertheless commences judicial processes in order to deal with the previous regime's crimes. This Article refers to this model type of transition as a "non-liberal transition."

A. Transitional Justice in Liberal Transitions

In the first scenario, transitional justice is made possible because a repressive regime, responsible for rights violations, is ousted by a regime that is committed to the rule of law and democratic ideals and wants to make a clean break with the repressive and unjust past. Transitional justice, somewhat simplified in this context, may therefore be seen as premised on the very nature of the transition; the liberal nature of the new regime is a precondition for transitional justice to occur.

In reality, there are few examples of "ideal liberal transitions," where a clearly repressive and non-democratic regime is replaced by a clearly democratic and rule-of-law-oriented regime. Usually it is a matter of degree, and such changes seldom take place overnight. However, transitions in Southern Europe in the mid-1970s; in some Latin American countries in the 1980s; in Central and Eastern Europe following communist rule; the South African transition in 1994; and—if we expand the understanding of "previous regime" to occupation powers—the transitions in some European countries following German occupation during World War II can roughly be placed in this category. While the success of democratic consolidation varies, the new regime in these transitions tended to offer hope for significantly more democratic and rule-of-law-based governance.⁸

In these liberal transitions, it is a reasonable expectation (although not necessarily true in individual cases) that the new leadership will be predisposed to support transitional justice to the extent that such processes will not conflict with other top priorities of the new leadership, including, but not limited to, maintaining its stability.⁹ There can be several reasons for this,

⁷ Some commentators have referred to these as "paradigmatic transition[s]." See Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172, 173 (2005).

⁸ See generally THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES, *supra* note 4.

⁹ Post-apartheid South Africa presents an interesting example of how other interests can constrain the leadership's support to transitional justice. While there can be little doubt about the liberal nature of the transition, or about differences

including the new regime's resentment towards the past regime and its crimes, the new leaders' sympathy for victims' call for justice, and the possibility that some leaders were themselves victimized under the prior regime. Preferences for transitional justice in such cases, however, are also likely to reflect the new democratic leaders' interest in furthering the values that their rule is to be built upon. To the extent the new regime proves favorable to systematically dealing with the past, it is plausible that one important reason for that concerns the perception that transitional justice may offer a possibility for the new government to distance itself from the repressive past. This may be thought of as an attempt to increase the legitimacy of newly formed state institutions. Without attempting to make this simplistic and elite-based conception of decision making more nuanced, the point can be made that it is a reasonable expectation that the new leadership will seek to enhance its popularity and that doing so requires that attention be paid to liberalization and democratization. It is also a reasonable expectation that deliberations on whether and how to obtain justice for the past regime's crimes will tend to reflect these more general interests. Sometimes, as was the case in Argentina, such considerations seemingly increase decision makers' willingness to embark on retrospective justice.¹⁰ In other cases, such as in post-Franco Spain, such considerations seemingly play a role when decision makers opt to refrain from dealing with the past.¹¹

Clearly, there are many important differences between these cases of transitional justice, which occur under regime changes that offer hope for establishing democracy and for significantly more rule of law-abiding governance. For instance, there can be important variations in the kinds of repression and violence that took place under the prior regime; there are important variations in the extent to which the past leadership and its supporters

between the scope of abuses committed by the apartheid regime and the ANC, the new leadership had mixed feelings about transitional justice. Because the ANC, given the context, saw accusations made by the Truth and Reconciliation Commission of gross human rights violations committed by the liberation movement as unjustified, the ANC had "serious reservations" about the final report and therefore tried, but unsuccessfully, to block its release with a lawsuit. See Thabo M. Mbeki, Former President of S. Afr., Statement on the Report of the TRC Joint Sitting of the Houses Of Parliament (Feb. 25, 1999) available at <http://www.dfa.gov.za/docs/speeches/1999/mbek0225.htm>.

¹⁰ See generally NINO, *supra* note 4.

¹¹ All major political parties in Spain, unlike the small far-left parties, were opposed to transitional justice because they perceived peace, national reconciliation, democratic consolidation, and their popularity among the electorate to require that a decision be made to abstain from dealing with past abuses. See Paloma Aguilar, *Justice, Politics, and Memory in the Spanish Transition*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES*, *supra* note 4, at 92, 99 (noting that there was "overwhelming desire of Spanish society to see a peaceful and gradual change and even to pretend that it had forgotten the past rather than call anyone to account.").

continue to have influence in the new democracy; there can be important variations in the nature of the new leadership, including its commitment to democratic and rule of law ideals; and, ultimately, there are important variations in the extent to which we can speak of a “liberal transition.”

However, the argument being developed here does not require a detailed analysis of such differences and their impact on whether and how transitional justice is pursued (which, it should be remarked, has already been subjected to intense debate).¹² The argument is simply that these instances of liberal transition have provided the kind of analytical material that dominant transitional justice discourses have been formed around,¹³ and that assumptions and expectations endorsed by these discourses appear acceptable in approaching such cases. Mainstream transitional justice theory thus seems to fit relatively well in understanding and, but less obviously,¹⁴ in evaluating processes of transitional justice in instances of a liberal transition.

There is, however, an important variant of transitional justice in liberal transitions that must be mentioned. This is the case where it is not a new regime but external forces that call for and ensure the implementation of transitional justice. Quite different concerns may emerge in such contexts.

One clear example of internationally driven transitional justice in liberal transitions can be found in the Allies’ dealing with the Germans following World War II. Prosecuting Nazi leaders and war criminals before the International Military Tribunal and subsequently under Control Council Law No. 10 was the consequence of a compromise between American, British, Russian, and French leaders.¹⁵ It would be a mistake to suppose that these decision makers had a shared agenda or one that was internally coherent and consistent over time. Nonetheless, bringing Nazi leaders to trial seems to be the result of a compromise between those who advocated for retribution or vengeance, where summary executions were an option, and those who emphasized other concerns, such as diminishing future

¹² Jon Elster, for one, has conducted an interesting study of how “modalities of transition may constrain the substantive and procedural decisions of transitional justice.” See ELSTER, *supra* note 5, at 188.

¹³ 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 4; see also TEITEL, *supra* note 1; TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 4; see generally, THE POLITICS OF MEMORY, *supra* note 4.

¹⁴ As touched upon later in this Article, creating a more just society is not singularly a question of liberalization and democratization, and evaluating these cases only according to such standards may overlook certain important aspects of transformation.

¹⁵ Taylor Telford, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington D.C., Government Printing Office 1949), available at <http://avalon.law.yale.edu/imt/imt10.asp>.

motivation for Germany to launch another aggressive war—for example, by supposing that the use of criminal trials would mean that Germans would come to realize the evils of the Nazi machinery.¹⁶ It is a reasonable conclusion that some of the concerns that surrounded the processes established to deal with Nazi crimes resemble concerns connected to confronting abuses in the context of “third wave of democratization countries.”¹⁷ The idea that trials can have an educational effect on the general population, for example, reappears when transitional justice was discussed in Argentina in the 1980s.¹⁸ It is interesting to note, though, that the Allies’ bringing German war criminals to account was not at the time conceptualized as “transitional justice,” but has only been retrospectively seen through this framework.¹⁹

Some may argue that this is simply a question of terminology.²⁰ However, one key difference between criminal and administrative justice following World War II and under liberal transitions in more recent decades is that only in the latter instances did debates on whether and why to establish judicial processes to deal with past abuses take their point of departure in an assessment of the law’s ability to further democracy and the rule of law. That democratization can be the *result* of doing justice for past abuses, and that retrospective justice should only be called for to the extent that this is the case, is thus a relatively new idea.²¹

In more recent cases of foreign imposed transitions, however, dealing with serious rights violations has explicitly been conceptualized as “transitional justice.”²² One interesting

¹⁶ For a description of the decision-making process, see ELSTER, *supra* note 5, at 198–207.

¹⁷ The expression was introduced by Samuel Huntington to cover the democratization processes that took place in Southern Europe, Latin America, and elsewhere from the mid-1970s up until 1990. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

¹⁸ See generally NINO, *supra* note 4.

¹⁹ See Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *HUM. RTS. Q.* 321, 327–28 (2009).

²⁰ See, e.g., Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 72 (2003) (considering post-war justice in Germany and other European countries a “first phase of . . . transitional justice”).

²¹ It is an idea that can be traced to the discussions of how to respond to the repression under military rule in Argentina. See, e.g., Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 *HUM. RTS. Q.* 1 (1990) (rejecting conventional penal theory, but arguing that punishment of state criminals can be justified since it may strengthen democratic values). See also NINO, *supra* note 4 (arguing that the key justification for transitional justice in Argentina should be found in the law’s ability to consolidate democratic values and the rule of law itself).

²² Besides the Iraqi case discussed below, attempts to deal with past abuses in the foreign imposed transition in Afghanistan has also been conceptualized as a matter of transitional justice. See, e.g., Patricia Gossman, *Truth, Justice and Stability in Afghanistan*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE*, *supra* note 5, at 255.

example can be found in U.S.-occupied Iraq. Prosecuting leaders of Saddam Hussein's regime, including Saddam Hussein himself, and screening the new administration for high-ranking Ba'ath party members following that regime's ousting may, on the surface, appear similar to transitional justice in domestically driven liberal transitions. However, as some commentators have pointed out, key differences not only concern the question of ownership, but also the interests that are served by transitional justice, and even by describing what is happening in Iraq as a matter of transitional justice.²³

One important observation is that such conceptualization fits well into U.S. interests in disseminating the picture that the Iraqi case is a liberal transition—that it is a project of democratization where an atrocious and non-democratic leader was ousted by foreign forces whose intentions were to help the Iraqis establish a better, more just, and democratic society. One further challenge of approaching the Iraqi case as a matter of transitional justice in a liberal transition is that abuses under Saddam Hussein's regime—and not abuses committed by occupation forces—are the ones dealt with by these processes. In fact, one might argue that the transitional justice framework provides the occupation forces with a helpful tool in differentiating crimes under the past regime from their own crimes.²⁴

In sum, transitional justice theory has predominantly been informed by cases of liberal transition. The assumption of law's connection to liberalization and democratization, as endorsed by influential studies, appears to provide useful tools for debating transitional justice in these cases. Nonetheless, it is important to note that reaching these objectives may in some cases require that the new regime refrains from retrospective justice, and we must accept that transitional justice in these cases can also serve other objectives than liberalization and democratization. It is also necessary to recognize that there can be important differences between transitional justice when used in a transition brought about by domestic forces and transitional justice brought about by external forces.

B. Transitional Justice in Non-Liberal Transitions

In the second scenario, transitional justice also relates to the new regime disapproving the prior. Such disapproval, however, does not correlate with the new regime supporting liberalization and democratization. The new regime may be non-democratic

²³ CHRISTINE BELL ET AL., *The Battle for Transitional Justice: Hegemony, Iraq, and International Law*, in JUDGES, TRANSITION, AND HUMAN RIGHTS 147 (John Morison et al. eds., 2007).

²⁴ *Id.* See also Eric Stover et al., *Bremer's 'Gordian Knot': Transitional Justice and the U.S. Occupation of Iraq*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 5, at 229.

and/or restrict or systematically violate citizens' fundamental rights as a means of consolidating its rule, maintaining security, or for other reasons. As is the case in liberal transitions, transitional justice in these instances may be seen as premised on the existence of a fundamental political transition. The fundamental political transition, with the new regime disapproving the prior, is a precondition for making transitional justice possible, at least in the domestic sphere. The main difference to the above, therefore, is that the new regime is not committed (or significantly less committed) to democratic principles and the rule of law. We can thus speak of transitional justice in "non-liberal transitions."

Again, in reality, there may be few examples of an illiberal and repressive regime being replaced by a regime that is equally illiberal and repressive, with the later, however, fundamentally contesting the legitimacy and righteousness of the prior, and therefore embarking on transitional justice to deal with its crimes. Nonetheless, there are many examples of transitional justice being brought into play by a new regime that may be *less* atrocious or notoriously repressive than its predecessor, but still cannot reasonably be looked at as liberal democratic.

