



International Law and Sequencing Transitional Justice

Navigating Pandora's Toolbox

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of God, the Most Gracious, the Most Merciful

I dedicate this thesis to my fathers for watching over me, to my mother and family for their constant support, and to my friends and loved ones for their endless encouragement.

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List of Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
CAVR	Commission for Reception, Truth, and Reconciliation (<i>Comissão de Acolhimento, Verdade e Reconciliação</i>) (Timor-Leste)
CONADEP	National Commission on the Disappearance of Persons (<i>Comisión Nacional sobre la Desaparición de Personas</i>) (Argentina)
CPR	Civil and Political Right
DDR	Disarmament, Demobilization, and Reintegration
ESCR	Economic, social, and cultural right
FARC-EP	Revolutionary Armed Forces of Colombia—People's Army (<i>Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo</i>)
HRBA	Human Rights-based Approaches to Development
HRC	Human Rights Committee
I/NGO	International/Non-Governmental Organization
IACtHR	Inter-American Court of Human Rights
IBL	Institutionalization Before Liberalization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDDRS	Integrated Disarmament, Demobilization and Reintegration Standards

IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
LRA	Lord's Resistance Army (Uganda)
LRV	Legal Representative of Victims
MATRA	Social Transformation Program (<i>MAatschappelijke TRAnsformatie</i>) (Netherlands)
MFA	Ministry of Foreign Affairs
NHRI	National Human Rights Institution
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor
PANEL	Participation, Accountability, Non-Discrimination, Empowerment and
Principles	Legality Principles
PIR	Comprehensive Reparations Plan (<i>Plan Integral de Reparaciones</i>) (Peru)
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
SR	Special Rapporteur
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSG	United Nations Secretary General

1 Introduction

In Hesiod's *Works and Days*, the Greek poet recalls the tale of Pandora.¹ According to the myth, Zeus gifted Pandora a box and instructed her never to open it.² When Pandora's curiosity overcame her, a foreboding cloud surged from within, releasing toil and plague upon the Earth.³ Like Pandora, transitional justice scholars and practitioners are endowed with a 'toolbox' of 'international norms and standards' that, when unpacked, unleashes a similarly amorphous mass of norms, duties, and rights. While not necessarily as malicious, these include concepts that are as embraced as they are contested and as universal and as they are relative.

Those who engage with the transitional justice 'toolbox' may attempt to 'sequence' it in transitioning societies. They attempt to coordinate the contents of the toolbox to produce the best outcomes. The challenges of sequencing such nebulous concepts shall be explored in this thesis.

1.1 International Law and Transitional Justice

In a few decades, TJ developed significantly as a 'field' that encompasses a range of strategies to address societal violence.⁴ TJ includes a variety of actors, each with increasingly perceived relevance to TJ.⁵ The UN, for example, has become particularly influential, shifting to the active management of the field.⁶ The organization rests its understanding of TJ on four "pillars" of international law—namely IHRL, IHL, ICL, and international refugee law.⁷ This "normative foundation" further includes specially developed "international norms and standards" that claim to bring greater legitimacy to TJ and more closely represent transitioning communities.⁸ These

¹ Hesiod, *Theogony and Works and Days* (M. L. West, Oxford University Press 1999).

² Ibid; Iseult Gillespie, *The Myth of Pandora's Box - Iseult Gillespie* (TED-Ed 15 Jan 2019).

³ Hesiod, *Theogony and Works and Days* 62-96.

⁴ For this work, transitional justice is referred to as a field, notwithstanding relevant discourse on its status as such. See Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3 *International Journal of Transitional Justice* 5-27.

⁵ These include "UN agencies, international development partners and international NGO." See Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge 2015) 107.

⁶ Leena Grover, 'Transitional Justice, International Law and the United Nations' (2019) 88 *Nordic Journal of International Law* 359-397.

⁷ UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (2004) S/2004/616 para. 9.

