

The Time and Space of Transitional Justice

Thomas Obel Hansen

1. Introduction

The field of transitional justice emerged in the context of the so-called third wave of democratization,¹ proposing to offer insight to the question of how the new democracies of Latin America and East and Central Europe should address serious human rights abuses committed under previous authoritarian or totalitarian regimes. The early transitional justice scholarship was premised on the notion that a window of opportunity was created by the transition itself, allowing the nascent democracies to devise justice tools in order to remedy victims and to consolidate the new democratic order.²

At the same time, transitional justice scholars tended to accept that the selfsame justice processes could jeopardize democratization if they failed to operate on the conditions set by the political transition.³ Grounded in a merger of human rights advocacy and the ‘transition to democracy’ literature of the 1980s and 1990s,⁴ transitional justice scholars thus focused on how newly established democratic governments could use the ‘transitional moment’ to respond to the abuses committed by their repressive predecessors.

In so doing, it was assumed that the transition – seen as a confined moment in time – presented both opportunities and limitations to the kind of justice that could be rendered. Accordingly, transitional justice was typically seen as something distinct to justice in ‘ordinary times’ in that the preferred transitional justice option is one which *facilitates* liberal transformation, while at the same time compromises to rule of law standards in ordinary times were acceptable due to the unique circumstances in which transitional justice operates.⁵ Often framed as a question of peace versus justice, these discussions tended to center around the question of whether the State should utilize criminal justice processes or other measures such as truth commissions and reparations when dealing with past abuses.⁶

¹ The term was coined by Huntington. See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).

² See eg the studies in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Volume I and II) (United States Institute of Peace Press 1995).

³ The debate between Orentlicher and Nino concerning the relationship between punishment and democratization in the Latin American transitions illustrates well the different understandings of this topic in the early scholarship. See Carlos Nino, ‘Response: The Duty to Punish Past Abuses of Human Rights into Context: The Case of Argentina’, in Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (United States Institute of Peace Press 1995), pp 417-436; Diane F. Orentlicher, ‘A Reply to Professor Nino’, in Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (United States Institute of Peace Press 1995), pp 437-438.

⁴ Notable studies of the transitions to democracy of this era include Guillermo O’Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (The Johns Hopkins University Press 1986), Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991); Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (The Johns Hopkins University Press 1996).

⁵ On the claimed uniqueness of transitional justice and the nature and ramifications of such compromises, see further Ruti Teitel, *Transitional Justice* (Oxford University Press 2000).

⁶ See eg José Zalaquett, ‘Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations’, in Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon*

Since then, transitional justice scholarship has developed enormously. Not only do contemporary studies of transitional justice claim that transitional justice can contribute to a range of other goals, such as peace building,⁷ but they also interrogate justice processes aimed at addressing human rights abuses and more broadly the roots of conflict in a myriad of situations not characterized by a liberalizing political transition.⁸ For example, transitional justice now claims to apply to contexts where abuses are ongoing due to the continued existence of violent conflict and/ or a repressive government; situations where large-scale abuses have ended, but there has been no (clear) political transition or that transition is not liberal; and even to situations where consolidated democracies attend to past unjust practices, for example against indigenous populations. Transitional justice therefore appears to have lost its connection to ‘an exclusive “moment” in time’,⁹ raising questions as to when a transition commences and ends and what kind of transformation the justice tools aim at achieving.

At the same time, the State has come to be seen as only one among several relevant actors relevant for promoting transitional justice and transitional justice occurs at a variety of spaces other than the State-level. Accepting that local communities, civil society and regional and international organizations play important roles in advancing the objectives of transitional justice, the contemporary scholarship explores how these actors can create and implement transitional justice in contexts where the national political leadership is incapable or unwilling to do so.¹⁰

Further, there is a lack of clarity as to how transitional justice should respond to the changing nature of conflict and various types of abuses, including inter-ethnic violence, cross-border conflict, systematic repression of minorities and injustices committed by established democracies. The move away from viewing transitional justice primarily as the responses of a new democratic regime to abuses committed by a past undemocratic and repressive regime raises profound questions which have not been sufficiently explored in the scholarship.

Positing that we cannot speak of transitional justice in a static and uniform sense, this Chapter discusses these developments and their ramifications. The Chapter is divided into three main sections, each discussing how current developments in transitional justice relate to central assumptions made in theory. First, the chapter engages with the assumption that transitional justice takes place during a confined ‘window of opportunity’. This is followed by a discussion of the assumption that transitional justice is correlated to a liberalizing political transition. Finally, the Chapter addressed the assumption that transitional justice occurs at the State level to address abuses committed within its territory.

with Former Regimes, Volume I: General Considerations (United States Institute of Peace Press 1995).

⁷ See eg Lisa J. Laplante, ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’, *International Journal of Transitional Justice*, Vol 2, No 3, 2008, pp 331-355. On the connections between transitional justice and peacebuilding, see further Chandra Sriram, ‘Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice’, *Global Society*, Vol 21, No 4, 2007, pp 579-591.

⁸ See further the literature cited in Section 3 of this chapter.

⁹ Kieran McEvoy and Lorna McGregor, ‘Transitional Justice from Below: An Agenda for Research, Policy and Praxis’, in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008), pp. 1-13, at 6.

¹⁰ See eg the studies in in Kieran McEvoy and Lorna McGregor (eds.), *Human Rights Law in Perspective (Vol. 14): Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008).

2. The assumption that transitional justice takes place during a confined ‘window of opportunity’

Teitel has defined transitional justice as ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’.¹¹ By political change, Teitel refers to one particular form of transition, namely ‘the move from less to more democratic regimes’.¹² While there are numerous definitions of transitional justice, Teitel’s has proven particularly influential because it has laid the foundation for an understanding that ‘transition’ concerns the move from authoritarianism to democracy and that ‘transitional justice’ concerns the types of justice that occur in these so-called paradigmatic transitions. Accordingly, the field of transitional justice is based on the notion that the ‘transition’ has well defined contours, starting with the ousting or surrender of a repressive non-democratic regime and ending with the consolidation of a liberal democratic regime.