The Rwandan case, which has been debated quite extensively in the scholarship, provides a clear example of how transitional justice can be used by a non-liberal regime. Some scholars have gone so far as to compare the current regime with the preceding, which was responsible for the 1994 Genocide. Filip Reyntjens argues,

There is a striking continuity from the pre-genocide to the post-genocide regime in Rwanda. Indeed, the manner in which power is exercised by the RPF [Rwandan Patriotic Front] echoes that of the days of single-party rule in several respects. A small inner circle of RPF leaders takes the important decisions, while the Cabinet is left with the daily routine of managing the state apparatus. Under both Habyarimana and Kagame, a clientelistic network referred to as the *akazu* accumulates wealth and privileges. Both have manipulated ethnicity, the former by scapegoating and eventually exterminating the Tutsi, the latter by discriminating against the Hutu under the guise of ethnic amnesia. Both have used large-scale violence to eliminate their opponents, and they have done so with total impunity, which is another element of continuity.²⁵

While some of these observations are not entirely unmerited, they fail to acknowledge the difference in scope and gravity of abuses. More importantly for this discussion, Reyntjens fails to discuss that there is a fundamental difference between restricting and violating rights in a manner that eventually *lead to* genocide,

²⁵ Filip Reyntjens, *Rwanda, Ten Years on: From Genocide to Dictatorship*, 103 AFR. AFF. 177, 208 (2004).

and restricting and violating certain rights *following* a genocide carried out by ordinary peasants and city dwellers.²⁶

That being said, it is difficult to argue that transitional justice in Rwanda unfolds under the guidance of a liberal regime. The regime's non-liberal nature is evident from a number of circumstances. The holding of elections, for example, was postponed for several years because the RPF insisted that the population was not yet mature enough to elect its leaders.²⁷ In 2003, when the RPF finally obtained a democratic mandate it was in elections generally observed to have significant flaws, most notably because the main opposition party (MDR) had been dissolved by the RPF-dominated Transitional National Assembly prior to the elections, and because the RPF had provided itself with important advantages in the campaigning, while still intimidating the little opposition that was left.²⁸ Moreover, the RPF administration continues to violate or restrict a number of fundamental human rights and provides little room for maneuver for the political opposition—in particular by bringing charges of divisionism and genocide ideology against any critical voices.²⁹ It does not seem entirely unfair to conclude that key members of the RPF leadership have considered, and continue to consider, that Rwandans are not ready for a pluralistic democracy and that quite extensive restrictions on Rwandans' freedoms, including the

²⁶ See, e.g., GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 247 (1995).

²⁷ See sources cited *infra* note 48.

²⁸ The elections were originally envisaged to take place in 2000. Other criticisms of the elections include: (1) that the campaigning period was restricted to 20 days; (2) that the media significantly favoured the RPF; (3) that the RPF used state funds for its campaigning; (4) that the National Electoral Commission was biased towards the RPF, for example because it focused almost exclusively on monitoring and summoning opposition candidates; and (5) that state agencies harassed the political opposition, including arrests that allegedly aimed at preventing the opposition from campaigning or voting. For some detailed accounts of the elections, see, e.g., International Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalisation* (Nov. 13, 2002), <http://www.crisisgroup.org/en/regions/africa/central-africa/rwanda/053-rwanda-at-the-end-of-the-transition-a-necessary-political-liberalisation.aspx>; Ingrid Samsft & Orrvar Dalby, *THE NORWEGIAN INST. OF HUM. RTS./NORDEM, RWANDA: PRESIDENTIAL AND PARLIAMENTARY ELECTIONS 2003* (2003), <http://www.cmi.no/publications/file/1770-rwanda-presidential-and-parliamentary-elections.pdf>. See also Jens Meierhenrich, *Presidential and Parliamentary Elections in Rwanda, 2003*, 25 *ELECTORAL STUD.* 627 (2006). Many of the same criticisms were raised after the September 2008 parliamentary elections, and it is important to note that there is virtually no political opposition in Rwanda today. Both of the opposition parties have not joined the RPF-coalition, the PSD and the PL, support Paul Kagame's presidency. See, e.g., EUR. UNION ELECTION OBSERVATION MISSION, *REPUBLIC OF RWANDA: FINAL REPORT, LEGISLATIVE ELECTIONS TO THE CHAMBER OF DEPUTIES 15–18 SEPTEMBER 2008*, http://www.delrwa.ec.europa.eu/en/downloads/studies_assessments/EUEOM_Rwanda_Final_Report_EN.pdf.

²⁹ See, e.g., Lars Waldorf, *Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers*, 11 *J. GENOCIDE RES.* 101 (2009).

freedom to criticize those in power, are necessary to maintain order and achieve progressive change.³⁰

Rwanda, despite a number of unique features, is not the only case where a non-liberal regime launches a process of transitional justice to deal with crimes committed under a previous regime.

In Nicaragua, the Sandinistas' military victory over the Somoza dictatorship in 1979, known as the Revolution, was followed by trials of captured Somoza supporters, in which more than five thousand cases were adjudicated by "popular tribunals" with politically appointed judges who usually had no documented qualifications in law.³¹ The left-ish junta governing the country from 1979 appears to have been more sensitive to the needs of Nicaraguans than the preceding right-wing dictatorship, and, in some important aspects, improved human rights protection. Yet, we can hardly describe the revolution as a liberal regime change. The Sandinistas' rule, although seemingly popular with large segments of the population, did not rest on a democratic mandate until 1984.³² Moreover, a state of emergency was declared in 1982 (due to the U.S.-sponsored Contras' insurgencies) and lasted until 1988, under which human rights such as the right to assembly, freedom of speech, and habeas corpus were severely restricted.³³ Perhaps because the Nicaraguan case so obviously deviates from the question of "how emerging democracies reckon with former regimes,"³⁴ transitional justice in Nicaragua has only rarely been analyzed in the scholarship.

Another rarely mentioned case of transitional justice under non-liberal rule occurred in Uzbekistan. In 1999, Uzbek President Islam Karimov launched a truth commission in his country. Despite Karimov's prior connection to the Uzbek communist party, "The Commission for the Promotion of the Memory of Victims" was mandated to look into repression under Soviet rule, an era now seemingly blamed for the misfortunes of today's

³⁰ This observation is supported by most of those who have analyzed the current leadership. Stephen Kinzer, in his generally pro-RPF account of post-genocide Rwanda, which is based on extensive interviews with Rwandan President Paul Kagame, notes: "Authoritarian regimes often sow the seeds of their own destruction, but President Kagame and many others believe that in postgenocide Rwanda, only such a government can prevent another cataclysm." STEPHEN KINZER, *A THOUSAND HILLS: RWANDA'S REBIRTH AND THE MAN WHO DREAMED IT* 242 (2008).

³¹ See, e.g., James H. McDonald & Marjorie S. Zatz, *Popular Justice in Revolutionary Nicaragua*, 1 SOC. & LEGAL STUD. 283 (1992).

³² See, e.g., W. Gordon West, *The Sandinista Record on Human Rights in Nicaragua*, 22 DROIT ET SOCIÉTÉ 393 (1992).

³³ *Id.*; see also McDonald & Zatz, *supra* note 31. The restrictions on fundamental rights under Sandinista rule, however, must be viewed in the context of the U.S.-sponsored Contra insurgencies. This article later returns to the important argument that the distinction between "liberal" and "non-liberal" transitions must be viewed in context of the question of whether civil war or other forms of large-scale political violence continue to occur in the country in question.

³⁴ Krititz, *supra* note 4 (phrase is used in the title).

Uzbekistan.³⁵ Although technically elected, it is fair to say that Karimov's regime is non-democratic. It is also fair to say that despite Karimov promising "step by step improvements," systematic and very grave human rights violations continue to occur in Uzbekistan (most well-known, perhaps, are the massacres of demonstrators in Andizhan in 2005).³⁶ Again, the absence of studies of the Uzbek case seemingly has to do with the fact that this case clearly departs from the expectation that transitional justice occurs in contexts of liberal transitions.³⁷

In Haiti, after returning from exile in 1994 to serve the rest of his presidency following three years of extremely repressive military rule under general Raul Cédras, Haitian President Jean-Bertrand Aristide established a "Special Investigation Unit" to look into political violence committed before and under Cédras' regime (with little success, however, in bringing court cases).³⁸ Moreover, a truth commission was established to investigate serious human rights violations committed during military rule (but also with little success in fulfilling its mandate).³⁹ Aristide held a democratic mandate, state sponsored violence, at least in some periods, reduced under his presidency, and he managed to implement some reforms.⁴⁰ On the other hand, Aristide allegedly supported mob justice which targeted political opponents, called for violent gangs as a means of social control, and the Haitian police force, which was formed by Aristide to replace the army's control of internal security, was involved in systematic and very grave human rights abuses.⁴¹

³⁵ On this point, and for a description of the commission, see Grodsky, *supra* note 2, at 285-86.

³⁶ See *id.* at 292 n.56. For recent accounts of how Karimov's Uzbekistan deals with questions of human rights and democracy, see AMNESTY INTERNATIONAL, UZBEKISTAN: SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE (Apr. 28, 2009) <http://www.amnesty.org/en/library/asset/EUR62/002/2009/en/a834e62b-fcd5-4391-b44c-f8d8fcc3f6a3/eur620022009en.pdf>; *Freedom in the World-Uzbekistan (2009)*, FREEDOM HOUSE (2009), <http://www.freedomhouse.org/template.cfm?page=363&year=2009&country=7731> (last visited Mar. 17, 2011).

³⁷ See Grodsky, *supra* note 2 (making a similar point).

³⁸ See, e.g., Kenneth Roth, *Human Rights in the Haitian Transition to Democracy*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 93 (Carla Hesse & Robert Post eds., 1999).

³⁹ See Joanna R. Quinn, *Haiti's Failed Truth Commission: Lessons in Transitional Justice*, 8 J. HUM. RTS. 265 (2009).

⁴⁰ See Roth, *supra* note 38.

⁴¹ The worst abuses under Aristide's rule are said to have taken place in 1991, and not when he returned to power in 1994 thru 1996, the period when these measures of transitional justice were established. In 2001, he was again elected president. However, in 2004 he was ousted by rebel groups, perhaps with U.S. assistance. For a detailed discussion of the early years, see Roth, *supra* note 38. An excellent documentary by Danish filmmaker Asger Leth points to Aristide's connection to rough gangsters in the slums of Cité Soleil (so-called "Chimeres"), and presents an interesting perspective on the events that took place in 2004. See GHOSTS OF CITÉ SOLEIL (Nordisk Film 2006).

Many more instances where one can question, to different extents, whether transitional justice occurs under the guidance of a liberal regime can be mentioned. For example, following Yoweri Museveni's takeover in 1986, a Truth Commission was established in Uganda to investigate human rights violations committed during prior regimes. Museveni's leadership quite clearly has been less repressive than Idi Amin's or Milton Obote's. Yet, not until the mid 2000s were other political parties allowed to operate relatively freely.⁴² There was, and continues to be, a number of restrictions on civil and political rights, and Museveni's administration has been responsible for severe human rights abuses, in particular in its attempt to fight the Lord's Resistance Army (LRA) in northern parts of the country.⁴³ In Ethiopia, criminal trials following the 1991 overthrow of the atrocious Mengistu regime take place in a context of semi-authoritarian rule.⁴⁴ In Chad, a Truth Commission was set up by President Idriss Déby following his overthrow of Hissène Habré (1990), but it functioned in a context where Déby's Patriotic Salvation Party was the only legal political organization, and with a regime in place that has itself been accused of systematic human rights abuses.⁴⁵ Also in Nigeria, a Truth Commission was set up in 1999 by newly, democratically elected President Olusegun Obasanjo.⁴⁶ Obasanjo, however, ruled the country as a military dictator from 1976–1979, and while serving as a democratically elected

⁴² See Roger Tangri, *Politics and Presidential Term Limits in Uganda*, in LEGACIES OF POWER: LEADERSHIP CHANGE AND FORMER PRESIDENTS IN AFRICAN POLITICS 175 (Roger Southall & Henning Melber eds., 2006).

⁴³ On the "Commission of Inquiry into Violations of Human Rights" set up by Museveni, see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS 56–57 (2001). On Museveni's human rights record, see, e.g., Susan Dicklitch & Doreen Lwanga, *The Politics of Being Non-Political: Human Rights Organizations and the Creation of a Positive Human Rights Culture in Uganda*, 25 HUM. RTS. Q. 482 (2003). More specifically on human rights violations committed in northern Uganda, see, e.g., BACKGROUND ON THE CONFLICT IN NORTHERN UGANDA (2009), <http://icar.gmn.edu/ICC/Background.pdf> (concerning international crimes committed by the Ugandan army in its fight against the LRA); see also, *Get the Gun! Human Rights Violations by Uganda's National Army in Law Enforcement Operations in the Karamoja Region*, HUM. RTS. WATCH (2007), <http://www.hrw.org/en/node/10693/section/1> (concerning violations committed during operations aimed at combating the proliferation of small arms and cattle rustling).

⁴⁴ For an analysis of the so-called "red terror" trials, which have taken place since the ousting of Mengistu's regime, see, e.g., Firew Kebede Tiba, *The Mengistu Genocide Trial in Ethiopia*, 5 J. INT'L CRIM. JUST. 513 (2007). On the political and human rights climate following the Ethiopian People's Revolutionary Democratic Front's overthrow of the Dergue, and later under president Gidada following the 1995 elections, see, e.g., John W. Harbeson, *A Bureaucratic Authoritarian Regime*, 9 J. DEMOCRACY 62, 66 (1998) (characterizing the regime as an "essentially bureaucratic-authoritarian regime dependent upon the EPRDF's superior military muscle").

⁴⁵ See HAYNER, *supra* note 43, at 57–59. See also Reed Brody, *The Prosecution of Hissène Habré: International Accountability, National Impunity*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 5, at 278.

⁴⁶ On the truth commission, see HAYNER, *supra* note 43, at 69–70.

president he was responsible for serious abuses—for example, Obasanjo endorsed the army's atrocities in the Niger Delta.⁴⁷

Because these cases of transitional justice under non-liberal regimes have endless differences, it makes little sense to attempt to generalize much on them. However, some important points can be made which are crucial for understanding challenges to transitional justice theory.

Where it appears to be a reasonable assumption that relatively liberal regimes may use transitional justice to consolidate democracy, strengthen the rule of law, and in other ways open up what was before restricted, the assumption must be that a non-liberal leadership will not prioritize transitional justice for these reasons. On the contrary, in non-liberal transitions one reason for the new leadership to establish processes of transitional justice is that these processes are intended to facilitate restrictions on freedoms and consolidate non-democratic and repressive rule.

