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# TRANSITIONAL JUSTICE AND THE CHALLENGING PURSUIT OF SOCIAL JUSTICE

Philipp Kastner

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Résumé de l'article

Dans cet article, l'auteur soutient que les failles du modèle de justice transitionnelle actuellement dominant, qui tient peu compte des principes de justice sociale, peuvent s'expliquer par plusieurs facteurs structurels du système juridique international. Il examine l'établissement relativement récent des institutions de justice transitionnelle et soutient que, malgré les diverses formes qu'elles revêtent – tribunaux pénaux internationaux, commissions de vérité et de réconciliation, tribunaux des peuples –, ces institutions reposent sur des assises similaires et visent les mêmes objectifs sous-jacents. Nourris par les influences normatives explicites et implicites que les différentes institutions exercent l'une sur l'autre, ces concepts parallèles, ainsi que la notion de temps trop linéaire ancrée en droit international, ont donné naissance à un modèle de justice transitionnelle internationale qui pose problème. Ainsi, ce modèle entrave la poursuite de la justice sociale, notamment en raison de la portée restreinte de son action, soit les droits humains individuels et les responsabilités individuelles à l'égard de crimes particuliers. L'auteur plaide en faveur du rejet des réponses institutionnelles préfabriquées et d'une reconceptualisation, indispensable, selon lui, du modèle de justice prédominant dans les discours juridiques internationaux afin de remédier aux inégalités structurelles et aux formes d'injustice qui constituent souvent les causes profondes des conflits armés.

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## TRANSITIONAL JUSTICE AND THE CHALLENGING PURSUIT OF SOCIAL JUSTICE

Philipp Kastner\*

*This article argues that the shortcomings of the currently dominant transitional justice model, which largely ignores considerations of social justice, can be explained by several structural factors within the international legal system. It considers the relatively recent establishment of transitional justice institutions and argues that despite different forms – international criminal tribunals, truth and reconciliation commissions, peoples’ tribunals – these institutions are motivated by similar rationales and have the same underlying objectives. These parallels, enhanced by the both explicit and implicit normative influences that the respective institutions have on each other, and the overly linear notion of time embedded in international law have given rise to a problematic model of transnational transitional justice. Among others, this model hinders the pursuit of social justice beyond a narrow focus on individual human rights and individualized responsibilities for specific crimes. The article calls for a deliberate turn away from prefabricated institutional responses as well as for a much-needed reconceptualization of the prevailing model of justice within international legal discourses in order to address structural inequalities and forms of injustice that are often part of the root causes of armed conflicts.*

*Dans cet article, l’auteur soutient que les failles du modèle de justice transitionnelle actuellement dominant, qui tient peu compte des principes de justice sociale, peuvent s’expliquer par plusieurs facteurs structurels du système juridique international. Il examine l’établissement relativement récent des institutions de justice transitionnelle et soutient que, malgré les diverses formes qu’elles revêtent – tribunaux pénaux internationaux, commissions de vérité et de réconciliation, tribunaux des peuples –, ces institutions reposent sur des assises similaires et visent les mêmes objectifs sous-jacents. Nourris par les influences normatives explicites et implicites que les différentes institutions exercent l’une sur l’autre, ces concepts parallèles, ainsi que la notion de temps trop linéaire ancrée en droit international, ont donné naissance à un modèle de justice transitionnelle internationale qui pose problème. Ainsi, ce modèle entrave la poursuite de la justice sociale, notamment en raison de la portée restreinte de son action, soit les droits humains individuels et les responsabilités individuelles à l’égard de crimes particuliers. L’auteur plaide en faveur du rejet des réponses institutionnelles préfabriquées et d’une reconceptualisation, indispensable, selon lui, du modèle de justice prédominant dans les discours juridiques internationaux afin de remédier aux inégalités*

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\* Assistant Professor, Law School, University of Western Australia. I would like to thank the participants of the research workshop *Contextualizing Social Justice in International and Transnational Law*, held at Windsor University’s Faculty of Law in 2016, as well as Elisabeth Roy Trudel for their useful comments.

*structurelles et aux formes d'injustice qui constituent souvent les causes profondes des conflits armés.*

## I. INTRODUCTION

Law has a considerable and complex impact on societies emerging from violent conflict, as instantiated by increasingly accepted obligations to end impunity for grave crimes, uncover the truth and envisage reparations in some form. Legal considerations appear to be omnipresent since the pursuit of justice in this context – captured in the concept of transitional justice – is typically associated with formal institutions, such as criminal tribunals and truth and reconciliation commissions, and with legal obligations to deal with grave violations of international human rights and humanitarian law. However, there is a marked tendency, both in theory and in practice, to emphasize certain official, state-based forms of justice focused on individual accountability as well as certain forms of truth, and to ignore other ways of legal meaning-making and forms of justice. The result is that the pursuit of goals associated with social justice within transitional justice endeavours is particularly difficult.

At the same time, existing institutional responses to conflict-related violence all face significant challenges to their legitimacy: international criminal tribunals for being political, imperialist and not reflective of local needs;<sup>1</sup> truth and reconciliation commissions as a “theatricalization of the power” of the state<sup>2</sup> with little positive import for local communities;<sup>3</sup> so-called traditional mechanisms, like the *Gacaca* courts in Rwanda,<sup>4</sup> *mato oput* in Uganda<sup>5</sup> or *Fambul Tok* in Sierra Leone<sup>6</sup> as outside-driven neo-traditionalizations that entrench existing power relations.<sup>7</sup> The field of transitional justice<sup>8</sup> is hence far from stable and settled, which may be unsettling and destabilizing but which also means that there is a real potential for change.

<sup>1</sup> Christian De Vos, Sara Kendall & Carsten Stahn, eds, *Contested Justice: The Politics and Practices of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015); Darryl Robinson, “Inescapable Dyads: Why the International Criminal Court Cannot Win” (2015) 28 *Leiden J Intl L* 323; Sarah MH Nouwen & Wouter G Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan” (2011) 21:4 *Eur J Intl L* 941.

<sup>2</sup> Richard Wilson, “Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights” (2000) 41:1 *Current Anthropology* 75 at 79.

<sup>3</sup> Fiona C Ross, “On Having Voice and Being Heard: Some After-Effects of Testifying before the South African Truth and Reconciliation Commission” (2003) 3:3 *Anthropological Theory* 325; Joanna R Quinn, “Haiti’s Failed Truth Commission: Lessons in Transitional Justice” (2009) 8:3 *J Human Rights* 265.

<sup>4</sup> Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press, 2010).

<sup>5</sup> Erin K Baines, “The Haunting of Alice: Local Approaches to Justice and Reconciliation in Uganda” (2007) 1:1 *Intl J of Transitional Justice* 91.

<sup>6</sup> Elisabeth Hoffman, “Reconciliation in Sierra Leone: Local Processes Yield Global Lessons” (2008) 32:2 *Fletcher Forum of World Affairs* 129.

<sup>7</sup> Adam Branch, “The Violence of Peace: Ethnojustice in Northern Uganda” (2014) 45:3 *Development and Change* 608 at 620 [Branch, “Ethnojustice”].

<sup>8</sup> On the question as to whether transitional justice is a “field”, see Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’” (2009) 3 *Intl J of Transitional Justice* 5.