As Quinn notes, the term transition is normally understood to imply ‘an event that results in a transformation’ and thus a fixed point in time, but it is not always self-evident exactly what this event is and its time span. More specifically, in political science thinking, ‘transition’ has been explained as ‘the interval between one political regime and another’, where regime change refers to something more profound than the periodic changes of government in established democracies.¹³ However, as argued by Venema, even with respect to paradigmatic transitions, it can be hard to agree on the starting and end points of these transitions as they are ‘not historical in the chronological sense, but in the political sense’.¹⁴ Some scholars argue that any transition, rather than happening at a particular moment in time, takes place over a long period, and may continue, incomplete, for a period of years after the transition is begun.¹⁵

While conceptually it has thus been assumed that there is a relatively well-defined space of time of a ‘transition’ in which transitional justice potentially appears, in reality justice processes addressing serious human rights abuses are created both before and long after a democratic transition has occurred – and in practice much of the contemporary scholarship is occupied with analyzing these types of justice processes. Yet, few scholars have examined what this means for our understanding of transitional justice.¹⁶ As Quinn notes: ‘if a state is not in “transition” then surely it ought to be ruled out as a case to study within the field, which is by its very definition concerned with transition. Yet much of the existing scholarship in the field of transitional justice has failed to

¹¹ Ruti Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, Vol. 16, 2003, pp. 69-94, at 69.

¹² Ruti Teitel, *Transitional Justice* (Oxford University Press 2000), p 5.

¹³ Guillermo O’Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (The Johns Hopkins University Press, 1986), p. 6.

¹⁴ Derk Venema, ‘Transitions as States of Exception: Towards a More General Theory of Transitional Justice’, in Palmer et al (eds), *Critical Perspectives on Transitional Justice* (Intersentia 2012), pp 73-89, at 75.

¹⁵ Devon E. Curtis, ‘Transforming a Rebel: Peace and Post-Conflict Governance’, *Paper Presented at the Annual Convention of the International Studies Association, Montreal*, 17 March 2011.

¹⁶ Some scholars, however, argue that the notion of transitional justice should be replaced with ‘transformative justice’, thereby reflecting that the ‘focus on “transition” as an interim process that links the past and the future’ is misguided as what is actually at stake is ‘transformation’, which implies ‘long-term, sustainable processes embedded in society’. See Wendy Lambourne, ‘Transformative Justice, Reconciliation and Peacebuilding’, in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge 2014), pp 19-39, at 19. Similarly, Gready and Robins argue in favour of an agenda that focuses on transformative, as opposed to transitional, justice. See Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, *International Journal of Transitional Justice*, Vol 8, 2014, pp 339-361.

interrogate the meaning and utility of the very “transition” that lies at its heart’.¹⁷

2.1. *Transitional justice before transition?*

Recent years has seen a proliferation of transitional justice discourse in situations where a political transition is yet to occur and the abuses are on-going.¹⁸ For example, justice processes – or the prospects thereof – which aim at addressing massive human rights violations in countries such as Zimbabwe and Sudan are sometimes being conceptualized as transitional justice notwithstanding that a democratic transition is yet to occur and the regime in power is the one responsible for the very violations that ‘transitional justice’ will ostensibly remedy.¹⁹ While some scholars argue that a political transition is a prerequisite for the actual implementation of transitional justice in countries where the repressive regime is still in power,²⁰ the fact remains that justice processes termed ‘transitional justice’ are often proposed and devised prior to such a transition commences, and even when a regime change seems unlikely to occur in any near future.

In some cases, such as Syria, the authors of such proposals argue that sustainable peace and political transformation can only be achieved if a ‘comprehensive justice and accountability process’ is established,²¹ thus highlighting a central expectation in contemporary transitional justice discourse, namely that justice processes can help *initiate* a transition, rather than being pre-conditioned on the existence of it.²² However, one significant problem with labelling societies such as Syria ‘transitional’²³ is that Syria is at the point actually not undergoing any transition towards democracy or stability. Moreover, whereas it might be reasonable to assume that ‘securing a sustainable transition’ in part depends on the existence of justice processes,²⁴ one must keep in mind that in the first place a political transition and an end to the on-going conflict requires great-power agreement on how the transition should look,²⁵ rather than justice solutions (though of course it cannot be excluded that justice tools will be included in a potential deal).

¹⁷ Joanna R. Quinn, ‘Whither the “Transition” of Transitional Justice?’, *Paper Prepared for Presentation at the Annual Meeting of the Canadian Political Science Association, 16 May 2011, Waterloo, Canada*, pp 1-2, available at http://politicalscience.uwo.ca/research/docs/joanna_quinn/WhithertheTransitionofTransitionalJustice2012.pdf.

¹⁸ See eg Thomas Unger and Marieke Wierda, ‘Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice’, in *Building a Future on Peace and Justice*, 2009, pp 263-302; Luis Moreno Ocampo, ‘Transitional justice in ongoing conflicts’, *International Journal of Transitional Justice*, Vol 1, No 1, 2007, pp 8-9; Par Engstrom, ‘Transitional Justice and Ongoing Conflict’, *Working Paper*, November 1 2011, available at <http://ssrn.com/abstract=2004313>.

¹⁹ See eg Alex Thomson and Niki Jazdowska, ‘Bringing in the Grassroots: Transitional Justice in Zimbabwe’, *Conflict, Security & Development*, Vol 12, No 1, 2012, pp 75-102; Pondai Bamu, ‘Transitional Justice without Transition in Zimbabwe?’, *Pambazuka*, Issue 421, 2009, available at <http://www.pambazuka.net/en/category.php/transjust/54438>.

²⁰ See eg Brian Kritz and Jacqueline Wilson, ‘No Transitional Justice without Transition: Darfur - A Case Study’, *Michigan State Journal of International Law*, Vol 19, No 3, 2010-2011, pp 475-500.