In Rwanda, postponing the elections to 2003 must be understood in the context of a perceived need for re-educating the population. The Saturday Talks—a series of meetings which involved Rwandan political leaders—explained how “[n]obody can think about introducing democracy in Rwanda before teaching about the people's rights; not killing and all other bad actions which have been canned out on behalf of democracy; and standing against bad ideology based on sectarianism.”⁴⁸ According to Filip Reyntjens, in 2002, then General Secretary of the National Unity and Reconciliation Commission, Aloysia Inyumba (who is also a prominent RPF leader), explained that “the ordinary citizens are like babies. They will need to be completely educated before we can talk about democracy.”⁴⁹ To facilitate this, the Saturday Talks noted how “solidarity camps” (which later became known as “Ingando Camps”) would be useful for raising awareness and re-educating Rwandans.⁵⁰ These camps have provided civic education for a large spectrum of groups in Rwandan society, but are alleged to disseminate RPF ideology and to oppose dialogue and diverse perceptions of identity and existence in post-genocide Rwanda.⁵¹ Moreover, it is a reasonable hypothesis that excluding RPF crimes (serious abuses committed by members of the current regime during the

⁴⁷ See, e.g., *Nigeria: President Ignoring Gravity of Military Massacre*, HUMAN RIGHTS WATCH (2002), <http://www.hrw.org/en/node/66116>.

⁴⁸ OFFICE OF THE PRESIDENT OF THE REPUBLIC OF RWANDA, REPORT ON THE REFLECTION MEETINGS HELD IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC FROM MAY 1998 TO MARCH 1999, at 37 (1999), available at <http://www.grandslacs.net/doc/2378.pdf>.

⁴⁹ Reyntjens, *supra* note 25, at 183–84 (internal quotation marks omitted).

⁵⁰ REPORT ON THE REFLECTION MEETINGS HELD IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC FROM MAY 1998 TO MARCH 1999, *supra* note 48, at 46–47.

⁵¹ See, e.g., Chi Mgbako, *Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201 (2005).

civil war) from the sphere of transitional justice, and prohibiting a broad spectrum of ethnic-related statements should be viewed in context of the RPF's particular understanding of the genocide, *and* that these measures, in part, serve to consolidate RPF's grip on power, for example by limiting criticism of the government, while portraying the RPF take-over as a "national salvation."⁵²

There are a number of other cases with similarly good reasons to believe that transitional justice is brought into play with the purpose of limiting and intimidating political opposition, and in other ways justifying restrictions of freedoms. As one of few who have commented on Chad's truth commission, Priscilla Hayner notes,

the same government of Chad that created this commission has been accused of serious human rights violations itself, which called into question the motivation of the government in setting up the commission. Some human rights observers had the impression that the commission was set up to improve the new president's image. Despite the many years of U.S. support for the Habré regime, one U.S. State Department official, when asked about the commission, said, "Wasn't that just Déby proving that Habré was an SOB?"⁵³

In a rare analysis of the Uzbek truth commission, Brian Grodsky remarks that "the very repression that has allowed Karimov to control the state and most of society has created conditions that make transitional justice possible and even likely," in part because Karimov has a need for blaming his poor human rights record on something, and also because making reference to difficulties in overcoming structures put in place during the Soviet era is a convenient strategy.⁵⁴

With the partial exception of studies of the Rwandan case, discussing how transitional justice can limit liberalization and democratization has not exactly dominated transitional justice discourses. Generally speaking, the scholarship appears to lack interest in these cases of non-liberal transitions, and how these cases may affect our understanding of transitional justice. Arguably, this lack of interest has to do with the fact that most observers think of transitional justice as something that is inherently "good," at least to the extent it preserves the rights of victims and perpetrators. As Grodsky points out with regard to

⁵² See, e.g., Allison Corey & Sandra F. Joireman, *Retributive Justice: The GACACA Courts in Rwanda*, 103 AFR. AFF. 73 (2004).

⁵³ HAYNER, *supra* note 43, at 57–59. A similar concern is expressed in Grodsky, *supra* note 2, at 285–86 (noting how the new repressive leadership celebrated the commission because it condemned the old elites and therefore was "politically expedient").

⁵⁴ Because Karimov allegedly seeks to distance himself from the Russians, his new friendship with Western countries who needs a platform in this part of the world to fight the War on Terrorism are willing to provide aid on these terms. See Grodsky, *supra* note 2, at 289.

truth commissions used in non-liberal transitions, these have “received little more than dismissive notes in the oft pro-truth commission transitional justice literature.”⁵⁵ But such observations are also valid for other measures of transitional justice used by non-democratic and repressive leaders.

There are at least two immediate implications of transitional justice’s ability to limit liberal values. First, there is a need for more rigorous scrutiny of the intentions behind establishing transitional justice mechanisms and, in particular, at the level of the general scholarship, a need for adjusting the perception that transitional justice generally aims at, and achieves, liberalization and democratization.

Second, there is a need for investors in transitional justice to consider more carefully whether or not processes of transitional justice deserve funding and moral backing. As Grodsky points out, one motivation for non-liberal rulers to embark on transitional justice can be that the provision of resources (for example loans and aid) and international recognition have become closely linked to a commitment to address past abuses.⁵⁶ On the other hand, foreign investment in transitional justice under non-liberal rule should not necessarily be rejected altogether because these processes may nonetheless hold potential for supporting certain aspects of the rule of law. In part, this is so because initiatives can change shape when international actors are involved. Categorically rejecting transitional justice under non-liberal rule may thus fail to acknowledge that dealing with past atrocities in these cases does not necessarily mean that transitional justice processes are *altogether* miscalculated in furthering liberal values. In Rwanda, for example, certain aspects of transitional justice, such as the establishment of a “judicial defenders corps” (paralegals with limited training) to provide legal assistance in genocide cases, has had important advantages for the rule of law in the long run. In particular, these paralegals have proved important for advancing access to justice, also for other types of cases than those relating to genocide justice, and the paralegals have helped increase awareness of legal procedures among the general public.⁵⁷

Connected to both of these immediate implications, a more profound question arises: is a normative framework, heavily

⁵⁵ *Id.* at 282.

⁵⁶ *Id.* at 291 (arguing that the fact that the U.S. almost doubled its aid to 33 million U.S. dollars in 1999 is closely connected to Uzbek leaders’ willingness to deal with the past).

⁵⁷ For further analysis of the judicial defenders corps and its contribution to access to justice in post-genocide Rwanda, see Thomas Obel Hansen, *Human Rights and Transitional Societies: Contemporary Challenges*, in *ACTIVATING HUMAN RIGHTS AND PEACE: UNIVERSAL RESPONSIBILITY CONFERENCE 2008 CONFERENCE PROCEEDINGS* 131 (Robert Garbutt ed., 2008).

influenced by the transitions in Latin America and Central and Eastern Europe, actually suitable for attending to cases of transitional justice under non-liberal regimes? Evaluating processes of transitional justice according to their ability to strengthen liberal values is *relevant*, but *insufficient*, when analyzing law and justice in non-liberal transitions. Passing judgments on the value of transitional justice processes, predominantly (or alone) by calling into question their conformity with democracy and rule of law ideals, may fail to acknowledge that these processes can serve other vital and legitimate interests. Whereas this observation is also relevant when dealing with transitional justice in liberal transitions, focusing primarily on liberal values when evaluating transitional justice under non-liberal transitions may pose particular challenges.

Key to such problems is that concepts such as pluralism, democracy, and human rights can sometimes be in tension with other desirable objectives, such as nation building,⁵⁸ security, and peace.⁵⁹ Put otherwise, we cannot exclude the possibility that transitional justice in non-liberal transitions can, from certain perspectives, be valuable because it limits liberal values, such as a pluralistic democracy and certain freedom rights, in order to benefit goals such as security and peace.

In Rwanda, one key challenge to our understanding of transitional justice is that we cannot easily dismiss the RPF's claims in the mid and late 1990s (but not necessarily later on) that Rwanda was not ready for democracy.⁶⁰ Similarly, it makes some sense when the Rwandan leadership argues that a number of human rights, such as freedom of expression, had to be seriously restricted given the genocide context; when arguing that offering increased space for political opposition could potentially endanger security and peace; and when seemingly considering transitional justice a valuable project because it helps to facilitate these purposes. In particular, this is so because the genocide was organized as a response of extremist powers to the democratization process taking place at the time, and these powers, who maintained influence in the broader population following the 1994 transition, relied significantly on disseminating their ideology through the radio and other media.

⁵⁸ Nation building is loosely understood here as leaders' deliberate attempt of constructing one national identity. For further discussions of this concept, see, e.g., Juan J. Linz, *State Building and Nation Building*, 1 EUR. REV. 335 (1993). See also Walker Conner, *Nation-Building or Nation-Destroying*, 24 WORLD POL. 319 (1972) (noting that the construction of a "nation-state" is not a desirable per se).

⁵⁹ Security is here understood as something more short-term and narrow than (positive) peace.

⁶⁰ REPORT ON THE REFLECTION MEETINGS HELD IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC FROM MAY 1998 TO MARCH 1999, *supra* note 48, at 37.

Judging transitional justice in Rwanda as altogether flawed—because in important aspects, it fails to live up to expectations of liberal change—is easy, but not necessarily sufficient. The implications of transitional justice in Rwanda—such as restrictions on freedom of expression (for example in the form of passing legislation on divisionism and genocide ideology); the use of transitional justice to demonstrate the executive’s control, which at times contravenes with human rights standards (the lengthy detentions and the trials of more than one million genocide cases in Gacaca Courts); and the use of transitional justice to limit pluralism by endorsing one particular understanding of Rwandan history while rejecting the establishment of a liberal democracy (Ingando camps and restrictions on political opposition through legal reforms)—entails a number of problems, but cannot simply be dismissed as *altogether* illegitimate purposes. While it is of significant importance to point to flaws in the rule of law, such processes should also be evaluated by discussing what other ends they are intended to further, by how they actually manage to further these ends, and by appreciating the value of these particular ends—not only according to universal standards, but also in a context-specific understanding of relevant goals.

In particular, the fact that Rwanda has embarked so comprehensively on a range of measures that deal with legacies of political violence, viewed in context of a determined and strong executive branch of government, may be correlated to the establishment of an environment that is, at least temporarily, relatively secure.⁶¹ Furthermore, transitional justice’s ability to reconcile individuals and communities is certainly crucial for evaluating the Rwandan case. While the notion of reconciliation is also familiar from some cases of liberal transitions (in particular the South African),⁶² reconciliation may have a specific meaning in the Rwandan case. Some, for example, will argue that national reconciliation in Rwanda requires that Hutu and Tutsi be abandoned as political identities.⁶³

⁶¹ However, it should be noted here that the question of whether the “Rwandan model” is likely to be productive for long-term peace may be different from the question of short-term peace and security.

⁶² See, e.g., Hugo van der Merwe, *National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 101 (Nigel Biggar ed., 2003).

⁶³ See, e.g., MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 276-79 (2001). For a methodologically rigorous analysis of whether transitional justice in Rwanda (here the Gacaca Courts) is likely to promote reconciliation, see Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 *GEO. WASH. INT’L L. REV.* 765 (2007) (arguing that the key aspect of Gacaca in this regard concerns its emphasis on engagement through popular participation). Other observers remain more skeptical toward Gacaca’s support for reconciliation. See, e.g., Corey &

Because the subjects of reconciliation and peace in accounts of cases such as the Rwandan are in fact subjected to much analysis, the key challenge to the field is not that other potential contributions of transitional justice are overlooked in case studies. Much more, the challenge seems to be that there has only been a limited engagement at the level of general theory with the question of when the pursuit of objectives which may run counter to liberal values should be supported.⁶⁴ Although concepts such as reconciliation have gained a prominent place in transitional justice discourses,⁶⁵ discussing questions of when, how, and to what extent it is justified that transitional justice is used for purposes of reconciliation, nation building, a strengthening of security, and so forth, *at the cost* of liberalization and democratization, remains largely off the table in general transitional justice theory. A key task for the scholarship, therefore, is to consider more rigorously how tensions between various claims of transitional justice should be dealt with. It is too easy simply to dismiss transitional justice as illegitimate in instances of non-liberal transition because these processes in important aspects may fail to live up to conventional ideas of what transitional justice can and should do. On the other hand, it is too easy to say that transitional justice should only be evaluated according to a context-specific understanding of values, or that purposes of security or reconciliation should generally override liberalization and democratization in these instances. Accepting that there are no simple solutions to these problems, at least three issues are crucial to take into account when attempting to strike a balance.

The *first* issue requires discussions of the injustices that transitional justice is to deal with. The kinds of past wrongs dealt with by means of transitional justice are extremely diverse. Military regimes' extra-legal repression in Latin American countries, oppression and lack of freedoms under communist rule in Central and Eastern Europe, structural violence and injustice during South Africa's Apartheid rule, devastating civil wars and state-sponsored violence in Haiti and Nicaragua, and crimes against humanity and genocide in the context of Rwanda's civil war represent very different legacies of violence and injustice. Key differences concern the scope and gravity of violence and suffering; the level of popular participation in abuses, and the question of whether violations can primarily be attributed to

Joireman, *supra* note 52, at 88 (noting that "[l]eaving accused Tutsi out of the *gacaca* process endangers any effort at true reconciliation, since reconciliation requires accountability").