This article argues that the shortcomings of the currently dominant transitional justice model, which largely ignores considerations of social justice, can be explained by several structural factors within the international legal system. It considers the relatively recent establishment of transitional justice institutions and argues that despite different forms – international criminal tribunals, truth and reconciliation commissions, peoples’ tribunals – these institutions are motivated by similar rationales and have the same underlying objectives. These parallels, enhanced by the both explicit and implicit normative influences that the respective institutions have on each other, and the underlying notion of time in international law have given rise to a problematic model of transnational transitional justice that hinders the pursuit of social justice beyond a narrow focus on individual human rights and individualized responsibilities for specific crimes; even presumably alternative responses have increasingly become co-opted by the dominant approach.<sup>9</sup> These are some of the reasons why the endeavour of delivering transitional justice seems to be undergoing a profound crisis.

Relying on a critical legal-pluralistic perspective,<sup>10</sup> the article therefore considers the broader transnational trends that have given rise to the mainstream transitional justice model and that shape the ways in which conflict and post-conflict societies contend with their violent pasts (and presents). It also attempts to capture some of the interactions between both different official and unofficial justice institutions and the ways in which these institutions contribute to articulating certain forms of justice. This approach also builds on recent critiques of the overly legalistic transitional justice paradigm and counters the still prevalent view that the various justice mechanisms are transplantable elements in a readily available “toolbox”.<sup>11</sup> In this sense, the article calls for a deliberate turn away from prefabricated institutional responses as well as for a much-needed reconceptualization of the prevailing model of justice within international legal discourses in order to address structural inequalities and forms of injustice that are frequently part of the root causes of armed conflicts. The article also seeks to account for the fact that the symbolic function of law is particularly visible in the context of transitional justice: beyond a tool to achieve specific outcomes, it is the ways in which such justice processes are created, imagined and perceived that play a significant role.

The article proceeds from the premise that the actors in question, namely those having the agency to adopt measures related to transitional justice, also have the agency to pursue goals associated with social justice, for instance by changing institutional structures.<sup>12</sup> It should be noted that the conception of social justice put forward here is not only related to ideas of distributive justice<sup>13</sup> but also to the elimination of structural violence and institutionalized oppression, beyond an insistence on human rights and equality.<sup>14</sup> Introducing principles of social justice into the transitional justice context hence means, more specifically, considering forms of inequality and injustice that often lie at the root of – or are exacerbated by – armed conflicts. As will be discussed, this requires disentangling transitional justice

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<sup>9</sup> Branch, “Ethnojustice”, *supra* note 7.

<sup>10</sup> Martha-Marie Kleinhans & Roderick A Macdonald, “What is a *Critical* Legal Pluralism?” (1997) 12 CJLS 25; Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13:1 Soc & Leg Stud 57.

<sup>11</sup> See e.g. Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice” (2007) 34:4 JL & Soc’y 411.

<sup>12</sup> David Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999) at 6.

<sup>13</sup> *Ibid* at 2.

<sup>14</sup> See generally Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011).

from its strong association with liberal-legalistic justice,<sup>15</sup> and also going beyond the idea of transitional justice as restorative justice (which might, in fact, imply restoring problematic relationships).<sup>16</sup> However, any closed or dogmatic definition of social justice is resisted, as its underlying principles may be understood differently by different actors and in different contexts. Social justice is, indeed, pluralistic.<sup>17</sup> There may be no broad consensus about the principles and particular values associated with social justice in a given post-conflict society. Yet, post-conflict societies, which already undergo significant changes with transitional justice issues and the establishment of associated mechanisms being important concerns, present unique opportunities to introduce principles related to social justice.

## II. THE EMERGENCE OF THE DOMINANT TRANSNATIONAL TRANSITIONAL JUSTICE MODEL

The apparently snowballing establishment of international and internationalized justice institutions focused on individual accountability from the 1990s onwards, combined with more and more domestic prosecutions, has aptly been described as a “justice cascade”.<sup>18</sup> As Kathryn Sikkink writes,

justice cascade means that there has been a shift in the legitimacy of the norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm. The term captures how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake.<sup>19</sup>

While the term “justice cascade” may lead us to tell an overly linear story,<sup>20</sup> which presumes that every new initiative in relation to individual accountability is part of an expected natural progress, it is useful as a metaphor to capture significant trends in the field of transitional justice. Indeed, despite numerous starting points and diverse manifestations of transnational legal norms on transitional justice, a dominant model that focuses on individual crimes, identifiable victims and specific perpetrators has emerged. This

<sup>15</sup> On the “commitment of orthodox transitional justice to a specific normative order: a liberal-legalist, human rights-based order to be founded in a ‘responsible’ sovereign state”, see Branch, “Ethnojustice”, *supra* note 7 at 611.

<sup>16</sup> Christine Bell & Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice? An Introductory Essay” (2007) 1 *Intl J of Transitional Justice* 23 at 41; Branch, “Ethnojustice”, *supra* note 7 at 624-25.

<sup>17</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) at 6.

<sup>18</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: WW Norton, 2013). A related phenomenon, namely the increasing inclusion of provisions on justice mechanisms in peace agreements, has been referred to as “accountability bubble”. Leslie Vinjamuri & Aaron P Boesenecker, “Accountability and Peace Agreements: Mapping Trends from 1980 to 2006” (Centre for Humanitarian Dialogue, 2007), online: <[https://www.files.ethz.ch/isn/39727/0907\\_Accountabilityreport.pdf](https://www.files.ethz.ch/isn/39727/0907_Accountabilityreport.pdf)> 27.

<sup>19</sup> Sikkink, *supra* note 18 at 5.

<sup>20</sup> For a critique of this approach embedded in liberal legal thinking, see Kamari Maxine Clarke, “Rethinking Liberal Legality through the African Court on Justice and Human Rights: Resituating Economic Crimes and other Enablers of Violence” in Philipp Kastner, ed, *International Criminal Law in Context* (Routledge, 2017) 170.

model concentrates and insists on individual accountability – typically in the form of criminal trials – for serious human rights violations.<sup>21</sup>

It is useful to recall that although now very common, the establishment and use of transitional justice mechanisms in the context of political transformations or post-conflict situations is a fairly new phenomenon. The concept of transitional justice itself has been regularly used since the early 2000s to denote several non-ordinary forms of justice to be applied during a particular period in time to facilitate a society's transition,<sup>22</sup> and a number of different judicial and non-judicial mechanisms that seek to end impunity, deter future violations of international human rights and humanitarian law, reveal the truth, bring about reconciliation, and promote peace. According to a key report of the United Nations Secretary-General on transitional justice in 2004, the concept

comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>23</sup>

Because of this relatively new approach, it is only natural that international, internationalized and national criminal tribunals, truth and reconciliation commissions and other transitional justice institutions – despite different mandates – can and should share experiences and learn from each other. Although every situation requires specific and different responses, sharing information among similar transitional justice processes, and across different contexts, is certainly useful and, in fact, occurs almost automatically. Furthermore, the latent and informal normative dynamics, while more difficult to gauge than the explicit reliance on certain legal norms by official institutions, are not less significant. To the contrary, it can be argued that the implicit and silent often lie at the heart of our understanding of law. By shifting the focus from an artefactual inquiry into formal legal rules to legal agency and human interaction, this approach hence also attempts to account for the implicit fostering of legal norms.<sup>24</sup>

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<sup>21</sup> The recent critical turn in the transitional justice and international criminal law scholarship, questioning, among others, this kind of liberal legalism and associated dominant assumptions, is a notable but still marginal development. See e.g. Nicola Palmer, Phil Clark & Danielle Granville, eds, *Critical Perspectives in Transitional Justice* (Intersentia, 2012); Christine Schwöbel, ed, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); Frédéric Mégret, "The Anxieties of International Criminal Justice" (2016) 29:1 Leiden J Intl L 197. For an overview of feminist scholarship on transitional justice, see Bell & O'Rourke, *supra* note 16.