²¹ Dawlaty and No Peace Without Justice, *Transitional Justice in Syria*, 2013, p 7, available at https://lb.boell.org/sites/default/files/thransisional_justice.pdf.

²² See eg Fionnuala N. Aoláin and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies’, *Human Rights Quarterly*, Vol 27, 2015, pp 172-213 (arguing that justice tools used in contexts where there has not been a fundamental political transition should be conceptualized as transitional justice since they have potential to bring about a stable and peaceful democracy).

²³ For example, Syria is referred to as a ‘transitional society’ in Dawlaty and No Peace Without Justice, *Transitional Justice in Syria*, 2013, p 14, available at https://lb.boell.org/sites/default/files/thransisional_justice.pdf.

²⁴ *Ibid.*

²⁵ See eg ‘Obama and Putin Play Diplomatic Poker Over Syria’, *New York Times*, 28 September 2015, available at <http://www.nytimes.com/2015/09/29/world/middleeast/obama-and-putin-clash-at-un-over-syria-crisis.html>.

Even for those who argue that transitional justice in situations where no political transition has occurred is unlikely to advance political transformation, ‘pre-transition transitional justice’ is still seen as beneficial for a variety of reasons. A report by Freedom House illustrates this perception well:

[t]he TJ paradigm – strengthened by the Nuremberg and Tokyo trials, the Hague and Geneva Conventions, the International Covenant on Civil and Political Rights, and emerging human rights movements – is capable of confronting the present as well the past. Most recently, we have seen an emergence of international, regional and domestic efforts to deliver/achieve at least some form of justice prior to transitions. These attempts, by definition independent from governments, have a more narrow scope of addressing violations in restrictive contexts: they can provide some redress for individual suffering, document personal stories, and even occasionally prosecute perpetrators, but they cannot focus on political structures that give rise to human rights violations.²⁶

A key reason why some form of justice may at times be possible prior to a political transition is that international courts are increasingly involved in rendering justice for serious human rights abuses, and the conceptual overlap between transitional justice and international criminal law, including provisions for victims’ redress within the ambit of the Rome Statute.²⁷ Of the eight countries subject to a formal ICC investigation (DRC, Uganda, Central African Republic, Darfur, Kenya, Libya, Cote d’Ivoire and Mali) none are best understood as taking place in the context of a democratic transition, and a significant proportion are occurring under some form of authoritarian leadership and/ or ongoing conflict. However, to the extent the Court has targeted members of an incumbent repressive regime, as the case in Sudan for example, the lack of cooperation of the affected State – and possibly other States – means that it will often be impossible to see these leaders actually being prosecuted.²⁸

In sum, some form of justice, usually internationally-led, may take place prior to a political transition, but it may be naïve to assume that these justice processes hold great potential for facilitating fundamental transformation where the repressive regime is still in place and it will often be hard to actually give effect to justice processes initiated in the face of State hostility.

2.2. *Transitional justice after transition?*

Assuming that transitional justice exclusively occurs in the limited window of opportunity created by a democratic regime change further ignores the fact that accountability processes, truth-seeking, reparation programs and other measures usually considered tools of transitional justice are often utilized long after a democratically elected government has been installed. In reality, justice processes relating to serious human rights abuses committed under repressive regimes are

²⁶ Freedom House, *Delivering Justice Before and After Transitions*, 2013, p 5, available at <https://freedomhouse.org/sites/default/files/Delivering%20Justice%20Before%20and%20After%20Transitions%20Istanbul%20Report%20Final%202014.pdf>.

²⁷ However, some scholars have warned against confusing transitional justice with international criminal law. See eg Jens Iverson, ‘Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics’, *International Journal of Transitional Justice*, Vol 7, No 3, 2013, pp 413-433 (noting that ‘If Transitional Justice is made so elastic as to implicitly absorb International Criminal Law and *jus post bellum*, it actually lessens the potential value of Transitional Justice as a discreet, focused concept’.)

²⁸ See eg Gwen P. Barnes, ‘The International Criminal Court’s Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir’, *Fordham International Law Journal*, Vol 34, No 6, 2011, pp 1585-1619.

frequently assumed, re-assumed or revised, many years after democratic rule has been installed.²⁹

For example, in several Latin American countries transitional justice solutions originally devised in the context of the political transition from military dictatorships to elected government have later been contested and revised, especially to the extent they initially involved amnesties for serious human rights abuses. As Cath Collins points out, the region's 'Dirty Wars' of the 1970s and 1980s are now being addressed by local courts 'after years of de facto or de jure impunity'.³⁰ Labeling these renewed accountability and truth-seeking efforts 'post-transitional justice', Collins argues that new opportunities for doing justice often arise long after a democratic order has formally been established because the old political elite are no longer in the same position to threaten the democratic order.³¹

Whether we want to label justice processes occurring long after the political transition took place as 'transitional justice', 'post-transitional justice' or something else is not simply a question of terminology, but also brings into question whether the passage of time may be an important factor in terms of allowing 'more justice'. If that is the case, as Collins suggests it is,³² this problematizes the assumption in mainstream transitional justice theory that a limited window of opportunity for doing justice is created and confined to the period of regime change. If indeed substantive justice for serious human rights violations is more likely to be delivered following the lapse of time, this would run counter to much of the advocacy surrounding transitional justice, namely that States and other actors have an exceptional opportunity for dealing with accountability, truth-seeking and reparation in the context of the transition, though of course, as Collins also emphasizes, previous legal activity in defence of human rights seems to make post-transitional justice more likely and substantive.³³

However, in so far as we consider these 'delayed' responses to human rights abuses under a past repressive regime as a form of transitional justice, one could be tempted to conclude that almost all forms of litigation and redress relating to serious human rights abuses should be considered transitional justice. This raises the prospect that the term 'transitional justice' loses meaning because it involves 'everything' and hence 'nothing'.³⁴ Kersten argues:

²⁹ See eg Cynthia M. Horne, 'The Timing of Transitional Justice Measures', in Lavinia Stan and Nadya Nedelsky (eds), *Post-Communist Transitional Justice Lessons from Twenty-Five Years of Experience* (Cambridge University Press 2015), pp 123-147.