⁶⁴ See, however, Phil Clark's recent account of "key themes" in transitional justice, which is valuable because it highlights the need to think in broader terms about the normative framework. See Clark, *supra* note 3.

⁶⁵ See, e.g., AFTER GENOCIDE, *supra* note 3.

state agencies, or if other entities such as rebel groups were also responsible for abuses; the time span of repressive governance or conflict; the question of whether legacies of injustices had prevailed prior to the most recent outbreak of violence; and the level of support within segments of the population for repressive governance or violence. Some may argue that we should simply distinguish between authoritarian regimes and other forms of repressive governance on the one hand, and civil war and other forms of large-scale conflict on the other. This approach, however, easily runs into a number of problems, for instance, because civil war and other forms of large-scale conflict frequently occur with an authoritarian government in place.⁶⁶ Nonetheless, it seems reasonable to argue for a more flexible approach to liberalization and democratization in cases of mass violence than in cases of limited repression under an authoritarian regime. In some cases, such as many of the Latin American, rights-violations were intimately linked to a “national security doctrine” which had stipulated the necessity of military rule.⁶⁷ In these cases, the abuses were committed by a relatively limited set of actors and these actors tended to target individuals within relatively well-defined groups.⁶⁸ In other cases, such as the Rwandan, a very large number of ordinary citizens were agents of political violence and very large numbers of ordinary citizens were victimized. Such differences may be determining factors for the weight given to different objectives. The existence of guilty masses, for example, can make it impossible to adhere to all aspects of the rule of law (as is evident in some cases, such as the Rwandan, from a tension between accountability norms and fair trial norms), thus calling into question the idea that transitional justice should be judged by usual standards. Furthermore, in some cases a pressing need is not only to (re)establish the rule of law, but also to make groups in society want to coexist, and for the state to survive. In addition, to avoid the return to conflict following identity-based conflict with mass involvement it may be necessary to have a strong and decisive government in place, at least in the immediate aftermath of conflict (whereas what was seemingly the most pressing need in many Latin American countries in the 1980s was a return to civil governance and respect for the rule of law, including individuals’ freedoms). In conclusion, the nature of violence and injustice, and

⁶⁶ The “Dirty War” in Argentina, for example, was connected to guerrillas fighting the military regime, at least until 1976. See, e.g., David Pion-Berlin, *The National Security Doctrine, Military Threat Perception, and the “Dirty War” in Argentina*, 21 COMP. POL. STUD. 382 (1988).

⁶⁷ For a critical review of the extent to which Latin American military regimes (here primarily the Argentine) were informed by the “national security doctrine,” see *id.* at 383 (concluding that the armed forces practiced “selective vision, magnifying those components of the doctrine they liked and losing sight of the rest”).

⁶⁸ *Id.*

in particular the question of whether abuses occurred as part of an identity-based conflict with mass participation and mass victimization, may be central when considering how to strike a balance between liberal goals and other important objectives.

The *second* issue requires that attention be paid to current affairs. In cases where continued mass violence or extreme instability characterize the conditions in which transitional justice is deployed, a more supportive position towards prioritizing security and peace at the cost of liberal values may be justified. In cases such as Nicaragua, Haiti, and, to a certain point, Rwanda, transitional justice is carried out while the new regime remains involved in an armed struggle with supporters of the old regime or other violent groups.⁶⁹ Arguably, expectations that transitional justice in such instances should primarily further liberal values will tend to overlook that stability and security can be more pressing needs than consolidating liberal democratic rule. On the other hand, it should of course be kept in mind that the continued rejection of liberalization and democratization may be underlying causes of the conflict.

The *third* issue requires that the level of poverty and the existence of well-functioning state institutions be taken into consideration. Human poverty—broadly understood to include the lack of education, among other things—and the absence of well-functioning state institutions or their limited reach may be determining factors for the extent to which it is realistic to expect that transitional justice can further liberal democratic rule. Those societies loosely referred to as liberal in this article tend to be characterized by the existence of relatively well-functioning state institutions, and they are usually wealthier than the societies referred to as non-liberal.⁷⁰ Countries such as Haiti and Rwanda launched a transitional justice process at a time when these countries faced significant problems concerning poverty, lack of basic state institutions and were attempting to commence a post-conflict reconstruction. In these instances, what should be seen as legitimate interests with transitional justice may deviate from interests in societies with more well-established institutions. Establishing a liberal democracy, in other words, is not necessarily the most pressing need in extremely poverty-ridden societies that embark on transitional justice processes. To the extent these institutions and practices may contribute to goals

⁶⁹ See McDonald & Zatz, *supra* note 31; Roth, *supra* note 38; Reyntjens, *supra* note 25, at 195.

⁷⁰ Compare for example Latin American countries, such as Argentina, Uruguay, and Chile, and East European countries, such as Poland, the Czech republic and Hungary with Rwanda, Haiti and Nicaragua in UNDP, *Human Development Report 2010*, available at http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf.

such as security or nation building, transitional justice can certainly be important on its own.

Very difficult questions of how to approach transitional justice in times of non-liberal transition thus emerge, and more attention to these cases is required in theory. Two observations, however, seem to stand relatively clear. Firstly, dominant transitional justice discourses, heavily influenced by transitions from authoritarian rule to democracy, are often insufficient for understanding the intentions behind and the results of commencing processes of transitional justice in such cases. Secondly, non-liberal transitions are very diverse, and much care is required when attempting to theorize about them.

II

TRANSITIONAL JUSTICE IN NON-TRANSITIONS

Instances where transitional justice takes place in the absence of a fundamental political transition, as the term “transitional justice” implies, have been less central in shaping the field compared to cases of transitional justice in transitions. Nonetheless, an institutionalized approach to dealing with massive human rights abuses can be found in a wide range of countries where we cannot speak of a “transition,” at least not in its usual meaning of a fundamental regime change.⁷¹ The underlying interests of dealing with systematic abuses and the potential achievements of these processes in cases of non-transition may differ radically from those interests and normative claims that are identified in influential studies of transitional justice. As with transitional justice in transitions, however, it is unrealistic to expect that cases of non-transition can be approached from the same point of departure. At least, it seems required to make an overall distinction between transitional justice in cases of fragile and conflicted societies and in cases of consolidated and relatively peaceful democracies. Like the distinctions made above, this does not imply a dichotomy, but should rather be seen as a continuum where societies can be more or less internally peaceful and democratic.⁷²

⁷¹ The term “transition” has been explained as “the interval between one political regime and another,” where regime change refers to something more profound than, for example, the periodic changes of government in consolidated democracies. See GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 6 (1986). The term “non-transition,” as it is used here, should thus be understood as the absence of a profound political transition. Yet, the absence of this type of transition does not necessarily mean that there is no transition, for example, in terms of moving from large-scale violent conflict to relative peace.

⁷² The consolidation of democracy is said to depend on three dimensions: (1) a behavioral dimension that requires that no significant actors in society “spend significant resources attempting to achieve their objectives by creating a non-democratic regime or turning to violence or foreign intervention to secede from the state,” (2) an attitudinal dimension that requires that a “strong majority of public

A. Transitional Justice in Deeply Conflicted Societies

Transitional justice in deeply conflicted societies that have not seen a fundamental regime change is not a subject that has had much influence on the forming of general theory. This neglect may in part be explained by the fact that in most of the instances where serious human rights abuses were dealt with in a systematic manner in the 1980s and the early 1990s—when the field was formed—the occurrence of such processes was related to a preceding political transition.⁷³ This, however, is no longer the case: truth commissions, criminal trials, and other measures normally considered processes of transitional justice when employed to deal with systematic human rights violations have been put in place in a number of fragile and deeply conflicted societies, where there has been no fundamental political transition, or where such a transformation remains highly disputed.⁷⁴ In a sense, transitional justice has moved forward in the sequencing of events. Yet, viewing the occurrence of transitional justice in these instances simply as a matter of change in sequencing is insufficient, and may in some cases even be wrong.

Even among the cases brought to attention here, there appear to be two fundamentally different modes of how transitional justice can occur: one where the state itself, although to very different degrees in various cases, seems content with transitional justice, therefore making possible the establishment of processes at the national level, and one where the state is clearly opposed to transitional justice, causing measures to confront abuses to be deployed at other levels. However, as will be suggested in the following, these instances are not necessarily as radically different as they may initially appear.

In Kenya, understanding the processes of transitional justice created following the 2007–08 election violence requires that attention be paid to the specific political context that surrounded the move towards a transitional justice solution for dealing with

opinion believes that democratic procedures . . . are the most appropriate way of governing collective life in a society,” and (3) a constitutional dimension that requires that government as well as other actors are subjected and habituated to laws sanctioned by the democratic regime in solving their disputes. Put plainly by Juan Linz and Alfred Stepan, we can speak of democratic consolidation when democracy is the “only game in town.” See JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 5–6 (1996).

⁷³ See Ruti Teitel, *Editorial Note—Transitional Justice Globalized*, 2 INT’L J. TRANSITIONAL JUST. 1, 1 (2008) (noting that “at that time [the late 1980s and early 1990s], transitional justice emerged from and came to be identified with a vital debate over whether to punish predecessor regimes, particularly in light of the aims of democracy and state-building associated with the political transitions of that era”).

⁷⁴ See below in this section concerning the cases of Kenya, Colombia, Uganda, and Sudan.

the violence. The decision to embark on a path where legacies of political violence are to be confronted domestically by means of accountability, truth, and reform was made during the so-called Kenyan National Dialogue and Reconciliation (“the Dialogue”), which aimed primarily at reaching a settlement on the political crisis that had sparked off the election violence. The Dialogue was facilitated by the African Union Panel of Eminent Personalities, headed by former UN Secretary-General Kofi Annan, and followed closely by the international community, thus having clear international dimensions.⁷⁵ The two key parties to the dispute concerning election results which had been the trigger of political violence (the Party of National Unity, headed by incumbent President Mwai Kibaki, and the Orange Democratic Movement, headed by Raila Odinga) recognized that their final goal was the achievement of “sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.”⁷⁶ The political settlement brought about the installation of a grand coalition government whereby both parties to the conflict obtained political influence, a measure that ended large-scale political violence in the country.⁷⁷ The move towards a “transitional justice solution” to the election violence was made within this framework of solving a national political crisis.⁷⁸ Decisions to establish various measures to deal with legacies of political violence include the parties’ agreement to ensure criminal accountability for the crimes, create a “Truth, Justice and Reconciliation Commission,” and commence a profound reform process that includes a constitutional review, institutional reform of such state institutions as the national police and the judiciary, as well as reforms targeting socio-economic problems underlying the conflict, such as poverty and unfair land distribution.⁷⁹

For us to understand the dynamics of transitional justice in Kenya, it is vital to recall that these decisions were made in a

⁷⁵ See Interview with Kofi A. Annan (May 9, 2008), available at http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/JBRN-7QM D4C-full_report.pdf.

⁷⁶ KENYA NATIONAL DIALOGUE AND RECONCILIATION, PUBLIC STATEMENT (2008), available at <http://www.dialoguekenya.org/docs/Public%20Statement%20from%20Dialogue%20Feb%201%20FINAL.pdf>.

⁷⁷ KENYAN NATIONAL DIALOGUE AND RECONCILIATION, THE NATIONAL ACCORD AND RECONCILIATION ACT (2008), available at http://www.dialoguekenya.org/docs/Signed_National_Accord_Act_Feb28.pdf.

⁷⁸ KENYA NATIONAL DIALOGUE AND RECONCILIATION, AGENDA ITEM THREE: HOW TO RESOLVE THE POLITICAL CRISIS (2008), available at http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf; KENYAN NATIONAL DIALOGUE AND RECONCILIATION, ON THE RESOLUTION OF THE POLITICAL CRISIS (2008), available at http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf; KENYA NATIONAL DIALOGUE AND RECONCILIATION, STATEMENT OF PRINCIPLES ON LONG-TERM ISSUES AND SOLUTIONS (2008), available at http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf.

⁷⁹ *Id.*

context where those who maintained and obtained political power through the political settlement include some of the same politicians who allegedly had incited, or in other ways supported, the very violence that these processes are meant to confront.⁸⁰ It is also necessary to keep in mind that some politicians benefit, or seemingly think that they benefit, from maintaining a status quo of governance, and that contrary to mainstream perceptions, large-scale violence in Kenya has in fact surrounded most significant political activity in this country since independence.⁸¹ Given this, it is not surprising that some key stakeholders in Kenyan transitional justice appear to have an ambiguous stand toward the extent to which these processes should really confront the causes of political violence and include accountability for its perpetrators. Many politicians seem to have had a half-hearted commitment to implementing the legal and institutional reforms that were initially agreed upon.⁸² Likewise, the ambitions to prosecute perpetrators of political violence in Kenyan courtrooms were rejected by Parliament, which voted down a proposed bill in 2009.⁸³ In doing so, some parliamentarians said they feared that fair justice would not be delivered in Kenya, while others implied that pursuing criminal justice in the Kenyan context runs counter to efforts of reconciling groups and individuals, though the main reason seems to be that large parts of the political leadership in Kenya simply remain opposed to accountability for the electoral violence.⁸⁴ These challenges to criminal accountability must be

⁸⁰ See Comm'n of Inquiry into Post Election Violence, *Report of the Commission of Inquiry into Post Election Violence*, 20–36 (2008), <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> [hereinafter *PEV Inquiry*]; Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Public Redacted Version of Document ICC-01/09-30-Conf-Exp, Dec. 15, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc985613.pdf>; Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Public Redacted Version of document ICC-01/09-31-Conf-Exp, Dec. 15, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc985621.pdf>.