⁸ Ibid para. 9-10.

include binding legal instruments as well as a litany of non-binding resolutions, declarations, and principles.⁹

The UNSG emphasizes a “comprehensive” approach to TJ, suggesting that “the greater the number of transitional justice measures selected, the better.”¹⁰ The UNSG moreover asserts that an “*appropriate* combination” of measures should be selected should conform to “international legal standards and obligations.”¹¹ Discerning an “appropriately conceived” combination is the preliminary dilemma of this thesis.¹² To this end, critically examining the ‘international norms and standards’ of TJ opens to contestation the “normative idealism” of what is considered ‘appropriate’ to governing TJ.¹³

As shall be illustrated in this thesis, TJ is riddled with “strategic hierarchies” that presuppose certain ‘universal’ norms without readily acknowledging their contested nature.¹⁴ The hierarchies of the field call into question the representativeness and coherence of TJ processes. Universal norms are assumed to represent societies with diverse interests. Yet, these communities’ preferences are often folded into predominant understandings of values such as ‘accountability’ and ‘justice.’ As a result, TJ may offer a limited sense of agency over its processes. Moreover, the ‘universal’ norms of TJ produce equally contentious rights and duties. Rights to justice, truth, and reparations stem from narrow normative roots, while the state duty to prosecute rests on ambiguous legal foundations. As a result, TJ appears incoherent in the values it seeks to promote.

A critical examination of TJ reveals a “messy, incomplete, [and] continually contested” nature that conflicts with scholarship that may for granted its consolidation as a field.¹⁵ Yet, relatively limited scholarship is dedicated to interrogating some of the “basic premises” that claim to legitimize the

⁹ Grover, 'Transitional Justice, International Law and the United Nations' 372. See further Office of the High Commissioner for Human Rights, 'International Standards' <<https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence/international-standards>> accessed 10 July 2022.

¹⁰ UN Secretary General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010) S/2004/616 principle 8; Grover, 'Transitional Justice, International Law and the United Nations' 373.

¹¹ UN Secretary General, *2004 Report* para. 26; UN Secretary General, *2010 Guidance Note* principle 8.

¹² *Ibid.*

¹³ Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339-361, 343.

¹⁴ Grover, 'Transitional Justice, International Law and the United Nations' 396.

¹⁵ Rosalind Shaw, Lars Waldorf and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010) 36 citing Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 *Hum Rts Q* 163.

field and represent its constituents.¹⁶ On the contrary, the choice of TJ responses can be limited by the central norms promoted and the rights and duties they produce—a phenomenon that can be broadly captured under the notion of ‘sequencing.’

1.2 Sequencing

TJ scholarship does not offer much guidance on the concept of ‘sequencing’ TJ. To construct a definition, sequencing relates to the selection, prioritization, and coordination of TJ measures over space and time to best achieve aims such as peace and reconciliation. This thesis broadly approaches ‘sequencing’ by exploring the values that shape sequencing according to certain “dominant scripts” of international law.¹⁷ This thesis, therefore, emphasizes the normative reasoning behind the coordination of TJ and its implications for transitioning societies.

Put plainly, sequencing relates to *what*, *when*, and *how* to operationalize TJ, as well as connected questions of *for whom*, *where*, and *why* TJ intervenes.¹⁸ This thesis shall focus on the question of *what* to sequence, which for present purposes encompasses the norms, rights, and duties that TJ promotes. Amongst these concepts, there is an “inherent tension” between the universalism of international law and the divergent local traditions it should accommodate.¹⁹ To this end, the question of *what* to sequence exposes the normative defaults that shape TJ interventions. Taken further, the question of *what* shall explore normative overlaps with adjacent disciplines and how they interact with TJ.

The *whom* of TJ relates to the inclusion or exclusion of certain stakeholders and their interests, spanning from UN agencies and NGOs to victims. Yet ‘victims,’ for example, are not a

¹⁶ Catherine Turner, 'Transitional Justice and Critique' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 52; UN Secretary General, *2004 Report* para. 9-10

¹⁷ James L. Cavallaro and Sebastián Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in Kieran McEvoy and others (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008).

¹⁸ Loosely expanding on Nagy’s questioning of “the categories of when, to whom and for what transitional justice applies” and inspired by the gap identified by McEvoy. See Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275-289; Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *Journal of Law and Society* 411-440 (“many lawyers ... tend not to overly analyze fundamental existential questions such as 'what is transitional justice for?' or 'whom does it serve?' ... [and] appear to spend most energy ... analyzing ... case law and relevant international standards.”).

¹⁹ Larissa van den Herik and Carsten Stahn, *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012) 26.