³⁰ Cath Collins, 'The End of Impunity? "Late Justice" and Post-Transitional Justice in Latin America', in Palmer et al (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012), pp 399-423, at 399.

³¹ In this regard, she notes that these processes are usually driven by civil society rather than the State. *Ibid.*, pp 400-405.

³² Collins points to a variety of factors which make 'post-transitional justice' likely, including: 1) 'sensitive anniversaries', such as commemorations; 2) incidents and accidents', understood as 'unforeseen, apparently fortuitous events' such as third country litigation; 3) the 'simple passage of time', noting that the 'prospect of aging can move relatives and survivors to redouble efforts to press justice claims'; 4) the 'intimate connection between truth and justice', noting that the judicial status of an officially-sponsored truth through a truth commission will tend to be tested; 5) a 'multiplier effect' of initiating trials; 6) institutional change and reform beyond the 'effects of changes of government', such as subsequent judicial reforms; and 7) a 'history of previous legal activity in defence of human rights'. *Ibid.*, 414-419.

³³ *Ibid.*

³⁴ On the lack of conceptual clarity, see also Jens David Ohlin, 'On the Very Idea of Transitional Justice', *The Whitehead Journal of Diplomacy and International Relation*, Winter/Spring 2007, pp 51-68, at 51 (noting that: 'the concept remains an enigma. It defines the contours of an entire field of intellectual inquiry, yet at the same time it hides more than it illuminates. No one is exactly sure what it means'). See also Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"', *International Journal of Transitional Justice*, Vol 3, No 1, 2009, pp 5-27.

[t]ransitional justice was intended to mean a particular set of choices and dilemmas facing societies in a particular time-frame. By conflating transitional justice with simple justice, we find ourselves back at square one: where everyone has a different idea of what is just and what is justice and virtually everything can be interpreted to be related to the pursuit of justice.³⁵

Accordingly, while confining the term transitional justice to the justice processes occurring *during* a democratic transition seems problematic because the reality differs in that justice processes aimed at addressing the abuses of repressive regimes frequently occur both before and after such a transition, expanding the conception of transitional justice to include such justice processes requires recognition of the different challenges and opportunities that these fundamentally different contexts present.

3. The assumption that transitional justice is correlated to a liberalizing political transition

Transitional justice studies increasingly analyze situations where justice processes are utilized in transitions which are not best characterized as liberalizing political. This includes transitions from war to peace, such as Sierra Leone and Uganda; from political or ethnic violence to some form of stability, perhaps facilitated by power-sharing as in Kenya; or from one authoritarian regime to another as in Rwanda. The contemporary field has even started interrogating justice processes in consolidated democracies such as Canada and Australia that address past abuses but which are seemingly disassociated from any form of transition.

3.1. Transitions from armed conflict to peace

Although attempts to replace the notion of ‘transitional justice’ with ‘post-conflict justice’ have not gained significant ground, some commentators have started to use definitions of transitional justice that embrace justice after authoritarian rule as well as justice after civil war. According to Roht-Arriaza, transitional justice can be understood as a ‘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’.³⁶ In line with this, some scholars have noted that contemporary ‘transitional justice discourses frequently conflate at least two primary kinds of transition: that from authoritarianism to democracy, and that from war to peace’.³⁷

These new definitions could be seen to imply that the field has developed as a consequence of the fact that the type of legal and quasi-legal measures referred to as transitional justice when occurring in paradigmatic transitions are now utilized in situations such as Sierra Leone, Liberia and Uganda where the main transition in question is one from armed conflict to (relative) peace and stability. The fact that justice processes in these and other countries undergoing peaceful transformation is now being debated as transitional justice could thus be seen as a kind of generation shift, reflecting a change in world affairs with fewer democratic transitions and where serious human rights abuses

³⁵ Mark Kertsen, ‘Transitional Justice: “Paradigm Shift or Hot Air?”’, *Justice in Conflict*, 19 July 2011, available at <http://justiceinconflict.org/2011/07/19/transitional-justice-paradigm-shift-or-hot-air/>.

³⁶ Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’, in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press 2006), pp 1-16, at 2.

³⁷ Fionnuala N. Aoláin, and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies’, *Human Rights Quarterly*, Vol 27, 2005, pp 172- 213, at 212.

increasingly take place in the context of civil wars and other forms of internal strife.³⁸ But what does this mean for our conception of transitional justice and the dilemmas surrounding it?

One important point is, as Reiter et al note, that civil war contexts tend to be characterized by a higher magnitude of violent acts compared to the abuses committed under authoritarian rule which informed the initial field of transitional justice.³⁹ In situations where significant proportions of the population have been victimized it may be unrealistic to expect that transitional justice tools such as reparation programs can attend to their individual needs and right to reparation.⁴⁰ In addition, the high level of perpetrators in civil wars may for very practical reasons, such as limited capacity of the judiciary, make it impossible to pursue individual accountability for any significant proportion of perpetrators.⁴¹

More fundamentally, war crimes and other abuses committed during civil wars are often committed by thousands of combatants on both sides. As noted by Reiter et al, while ‘authoritarian regime transitions tend to involve abuses by one set of actors, war tends to involve complicity on both sides’.⁴² This presents a number of dilemmas for transitional justice. For example, whereas transitional justice tools are usually based on the idea that we can clearly distinguish between perpetrators and victims, in civil wars this is not always so straightforward, as illustrated for example by child soldiers.⁴³ Moreover, complicity on both sides in civil wars raises questions as to how to ensure even-handed justice.⁴⁴ In situations where the war ends with a clear victory to one side, transitional justice is typically utilized in a manner whereby only the losing side is subject to sanctions. In Rwanda, for example, the post-genocide Gacaca Courts have prosecuted hundreds of thousands of genocide perpetrators, whereas members of the Rwandan Patriotic Front (RPF) responsible for war crimes in the civil war that surrounded the genocide have not been brought to account.⁴⁵