⁸¹ See *PEV Inquiry*, *supra* note 80, at 20–36.

⁸² A new constitution, which significantly changes the governance system, was adopted in August 2010. See Thomas Obel Hansen *Will the New Constitution Lead to a More Peaceful Kenya?*, *African Arguments* (Royal African Society & Social Science Research Council), Aug. 4, 2010, available at <http://africanarguments.org/2010/08/will-the-new-constitution-lead-to-a-more-peaceful-kenya/>. However, the implementation process has been slow, largely due to power struggles in Kenya's political leadership, many of which indicate that politicians continue to put their personal interests over the reform agenda. See, e.g., Anthony Kariuki, *Kibaki Withdraws List of Nominees, PM Welcomes Move*, DAILY NATION, Feb. 22, 2011, available at <http://www.nation.co.ke/News/politics/-/1064/1112564/-/7oxru4/-/index.html>.

⁸³ See, e.g., Charles Wanyoro & Philip Muyanga, *Ocampo Set to Take over Chaos Trials*, DAILY NATION, (Aug. 30, 2009), available at <http://www.nation.co.ke/News/-/1056/648008/-/um9prf/-/index.html>.

⁸⁴ See Thomas Obel Hansen, *Why the Ocampo Six Should Not Become Kenya's Six*, (Feb. 14, 2011), available at <http://www.opendemocracy.net/thomas-obel-hansen/why-ocampo-six-should-not-become-kenya%E2%80%99s-six>.

understood in light of the fact that some of those who are to adopt such measures are among those suspected for organizing the violence, a scenario that is obviously quite different from a new democracy's commitment to prosecute authoritarian leaders who no longer hold office.⁸⁵

However, to understand transitional justice in Kenya, it is indispensable to look beyond the interests of national political leaders. First, it must be recalled that the parties to the Dialogue were not only under a heavy pressure, both from local civil society and international actors, to find a political solution to the crisis that had sparked off the violence, they were—and are—also under heavy pressure to obtain justice for the victims, ensure accountability, reconcile the nation, and transform those institutions and structures that observers pointed to as underlying causes of the violence.⁸⁶ Second, and related hereto, there is an interesting interaction between international justice and justice at the national level in Kenya that deserves attention. The “Waki Commission,” which was set up by the parties to the Dialogue, was granted the powers to investigate the violence and put forward recommendations for how to deal with it.⁸⁷ The commission's report highlighted decades of impunity as a cause of the election violence, and therefore recommended the establishment of Special Tribunals, with a judicial staff made up of both Kenyans and foreigners, to acquire jurisdiction over the election violence.⁸⁸ The Waki Commission requested the parties to reach an agreement on the establishment of such tribunals and put forward a bill in Parliament.⁸⁹ The request was made under the threat that failure to comply with this within a timeframe of sixty days after the commission's report was made public would result in a list of names with high-profile Kenyans that the commission suspected responsible for the violence would be handed over to the prosecutor of the ICC.⁹⁰ Since Kenya failed to act, on July 9, 2009, Kofi Annan handed the list over to the ICC prosecutor, who, after receiving authorization from Pre-Trial Chamber II of the Court, commenced his investigations.⁹¹ When in

⁸⁵ *Id.*

⁸⁶ See, e.g., Anthony Kariuki, *New U.S. Sanctions Target 15 Kenya Leaders*, DAILY NATION (Sept. 24, 2009), available at <http://www.nation.co.ke/News/-/1056/662848/-/undt18/-/index.html>; Macharia Gaiitho, *Envoy Pushed for Regime Change to Avert Crisis in 2012*, DAILY NATION (Dec. 9, 2010), available at <http://www.nation.co.ke/News/politics/Envoy+pushed+for+regime+change+to+avert+crisis+in+2012+/-/1064/1069508/-/vanrw8/-/index.html>.

⁸⁷ See *PEV INQUIRY*, *supra* note 80 (presenting the commission's 500-plus page report, which is generally believed to comprise a thorough and impartial investigation of the election violence and its underlying causes).

⁸⁸ *Id.* at 472–75.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See, e.g., Bernard Namunane, *Six to be Tried at the Hague*, DAILY NATION, May 10, 2010, available at

December 2010, Ocampo named six key suspects of the electoral violence—including the former police chief, the head of civil service and three prominent politicians, of whom two have made clear they intend to run for president in 2012—this caused new turmoil in Kenyan politics.⁹² A number of strategies have been employed to avoid ICC prosecutions, including a motion passed by parliament putting pressure on the executive to withdraw from the Rome Statute, diplomatic pressure for the UN Security Council to defer the Kenyan ICC cases and renewed attention to the judicial reforms, believed to make such a deferral more likely.⁹³

The Kenyan case highlights how understanding transitional justice in cases where there has been no profound regime shift—or where at least the form of transition is very different from transitions to democracy—can require us to think in other terms about the actors and interests than in cases of democratic transitions. Those who support transitional justice may include local civil society; international NGOs, such as the International Center for Transitional Justice and human rights organizations such as Amnesty International; fractions within the incumbent regime; the “international community”, including UN agencies, international brokers of peace agreements, or groups of powerful states; particular international legal institutions, in particular the ICC; or, more reasonably considered, a combination thereof. Those who oppose dealing comprehensively with past violations by means of truth, accountability, compensation, and reform may still hold high political office or continue to serve as high-ranking civil servants. Thinking about transitional justice as a project pursued by new democratic leaders because it will consolidate liberal ideas is not a suitable model for understanding a case like the Kenyan. Rather, attention to the compromises brought about by international involvement in peace talks and justice processes and the continued influence of political elites responsible for orchestrating mass violence, along with below-the-state level advocacy for dealing with abuses, seems vital for comprehending difficult questions of what it is that transitional justice is intended to—and can—achieve in such contexts. It is certainly highly relevant to ask the question of how transitional justice in this kind of a scenario may transform governance, for example by means of accountability and institutional reform. At the same time, it must be acknowledged that the absence of a profound political transition imposes constraints on transitional justice in ways that are largely unfamiliar to democratic transitions.⁹⁴

<http://www.nation.co.ke/News/politics/Six%20to%20be%20tried%20at%20The%20Hague%20-/1064/916028/-/8fpj3ez/-/index.html>.

⁹² See Obel Hansen, *supra* note 84.

⁹³ *Id.*

⁹⁴ See, e.g., ELSTER *supra* note 5, at 188–215 (discussing constraints on transitional justice in democratic transitions).

Evaluating the success of a case like the Kenyan depends most crucially on the extent to which decision-makers commence processes that can transform the system of governance so that risks of “winner-takes-it-all calculus” decrease and so that accountability becomes a likely outcome of any future endorsement of political violence. At the same time, criteria for success include the extent to which socioeconomic structures are changed. Questions of land distribution, for instance, are highly relevant in the Kenyan context because they provide fertile ground for inter-community grievances, which have been triggers of political violence in the country since independence.⁹⁵ One practical implication of these observations is that we must acknowledge a very sensitive balance. On the one hand, external and internal pressure on decision-makers to implement the transformation that they agreed to in a context of a political settlement is vital for such change to actually occur in any meaningful way. Where imposing transitional justice—notably by trying perpetrators in The Hague—may prove the only solution for achieving accountability and deter members of the political elite from again organizing mass violence, that is, on the other hand, also insufficient for achieving the needed transformation.

In Colombia, a transitional justice process launched in 2005 has led to intense debate on the value of this endeavor.⁹⁶ Some scholars argue that these attempts equal “a flawed process of paramilitary disarmament” that has “arguably not been about the widening, deepening or strengthening of democracy in the country.”⁹⁷ Others look more positively at what they see as an integration of the transitional justice paradigm in processes of disarmament, demobilization, and reintegration (DDR programs), which offers hope, they suggest, for achieving truth, redress, and accountability in a context that has usually been approached from a security perspective, rather than a justice and reconciliation perspective.⁹⁸

The debate concerns a 2005 bill, “The Peace and Justice Law,” which was modified following a constitutional court ruling that declared several provisions unconstitutional. The law was enacted in the context of an already existing law on

⁹⁵ See Thomas Obel Hansen, *Political Violence in Kenya: A Study of Causes, Responses, and a Framework for Discussing Preventive Action*, Iss Paper No. 205 (2009), <http://www.issafrica.org/uploads/p205.PDF>.

⁹⁶ See Catalina Diaz, *Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* 189 (Kieran McEvoy & Lorna McGregor eds., 2008).

⁹⁷ *Id.*, at 196.

⁹⁸ See, e.g., Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49 (2006).

demobilization of combatants.⁹⁹ The Peace and Justice Law establishes a National Reparation and Reconciliation Commission; a National Reparation Fund; and, after hard critique, both from Colombian civil society and international observers of the government's proposal for blanket amnesties, facilitates that perpetrators can face criminal justice for gross human rights violations, though with provisions for very lenient sentences.¹⁰⁰ Decision-makers' interest in doing justice for serious abuses in this context of demobilization, some commentators suggest, may translate into creating perceptions that the government is attentive to victims' needs and pursues progressive change, while in reality attempting to avoid more thorough reforms of governance and only marginally benefitting the needs of victims.¹⁰¹ However, as in Kenya, the turn to justice for (some of) the abuses committed during the Colombian civil war must be looked at in a context where important parts of the international community have become significantly more opposed to blanket amnesties. Most importantly perhaps, we should recall that the existence of the ICC—and the prosecutor continuously implying that he is “keeping an eye on Colombia”¹⁰²—appears to have had significant influence on the shaping of domestic responses to accountability.¹⁰³

The National Reconciliation and Reparation Commission is now up running and has investigated some cases of gross human rights violations, and more than 30,000 paramilitaries have been demobilized.¹⁰⁴ Though only few have been convicted for serious crimes under the law, a number of ex-combatants are providing information to prosecutors, and investigations of high-ranking officials and members of parliament are commencing, partly as a result of the information provided by these ex-combatants.¹⁰⁵ Still, members of the Uribe administration are accused of maintaining ties with the paramilitaries, and Uribe is criticized for

⁹⁹ See *id.* (describing in detail the demobilization law).

¹⁰⁰ See, e.g., International Crisis Group, COLOMBIA: TOWARDS PEACE AND JUSTICE 8–14 (2006) <http://merln.ndu.edu/archive/icg/Colombia14Mar06.pdf>.

¹⁰¹ See, e.g., Diaz, *supra* note 96.

¹⁰² The American Non-Governmental Organizations Coalition for the International Criminal Court, *An ICC Investigation of Colombia?*, (Aug. 11, 2005), available at <http://www.amicc.org/docs/Colombia.pdf>.

¹⁰³ See, e.g., Maria José Guembe & Helena Olea, *No Justice, No Peace: Discussion of a Legal Framework Regarding the Demobilization of Non-State Armed Groups in Colombia*, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 5, at, 137 (“The JPL [the Justice and Peace Law] appears to have been conceived in an effort to try to avoid triggering ICC’s jurisdiction”).

¹⁰⁴ See, e.g., HUMAN RIGHTS WATCH, *Breaking the Grip? Obstacle to Justice For Paramilitary Mafias in Colombia (2008)* [HEREINAFTER *Breaking The Grip?*], <http://www.hrw.org/en/reports/2008/10/16/breaking-grip>; Semana International, *Justice and Peace Law . . . Four Years Later* (2009), <http://www.semana.com/noticias-international/justice-and-peace-law-four-years-later/126742.aspx>.

¹⁰⁵ *Id.*

failing to launch more thorough reforms of governance which could circumvent democratic deficits and serious problems in the executive's respect for human rights while also potentially help to facilitate the cease of large-scale conflict by bringing to an end the decade-long civil war with left-wing guerrillas (FARC and others).¹⁰⁶

Referring to the Colombian efforts as a matter of "transitional justice" illustrates the power of the transitional justice paradigm and calls into question the accuracy in describing the process primarily as a question of "justice." Turned around, the Colombian case may be said to illustrate how in fact it is possible to achieve some kind of justice while attempting to limit violent conflict. This also suggests that this case cannot easily be evaluated according to the same standards as used in contexts of ended conflict or ended regime oppression. On the one hand, much more than decision-makers are attempting to achieve liberalization and governance reform, transitional justice in Colombia provides central actors with a tool for controlling an ongoing conflict and maintaining status quo in governance.¹⁰⁷ On the other hand, the setting up of a legal framework for accountability for paramilitaries shows how transitional justice can have its own dynamics and how some amount of justice can actually be achieved despite the process focusing on still powerful entities and taking place in a period where there has been no completed transition, political or otherwise.¹⁰⁸

Approaching transitional justice in times of conflict may require that expectations of liberal change are adjusted, at least as long as the very stakeholders subjected to accountability maintain influence and power. Of course, this does not mean that transitional justice in cases such as Colombia should not be carefully scrutinized and that we should not point to flaws in the process. But it suggests that it may be too much to expect that besides providing some amount of accountability, truth, and redress for victims, transitional justice should have significant potential for facilitating a transformation of governance, at least in the short-term.