<sup>22</sup> *Ibid* at 24.

<sup>23</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc S/2004/616 (3 August 2004), para 8.

<sup>24</sup> On the importance of implicit and "inferential" legal norms, see Roderick A Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et « inférentielle »" (1986) 18:1 Sociologie et sociétés 47.

### A. Institutional Interactions Across Jurisdictions and the Official/Unofficial Divide

The history of transitional justice institutions in the second half of the 20<sup>th</sup> century shows that despite the idiosyncratic character of each situation, many institutions have, explicitly or implicitly, built on previous institutions and have, in turn, inspired others. By way of example, the post-World War II International Military Tribunal in Nuremberg influenced a range of other initiatives, in addition to the international and internationalized criminal tribunals of the 1990s. Following Nuremberg's rationale to some extent, a "peoples' tribunal" was initiated in the 1960s by Bertrand Russell (and others) to examine violations of both *jus ad bellum* and *jus in bello* in the context of the Vietnam War. This peoples' tribunal then inspired a host of similar tribunals, which have been used and are still being used to look at various situations of conflict-related violence,<sup>25</sup> as well as formal justice institutions.<sup>26</sup>

Other situations highlight the influence of so-called traditional responses on the establishment – or non-establishment – of official institutions. In Mozambique, for instance, where an amnesty law was adopted in the aftermath of the 1992 peace agreement, no official mechanism has contended with the violent conflict. However, quite contrary to the idea of an amnesty, both sides have continuously and strategically made use of memories to try to delegitimize the other side.<sup>27</sup> It is only at the very local level that traditional mechanisms of reconciliation around *gamba* spirits and healers have allowed some communities to recall the violent past more actively and to attempt to resolve present troubles relating to this past.<sup>28</sup> At the same time, these mechanisms have had an influence on official responses, or rather the lack thereof, allowing the government to claim that establishing state-based justice-related institutions was not needed in Mozambique.

Northern Uganda is another good example of the cross-influence of different approaches. It was arguably the involvement of the International Criminal Court [ICC], which issued arrest warrants against leaders of the rebel group Lord's Resistance Army [LRA] in 2005, that put the question of justice – in the form of individual accountability – high on the agenda in subsequent negotiations between the Ugandan government and the LRA. In a 2007 agreement, the parties even agreed that "[a] special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict."<sup>29</sup> Although the option of more traditional avenues of justice was not excluded,<sup>30</sup> the agreement was clearly negotiated in the shadow of the ICC and the possibility of international criminal trials. Moreover, as it has been argued, official support for

<sup>25</sup> The better known initiatives include the Permanent Peoples' Tribunal, the World Tribunal on Iraq, the Kuala Lumpur War Crimes Tribunal and the Tokyo Women's Tribunal.

<sup>26</sup> See e.g. Arthur J Klinghoffer & Judith Apter Klinghoffer, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights* (Palgrave Macmillan, 2002).

<sup>27</sup> Victor Igreja, "Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique" (2015) 9 Intl J of Transitional Justice 239, 253.

<sup>28</sup> Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2<sup>nd</sup> ed (New York: Routledge, 2011) at 201 [Hayner, *Unspeakable Truths*].

<sup>29</sup> *Annexure to the Agreement on Accountability and Reconciliation*, 19 February 2008 (Uganda), online: UN Peacemaker <[http://peacemaker.un.org/sites/peacemaker.un.org/files/UG\\_080219\\_Annexure%20to%20the%20Agreement%20on%20Accountability%20and%20Reconciliation.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/UG_080219_Annexure%20to%20the%20Agreement%20on%20Accountability%20and%20Reconciliation.pdf)>, art 7.

<sup>30</sup> *Ibid*, arts 19-22.

traditional forms of justice has allowed the state to avoid accountability for its own violence and repression.<sup>31</sup>

It is because of such multifaceted interactions between international, regional and national institutions, including unofficial ones, that certain transnational legal norms have developed and now shape the establishment and practice of these institutions. These interactions and resulting norms are more visible in certain areas, with the accountability norm being particularly perceptible.

### **B. The Construction of Transnational Legal Norms Focused on Accountability and Truth**

An international legal prohibition on blanket amnesties for grave crimes, such as genocide and crimes against humanity, and an associated obligation to prosecute at least high-level perpetrators of these crimes have crystallized in recent years.<sup>32</sup> In 1988, the Inter-American Court of Human Rights already ruled in *Velasquez-Rodriguez* that a situation of impunity violated the American Convention on Human Rights and affirmed that states must investigate and prosecute those responsible for human rights violations.<sup>33</sup> In 2001, the same court stated in *Barrios Altos* that amnesty provisions were inadmissible because they were “intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>34</sup>

This now highly influential norm shapes the ways in which peace and transitional justice issues more generally are negotiated.<sup>35</sup> The negotiations between the Colombian government and different armed groups are a good illustration of this influence. The 2005 Justice and Peace Law, for instance, by envisaging reduced prison sentences for demobilized members of armed groups having committed serious crimes, can be considered to have been negotiated under the continuous impact of international criminal law and the potential of prosecutions before the ICC.<sup>36</sup> The issue of individual accountability was also very prominent in the negotiations with the FARC that took place from 2012 to 2016, and dissatisfaction among the electorate with the negotiated justice provisions was among the reasons why

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<sup>31</sup> Branch, “Ethnojustice”, *supra* note 7 at 615, 619, 625.

<sup>32</sup> Leila Nadya Sadat, “Exile, Amnesty and International Law” (2006) 81 *Notre Dame L Rev* 955 at 1022.

<sup>33</sup> *Velasquez-Rodriguez Case (Honduras)* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4. Other regional and international bodies, like the European Court of Human Rights and the UN Human Rights Committee, have confirmed this obligation. See e.g. *Kurt v Turkey* (1998), 74 ECHR (Ser A) 1152, 27 EHRR 373; *Bleier v Uruguay*, UN Human Rights Committee, UN Doc A/37/40 (1982). For one of the first scholarly claims in this regard, see Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1990) 100 *Yale Law Journal* 2537;

<sup>34</sup> *Barrios Altos Case (Peru)* (2001), Inter-Am Ct HR (Ser C) No 75, para 41.

<sup>35</sup> See generally Claus Kress & Leena Grover, “International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character” in Morton Bergsmo & Pablo Kalmanovitz, eds, *Law in Peace Negotiations*, 2<sup>nd</sup> ed (Oslo: Torkel Opsahl Academic EPublisher, 2010) 41; see also Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2015) 161-163.