In other situations of civil strife, the hostilities are concluded with a peace-agreement or a power-sharing deal. Although advocates of transitional justice tend to argue that such arrangements must include provisions for accountability, truth-seeking and reparations, the fact remains that it can be

³⁸ Andrew Reiter et al argue that the shift toward the use of transitional justice in the context of civil war will likely endure since the number of post-authoritarian settings has begun to wane and most countries of the third wave of democratization and the relatively short but explosive fourth wave of democratization have already adopted transitional justice processes, meaning that fewer authoritarian state transitions demanding transitional justice occur today. In contrast, they argue, ‘civil wars continue to proliferate around the world, offering new opportunities for transitional justice.’ See Andrew Reiter et al, ‘Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts’, *Transitional Justice Review*, Vol 1, No 1, 2012, pp 137-169, at 138-39.

³⁹ *Ibid.*, at 139.

⁴⁰ See Moffett chapter x.

⁴¹ See eg William A, Schabas, ‘The Rwanda Case: Sometimes It’s Impossible’, in M. Cherif Bassiouni (ed), *Post Conflict Justice* (Transnational Publishers 2002), pp 499- 522.

⁴² Andrew Reiter et al, ‘Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts’, *Transitional Justice Review*, Vol 1, No 1, 2012, pp 137-169, at 139.

⁴³ See eg Laura Martin, ‘Negotiating Transitional Justice: An Examination of Local Processes and Institutional Engagement with Victims in Rural Sierra Leone’, in Thomas Obel Hansen (ed), *Victims and Post-Conflict Justice Mechanisms in Africa* (Law Africa forthcoming 2015).

⁴⁴ As Victor Peskin points out, problems with one-sided justice are not limited to transitional justice at the national level, but extends to international tribunals. See Victor Peskin, ‘Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda’, *Journal of Human Rights*, Vol 4, No 2, 2005, pp 213-231.

⁴⁵ See eg Human Rights Watch, *Rwanda: Mixed Legacy for Community-Based Genocide Courts*, 31 May, 2011, available at <https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts>.

difficult to achieve political reconciliation if actors involved in the process will be prosecuted and often, as the case in Kenya, even when we do see formal inclusion of justice provisions in power-sharing deals facilitated to end violence, these will later be undermined and compromised due to the lack of interest of political actors in implementing justice mechanisms which could end up targeting themselves or their supporters.⁴⁶

Transitional justice theory was developed on the basis that the political leadership is in principle committed to seeing justice done, but as argued here the situation will often be more complex in situations of addressing abuses committed during an internal violent conflict. More generally, there is still a level of uncertainty as to how the field should reorient as to address transitions from armed conflict to a more peaceful and stable order. As Dustin Sharp observes: ‘the turn to peacebuilding might be seen to represent a broadening and a loosening of earlier paradigms and moorings, making this a significant moment in the normative evolution of the field. Yet, with few exceptions, there has thus far been little scrutiny as to what transitional justice as peacebuilding might actually mean or how it might be different from transitional justice as liberal democracy building.’⁴⁷

Some scholars question the assumption that transitional justice is necessarily conducive for peacebuilding. Exploring the linkages between transitional justice and peacebuilding, Sriram has argued that although it is frequently assumed that transitional justice contributes to peace, in reality ‘transitional justice processes and mechanisms may, like liberal peacebuilding, destabilise post-conflict and post-atrocity countries, and may also be externally imposed and inappropriate for the political and legal cultures in which they are set up.’⁴⁸

3.2. *Transitions to authoritarian rule*

As noted above, contemporary definitions of transitional justice often assume the existence of two main forms of transition, namely a liberalizing political one and one from armed conflict to peace. However, such definitions do not embrace all the scenarios where debates about transitional justice currently take place. Notably, there are situations where transitional justice tools are being utilized in the context of a non-democratic political transition. This usually takes the form of one repressive regime being replaced by another, with the latter bringing into play justice tools to sanction members and supporters of the former regime.

In Rwanda, for example, various forms of transitional justice have been pursued following the 1994 RPF-takeover, but the RPF-led regime can hardly be described as democratic (in December 2015, an amendment to the constitution was passed which would effectively allow Paul Kagame, who has been in control since 1994, to stay in power until 2034),⁴⁹ and continues to violate a number of basic freedoms.⁵⁰ Uzbekistan offers another example of transitional justice occurring during a

⁴⁶ See further Thomas Hansen, ‘Kenya’s Power-Sharing Arrangement and Its Implications for Transitional Justice’, *International Journal of Human Rights*, Vol 17, No 2, 2013, pp 307-27.

⁴⁷ Dustin Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’, *International Journal of Transitional Justice*, 2014, advance access at <http://ijtj.oxfordjournals.org/content/early/2014/12/02/ijtj.iju021>.

⁴⁸ Chandra Sriram, ‘Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice’, *Global Society*, Vol 21, No 4, 2007, pp 579-591, at 579.

⁴⁹ See The Guardian, *Rwandan president Paul Kagame to run for third term in 2017*, 1 January 2016, available at <http://www.theguardian.com/world/2016/jan/01/rwanda-paul-kagame-third-term-office-constitutional-changes>.