¹⁰⁶ *Id.*; see also International Crisis Group, *supra* note 100, at i (noting that there is "concern that the Uribe administration prioritises quick fix removal of the paramilitaries from the conflict at the cost of justice for victims and the risk of leaving paramilitary economy and political power structures largely untouched"). For a recent account of the present administration's commitment to human rights and democracy, see, e.g., HUMAN RIGHTS WATCH, *Columbia: Obama Should Press Uribe on Rights* (2009), <http://www.hrw.org/en/news/2009/06/26/colombia-obama-should-press-uribe-rights-0>.

¹⁰⁷ See Diaz, *supra* note 96.

¹⁰⁸ For a detailed analysis of how the transitional justice process has turned out to implicate parliamentarians and cabinet members, see, e.g., BREAKING THE GRIP?, *supra* note 104.

In Uganda, the commencement of a transitional justice process to deal with violations committed during the conflict in northern parts of the country presents an interesting example of how different interests can intertwine. Some observers imply that when in 2003 President Museveni referred crimes committed by the LRA in northern Uganda to the ICC, this move should be viewed as one weapon in the arsenal in fighting the still active rebels.¹⁰⁹ While the ICC issuing arrest warrants against LRA leaders in 2005 was celebrated by many commentators, the Court's failure to investigate Ugandan army atrocities has been criticized as an example of selective justice.¹¹⁰ However, when peace talks with the LRA appeared to stand a real chance of success, and the rebels unsurprisingly made clear that they perceived the arrest warrants as *the* key obstacle to reaching an agreement,¹¹¹ new developments took place. With reference to the fact that the Ugandan government and the LRA had decided to deal with issues of transitional justice *in* Uganda, Museveni attempted to convince the ICC that it should drop charges against LRA leaders, an idea that the Court has so far rejected.¹¹² The arrangement, known as the Juba Agreement, sets up "Special Tribunals" to hear the most grave cases (with provisions for "alternative sentences"), while referring the rest to "alternative justice mechanisms" that rely on so-called traditional justice.¹¹³ The Juba Agreement also stipulates that a reparation fund to victims must be set up.¹¹⁴ The Ugandan "Justice, Law and Order Sector" has been charged with the responsibility of implementing these decisions.¹¹⁵ It has engaged in consultations with civil

¹⁰⁹ Compare, e.g., The Refugee Law Project, ICC Statement 4 (2004), <http://www.refugeelawproject.org/archive/2004/RLP.ICC.investig.pdf> (noting that "by November 2003, Museveni had seemingly lost the diplomatic battle on the military solution to the LRA. To regain lost ground and to re-assert his democratic credentials, he took a number of actions [including ICC referral] in rapid succession which served to obfuscate the debate on the war in northern Uganda, which was now gaining momentum"), with Phil Clark, *If Ocampo Indicts Bashir, Nothing May Happen*, (July 13, 2008) (unpublished manuscript) available at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf (implying that the ICC itself played an important role in convincing the Ugandan leaders to make the referral).

¹¹⁰ See, e.g., *ICC Takes Decisive Step for Justice in Uganda*, HRW.ORG, <http://www.hrw.org/node/70189>. (last visited Feb. 8, 2011).

¹¹¹ See H. Abigail Moi, *The International Criminal Court's Arrest Warrants and Uganda's Lord's resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267 (2006) (discussing ICC actions and responses in Uganda from the political leadership and the LRA).

¹¹² *Id.*

¹¹³ See Agreement On Accountability and Reconciliation, Uganda-Sudan, June 29, 2007, http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf.

¹¹⁴ *Id.* (Making clear reference to the principle of complementarity as a guiding principle of the ICC).

¹¹⁵ See Beyond Juba, *Tradition in Transition: Drawing on the Old to Develop a New Jurisprudence for Dealing with Uganda's Legacy of Violence* (Working Paper No. 1, July

society and has facilitated the setting up of a special war crimes division of the High Court, which is to try the most serious LRA offences.¹¹⁶ Yet, while communities in northern Uganda are utilizing “traditional practices” to reintegrate and reconcile, ICC arrest warrants are still valid; the war crimes division of the High Court has yet to put on trial the first LRA leader; Joseph Kony, the leader of the LRA, has failed to sign the final peace accord, and as a result, LRA atrocities continue to occur in the DRC, the Central African Republic, and Southern Sudan.¹¹⁷

The Ugandan case thus highlights how the interests behind establishing processes of transitional justice in still deeply conflicted societies with no regime change—much more than aiming at reforming governance—can be a “tool in the toolbox” for leaders to control conflict. But it also illustrates that serving these objectives can take place simultaneously with efforts to provide victims with some amount of redress. In a sense, the Ugandan case highlights how transitional justice has become both *internationalized* (the ICC’s arrest warrants and their complicated connection to transitional justice in Uganda, international actors pushing for justice in Uganda, and a regional dimension of the atrocities which must be addressed) and *localized* (the opt for using so-called “traditional practices” in local communities and the influence of Ugandan civil society in shaping transitional justice policies). Understanding transitional justice in Uganda requires that attention be paid to how these levels intertwine. Finally, the case exemplifies how appreciating transitional justice may require the observer to integrate an interpretation of a variety of goals, such as peace, reconciliation, victims’ healing, justice in different forms, and governance reform. Any meaningful appraisal must depart from the perception that transitional justice is a matter of leaders at the state level attempting to “do good,” while having to overcome obstacles imposed by other stakeholders. This is highlighted by the fact that the Ugandan government itself is responsible for gross human rights violations, and because the conflict in northern Uganda must be understood in light of a “north-south” divide, where the current administration is accused of discriminating against northerners, thus leading to widespread dissatisfaction

2009) http://www.beyondjuba.org/working_papers/BJP.WP1.pdf (discussing the use of so-called traditional practices).

¹¹⁶ *Id.*

¹¹⁷ See generally Moi, *supra* note 111; Beyond Juba Project, *supra* note 115 (discussing the use of so-called traditional practices); INTERNATIONAL CRISIS GROUP, NORTHERN UGANDA: UNDERSTANDING AND SOLVING THE CONFLICT (2004), <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/uganda/Northern%20Uganda%20Understanding%20and%20Solving%20the%20Conflict.ashx> (analyzing LRA atrocities and discussing appropriate responses for solving the conflict).

with the government among certain groups, such as the Acholis, and laying the ground for rebel groups to gain support.¹¹⁸

The three cases brought to attention here are not the only examples of a transitional justice process being launched domestically, or in combination with international efforts, in still conflicted and largely non-transitional societies.¹¹⁹

As such, there is a need for devoting more attention to the implications of conceptualizing these cases as “transitional justice.” In particular, analysis of how the interests of different stakeholders intertwine in shaping judicial responses to serious human rights abuses, and what interests are served by referring to these practices within a transitional justice paradigm, appear as most vital measures when attempting to understand what it is that we actually see in these cases. In analyzing this type of cases, it is crucial to acknowledge that one cannot suppose that decision-makers at the national level have a sincere interest in reforming governance. Analyses are therefore obliged to take into account the question of whether transitional justice functions to shun more profound reform that may be crucial for ending conflict and creating a more just society. At the same time, one must maintain realistic expectations to what transitional justice can actually achieve in instances where a fundamental political transition is absent and societies remain deeply conflicted.

While the cases discussed here share the feature that transitional justice entails some amount of commitment by national decision-makers to deal with grave abuses, there are also cases where the state is entirely opposed to do so.

Recent developments in Sudan provides clear examples of how accountability can be pursued when a profound political transition is absent and the conflict is still ongoing, *and* the state

¹¹⁸ See, e.g., INTERNATIONAL CRISIS GROUP, *supra* note 117.

¹¹⁹ Burundi may be said to provide another example. The 2000 Arusha Accords called for the establishment of a truth and reconciliation commission and the establishment of an international commission of inquiry into past abuses. In 2004, the Burundian parliament passed a bill on a truth commission. The commission has yet to be implemented. In 2005, the UN Security Council endorsed the so-called Kalomoh report, which calls for the establishment of a truth and reconciliation commission and for the creation of special chambers to try those responsible for atrocities. Since 2005, a coalition government has been in place, headed by the CNDD-FDD. The UN and international civil society organizations continue to negotiate with the government concerning the implementation of measures of transitional justice. Some of those in government are likely to oppose comprehensively dealing with past abuses because they have been involved in atrocities. Moreover, the current government is still involved in a low-scale armed struggle with the FNL, leading to accusations of gross human rights violations. See INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, BURUNDI, <http://ictj.org/en/where/region1/512.html> (last visited Feb. 8, 2011). For an in-depth analysis of transitional justice attempts in Burundi, see Stef Vandeginste, TRANSITIONAL JUSTICE FOR BURUNDI: A LONG AND WINDING ROAD, WORKSHOP 10 REPORT, BUILDING A FUTURE ON PEACE AND JUSTICE (2007), <http://www.peace-justice-conference.info/download/WS10-Vandeginste%20report.pdf>.

lacks any form of commitment to deal with systematic and very grave abuses. Dealing with the conflict in Darfur is not only thought of as a matter of achieving *peace* and ending large-scale rights-violations. Even if violations are still ongoing, such speculations coexist with debates on how to achieve *justice*. To a certain extent, these paradigms have intertwined in that some observers argue that only by pursuing accountability can the abuses end.¹²⁰ Others, however, suggest that the quest for accountability endangers peace processes and may lead to more or worse abuses.¹²¹

The fact remains that war criminals and perpetrators of crimes against humanity in Sudan have for decades had little reason to fear accountability. Lutz Oette explains this culture of impunity by “deficiencies in the legal framework; the lack of transparency and effective monitoring; the absence of an independent judiciary; and the failure to establish adequate accountability mechanisms in response to violations committed in the course of conflict.”¹²² One interesting aspect of the general lack of accountability, for crimes committed in Darfur and elsewhere in Sudan, is that there appears to be a separate legal regime for state officials, where prosecutors are required to obtain an approval by the superior to the official they would like to prosecute.¹²³ As pointed to above, ICC involvement in Uganda and Kenya (and even Colombia, though the Court is not officially involved) has influenced the shaping of domestic transitional justice responses. It is also worth noting that in Sudan, talks of ICC investigations brought about domestic reactions. In a move “ostensibly designed to show that domestic courts were able and willing to try such crimes,” a Special Criminal Court was established in 2005 to try crimes committed in Darfur.¹²⁴ The court, however, has only been able to try a very limited number of cases, mostly of ordinary offences rather than international crimes and only concerning low-level perpetrators. This makes one observer comment that “by all accounts, the Court and other related measures have failed to constitute a credible accountability

¹²⁰ See, e.g., Press Release, Transnational Radical Party, No Peace Without Justice Welcomes ICC Prosecutor’s Decision to Launch Investigations in Darfur (June 6, 2005) available at <http://www.radicalparty.org/en/content/no-peace-without-justice-welcomes-icc-prosecutor’s-decision-launch-investigations-darfur>.

¹²¹ See, e.g., Naseem Badiey, *Ocampo v. Bashir: The Perspective from Juba* (July 18, 2008) (on file with the Oxford Transitional Justice Working Paper Series), available at http://www.csls.ox.ac.uk/documents/Badiey_Final.pdf.

¹²² Lutz Oette, *Another Piece in the Puzzle: Accountability and Justice for International Crimes in Sudan*, 1 (Aug. 20, 2008) (on file with the Oxford Transitional Justice Research Working Paper Series), available at <http://www.csls.ox.ac.uk/documents/OetteFi.pdf>.

¹²³ See *id.* at 2.

¹²⁴ See *id.* at 3.

mechanism.”¹²⁵ In 2005, acting on a Security Council referral,¹²⁶ the ICC commenced investigations into crimes in Darfur.¹²⁷ In May of 2007, these investigations led Pre-Trial Chamber I to issue two arrest warrants against high-profile Sudanese citizens (one being the former Minister for the Interior and the current serving Minister of Humanitarian Affairs; and the other a leader of the Janjaweed militia).¹²⁸ Then, on March 4, 2009, the ICC in a highly controversial move issued an arrest warrant against incumbent President Omar Bashir.¹²⁹

Very difficult questions arise as to how we should approach these attempts of doing justice for crimes against humanity in an ongoing conflict where there is little reason to believe that national leaders will deal with these crimes in the near future. There seems to be two overall ways of looking at ICC involvement in Sudan.

One view builds on a universal understanding of justice where the development of international standards on accountability for serious abuses—and the establishment of institutions that can put into effect these principles—should be celebrated because they are indicators of an increased concern for human rights and attention to victims. This position will argue that these developments reflect that rights have become more central in the international domain. It claims to separate law and politics, or argues for the need to do so. This perception would suggest that the establishment of the ICC is altogether a “good thing” because it offers hope that standards on accountability can be more rigorously enforced. It would suggest that the more active the Court is the better.¹³⁰ According to such views, the ICC issuing arrest warrants for Sudanese leaders represents an important step forward in dealing with the situation in Darfur. From this perspective, the greatest merits of ICC actions are that they offer

¹²⁵ *Id.*

¹²⁶ U.N. S.C. Res. 1593, U.N. Doc. S/Res/1593/2005 (March 31, 2005).