<sup>36</sup> For an analysis of the Justice and Peace Law, and the reduced sentences of five to eight years in light of the International Criminal Court’s complementarity regime, see Kai Ambos, “The Colombian Process (Law 975 of 2005) and the ICC’s principle of complementarity” in Carsten Stahn & Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity: From Theory to Practice*, vol II (Cambridge: Cambridge University Press, 2011) 1071.



the initial peace agreement was rejected in the referendum held in October 2016.<sup>37</sup> The agreement foresaw the creation of a special judicial system, the Special Jurisdiction for Peace, having jurisdiction over serious crimes, like war crimes and crimes against humanity, and imposing alternative sanctions, namely restrictions of liberty – not jail – of five to eight years, on those who immediately confess and recognize their responsibility for the crimes committed.<sup>38</sup> One of the points that was further clarified in the revised agreement, quickly re-negotiated and adopted by the Colombian congress two months after the plebiscite, concerned these alternative sentences. The result is that although the sentences will still not have to be served in prison, the zones of “restrictions of liberty” were further defined and, in fact, reduced in size.<sup>39</sup>

In addition to the general obligation of states to prosecute serious crimes, or at least to provide some form of individual accountability, the claimed right to a remedy and right to truth have had a significant impact on several transitional justice processes, particularly in Latin America.<sup>40</sup> As a result, situations like in Mozambique, where the 1992 agreement did not include any justice or truth-seeking measures, or in Algeria, where the government adopted a series of amnesty laws in 1995, 1999 and 2006 and followed a practice of implicit amnesty for public officials,<sup>41</sup> would arguably be much more difficult to justify today; the international legal claims with respect to justice, truth and accountability have become increasingly compelling. While not entirely inconceivable, especially in light of the current push-backs by certain African states against the presumably universal ICC, failures to conduct even basic investigations and associated measures of forced forgetting to make a society “move on” would violate international legal obligations and risk severe criticism.

Recent initiatives to envisage a forum to hold accountable those responsible for the crimes committed in the Syrian conflict reveal the extent to which the underlying accountability norm has become internalized. In this situation, the ICC does not have jurisdiction, and the Security Council is unable to refer the situation to the ICC Prosecutor, since two members of the permanent five would veto such a

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<sup>37</sup> Kirsten Ainley, “The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process” (13 October 2016), online: Justice in Conflict <<https://justiceinconflict.org/2016/10/13/the-great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/>>.

<sup>38</sup> For a succinct analysis of these provisions and the positive reaction from the ICC Prosecutor, see Nelson Camilo Sanchez Leon, “Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?” (2016) 110 AJIL Unbound 172.

<sup>39</sup> For an overview of the main changes, see Colombia Peace, “Key Changes to the New Peace Accord” (15 November 2016), online: Colombia Peace <<http://colombiapace.org/2016/11/15/key-changes-to-the-new-peace-accord/>>.

<sup>40</sup> For an overview of the evolution and examination of the general principles pertaining to the right to truth in the Inter-American human rights system, see Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 (13 August 2014). For an analysis of an emerging “right to accountability”, see Ruti Teitel, “Transitional Justice and Judicial Activism – A Right to Accountability?” (2015) 48 Cornell Intl LJ 385.

<sup>41</sup> On ongoing approaches to remember the victims of crimes committed in Algeria during the 1990s (the “dark decade”), during which up to 200,000 people were killed and thousands disappeared, see e.g. Nassera Dutour, “Algérie : de la Concorde civile à la Charte pour la paix et la réconciliation nationale : amnistie, amnésie, impunité” (2008) 53 *Mouvements* 144. For an overview and critical assessment of the amnesty measures seeking to achieve reconciliation, see George Joffé, “National Reconciliation and General Amnesty in Algeria” (2008) 13:2 *Mediterranean Politics* 213. On Algeria’s amnesty laws violating international law, in particular the obligation to prosecute those responsible for crimes against humanity and war crimes, see Laura Scully, “Neither Justice, Nor Oasis: Algeria’s Amnesty Law” (2008) 33:3 *Brook J Intl L* 975.

move; similarly, an international or hybrid tribunal would need to be established through the Security Council; and any national initiative – whether the establishment of a special criminal tribunal or a truth commission – is unlikely to have much credibility in the current political climate. Any comprehensive peace process, however, can be expected to deal with and envisage some form of accountability for the crimes committed. In the meantime, the establishment, in December 2016, by the United Nations General Assembly of a “mechanism” to assist in the investigation and prosecution of those responsible for the most serious crimes committed in Syria,<sup>42</sup> while certainly not being able to bring justice to Syrians by itself, signals, once again, the international community’s commitment towards the accountability norm.

The normative position of the United Nations is particularly clear in this regard, with the Secretary-General’s 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings insisting that “peace agreements ... [r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”<sup>43</sup> It is worth recalling that this is a relatively new policy. It is the adoption in 1999 of the Lomé Peace Agreement for Sierra Leone that signalled the turning point. While the United Nations had supported various forms of amnesties in places like El Salvador and Haiti up until that point,<sup>44</sup> the broad amnesty provision in the Lomé Peace Agreement was disapproved by the United Nations: the Special Representative of the Secretary-General, who signed the agreement as a witness, added a disclaimer stipulating that the amnesty and pardon shall not extend to genocide, crimes against humanity and war crimes.<sup>45</sup>

This normative position of the United Nations *vis-à-vis* amnesties resonates with – and is further developed by – the establishment and findings of peoples’ tribunals, which are another avenue to provide some form of justice, expose officially sanctioned impunity, reveal the truth, and call for further measures.<sup>46</sup> For instance, as the Permanent Peoples’ Tribunal stated in 2004 with respect to human

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<sup>42</sup> *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, GA Res 71/248, UN GAOR, 71st sess, 66th plen mtg, UN Doc A/RES/71/248 (21 December 2016).

<sup>43</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004), paras 64 (a) and (b). See also UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN ESCOR, 2005, UN Doc E/CN.4/2005/102/Add.1, principles 1 and 24.

<sup>44</sup> For further examples and an analysis of this changing practice, see Carsten Stahn, “United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?” (2002) 84:845 *Intl Rev Red Cross* 191.

<sup>45</sup> See Patricia Hayner, “Negotiating Peace in Sierra Leone: Confronting the Justice Challenge” *Centre for Humanitarian Dialogue & International Centre for Transitional Justice* (December 2007), online: International Center for Transitional Justice <[https://www.ictj.org/sites/default/files/ICTJ-CHD-SierraLeone-Negotiating-Peace-2007-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-CHD-SierraLeone-Negotiating-Peace-2007-English_0.pdf)> at note 3.