⁵⁰ See eg Filip Reyntjens, ‘Rwanda, Ten Years on: From Genocide to Dictatorship’, *African Affairs*, Vol 103, 2004, pp 177-210. On transitional justice in Rwanda, see further Phil Clark and Zachary Kaufman (eds), *After Genocide:*

clearly non-liberal political transition. President Karimov decided to launch a truth commission to deal with abuses committed in the Soviet era, but Karimov's regime is clearly undemocratic and responsible for serious human rights abuses.⁵¹ The so-called Red Terror trials in Ethiopia, which took place following the overthrow of the highly repressive Mengistu regime but under the auspices of another authoritarian regime, similarly offers an example that transitional justice can take place in the context of a fundamental political transition that is not liberalizing.⁵²

Even if the justice mechanisms utilized in these non-democratic transitions do not correspond with definitions of transitional justice, such as those proposed by Teitel and Aoláin and Campbell, they are nonetheless typically conceptualized as transitional justice, both by those who contemplate them and by observers. More generally, Venema argues that transitional justice theory needs to incorporate non-democratic transitions, noting that 'expanding the theory of transitional justice to include all fundamental political transformations' is beneficial because it makes transitional justice theory 'more general and thus more scientifically interesting and possibly more reliable'.⁵³ Indeed Venema argues that Teitel's conception of the key features of transitional law, including how it aims at creating a dichotomy or discontinuity between the old and the new regime, 'can be equally well applied to transitions away from democracy as towards it'.⁵⁴

Whether or not Venema is right in equaling the characteristics of law in democratic and non-democratic transitions, there can be little doubt that conceptualizing justice mechanisms utilized by non-democratic regimes as transitional justice raises a series of questions and challenges for the field. Importantly, as Dustin Sharp argues, this implies that 'transitional justice are not a one-way ratchet of liberal betterment, but can in fact be used to reinforce illiberal ideologies and to consolidate the power of illiberal regimes'.⁵⁵ To the extent that transitional justice facilitates repression and helps consolidate the regime responsible for it, this of course challenges the very foundation of the field, namely that transitional justice is inherently 'good' because it advances liberalization.⁵⁶

Yet, it would be too simplistic to say that the use of transitional justice tools under non-democratic regimes can never have any positive value. Categorically rejecting transitional justice under non-liberal rule may fail to acknowledge that transitional justice processes, such as Rwanda's Gacaca Courts, may indeed serve legitimate goals such as victims' redress, while at the same time serving less legitimate goals such as disseminating the narrative of a non-democratic regime and hence possibly help to consolidate this regime's grip on power.⁵⁷

3.3. *Transitional justice in consolidated democracies*

Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond (Hurst 2008).

⁵¹ See eg Brian Grodsky, 'Justice without Transition: Truth Commissions in the Context of Repressive Rule', *Human Rights Review*, Vol 8, 2008, pp 281-297.

⁵² See eg Firew Tiba, 'The Mengistu Genocide Trial in Ethiopia', *Journal of International Criminal Justice*, Vol 5, No 2, 2007, pp 513-528.

⁵³ Derk Venema, 'Transitions as States of Exception: Towards a More General Theory of Transitional Justice', in Palmer et al (eds), *Critical Perspectives on Transitional Justice* (Intersentia 2012), pp 73-89, at 73-74.

⁵⁴ *Ibid*, at 79.

⁵⁵ Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition', *International Journal of Transitional Justice*, 2014, advance access at <http://ijtj.oxfordjournals.org/content/early/2014/12/02/ijtj.iju021>, at 7.

⁵⁶ See further Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory', *Oregon Review of International Law*, Vol 13, No 1, 2011, pp 1-46.

⁵⁷ *Ibid*.

The pursuit of justice for past abuses in consolidated democracies has had limited influence on the shaping and development of transitional justice theory, and until recently few would consider such processes within a transitional justice paradigm. However, contemporary studies increasingly examine these processes as a question of ‘transitional justice’. Scholars such as Winter have even attempted to lay out a more general theory of transitional justice in established democracies.⁵⁸ But as Winter notes, the project of theorizing transitional justice within established democracies has confronted resistance. One argument is that if these justice processes taking place in the absence of a fundamental political transition are to be considered transitional justice, there is nothing conceptually distinctive about transitional justice. Another argument suggests that ‘structural injustices embedded in established democracies require more prolonged and substantive efforts than the time-limited models borrowed from paradigmatic cases’.⁵⁹

The fact remains that it is an increasingly common phenomenon that established democracies create justice processes to address past abuses. In Australia, for example, attempts to deal with abuses committed against aboriginals have been a central theme in political debates for some time. The officially sanctioned report by the Australian Human Rights Commission concerning the forcible removal of aboriginal children in the 1970s, ‘Bringing Them Home: The Stolen Children Report’, handed over to Parliament and made public in 1997, led to an official apology from the Prime Minister and some amount of compensation to victims.⁶⁰ In Canada, the establishment of a Truth and Reconciliation Commission in 2008 addressed injustices committed against the indigenous population, including forcible placement of children in Christian boarding schools where they were to be ‘culturally assimilated’, and were often sexually abused.⁶¹ Similarly to Australia, an official apology was issued and victims provided with an amount of compensation.⁶²

As the case with the ‘post-transitional justice’ efforts in some Latin American countries discussed above, the justice processes in consolidated democracies aimed at addressing past injustices tend to occur long after the abuses were committed, raising similar questions relating the assumption in mainstream theory that transitional justice occurs in a limited window of opportunity created by a liberalizing political transition. In this case, the passing of time and a change in attitudes and prevailing norms *within* a liberal democratic order seems a pre-condition for rendering justice for these types of abuses and pressure from civil society and victim groups may often prove determining for the State’s eventual commitment to reparations.⁶³

⁵⁸ Stephen Winter, *Transitional Justice in Established Democracies* (Palgrave, 2014).

⁵⁹ Stephen Winter, ‘Towards a Unified Theory of Transitional Justice’, *The International Journal of Transitional Justice*, 2013, pp 1–21, at 2 (citing, among others, to Eric A. Posner and Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’, *Harvard Law Review*, Vol 117, No 3, 2004, pp 761–825; Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, *Human Rights Quarterly*, Vol 31, No 2, 2009, pp 321–367).

⁶⁰ Australian Human Rights Commission, *Bringing Them Home: The ‘Stolen Children’ Report*, 1997, available at http://www.hreoc.gov.au/social_justice/bth_report/index.html.

⁶¹ L. Ian MacDonald, ‘Truth came first. Reconciliation must come next’, *Ipolitics*, June 2, 2015, available at <http://ipolitics.ca/2015/06/02/truth-came-first-reconciliation-must-come-next/>.