“homogenous group” but a fluid category with non-generalizable needs.²⁰ Surveying a particular group of victims may not yield input that is representative of all of those who have been victimized.²¹ In another instance, favoring “professionalized” urban NGOs may exclude rural grassroots organizations, which is partial to certain donor agendas.²²

The *when* and *where* of sequencing TJ reflects an elastic concept of transition.²³ While the classical orthodoxy of the field concerned itself with “paradigmatic transitions” from authoritarianism to democracy, contemporary scholarship has significantly broadened its purview.²⁴ TJ now arguably applies in established democracies, where abuses are ongoing, or where the transition is illiberal.²⁵ In Rwanda, TJ efforts occur in a pointedly illiberal context.²⁶ Meanwhile, in Australia and Canada attempts to render justice for historic abuses against indigenous peoples are situated in stable democracies.²⁷ Even within these contexts there may be an uneven deployment of TJ. For example, in Peru certain reparations initiatives were concentrated in urban centers, neglecting the rural communities that were hardest hit by the conflict.²⁸ The *when* and *where* aspects also relate to the

²⁰ Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29 *International Criminal Justice Review* 221-248.

²¹ Shaw, Waldorf and Hazan, *Localizing Transitional Justice*.

²² Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 *Journal of Law and Society* 265-292, 282.

²³ See Joanna R. Quinn, 'Whither the "Transition" of Transitional Justice' (2014) 8 *Interdisc J Hum Rts L* 63.

²⁴ Dustin N. Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2014) 9 *International Journal of Transitional Justice* 150-169; for a more conservative view, see Pádraig McAuliffe, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition' (2017) 2 *Journal of Conflictology* 30.

²⁵ Kieran McEvoy and others, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008), citing Lundy and McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up'; Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice' 109; Thomas Obel Hansen, 'The Time and Space of Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017).

²⁶ Hansen, 'The Time and Space of Transitional Justice'.

²⁷ *Ibid* 46 (“In Australia ... attempts to deal with abuses committed against aboriginal people ... concerning the forcible removal of aboriginal children in the 1970s ... led to an official apology ... and some amount of compensation to victims. ... In Canada, the establishment of a Truth and Reconciliation Commission ... addressed injustices committed against the Indigenous population, including forcible placement of children in Christian boarding schools ... An official apology was issued and victims provided with an amount of compensation.”).

²⁸ Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Develop' (2007) 10 *Yale Hum Rts & Dev LJ* 141 162-163; Katherine Orlovsky and Naomi Roht-Arriaza, 'A Complementary Relationship: Reparations and Development' in Pablo De Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council; John Wiley 2010).

point at which TJ mechanisms are deployed, and contextual factors such as the transitional governance or peace arrangement.²⁹

The *how* of sequencing TJ concerns the choice of measures adopted. Under the UN definition, these include “judicial and non-judicial processes” such as “individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals.”³⁰ This aspect also relates to the choice of international, hybrid, or local institutions and budgetary, security, or other concerns.³¹ Finally, *why* TJ seeks to intervene relates to the aims of its measures. Yet, goals such as ‘sustainable peace’ remain ambiguous, spanning different “structural” and “relational” understanding.³² Similarly, ‘reconciliation’ spans various forms of socio-political interactions, yet remains elusive.³³

It is worth noting that TJ jurisprudence has moved past the question of *whether* TJ should intervene.³⁴ In his 2010 Guidance Note, for example, the UNSG confirms that “the question for the UN is never *whether* to pursue accountability and justice, but rather *when* and *how*.”³⁵ In this context, this thesis largely focuses on the preceding questions, particularly *what* TJ aims to sequence while incorporating other aspects such as *whom* it represents, *why*, and *how*.

1.3 Methodology

The overall research question(s) of this thesis are as follows:

How is the sequencing of transitional justice shaped by the ‘international norms and standards’ of international law?

²⁹ Jacopo Roberti di Sarsina, William Schabas and Augusto Barbera, *Transitional Justice and a State’s Response to Mass Atrocity: Reassessing the Obligations to Investigate and Prosecute* (T.M.C. Asser Press 2019) 110 citing Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Oxford University Press 2001).

³⁰ UN Secretary General, *2004 Report* para 8.

³¹ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* citing Adam Przeworski, ‘Some Problems in the Study of the Transition to Democracy’ in Guillermo O’Donnell, Philippe C. Schmitter and Laurence Whitehead (eds), vol 3 (The Johns Hopkins University Press 1986).

³² Cathy Bollaert, ‘Anchoring Concepts: Sustainable Peace, Identity, Culture and Worldview’ in Cathy Bollaert (ed), *Reconciliation and Building a Sustainable Peace: Competing Worldviews in South Africa and Beyond* (Springer International Publishing 2019) 48-49.