<sup>46</sup> Peoples’ tribunals are, of course, not without their problems. They may, for instance, reproduce elitist power structures or be clearly prejudiced and give little space to the defense, producing largely predetermined findings. See e.g. Christine Chinkin, “Peoples’ Tribunals: Legitimate or Rough Justice” (2006) 24:2 *Windsor YB Access Just* 201 at 212, 217; Andrew Byrnes & Gabrielle Simm, “Peoples’ Tribunals, International Law and the Use of Force” (2013) 36:2 *UNSWLJ* 711 at 738-39.

rights violations committed in Algeria, impunity represents in itself a human rights violation, and ending it would require a serious “opération-vérité.”<sup>47</sup> In this account, providing justice hence takes the dual form of ensuring individual accountability for serious crimes and revealing the truth. Similarly, the World Tribunal on Iraq, which considered the legality of the 2003 intervention (or invasion), was held, among other reasons, because of the “failure of official international institutions to hold accountable those who committed grave international crimes and constitute a menace to world peace,” with the main aims of this tribunal being to “establish the facts” and to “restore truth and preserve collective memory.”<sup>48</sup> Peoples’ tribunals are, of course, not state-sanctioned and do not have any capacity to enforce their “findings” in the orthodox sense. From a legal-pluralistic perspective, they are, however, a potentially meaningful way in which different legal actors engage with forms of injustice, and are hence part of the normative dynamics of the transnational transitional justice field.

### III. THE DIFFICULT PURSUIT OF SOCIAL JUSTICE

While the establishment of official institutions relying on and promoting the currently dominant norms may have positive effects on societies emerging from violent conflict, these institutions may also hinder the development of alternative and possibly more creative responses, and also frustrate the pursuit of goals associated with social justice. Moreover, and this is highly relevant when searching for avenues to introduce social justice principles into the context of transitional justice, no comparable norms and obligations have emerged with respect to recognizing and revealing violence that cannot easily be related to a specific act and an individual perpetrator. To return to the metaphor of the justice cascade, the main cascade may have engulfed many small but potentially significant streams and their ideas. This means that the collective dimensions of responsibility for serious crimes, structural forms of violence and other root causes of conflicts need to be addressed through different approaches than the currently prevalent – indeed mainstream – one that focuses on a limited and selective individualization of responsibility through tribunals and commissions.

It should be mentioned that the main purpose of this article is not to carry out a definite assessment of the merits and impact of the transnational transitional justice norms that have emerged in recent years, or to make a normative judgment about the perceived strengths and weaknesses of different institutions relying on these norms. The objective is rather to analyse and contribute to a better understanding of transitional justice endeavours and of the rich interactions between different processes, highlighting and tolerating normative disagreement,<sup>49</sup> but pointing out problematic hegemonic tendencies.

#### A. Diverting Attention Away from Structural Factors

So far, international law has not been able to make any meaningful contribution to considering violence beyond specific events. To the contrary, because of its fixation on individual accountability and

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<sup>47</sup> Tribunal Permanent des Peuples, 32<sup>e</sup> session, *Les violations des droits de l’homme en Algérie (1992-2004)*, *Sentence* (Paris, 8 November 2004), online: <<http://www.algerie-tpp.org/tpp/pdf/sentence.pdf>>, para 7-2-1.

<sup>48</sup> Coordinating Committee for World Tribunal on Iraq, “World Tribunal on Iraq: Platform Text” (29 October 2003), online: <[http://www.iraqtribunal.de/dokus/wti\\_platformtext.pdf](http://www.iraqtribunal.de/dokus/wti_platformtext.pdf)>.

<sup>49</sup> Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall LJ* 167 at 179-82.

a view of transitional justice as liberalizing justice,<sup>50</sup> it has arguably diverted attention away from the collective and structural dimensions of violence. State responsibility – a form of collective responsibility – is, of course, a well-established and important concept in international law.<sup>51</sup> It is also true that the insight of the post-World War II judgment at Nuremberg that “[c]rimes against international law are committed by men, not by abstract entities,”<sup>52</sup> was a significant achievement that pierced the veil of state sovereignty and rejected the idea that state agents are not responsible for crimes committed by their states. However, along with the emerging hierarchization of international crimes, with genocide and crimes against humanity at the top, the focus on individual perpetrators contributed to a quite drastic demise of the notion of state criminality<sup>53</sup> and to the disregard of the collective and structural dimensions of violence more generally.

In the context of international human rights law, emphasizing specific events and particular manifestations of violence through the common discourse of “crisis” channels legal and political attention in certain directions, which has resulted in privileging civil and political rights over economic, social and cultural rights.<sup>54</sup> The latter, more closely related to structural forms of injustice, such as poverty and power differentials based on gender, rarely play any role in the dominant conflict resolution and transitional justice discourses, which typically pay more attention to specific and individualizable violations of international human rights and humanitarian law. In fact, transitional justice, because it ignores – sometimes unintentionally – certain forms of violence and operates with existing gender paradigms, is complicit in perpetuating such violence. As Adam Branch has pointed out, the dominant liberal transitional justice model does not unsettle private property or global capitalism, but it rather contributes to consolidating an oftentimes violent liberal political and economic order.<sup>55</sup> Furthermore, narrow conceptions of the conflict to be resolved, along with male bias, mean that peace negotiations rarely deal with such systemic issues as discrimination and domination based on gender or with social security.<sup>56</sup>

Furthermore, legal intervention in the form of justice institutions dealing with violence committed during an armed conflict tends to rely on the discourse of extraordinary and exceptional violent events, with the objective of contributing to the attainment of peace in its negative sense. This dominant notion of peace in international law, which is associated with the absence of physical violence, can also be seen

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<sup>50</sup> See Bell & O’Rourke, *supra* note 16 at 37-39.

<sup>51</sup> For a recent study on the implementation of the law on state responsibility in the context of transnational terrorism, see Vincent-Joël Proulx, *Institutionalizing State Responsibility: Global Security and UN Organs* (Oxford: Oxford University Press, 2016).

<sup>52</sup> *Nuremberg Judgement (International Military Tribunal, 1 October 1946) in Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 1947)* at 223.

<sup>53</sup> Frédéric Mégret, “The Subjects of International Criminal Law” in Kastner, *supra* note 20. For the “second death” of so-called ‘crimes of states’ in the 2007 judgment of the International Court of Justice on the application of the Genocide Convention (*Bosnia and Herzegovina v Serbia and Montenegro*), see Pierre-Marie Dupuy, “A Crime without Punishment” (2016) 14:4 *J Intl Criminal Just* 879 at 880.

<sup>54</sup> Benjamin Authers & Hilary Charlesworth, “The Crisis and the Quotidian in International Human Rights Law” (2013) 44 *Netherlands YB Intl L* 19 at 36.

<sup>55</sup> Branch, “Ethnojustice”, *supra* note 7 at 615.

<sup>56</sup> Bell & O’Rourke, *supra* note 16 at 25.

as preventing the pursuit of social justice.<sup>57</sup> Seemingly routine forms of injustice are harder to tackle and are, as a result, often ignored, with “crises act[ing] as both catalysts and distractions in law’s production and application.”<sup>58</sup> While serious crimes committed during an armed conflict, such as killings of civilians, rape and torture, are perceived as necessitating particular legal responses, structural forms of violence and injustice, which are frequently part of the root causes of an armed conflict and continue to affect post-conflict societies, seem to be beyond the reach of law. Indeed, international lawyers usually do not take into account the role of socioeconomic factors and the global economic order, including the role played by international economic institutions, in contributing to armed conflicts.<sup>59</sup>

It can, therefore, be argued that the dominant focus on particular crimes – shocking as they may be and requiring, without doubt, legal responses – has contributed to leaving in place the underlying conflict dynamics that enabled these crimes in the first place. This means that the idea of imperfect justice being better than no justice, as it is sometimes claimed with respect to international criminal courts and tribunals,<sup>60</sup> is more problematic than at first sight. Such anti-impunity discourses, promoted through international advocacy and institutions like the ICC, may even legitimize and entrench existing inequalities, both on a global scale and within societies emerging from violent conflict. As Adam Branch has argued, “the doctrine that some justice is better than no justice can end up not only making justice conform unapologetically to power, but also making justice an unaccountable tool of further violence and injustice.”<sup>61</sup> The establishment or intervention of such justice institutions might, therefore, not always and not necessarily be desirable, not only because of inherent shortcomings, such as the necessary focus on a small number of perpetrators, but also because these institutions contribute to obscuring the collective dimensions of violence and structural forms of injustice by emphasizing individual crimes, victims and perpetrators.