⁶² International Center for Transitional Justice, *Canada’s Truth and Reconciliation Commission*, 29 April 2008), available at <http://www.ictj.org/en/news/features/1652.html>.

⁶³ Dustin Sharp argues that the main form of transformation reflected and perhaps furthered by the creation of justice processes in established concerns ‘normative transitions with respect to historical injustices’. See Dustin Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition’, *International Journal of Transitional Justice*, Vol 9, No 1, 2015, pp 150–169.

4. The assumption that transitional justice occurs at the State level to address abuses committed within its territory

As noted above, the field of transitional justice originates in discussions about how the emerging democracies in Latin America and East and Central Europe should address serious human rights abuses committed by the prior dictatorships.⁶⁴ These discussions tended to be based on the assumption that it was for the State to deliver justice for abuses committed within its territory by a former regime.

4.1. The diversification of spaces where transitional justice occurs

Accordingly, the early field of transitional justice tended to view the State, or more precisely the executive branch of the government, as the entity responsible for devising and implementing transitional justice policies. Whereas academia, civil society as well as international actors were seen as capable of offering critical input, ultimately the decision to deploy various forms of transitional justice was thought to rest with the new political leadership. These premises of the early field seem at least in part connected to the fact that transitional justice theory was heavily influenced by the so-called transition to democracy scholarship, which emphasized democratization as the outcome of elite choices.⁶⁵

In contrast, contemporary transitional justice discourses perceive the State as only one among several actors with the ability to shape and implement transitional justice. The emergence of international criminal tribunals to prosecute those responsible for international crimes most obviously indicates that international actors play an increasingly prominent role in providing justice for massive human rights abuses, but other factors, such as international funding and the inclusion of international experts and lawyers in national transitional justice processes such as truth commissions, can also be seen as evidence of this trend.⁶⁶

This internationalization of transitional justice has important ramifications for the field, for example because the justice processes in question can impact domestic politics and vice-versa in ways that are fundamentally different from State-driven transitional justice in democratic transitions. In Kenya, for example, the ICC Prosecutor charging Uhuru Kenyatta and William Ruto in the first place helped spark off a more general debate about transitional justice in the country and many thought that the Court's involvement offered promises for helping to facilitate transformation, in particular by challenging the country's culture of impunity.⁶⁷ However, domestic political actors, including the persons accused by the ICC, launched an effective anti-ICC campaign and managed to manipulate and capture the agenda, ultimately gaining presidency and with that effectively undermining the prospects of international justice and more broadly a fundamental

⁶⁴ On the origin of the field, see further Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly*, Vol 31, 2009, pp 321-367.

⁶⁵ See in particular Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991); Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (The Johns Hopkins University Press 1996).

⁶⁶ See eg International Center for Transitional Justice, *Truth Seeking: Elements of Creating an Effective Truth Commission*, 2013, available at <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>.

⁶⁷ See eg Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', *California Western International Law Journal*, Vol 42, No 1, 2011, pp 1-35

transformation.⁶⁸ In Uganda, ICC intervention arguably contributed to convincing Lord's Resistance Army (LRA) leaders that they should come to the negotiating table in the first place, but may later have proven an obstacle to implementing the peace process. Further, as the Court has exclusively focused on LRA atrocities, some argue that President Museveni has benefitted in that the ICC process has helped disseminate a picture that the LRA are the 'bad guys' and the Ugandan Government the 'good guys', though the reality is more complex.⁶⁹

Furthermore, the internationalization of transitional justice is evident from the enhanced role played by international actors, such as UN agencies, international development partners and international NGOs, in supporting and implementing transitional justice tools. These actors increasingly see it as their role to provide technical advice and assist governments and others that attempt to create and implement a transitional justice solution, often within broader human rights and peacebuilding programs.⁷⁰ While such international involvement may help promote that rule of law standards are respected in transitional justice mechanisms, the strengthened role of international actors has led some commentators to question whether not international 'best practices' reflect a 'top-down design' that neglects the voices of victims and the communities affected by violence. Miller, for example, speaks of a 'consistency of language and terminology employed in a wide diversity of post-conflict contexts', which points to transitional justice as a 'global phenomenon and its seemingly successful export/ import from one country or region to another over the course of the past several decades'.⁷¹

The resistance to 'top-down' transitional justice has led segments of the scholarship to call for local-level and participatory approaches to transitional justice. Accordingly, consultation and involvement of civil society, local communities and victims have emerged as benchmarks for the legitimacy of transitional justice processes.⁷² Yet, scholars such as Sharp argue that despite its centrality, concepts such as 'local ownership' remain vague and poorly understood, often being associated more with aspirational rhetoric than concrete policy reality. He argues that examined 'more deeply, the seeming consensus about the importance of the local in transitional justice masks a profound ambivalence arising out of a clash of normative commitments: between liberal internationalism and international human rights on the one hand, and principles of local sovereignty and autonomy on the other'.⁷³

This critique of transitional justice is related to a broader concern that transitional justice focuses

⁶⁸ See eg Thomas Obel Hansen and Chandra Sriram, 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies', *International Journal of Transitional Justice*, Vol 9, No 3, 2015, advance access at <http://ijtj.oxfordjournals.org/content/early/2015/07/21/ijtj.ijv012.full>.

⁶⁹ On the Ugandan case, see eg Abigail Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army', *Harvard Human Rights Journal*, Vol 19, 2006, pp 269–71; Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in Phil Clark and Nicholas Waddell (eds), *Courting Conflict? Peace, Justice and the ICC in Africa* (Royal African Society 2008), pp 42–43.

⁷⁰ See eg Duthie, Roger, 'Toward a Development-Sensitive Approach to Transitional Justice', *International Journal of Transitional Justice*, Vol 2, No 3, 2008, pp 292–309.

⁷¹ Zinaida Miller, 'Effects of Invisibility: In Search of the Economic in Transitional Justice', *International Journal of Transitional Justice*, Vol 2, No 3, 2008, pp 266–291.