³³ Joanna R. Quinn, *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen’s University Press 2009). See J. Sarkin and E. Daly, ‘Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies’ (2004) 35 *Columbia Human Rights Law Review* 661-728.

³⁴ Nagy, ‘Transitional Justice as Global Project’ 276 (“The question today is not *whether* something should be done after atrocity but *how* it should be done.”) (emphasis added).

³⁵ UN Secretary General, *2010 Guidance Note* principle 2 (emphasis added).

- a. How do the concepts of ‘justice’ and ‘accountability’ under international law shape transitional justice interventions?
- b. How do the underlying rights to justice, truth, and reparations subsequently impact transitional justice interventions?
- c. How do the interdisciplinary frameworks of development and peacebuilding affect overlapping (post-)conflict interventions?

To answer the above questions, this thesis employs a “fourth generation” analytical lens.³⁶ Based on Teitel’s genealogy, the present “third phase” of TJ is characterized by its normalization as a “mainstream” response.³⁷ The “fin de siècle” maturation of the field presents questions of its scope, content, and sequencing as a given for shaping its responses.³⁸ Yet, critical scholarship problematizes issues that remain at its periphery, despite or because of its regulation by international actors.³⁹ A “fourth phase” approach addresses persistent issues in such generally accepted concepts with a view of interrogating their blind spots.⁴⁰ Pertinent issues include the marginalization of ESCRs, the privileging of states, and due regard for the local context.⁴¹ In turn, this thesis addresses sequencing by examining the assumptions that form TJ’s “own constructed boundaries” and order it according to the dominant framework of international law.⁴²

This thesis utilizes an interdisciplinary approach that blends doctrinal and analytical research. The doctrinal method seeks to clarify and systemize the relationships found within legal rules.⁴³ This thesis distinguishes between binding and non-binding instruments, while placing particular emphasis on the Rome Statute, 2005 (Updated) Basic Principles to Combat Impunity, and the Basic Principles on the Right to Remedy. This thesis also focuses on the case law of the ICC and to a lesser extent the IACtHR. This thesis otherwise approaches legal doctrine as a “normative discipline” that not only synthesizes rules but “takes normative positions ... among values and

³⁶ See Dustin N. Sharp, 'Interrogating the Peripheries: the Preoccupations of Fourth Generation Transitional Justice' (2013) 26 Harvard Human Rights Journal 149.

³⁷ Ibid, citing Ruti G. Teitel, 'Transitional Justice Genealogy' (2003) 16 Harv Hum Rts J 69.

³⁸ Sharp, 'Interrogating the Peripheries', citing Teitel, 'Transitional Justice Genealogy'.

³⁹ Sharp, 'Interrogating the Peripheries'.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid 176.

⁴³ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83.

interests.”⁴⁴ The analytical approach further illustrates legal concepts by way of their underlying normative hierarchies and social context.⁴⁵ In this context, case studies are used primarily to illustrate relevant points of analysis. Finally, an interdisciplinary approach advances the “research frontiers” of (post-)conflict scholarship by including systems that cross disciplinary borders.⁴⁶ As this thesis contends, fundamental questions of TJ do not “correlate neatly with disciplinary boundaries,” thus the scope and meaning of certain concepts can only be determined in relation to other fields.⁴⁷

1.3.1 Research Gap & Contribution

An abundance of research addresses distinct aspects of sequencing, ranging from analyses of certain duties to studies of TJ mechanisms.⁴⁸ Yet, there exists a lack of scholarship that systemizes these concepts under the framework of sequencing, while sequencing lacks a distinct theoretical basis. Given this gap, this thesis introduces a comprehensive definition of the term, spanning its normative, institutional, and spatial-temporal dimensions. The rest of this thesis fills in the normative dimension of this definition. This thesis highlights the values that shape sequencing, introducing the normative foundation for the measures selected, prioritized, and coordinated under TJ. To this end, the research question(s) target the ‘international norms and standards’ that define TJ, focusing on ‘justice’ and ‘accountability’ as salient norms. The rights and duties attached to these norms, as well as overlapping frameworks in adjacent fields, are subsequently evaluated to deepen the normative analysis provided.