## B. The Prejudiced Notion of Time

The underlying notion of time in international law is a related factor that contributes to international law’s current focus on providing certain forms of justice in conflict and post-conflict settings, its fixation with individual accountability and the establishment of certain causal connections. Institutional responses to violence are contingent on the ways in which the relations between different periods of time

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<sup>57</sup> On the classic distinction between “positive” and “negative” peace, see Johan Galtung, “Violence, Peace, and Peace Research” (1969) 6:3 J Peace Res 167. Interestingly, Johan Galtung already associated “positive peace” with “social justice”. *Ibid* at 190 n 31. More recently, the concept of “quality peace” has been put forward, the three criteria of which are dignity, security and predictability. See Peter Wallensteen, *Quality Peace: Peacebuilding, Victory, and World Order* (New York: Oxford University Press, 2015) at 6. Social justice concerns could perhaps be subsumed under “dignity”, but although quality peace is claimed to be a relational concept, Wallensteen’s understanding of dignity seems to be rooted in a very liberal understanding of equal rights. *Ibid* at 5, 17.

<sup>58</sup> Authers & Charlesworth, *supra* note 54 at 21.

<sup>59</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) at 69.

<sup>60</sup> Sarah Williams, “The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?” (2004) 53 ICLQ 227 at 245.

<sup>61</sup> Adam Branch, “What the ICC Review Conference Can’t Fix” (Oxford Transitional Justice Research Working Paper Series, 2010), online: <[https://www.law.ox.ac.uk/sites/files/oxlaw/adambranchicc\\_final1.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/adambranchicc_final1.pdf)>. See also Branch, “Ethnojustice”, *supra* note 7 at 609.

are imagined. International law clearly recognizes that the past is relevant for the present and the future, and that the past, present and future are interrelated in important ways. This is particularly evident in the context of transitional justice and international law's ban on blanket amnesties for grave crimes. Since international law proscribes such presumably clear breaks with the past,<sup>62</sup> making the past more relevant to the present and the future, most transitional justice measures are now explicitly both backward- and forward-looking.<sup>63</sup>

However, because of the common linear notion of time,<sup>64</sup> certain forms of violence appear more present and less distant, and international law is typically concerned with the short-term and immediately appreciable causes for violent events.<sup>65</sup> As Richard Joyce has highlighted, the dominant view – one of modernity's myths – “takes the present as inevitable and reduces the past to a series of steps leading towards it.”<sup>66</sup> More recent events will always be considered more relevant according to such a linear conception of time and international law's temporal focus, which is why apparently more distant yet very significant forms of violence, like the colonial history of a conflict or post-conflict society, hardly play any role in transitional justice discourses. One of the results of this logic is that international law often ends up reacting to a “moment of crisis”, where the international community is presented with a false choice between action and inaction.<sup>67</sup>

#### IV. FROM THE DOMINANT TOOLKIT APPROACH TO NEW SPACES

The common emphasis on technical institutional responses in the field of transitional justice has tended to standardize mechanisms and processes. It has overlooked the particular needs of local contexts and obstructed the development of original responses that could also be more open to furthering goals associated with social justice, beyond a narrow individual rights-based approach. As Phil Clark and Nicola Palmer write, “[t]he toolkit approach to transitional justice begins with institutions and appears to work backwards through questions of needs and objectives.”<sup>68</sup> The focus on possible institutional responses is illustrated by a common impulse to ask how we can best make use of an institution that we have already created. It becomes evident that the choice of means constrains the possible ends (although the reverse is also true).<sup>69</sup> In other words, it is not the availability of a certain justice mechanism that should necessarily drive its use; ICC proceedings, for instance, may be appropriate in certain situations, but the fact that the ICC has jurisdiction over certain crimes does not automatically make it the best forum to deal with such violence.

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<sup>62</sup> Philipp Kastner, “Peace Agreements between Rupture and Continuity: Mediating Time in International Law” in León Castellanos Jankiewicz, Luca Pasquet & Klara Polackova van der Ploeg, eds, *International Law and Time: Narratives and Techniques* (Springer, 2018) [forthcoming].

<sup>63</sup> Christine Bell, *Human Rights and Peace Agreements* (Oxford: Oxford University Press, 2000) at 311.

<sup>64</sup> Anne Orford speaks of the “conservative pull of law's temporal focus”. Orford *supra* note 59 at 18.

<sup>65</sup> For different conceptions of “events” in international law, see Fleur Johns, Richard Joyce & Sundhya Pahuja, eds, *Events: The Force of International Law* (New York: Routledge, 2011).

<sup>66</sup> Richard Joyce, “Westphalia: Event, Memory, Myth” in Johns, Joyce & Pahuja, *supra* note 65, 55 at 65.

<sup>67</sup> Orford, *supra* note 59 at 15, 18.

<sup>68</sup> Phil Clark & Nicola Palmer, “Challenging Transitional Justice” in Palmer, Clark & Granville, *supra* note 21, 1 at 6.

<sup>69</sup> *Ibid.*

Moreover, presumably creative alternatives do not necessarily challenge the underlying logic and objectives. The *gacaca* courts in Rwanda are a telling example. Although combining retributive and restorative justice elements, this modified form of a revived traditional conflict resolution method focussed primarily on the individual responsibility of *génocidaires* and was arguably only used in this context because the ordinary national justice system could never have processed the large number of alleged perpetrators.<sup>70</sup> Another example is the establishment of the International, Impartial and Independent Mechanism for Syria mentioned above, which is mandated to “collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses”<sup>71</sup> committed since 2011. The absence of ICC jurisdiction has certainly led to some forced creativity in the form of thinking outside the ICC framework or other existing transitional justice institutions, but the underlying preoccupation with impunity for certain forms of recent violence remains firmly embedded within the logic of the mainstream “justice cascade.”