⁷² See eg Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice', in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008), pp 99–120.

⁷³ Dustin Sharp, 'Addressing Dilemmas of the Global and the Local in Transitional Justice', *Emory International Law Review*, Vol 29, 2014, pp 71–117.

overly on a liberal democratic ideal, as endorsed by major actors in the West. Franzki and Olarte, for example, challenge transitional justice discourse for claiming to offer a ‘neutral’ framework for analyzing justice tools in transitions, while in reality being a ‘problem-solving theory which is bound by its context of emergence, namely presumed “liberal consensus” and the disappearance of fundamental political agonisms after the end of the Cold War’.⁷⁴ Vieille similarly argues that ‘transitional justice literature is defined by a Western, legalistic approach to justice, which affects the field’s ability to account for indigenous and customary mechanisms of justice that do not espouse this legalistic lens’.⁷⁵

In sum, while the contemporary scholarship demonstrates clear interest in ‘global’ and ‘local’ aspects of transitional justice,⁷⁶ still much is to be clarified in terms of the benefits and challenges of doing justice in different ‘spaces’.

4.2. Regional dimensions of conflicts and transitional justice

As noted above, the assumption in mainstream transitional justice theory is that transitional justice tools are created to address abuses committed within the territory of a given State. However, as Ross and Sriram note, violence and human rights violations in putatively internal armed conflicts often involve significant cross-border dimensions and despite the ‘proliferation of transitional justice mechanisms, they have generally not been designed or utilized to address transboundary or regionalized abuses’.⁷⁷

More specifically, as Ross and Sriram note, ‘the regional dimensions of many conflicts contribute to a complex web of crimes in which combatants, refugees, resources and weapons cross borders, but peace agreements and accountability processes often address only the crimes committed on the territory of, or by the nationals of, one state’.⁷⁸ Accordingly, they observe that although many conflicts are regionalized, involving multiple countries, ‘most peace agreements and accountability processes are developed for single states in isolation, creating a patchwork of accountability, whereby complex regionalized crimes are treated differently by individual countries and/or international processes’, a factor which they argue can create zones of impunity.⁷⁹ Focusing on cross-border violence in the context of the conflicts in Sierra Leone and Liberia, Sirleaf similarly argues that ‘where these mechanisms have been established without regard to the regional or transnational nature of human rights violations, such mechanisms will encounter problems of coordination including legal primacy, information sharing, and access to detainees’.⁸⁰

Some scholars have argued that to address these shortcomings of transitional justice, regional organizations should play a more prominent role. In one study relating to the Great Lakes Region, Sumaili, argues that given the fact that conflicts across the region have cross-cutting dimensions, a

⁷⁴ Hannah Franzki and Maria Olarte, ‘Understanding the Political Economy of Transitional Justice: A Critical Perspective’, in Susanne Buckley-Zistel et al (eds), *Transitional Justice Theories* (Routledge 2014), pp 201-221, at 202.

⁷⁵ Stephanie Vieille, ‘Transitional Justice: A Colonizing Field?’, i, Vol 4, No 3, 2012, pp 58-68, at 58.

⁷⁶ See eg *International Journal of Transitional Justice*, Special Issue: Whose Justice? Global and Local Approaches to Transitional Justice (Guest Editor, Kimberly Theiden), November 2009.

⁷⁷ Amy Ross and Chandra Lekha Sriram, ‘Closing Impunity Gaps: Regional Transitional Justice Processes?’, *Transitional Justice Review*, Vol 1, No, 1, 2013, pp 3-30.

⁷⁸ *Ibid*, p 5.

⁷⁹ *Ibid*.

⁸⁰ Matiangai Sirleaf, ‘Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia’, *Florida Journal of International Law*, Vol 21, 2009, pp 209-280.

regional approach seems necessary to appropriately address the needs of victims. Yet, he observes, African regional organisations, including those dealing with the Great Lakes Region, have so far made only limited efforts helping their member States to address past violent conflict.⁸¹

4. Conclusions

Dhawan refers to transitional justice as ‘a travelling norm which can never be filled with one particular meaning but changes over space and time’, raising important questions about – and at the same time challenging – the sites of production and reproduction of the notion which she firmly locates in the so-called Western world.⁸² This chapter has shown how the notion of transitional justice is itself in transition. Originally perceived to concern situations where a new democratic regime utilizes justice mechanisms to address serious human rights abuses by a past repressive regime, transitional justice discourse is now applied to a myriad of situations where either the transition in question concerns ‘something else’, such as peaceful transformation, or where no transition has occurred. The original premise that transitional justice occurs in a limited window of opportunity, created by a liberalizing political transition, therefore no longer seems correct. Furthermore, transitional justice now occurs in a variety of spaces, including the local and international, which were not offered much attention in the early field.

These developments in the field raise a number of profound questions which the scholarship has not yet fully explored. One central question is whether we can operate with one coherent theory of what transitional justice is and what it can facilitate. In the view of this author this is not the case already because the notion of transitional justice is applied to both ‘pre-transition’ and ‘post-transition’ justice tools that address serious human rights abuses; to justice tools that are devised in the context of the move from armed conflict to peace; to the justice mechanisms created by repressive and authoritarian regimes to address past abuses; and to the measures created in established democracies to attend to injustices of the past. Rather than confining transitional justice discourse to the paradigmatic transitions that characterized the early field, transitional justice scholarship and practice needs to further explore the defining features of these new contexts and interrogate what opportunities and challenges they create for the prospects of rendering justice for massive human rights abuses.

⁸¹ Adolphe Sumaili, ‘The International Conference on the Great Lakes Region and Transitional Justice: A Future Prospect’, in Thomas Obel Hansen (ed), *Victims and Post-Conflict Justice Mechanisms in Africa* (Law Africa forthcoming 2015).

⁸² Nikita Dhawan, ‘Transitions to Justice’, in Susanne Buckley-Zistel et al (eds), *Gender in Transitional Justice* (Palgrave 2012).