This thesis attempts to synthesize an understanding of sequencing in a language familiar to international lawyers. To this end, the hegemonic tendencies of international law are highlighted to emphasize the limitations of its legal constructs. In turn, this paper fundamentally agrees that “international law is a process marked by contradictions and imperfections, the frictions of which

⁴⁴ Mark Van Hoecke, *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing 2011) 10.

⁴⁵ P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2020).

⁴⁶ Malcolm Langford, 'Interdisciplinarity and Multimethod Research' in Bård A. Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017) 164.

⁴⁷ Ibid.

⁴⁸ See, for example, Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1990) 100 Yale LJ 2537; Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace 2010).

enable its development and evolution.”⁴⁹ While this thesis is situated in the legal sphere, its findings broadly target scholars, practitioners, and stakeholders that engage with TJ and related fields that seek to critically appraise their post-conflict interventions.

1.3.2 Parameters & Limitations

This thesis does not offer an exhaustive treatment of sequencing, but a “sampling of peripheries” that deserve further scrutiny.⁵⁰ Moreover, this thesis cannot feasibly cover the breadth of the sequencing definition proposed nor the depth of its underlying ‘international norms and standards.’ Therefore, by focusing on the normative dimension this thesis examines a selection of norms, rights, and duties as well as interdisciplinary concerns in a selection of adjacent fields.

The selection of concepts in this thesis aims to reflect the fundamental norms of TJ, specifically those at the top of its normative hierarchy that exert the most influence over its processes. ‘Accountability’ and ‘justice’ are identified as central norms with closely related rights and duties. Likewise, the interdisciplinary selection aims to reflect disciplines with overlapping processes and situational contexts. Development and peacebuilding are selected as two closely related fields.

Several concepts fall outside of closer inspection. For example, ‘reconciliation,’ ‘local ownership,’ and the right to participation are not independently analyzed. Similarly, gender and feminist studies are among disciplines that are not encompassed by this thesis. As a result, this thesis does not offer a complete illustration of the legal ecosystem of TJ, nor a complete overview of the (post-) conflict biosphere. This thesis offers a general overview of the relationships that govern TJ and how they impact its responses. By exploring adjacent fields, this thesis also identifies nodes of opportunity and conflict that can mutually reinforce TJ.

This thesis acknowledges its situation in presumably legitimating scholarship that seeks to further consolidate TJ as a ‘field.’⁵¹ Secondly, this thesis acknowledges that addressing the concept of

⁴⁹ Lorna McGregor, 'International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008) 46.

⁵⁰ Sharp, 'Interrogating the Peripheries' 176.

⁵¹ See Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'.

sequencing implicitly assumes the “malleability” of transitioning societies.⁵² In turn, this thesis rejects a blind optimism in the “performative force” of TJ and international law that can surpass the complex, highly divergent ecologies of transitional settings.⁵³

1.4 Overview

This thesis is divided into five chapters. Chapter 2 shall answer the first sub-question by highlighting the ‘justice’ and ‘accountability’ as central norms that distort TJ measures. Chapter 3 shall answer the second sub-question by interrogating the rights to justice, truth, and reparations as normative innovations that further deform TJ interventions. Chapter 4 looks outward to reveal how overlapping interdisciplinary frameworks can also alter the landscape of broader (post-) conflict interventions.

⁵² Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-conflict States* (Edward Elgar Publishing, Inc. 2017) 10-11 (“the humanitarian urge to better the world fosters a propensity to see the world as ‘limitlessly malleable’ ... [that] is exaggerated in the context of post-conflict transition.”).

⁵³ *Ibid* citing Catherine Turner, 'Deconstructing Transitional Justice' (2013) 24 *Law and Critique* 193-209.

2 Sequencing Norms: Navigating ‘Justice’ and ‘Accountability’

As a field “highly defined” by its attachment to legal norms, TJ is a “prime site” for universalizing sentiments.⁵⁴ TJ actors, particularly international organizations such as the UN, tend to assume that primarily Western-liberal values can diffuse uniformly through its legal constructs, yet it is often met with significant resistance.⁵⁵ As this chapter contends, TJ upholds a “hierarchy” of norms that disregard their contested nature.⁵⁶ The purpose of this chapter, therefore, is to reveal the salient features of TJ’s normative landscape and the difficulties it raises toward shaping coherent, inclusive TJ responses.