#### A. Considering the Socioeconomic Context

It seems crucial to break with the orthodox transitional justice model that manifests itself in the ubiquitous concern of international and internationalized criminal tribunals, truth and reconciliation commissions and other institutions to deliver justice – in the form of criminal convictions, apologies, reparations, etc. – for individual violations of civil and political rights, especially of the physical integrity of the person. Transitional justice endeavours arguably have the potential to move beyond seeking to deliver justice for individual crimes, address structural violence and to counter some of the “injustices of everyday life.”<sup>72</sup> Against the common emphasis in the dominant Western human rights discourses, it has, for instance, been suggested that transitional justice should also consider corruption and other economic crimes. These crimes often intersect with civil and political rights violations but are rarely considered in terms of rights violations themselves. As Ruben Carranza has argued,

[b]oth civil and political rights and socioeconomic rights abuses are committed against overlapping sets of victims by an invariably overlapping set of perpetrators. An impunity gap is created when transitional justice mechanisms deal with only one kind of abuse while ignoring accountability for large-scale corruption and economic crimes.<sup>73</sup>

The 2014 Malabo Protocol of the African Union can be seen as embodying the increasing awareness about this relationship between different rights violations. According to this protocol, the African Court on Justice and Human Rights, which could be described as a regional transitional justice institution, would have jurisdiction over a number of economic crimes, like corruption, money laundering and the illicit exploitation of natural resources, in addition to those considered to be the “core” crimes under

<sup>70</sup> See e.g. Clark, *supra* note 4 at 62.

<sup>71</sup> GA Res 71/248, *supra* note 42, para 4.

<sup>72</sup> Hilary Charlesworth, “International Law: A Discipline of Crisis” (2002) 65:3 Mod L Rev 377 at 392.

<sup>73</sup> Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” (2008) 2 Intl J of Transitional Justice 310 at 329. As Carranza also points out, most truth commissions have not engaged with corruption and other economic crimes. *Ibid* at 315.

international law, namely genocide, crimes against humanity, war crimes and the crime of aggression.<sup>74</sup> The goal behind granting a regional court this broader jurisdiction is to address both extraordinary and everyday security threats as well as structural violence of particular concern to the African context.<sup>75</sup> However, even if economic, social and cultural rights violations were included, the prevailing rights-based approach to justice, which remains overly concerned with individual responsibility for relatively recent rights violations, is unlikely to provoke a more profound paradigmatic shift. In this context, it is worth recalling that the pursuit of objectives related to social justice is usually left to the development and post-conflict reconstruction fields,<sup>76</sup> as if a neat division of labor was possible, and as if transitional justice could and should make abstraction of the socioeconomic environment.

Some scholars have gone beyond the call for a less compartmentalized and more holistic view of rights and rights violations and have maintained that transitional justice can and should have transformative ambitions and encompass socioeconomic justice.<sup>77</sup> For instance, Carranza has claimed that “addressing poverty and social inequality must be regarded as among the strategic goals of any transitional justice undertaking.”<sup>78</sup> Writing about transitional justice institutions in Nepal, Tafadzwa Pasipanodya has similarly argued that economic and social injustice are “both a root and a product of Nepal’s conflict” and that a truth and reconciliation commission should consequently consider not only a larger range of rights violations but also the economic and social causes of armed conflicts.<sup>79</sup> This would require an important shift from the common focus on rather narrow legal issues associated with transitional justice to broader social and political issues, and from large institutional structures and nation-building endeavours to communities and their everyday concerns.<sup>80</sup> To this end, new spaces – within and outside existing institutional frameworks – to consider and promote justice in conflict and post-conflict societies need to be envisaged.

## B. Navigating Between the International and the Local

One of the central related challenges that has, so far, only briefly been alluded to and that is encountered by virtually all transitional justice institutions is dealing with pressures from and towards both the international and the local. While it would be important not to entrench an unhelpful polarization between Western and non-Western, or “foreign” and “natural”, justice discourses, it still seems that a technocratic toolkit approach that imposes – or is perceived as imposing – certain

<sup>74</sup> *Malabo Protocol*, AU Doc Assembly/AU/Dec.529 (XXIII) (30 June 2014), art 28A(1). The other crimes included in the Malabo Protocol are the crime of unconstitutional change of government, piracy, terrorism, mercenarism, and trafficking in persons, drugs and hazardous wastes.

<sup>75</sup> Clarke, *supra* note 20.

<sup>76</sup> Tafadzwa Pasipanodya, “A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal” (2008) 2 *Intl J of Transitional Justice* 378 at 389. Social justice, however, not a primary concern in the field of peacebuilding either. As usefully summarized by Wallenstein, the literature is mostly concern with building institutions, security and the economy. Wallenstein, *supra* note 57 at 25-28.

<sup>77</sup> Wendy Lambourne, “Transformative Justice, Reconciliation and Peacebuilding” in Susanne Buckley-Zistel et al, eds, *Transitional Justice Theories* (New York: Routledge, 2014) 19 at 28-29.

<sup>78</sup> Pasipanodya, *supra* note 76 at 329.

<sup>79</sup> For this suggestion in the context of Nepal, see *ibid* at 379, 393.

<sup>80</sup> Paul Gready & Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice” (2014) 8 *Intl J of Transitional Justice* 339 at 340.



mechanisms and methods can do more harm than good. This is illustrated by the fact that justice, like human dignity, may have very different meanings and its delivery – or rather its endeavour – may thus take different forms. Similarly, and contrary to the dominant, institution-oriented and “overly scientific approach to truth-telling”,<sup>81</sup> which is often promoted by both official and unofficial institutions, truth is not singular and monolithic but plural and variable. This is why more attention should be paid to the multiple and more comprehensive strategies through which societies and communities engage with past and present forms of injustice.

The international/transnational/universal, on one hand, is embodied in institutions and values promoted by an imagined international community<sup>82</sup> and conveyed through common discourses of exceptionality: the international is allowed – or even obligated – to intervene through extraordinary means to address exceptional situations of concern to the international community as a whole. “International community” is here a rhetorical device that can be applied quite loosely.<sup>83</sup> Moreover, as Anne Orford has argued in the context of so-called humanitarian intervention, the international community is typically seen as “absent from the scene of violence and suffering until it intervenes as a heroic savior.”<sup>84</sup> Similar dynamics are apparent in the field of transitional justice, where international courts and tribunals as well as international transitional justice experts are called upon to intervene when the national system is unwilling or unable to deliver justice and implement associated international legal expectations.

On the other hand, the local and particular, associated with presumably traditional grassroots institutions, may imply a greater plurality of approaches and values. However, the dominant approach to transitional justice has tended to reify identities and to essentialize “traditional” mechanisms of conflict resolution and reconciliation. Apparent dangers include the undue empowerment of certain groups, such as male elders, instrumentalization by the state, and the creation of further violence.<sup>85</sup> The two spheres – international and local – hence do not exist in isolation; rather, the spheres and their respective approaches blend due to mutual influences. International institutions, for instance, increasingly seek to turn to the “local” to ground their efforts and to root their legitimacy in the particular and the participatory.<sup>86</sup> Even the inevitably perpetrator-focused and retributive justice-generating ICC aims to pay more attention to the victims of crimes within its jurisdiction by allowing them to participate in the proceedings – not only as witnesses but as *victims* – and by envisaging reparations through a trust fund.<sup>87</sup> It is through this turn to the local that some, albeit very limited, ideas of distributive justice have been introduced into the ICC’s retributive justice framework.

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<sup>81</sup> Louis Bickford, “Unofficial Truth Projects” (2007) 29:4 Hum Rights Q 994 at 1034.

<sup>82</sup> Dino Kritsiotis, “Imagining the International Community” (2002) 13:4 Eur J Intl L 961 at 989.

<sup>83</sup> *Ibid* at 991.

<sup>84</sup> Orford, *supra* note 59 at 85.