¹²⁷ See <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB>.

¹²⁸ Prosecutor v. Harun & Abd-Al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmand Harun (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>; Prosecutor v. Harun & Abd-Al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279858.pdf>.

¹²⁹ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

¹³⁰ A common critique from these commentators is that the Court has insufficient powers, as opposed to whether international justice is the best way to move forward. See, e.g., Cees Flinterman, *The International Criminal Court: Obstacle or Contribution to an Effective System of Human Rights Protection?*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 264 (Ramesh Thakur & Peter Malcontent eds., 2004).

hopes for accountability where there would probably otherwise never be any (a concrete justification), and that they are thought to facilitate the rule of law on the global scene (a principled justification).¹³¹

According to the other view, ICC action on Bashir is problematic because it clashes with other important goals. Some say the Court's move threatens stability and peace in Sudan and may lead to more abuses and suffering.¹³² Others say the ICC is pushing Bashir and his comrades into a corner where they now have more reasons than ever not to give up power.¹³³ Still others say there are dangers that a potential ousting of Bashir can lead to hardliners taking over (with Bashir himself considered less a hardliner than most senior army officers).¹³⁴ It has also been argued that ICC involvement creates a regional backing for Bashir and resistance to the Court that would otherwise not be there.¹³⁵ Finally, because it is unlikely that the President will be arrested and transferred to The Hague, some criticize the Court's endeavors since they are said to endanger its own legitimacy.¹³⁶

A polarized debate on this difficult question of whether indicting Bashir was a "good idea" seems almost inevitable. The purpose here is not to attempt to provide a straightforward answer to this question. Rather, the point is that in understanding and evaluating issues of justice in a case like Sudan, commentators will benefit from looking at consequences and concepts both familiar from other contexts of transitional justice, such as a potential tension between peace and criminal justice, and at consequences that take a quite different orientation than those debated when transitional justice is endorsed by state leaders after large-scale abuses have ended. One important issue concerns the argument that ICC prosecutions end up being portrayed as a neo-imperialist adventure. Increased backing of

¹³¹ For a view that is endorsed by influential parts of the human rights movement, see ICC: Bashir Warrant is Warning to Abusive Leaders, HUMAN RIGHTS WATCH, <http://www.hrw.org/node/81231> (last visited Feb. 9, 2011).

¹³² See, e.g., Badiy, *supra* note 121. This point of view has proved to be correct, at least in the sense that suffering increased following the ICC's issuing of an arrest warrant because Bashir expelled a large number of humanitarian organizations from Darfur, leaving many IDP's without needed assistance. See, e.g., Xan Rice & Tania Branigan, *Sudanese President Expels Aid Agencies*, THE GUARDIAN, Mar. 5, 2009, available at <http://www.guardian.co.uk/world/2009/mar/05/sudan-aid-agencies-expelled>.

¹³³ See, e.g., Andrew Natsios, *Waltz with Bashir: Why the Arrest Warrant against Sudan's President Will Serve Neither Peace nor Justice*, FOREIGN AFFAIRS, Mar. 23, 2009, available at <http://www.foreignaffairs.com/articles/64904/andrew-natsios/waltz-with-bashir>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See, e.g., Clark, *supra* note 109, at 1 ("The concern is not that the indictment of Bashir may have a negative effect but that it may have no effect at all, raising questions about the fundamental purpose of the ICC in responding to mass atrocity").

(alleged) war criminals *resulting* from an international body indicting a sitting head of state is a concern that should be taken seriously. It calls into question the idea that a legal regime can be separated from politics, while raising fundamental questions of “whose justice.”¹³⁷ Moreover, a key challenge to justice in such contexts is that we risk narrowing our conception of a complicated conflict to a matter of “good guys” and “bad guys,” while in reality more sustainable justice for the people of Sudan is likely to necessitate reform of governance. Such reforms may exactly require a more nuanced understanding of underlying causes of conflict.

In sum, approaching cases of transitional justice in still conflicted societies that have not experienced a fundamental political transition requires the commentator to move beyond conceptions of transitional justice in times of transitions. Yet, looking at cases such as the Kenyan, Colombian, Ugandan, and Sudanese can benefit from the transitional justice scholar bringing with him a preference for appreciating law and justice in its societal context. Simply dismissing the idea that the field should occupy itself with instances where past or ongoing abuses are addressed under circumstances where a profound political transition is absent is problematic. First, it neglects that while these cases indeed pose significantly different challenges if compared to transitional justice in democratic transitions, they are nonetheless characterized by the application of many of the same processes that find use when abuses are dealt with under or after a fundamental political transition. Second, the fact that many of the concepts used in transitional justice discourses take radically different meanings when dealing with large-scale abuses in still conflicted societies does not mean that these concepts are altogether irrelevant. Concerns of progressive societal change, for example, are relevant as benchmarks for the legitimacy of justice processes, although, in part, what makes up progressive change may have a different meaning in deeply conflicted societies. Similarly, concerns of how to provide victims with redress as well as questions of how to reconcile individuals and groups are also relevant in cases where there has not been a fundamental political transition. In other words, the interests

¹³⁷ The question of whether the ICC, by so far focusing exclusively on African countries in its indictments should be seen as a sort of neo-colonialist enterprise is interesting and subjected to quite intense debate in some African forums. *See, e.g.,* Assembly of the African Union, *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, A.U. Doc. Assembly/AU/13 (July 3, 2009). Likewise, some academics have questioned why the ICC only focuses on crimes on the African continent, when a large number of complaints have been made to the Court, including allegations of war crimes in Afghanistan, Iraq, Israel, and elsewhere. *See, e.g.,* Stephen Oola, *Bashir and the ICC: The Aura or Audition of International Justice in Africa* (Oxford Transitional Justice Research Working Paper Series, 2008), <http://www.csls.ox.ac.uk/documents/OolaFin.pdf>.

pursued in these cases can be different and these objectives should partly be judged according to different standards, but this does not mean that observers of transitional justice should reject to analyze them. To a certain extent, the lack of attention in general theory to the type of cases discussed here has to do with the fact that when the field was born, the idea of confronting repression and mass violence was in fact typically preconditioned on the existence of a profound political transformation. Yet times have changed, and if the field wants to maintain its relevance for the real world, there is a need for engaging with the theoretical implications that follow from these developments.

B. Transitional Justice in Consolidated Democracies

Transitional justice in consolidated democracies is a subject that has had limited influence on the shaping and development of transitional justice theory, or perhaps put more correctly, has been marginalized by mainstream conceptions of transitional justice, while tending to be discussed in a rather separate sphere. Nonetheless, it is now a common phenomenon that consolidated democracies establish some of the processes that resemble those that are used in fundamental political transitions when dealing with legacies of violence and injustices.

In Australia, attempts to deal with systematic human rights abuses against aboriginals have been a central theme in political debates for some time. In 1995, the Attorney General mandated the Australian Human Rights Commission to inquire into the state's practices until the early 1970s concerning the forcible removal of aboriginal children from their parents.¹³⁸ In 1997, the Commission's report, "Bringing Them Home: The Stolen Children Report," was handed over to Parliament and made public.¹³⁹ The report includes a wide range of recommendations, such as monetary compensation to the victims of forcible removal and for the Australian government officially to apologize for endorsing these practices.¹⁴⁰ Then Prime Minister John Howard stated his regret for these injustices, but it was not until February 2008, after Kevin Rudd took office that a formal apology was offered at the federal level of the state (February 2008).¹⁴¹ The question of compensation remains a controversial issue, with funding created in some states but not in others.¹⁴²

In Canada, the establishment of a Truth and Reconciliation Commission in 2008 presents a move to deal with legacies of

¹³⁸ See THE AUSTRALIAN HUMAN RIGHTS COMM'N, BRINGING THEM HOME: THE 'STOLEN CHILDREN' REPORT (1997), http://www.hreoc.gov.au/social_justice/bth_report/index.html.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

human rights injustices committed against the indigenous population. These injustices concerned the forcible placement of children in Christian boarding schools where they were to be “culturally assimilated,” not entirely unlike the rationale in Australia. The establishment of the commission was preceded by the Canadian government, in 2006, agreeing to compensate around 80,000 victims of these practices, with a total amount of around two billion Canadian dollars. In 2008, Canadian Prime Minister Stephen Harper offered an apology to the victims.¹⁴³

Other consolidated democracies have, in different ways, attempted to deal with past wrongdoings, whether against their own citizens or in an international context. In particular, these democracies have offered apologies for past abuses, including the treatment of indigenous populations, colonialism, slavery, involvement in the Rwandan genocide, and other instances of “past wrongdoing.”¹⁴⁴

With some important exceptions,¹⁴⁵ general studies of transitional justice have not been particularly occupied with these cases. A number of inquires, usually not referring to themselves as studies of transitional justice, had reparations for past systematic rights violations in consolidated democracies as a central theme. Elezar Barkan, for example, argues that, “international public opinion and organizations are increasingly attentive to moral issues” and that these issues require attention to restitution.¹⁴⁶ Barkan views this trend of offering reparations

¹⁴³ See INT’L CTR. FOR TRANSITIONAL JUSTICE, CANADA’S TRUTH AND RECONCILIATION COMM’N (Apr. 29, 2008), <http://www.ictj.org/en/news/features/1652.html>. See also *Canada Apology for Native Schools*, BBC NEWS (June 11, 2008), available at <http://news.bbc.co.uk/2/mobile/americas/7447811.stm>.

¹⁴⁴ Besides Australia and Canada, countries such as New Zealand have offered an apology and compensated its indigenous population for unfair treatment in the past. See, e.g., Kathy Marks, *A £160m Apology to the Maoris for Shameful History of Injustices*, THE INDEPENDENT, June 26, 2008, <http://www.independent.co.uk/news/world/australasia/a-163160m-apology-to-the-maoris-for-shameful-history-of-injustice-854333.html>. Some former colonial powers, most clearly perhaps the case with Germany, have expressed remorse, although not directly apologized, for some aspects of their colonial past. See, e.g., Ger. Bundestag, Declaration of the Ger. Bundestag Namib. Resolution 15th Legislative Period, Doc. 15/3329 (June 16, 2004). In 2009, the U.S. Senate unanimously passed a resolution apologizing for slavery, however, noting that the resolution is not relevant for attempts to file court cases for compensation. See, e.g., Krissah Thompson, *Senate Backs Apology for Slavery*, WASH. POST (June 19, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/18/AR2009061803877.html>. Around 2000, both the Belgian Prime Minister and the UN acknowledged their responsibility for failing to prevent the Rwandan genocide. See, e.g., *Belgian Apology to Rwanda*, BBC NEWS (Apr. 7, 2000), available at <http://news.bbc.co.uk/2/hi/africa/705402.stm>; *UN Admits Failure in Rwanda*, BBC NEWS, (Dec. 16, 1999) available at <http://news.bbc.co.uk/2/hi/africa/568566.stm>.

¹⁴⁵ See MARTHA MINNOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91–117 (1998).

¹⁴⁶ ELEZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 308 (2000).

to victims of past injustices in consolidated democracies as an indication of adherence to these dominant norms and as an exercise that serves self-affirmation.¹⁴⁷ Thus, there appears to be a partial academic division, where consolidated democracies' dealing with past injustices are considered separately from those cases which have provided the foundation of transitional justice, namely new democracies' dealing with repression under prior authoritarian regimes.

From certain perspectives, this division seems well justified. Key concepts such as liberal change are likely to take a radically different meaning when consolidated democracies decide to account for past abuses. That, however, does not mean that increased attention should not be paid to consolidated democracies' dealing with past—and ongoing—violations, nor does it mean that we should not scrutinize these societies' identification of which problems should be considered along a paradigm of redress and justice. One danger embedded in reserving the concept of transitional justice to societies in radical change is that it implies a moral differentiation. On the one hand, mainly poor countries in “transition” are seen as having endemic problems with gross violations of human rights. On the other hand, consolidated democracies, mainly in the West, are implied to be free of such mess and only have a need to come to terms with practices that took place in a relatively distant past (and usually in a softer way that excludes talks of criminal accountability). One might argue that when Western countries define their need to deal with the past as a matter of looking into practices concerning indigenous populations, slavery, or colonialism, it overlooks dealing with gross human rights violations taking place in the present, for example in the context of the War on Terrorism.¹⁴⁸ Moreover, it must be noted that the willingness to confront past wrongdoings is not a phenomenon that can be recognized in *all* consolidated democracies. In Denmark, for example, calls for accountability measures for gross human rights violations, calls for strengthening an “international rule of law,” and eager assistance to poor countries' attempts of dealing with legacies of past injustices are not necessarily indicative of how this country deals with its own legacies of

¹⁴⁷ *Id.* at 315. Barkan's appraisal is not limited to consolidated democracies, but it is made clear that “today liberal societies are more likely than most to recognize past public injustices” and most of the analysis concentrates on Western democracies' dealing with past injustices.