<sup>85</sup> For an excellent study, drawing on research in northern Uganda, see Branch, *supra* note 7, particularly at 621-625.

<sup>86</sup> Simon Robins & Erik Wilson, “Participatory Methods with Victims: An Emancipatory Approach to Transitional Justice Research” (2015) 30 CJLS 217; Dustin N Sharp, “Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice” (2013) 26 Harv Hum Rts J 149.

<sup>87</sup> Stephen Smith Cody & Eric Stover, “The Role of Victims: Emerging Rights to Participation and Reparation in International Criminal Courts” in Kastner, *supra* note 20.

The tendency – and arguably emerging obligation – to turn to the local manifests itself even more strongly in the context of truth and reconciliation commissions than of international and internationalized criminal tribunals. The mandate of truth and reconciliation commissions is more closely related to different narratives and perceptions about a violent past as well as to individual and collective feelings about the “other”. As a result, truth and reconciliation commissions and similar endeavours are better equipped to consider more carefully what kind of truth the communities concerned want to reveal and what kind of reconciliation and forms of justice these communities seek to achieve. Conflict-related justice institutions can, indeed, be driven by victims’ associations, and, as it has been argued convincingly, they should be informed by local knowledge.<sup>88</sup> Top-down approaches that do not sufficiently consider local needs and desires, and that fail to secure popular support will hardly be successful, as exemplified by the largely failed Haitian *Commission nationale de vérité et de justice*.<sup>89</sup> Moreover, approaches focused on institutional design often fail to consider the sometimes very practical obstacles to participation in justice mechanisms, such as the economic situation of those who are invited to participate.<sup>90</sup>

Considering peoples’ tribunals is particularly interesting here for several reasons. It is true that they usually follow a logic that is similar to those of official, state-based institutions when it comes to rooting legitimacy in ideas of substantive justice expressed in international documents, such as the United Nations Charter and human rights treaties, as well as in legalistic, rule of law-based proceedings.<sup>91</sup> However, because peoples’ tribunals embrace an alternative, and often bottom-up approach, they also attempt to give a voice to those that are not heard in official fora. When compared to formal, state-based institutions, such processes may give more space to both individual and collective narratives, particularly for victims.<sup>92</sup> More fundamentally, they may also be an avenue to provide forms of justice and establish truths that are complementary or alternative to those offered (or refused) by official institutions. The contribution of unofficial institutions goes, in fact, beyond filling in jurisdictional gaps of formal institutions. Rather, they are sites where a variety of actors articulate, develop and re-negotiate transnational legal norms and imagine different forms of justice.

There is hence a discernible trend in the transitional justice field, which is supported by different official and unofficial institutions, to turn to the local and to the victims and communities most immediately affected. This is certainly a welcome development: while international interventions may all too easily be dismissed as hegemonic or neo-colonial, and local, bottom-up approaches essentialized or romanticized,<sup>93</sup> enabling local communities to provide meaningful input to the justice processes in

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<sup>88</sup> Robins & Wilson, *supra* note 86 at 221.

<sup>89</sup> On the role of the Haitian diaspora community in the establishment of the commission and the commission’s failure to gain popular support of Haitians more generally, among others because it did not hold public hearings due to security concerns, see Quinn, *supra* note 3 at 273.

<sup>90</sup> Robins & Wilson, *supra* note 86 at 233.

<sup>91</sup> Byrnes & Simm, *supra* note 46 at 713; Chinkin, *supra* note 46 at 215.

<sup>92</sup> Chinkin, *supra* note 46 at 220.

<sup>93</sup> On the “apparently natural process of reconciling and healing at the local level” in Mozambique, see Hayner, *Unspeakable Truths*, *supra* note 28 at 201. For an exploration of different “local realities” in the context of transitional justice, see for instance the collection edited by A Laban Hinton, ed, *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (Rutgers University Press, 2011).

question is salient. This can contribute to enhancing local ownership over such processes and to creating spaces that allow endeavouring towards plural forms of justice. Since those most immediately affected by a society's violent past or present may not necessarily make a sharp distinction between violations of civil and political rights and socioeconomic violence, this also means that social justice issues may end up being introduced and eventually be mainstreamed in the field of transitional justice.

## V. CONCLUSION

As this article has argued, the currently dominant transitional justice model adopted by a variety of institutions, which is based on individual rights and individualizable responsibilities, has rendered the pursuit of social justice difficult in this context. It seems that promoting values associated with social justice, such as redistribution and solidarity, which would often imply tackling the root causes of violent conflicts, is unlikely to occur through the introduction of new international meta-norms on social justice. Rather, greater procedural openness and respect for a plurality of approaches would be needed, with international institutions and “experts” adopting a more modest stance and being more mindful of the limits – and dangers – of technocratic and presumably universal solutions. The diversity of narratives and lived experiences contributing to transitional justice endeavours should, indeed, be considered as creating valid and relevant normative responses. Since no system or institution, whether state-based or unofficial, has a monopoly over law and legal meaning-making,<sup>94</sup> legal knowledge is constructed in a variety of sites by a plurality of actors. Moreover, the critical legal-pluralistic approach relied upon in this article does not uphold a sharp distinction between the legal and the non-legal but is determined to recognize and enhance the emancipatory potential of law, including its potential of promoting social justice.

Furthermore, and in addition to informing the theory and practice of transitional justice, concerns for social justice and their consideration in the context of transitional justice would also contribute to recognizing the fact that the international community already intervenes in the socioeconomic environment of conflict and post-conflict societies, something that is usually overlooked by international lawyers and transitional justice practitioners.<sup>95</sup> Should international law be more concerned with social justice and perhaps also intervene more consistently through international or internationalized institutions to further goals associated with social justice, as it does in the area of international criminal law? The answer suggested here is a qualified no. International law, in its current form, does not appear well-equipped to fully embrace the pursuit of social justice, particularly because of the latter's multiple meanings and manifestations that can hardly be captured by international law itself. Instead, international legal scholars and practitioners should recognize international law's shortcomings and the – oftentimes unintended – negative consequences that result from the orthodox transitional justice model and the establishment and operation of its institutions.

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<sup>94</sup> This draws on Roderick A Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57 Northern Ireland LQ 610.

<sup>95</sup> Orford speaks of “the ‘myopia’ of international lawyers about the effects of the new interventionism”. Orford, *supra* note 59 at 18.

Finally, while this article has sought to make sense of law and legal meaning-making in the context of transitional justice, with the ultimate objective being the enhancement of the legitimacy and effectiveness of transitional justice processes and the promotion of a more committed pursuit of social justice in this context, the objective is certainly not to further “colonize”<sup>96</sup> the field of transitional justice. Law has, without doubt, a role to play, but the claim that law is omnipresent does not imply it being superior or always conducive to facilitating human interaction in a constructive way. Moreover, it is unlikely, and in fact undesirable, that we could ever speak of *the* law of transitional justice, just as there is no singular form of justice or one universally valid, monolithic truth.

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<sup>96</sup> Indeed, interdisciplinarity may imply attempts by one discipline to colonize another. As Christine Bell has argued in the context of transitional justice, “the project of interdisciplinarity can perhaps best be understood as a mutual project of (de)colonization and resistance.” Bell, *supra* note 8 at 22.