¹⁴⁸ Interestingly, there might now be a change in this understanding. As an example, discussions of a truth commission and/or accountability for U.S. practices in the War on Terrorism are starting to take place. *See, e.g.,* Randall Mikkelsen, *U.S. Senator Seeks Bush-Era “Truth Commission,”* REUTERS (Feb. 9, 2009), available at <http://www.reuters.com/article/idUSTRE5186JZ20090210> (quoting U.S. Senator Patrick Leahy).

abuses.¹⁴⁹ It is noteworthy that the Danish prime minister recently refused to inquire further into “experiments” in the 1950s where Greenlandic children were forcibly removed from their parents and placed in Danish institutions or with Danish foster parents.¹⁵⁰

CONCLUSION

There are significant problems connected to understanding the complex and very diverse instances of transitional justice by relying on a theoretical framework that is heavily influenced by ideas about transitions from authoritarian rule to democracy that were developed in the late 1980s and early 1990s. Though the scholarship analyzes cases that are radically different from “transitions to democracy,” the conceptual underpinnings of transitional justice as an academic field continue to be heavily influenced by values and understandings of dilemmas that connect intimately to liberal transitions. In a world where systematically dealing with serious abuses can take place in democratic transitions, in non-liberal transitions, as well as in highly diverse contexts of non-transitions, there is a clear need for “updating” transitional justice theory. This Article has proposed that liberal transitions are only *one* among a number of key scenarios in which a systematic and institutionalized dealing with serious human rights abuses occurs; and a number of observations have been made on the different interests that can be pursued by stakeholders in transitional justice. Further, the Article has discussed how we should evaluate transitional justice in these different contexts.

Rejecting a uniform normative framework for evaluating transitional justice, however, does not mean that we cannot formulate some general positive goals of transitional justice. How to reach these goals, however, will to a large extent depend on the type of case in question.

A chief goal is preventing the recurrence of abuses. If we agree with Kofi Annan when he insists that “an ounce of prevention is

¹⁴⁹ See, e.g., DEN. MINISTRY OF FOREIGN AFFAIRS, DANMARKS MEDLEMSKAB AF SIKKERHEDSRÅDET 2005–06: ERFARINGSOPSAMLINGSRAPPORT [DENMARK’S MEMBERSHIP OF THE UN SECURITY COUNCIL: LESSONS LEARNED] (2007), <http://www.netpublikationer.dk/um/7784/pdf/nyweb.pdf>.

¹⁵⁰ Only recently have these questions reached a central place in the political debate in Denmark. Some parties are suggesting a truth commission and an official apology from the Danish government. Prime Minister Lars Løkke Rasmussen, however, refuses to take any further action because these practices were “unfortunate,” but belong to another era where “intentions were good,” and, it is argued, we should instead be “pleased that times have changed.” See Hagen Højer Christensen, *Statsminister Lars Løkke Siger Nej til Officiel Undskyldning [Prime Minister Lars Løkke Refuses to Offer Official Apology]*, GREENLANDIC BROADCASTING CORPORATION (Aug. 19, 2009), available at [http://www.knr.gl/index.php?id=183&tx_ttnews\[tt_news\]=47594&tx_ttnews\[backPid\]=143&cHash=f5b64b8014](http://www.knr.gl/index.php?id=183&tx_ttnews[tt_news]=47594&tx_ttnews[backPid]=143&cHash=f5b64b8014).

worth significantly more than a pound of cure,”¹⁵¹ this is a very important goal of transitional justice. However, the question of prevention takes different forms in different contexts. In cases such as that of Colombia, “prevention,” at least initially, translates into halting ongoing abuses, but in cases such as the Latin American, it primarily means attempting to prevent the return of military dictatorships while consolidating a democratic order based on rule of law principles.

The role of transitional justice in helping to achieve this preventive objective obviously varies according to the context. Sometimes, as when consolidated democracies confront abuses committed in a relatively distant past, the commitment to prevent (the same kind of) injustices and abuses from recurring may already be present at the level of the current political leadership. From a preventive perspective, the most important role of transitional justice in such cases may be labeling certain practices as unjust in the public domain. In other cases, such as when rights violations are ongoing in deeply conflicted societies, demobilization of paramilitaries, a political settlement and reforms that allow for restructuring of abusive state institutions, and increased transparency and accountability can be vital measures. In cases such as that of Rwanda, where abuses were connected to an identity-based conflict, the question of how to reconcile groups within society may be one of the most important issues for preventing the return to conflict—and thus for preventing large-scale abuses. In cases such as the Kenyan, where we have seen decades of impunity for political violence, it may be particularly desirable to pursue criminal justice for (some of) the perpetrators. Yet, focusing alone on trial and punishment will tend to prove insufficient, particularly in cases where violence is related to long-standing grievances and structures in society which marginalize certain groups.

This is closely connected to a second goal of creating a more just society. Although in many cases, issues such as liberalization and democratization may in the long-term be vital for reaching this goal, these are not the only dimensions of creating a more just society, and the relevance of these particular elements depends on the context.

In cases where abuses were committed by a limited set of actors under a prior authoritarian or totalitarian regime, it is highly desirable if transitional justice can contribute to strengthening liberal values as soon as possible. However, as this Article has argued, issues such as democratization and freedom of expression may under other circumstances contravene with goals

¹⁵¹ THE SEC’Y-GEN., THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES: REPORT OF THE SECRETARY-GENERAL, at 3, U.N. Doc. S/2004/616 (2004).

of security and nation building, at least in the initial post-conflict phase. What is more, it is not always realistic to expect that extremely poor countries emerging out of large-scale conflict can pursue these goals in the immediate aftermath of mass violence. In these cases, it may be necessary to distinguish between different phases of post-conflict, where the first step to transitional justice may be a question of securing an environment where conflict is absent. Only later on can liberalization and democratization play a central role in the project of transforming society.

It is also important to keep in mind that creating a more just society is not only a question of liberalization and democratization. Especially in highly unequal post-conflict or still conflicted societies, there can be an element of group-based marginalization. Creating a more just society may require that far-reaching reforms are carried out to change such patterns. If access to political, economic, and social resources is not made more equal, chances are that those victimized in the past will continue to feel victimized, or that new groups will be marginalized. If so, risks are high for a return to violent conflict.

In cases such as that of Rwanda, where a new regime embarks on a path to comprehensively address past abuses, the question remains whether the new regime also supports the implementation of reforms so that large groups in society do not feel marginalized or excluded from the administration of the country and from access to economic resources. Ultimately, the greatest risk for long-term peace in a country such as Rwanda is not necessarily that transitional justice in certain aspects has resulted in limits to a number of freedoms, but rather, the risk that transitional justice contributes to the perception that the current regime is an *ethnically based* authoritarian regime. The extent to which what Filip Reyntjens refers to as an “RPF-ization” will be identified with what he refers to as “Tutsization,” in other words, appears crucial for Rwanda’s future.¹⁵² If groups in Rwanda feel that they are excluded from influence and resources, these groups are unlikely to perceive the “new Rwanda” as a just Rwanda, thereby increasing the risk that mass violence may once again erupt. In this way, there can be an intimate connection between the goal of constructing a more just society and the goal of preventing large-scale abuses.

Even in cases of liberal transitions, where transitional justice has often been labeled a success story, extremely unequal distribution of resources may challenge conventional conceptions of what in fact are the criteria for success. South Africa, for instance, has been successful in ensuring a peaceful transformation to democracy and the Truth and Reconciliation

¹⁵² Reyntjens, *supra* note 25, at 187.

Commission (TRC) managed to account for the horrors of Apartheid while bringing victims and perpetrators together in one forum. Yet, the transformation has in important aspects failed to implement measures for the creation of a society where groups have more equal opportunities. It has rightly been pointed out that in South Africa, “gross violations of human rights involve mainly (and not peripherally) the victimization of communities (and not individuals).”¹⁵³ While the TRC defined victims in a narrow way, this institution of transitional justice did in fact put forward recommendations for the new democracy to attend to creating equal access to resources. Only to a limited extent, however, have these recommendations been acted on. As Charles Villa-Vicencio notes, “some recommendations have since been implemented and some rejected, while many have simply been ignored.”¹⁵⁴ Despite the turn to democratic rule, South Africa remains among the most unequal countries in the world. This inequality has a group-based nature, which can be traced to the Apartheid regime’s construction of society, creating a problem that may impede on objectives of transitional justice. A recent report by the Institute for Justice and Reconciliation notes, “while growing income inequality has been a disquieting global phenomenon in recent decades, its manifestation in South Africa also has a perturbing racial dimension,” thus making inequality the most common source of division between communities.¹⁵⁵ Although large-scale political violence has by and large been avoided in post-Apartheid South Africa, enormous challenges concerning violent crime appear closely related to group-based marginalization and the persistence of devastating poverty in many communities.¹⁵⁶

Also in many other contexts, the question of how to create a more just society requires that increased attention is paid to reforms aimed at more inclusive governance and equality in access to economic and social resources. In Uganda, legacies of political violence have roots in group-based marginalization and exclusion. Yet, the debate about transitional justice focuses primarily on accountability, truth telling, and re-integration of

¹⁵³ RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 120 (2002) (quoting Mahmood Mamdani from a personal conversation).

¹⁵⁴ Charles Villa-Vicencio, *The Complex Legacies of the TRC*, in *TRUTH AND RECONCILIATION IN SOUTH AFRICA: 10 YEARS ON* 164, 165 (Charles Villa-Vicencio & Fanie Du Toit eds., 2006); see also Miriam Mannak, *Report: South Africa Most Unequal Society*, *DIGITAL JOURNAL* (Sept. 28, 2009), <http://www.digitaljournal.com/article/279796>.

¹⁵⁵ INSTITUTE FOR JUSTICE AND RECONCILIATION, *SA RECONCILIATION BAROMETER 2008: 8TH ROUND MEDIA BRIEFING 9* (2008), <http://sabarometerblog.files.wordpress.com/2009/09/2008-sarb-media-report-final.pdf>.

¹⁵⁶ See, e.g., THE CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, *THE VIOLENT NATURE OF CRIME IN SOUTH AFRICA* (2007), <http://www.info.gov.za/view/DownloadFileAction?id=87382>.

combatants.¹⁵⁷ In Central American countries such as Guatemala, conflict was closely related to historically nested inequality with a clear group-based character. Despite the pursuit of transitional justice in that country, many of these root causes of conflict are yet to be addressed.¹⁵⁸ Though military regimes have been ousted in the Southern Cone and different attempts have been made to confront past abuses, large landowners and other elites who had tended to support authoritarianism continue to enjoy privileges while inequality, sometimes as in Brazil having racial undertones, still threatens security in some of these countries.¹⁵⁹

The failure or the success of creating a more just society where groups have more equal access to resources can therefore be linked to other concerns such as security. For further development of transitional justice theory, it is vital that a nuanced understanding of the role of law and legal institutions in transforming society is endorsed and that further effort is put into understanding the links between transitional justice and conflict prevention. This calls for interdisciplinary approaches, but more to the point it calls for a less fixed understanding of the mechanisms of transitional justice and for recognition that law and legal change in a post-conflict society are about much more than retrospective justice.

A third goal of transitional justice is attending to the needs of victims. Assuming that we can speak of such needs in universal terms is misguided. Victims have different needs, depending on the kind of abuses they have suffered as well as their socioeconomic status, the time span between abuses and the implementation of measures to address their needs, the perceptions in different cultures of what are the most relevant ways of redressing harms, and so forth. Moreover, the question of how we should define victims may vary from context to context. In some cases, such as in a number of Latin American countries, it may make sense to say that the victims were predominantly those who were tortured, illegally detained, or the families of those who “disappeared.” While this does not mean that other individuals and groups did not suffer under authoritarian rule, it may make sense for processes of transitional justice to focus primarily on redressing the most immediate victims of the past regime in such contexts. In other cases, however, those who were victimized under a past regime or during a conflict may far exceed those who suffered from direct and personal violence. Dealing with abuses after identity-based conflict, for example, tends to require that a

¹⁵⁷ INTERNATIONAL CRISIS GROUP, *supra* note 117 (quoting from summary).

¹⁵⁸ See, e.g., Laura Arriaza & Naomi Roht-Arriaza, *Social Repair at the Local Level: The Case of Guatemala*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE, *supra* note 96, at 143.

¹⁵⁹ See, e.g., Thomas E. Skidmore, *Brazil's Persistent Income Inequality: Lessons from History*, 46 LATIN AM. POL. & SOC'Y 133 (2004).

more nuanced understanding of victims is endorsed because whole groups may have suffered. And, when dealing with abuses committed by Western democracies against indigenous populations, it may be insufficient to say that victims are only those who were directly subjected to oppression. This is because the time span between the point where these abuses were committed and the putting in place of transitional justice measures may mean that the direct victims are no longer alive, and more importantly because the effects of the oppression is in many cases still being felt by the current generation of descendants of those originally oppressed.

It is essential that studies of transitional justice further investigate the most pressing needs of victims in different contexts and further discuss how these needs can be integrated into transitional justice measures.

In sum, this Article has argued that there is a need for distinguishing between the different types of situations where transitional justice is utilized. Despite the fact that these different cases are often characterized by very different interests seeking transitional justice, and despite the observation that evaluating such objectives must take place using different normative frameworks according to the type of case in question, it is still possible to put forward some overall positive goals for transitional justice. Applying these goals to concrete cases, however, must be based on an understanding that transitional justice occurs in radically different contexts.