2.1 ‘Accountability’

TJ places ‘accountability’ for international crimes at the peak of its normative hierarchy.⁵⁷ To be precise, individual criminal accountability is considered vital to “consolidate rule of law, [effect] democratic change, and promote social reconciliation.”⁵⁸ The scope of ‘accountability’ is notably narrow—targeting individual perpetrators while neglecting state responsibility or accountability for non-state actors such as corporations or private military contractors.⁵⁹

It is worth noting a sister norm against impunity mutually reinforces accountability. Anti-impunity lies at the heart of international law’s vision for TJ. International instruments that call upon accountability for international crimes regularly invoke ending impunity.⁶⁰ The most visible example is the Rome Statute, whereas the preamble asserts a determination “to put an end to impunity” through its criminal accountability regime.⁶¹

⁵⁴ Stephanie Vieille, 'Transitional Justice: A Colonizing Field?' (2012) 4 Amsterdam Law Forum 58 63 citing Peer Zumbansen, 'Transitional Justice in a Transnational World: The Ambiguous Role of Law' (2008) CLPE Research Paper No 40/2008 8-9; Bell, 'Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’'.

⁵⁵ Rosa Ehrenreich Brooks, 'The New Imperialism: Violence, Norms, and the Rule of Law' (2002) 101 Mich L Rev 2275.

⁵⁶ Laurel E. Fletcher, 'International Criminal Law and the Subordination of Emancipation: The Question of Legal Hierarchy in Transitional Justice' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford handbooks, 1st edn, Oxford University Press 2020).

⁵⁷ Ibid. Unless otherwise specified, ‘accountability’ refers to individual criminal accountability.

⁵⁸ Ibid.

⁵⁹ For notable scholarship, see Leigh A. Payne, Gabriel Pereira and Laura Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever* (Cambridge University Press 2020); Dawn L. Rothe and Jeffrey Ian Ross, 'Private Military Contractors, Crime, and the Terrain of Unaccountability' (2010) 27 Justice Quarterly 593-617.

⁶⁰ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 712.

⁶¹ Rome Statute of the International Criminal Court (adopted 17 July 1998) UN Doc A/CONF183/9* preamble 3, 4.

As the following sections illustrate, accountability and anti-impunity presuppose a duty to prosecute international crimes under international law, which in turn steers TJ's responses towards retributive measures that limit their sense of agency and sustainability.

2.1.1 Duty to Prosecute

The “dominant frame” of international law characterizes conflict and violence as instances of international crimes, which inevitably elicits pursuing accountability.⁶² The most notable progeny of this approach is the ‘duty’ of states to prosecute international crimes. While this “emerging legal consensus” claims to reflect the “centrality” of accountability in international law, its foundations are far from established, and significant scholarship challenges its existence.⁶³

In terms of binding legal instruments, only a handful of treaties explicitly impose a duty to prosecute, and those correspond with the crimes of genocide, torture, and more recently, enforced disappearance.⁶⁴ Crimes against humanity are a notable omission in current treaty law, whereas only the ICPPED mentions a binding duty to prosecute a “widespread and systematic practice” of enforced disappearances.⁶⁵ Nevertheless, a dedicated convention on crimes against humanity has been in the works for more than a decade.⁶⁶ In its latest form, the ILC's Draft Articles do envision a duty to prosecute.⁶⁷ Draft Article 3 creates a general obligation “to prevent and to punish crimes against humanity” that—read with Draft Article 6 on their criminalization—requires states to ensure individual criminal accountability.⁶⁸

⁶² Fletcher, 'International Criminal Law and the Subordination of Emancipation' 701.

⁶³ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 50, 128 citing René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002); for a salient critique, see Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *The Yale Law Journal* 2619-2640.

⁶⁴ See Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948) UNTS 78 Article 1, 4; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984) UNTS 1465 Article 7; International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 23 December 2010) A/RES/47/133 Article 6.

⁶⁵ ICPPED Article 5.

⁶⁶ See Ruth Green, 'Draft Global Treaty on Crimes Against Humanity Reaches Critical Juncture' (*International Bar Association*, 29 September 2021) <<https://www.ibanet.org/draft-global-treaty-on-crimes-against-humanity>> accessed 10 August 2022.

⁶⁷ International Law Commission, Draft Articles on Prevention and Punishment of Crimes Against Humanity (2019) A/74/10 chp.IV.E.1.

⁶⁸ *Ibid* Article 3, 6.

Nevertheless, while the Draft Convention may become binding treaty law soon, its protracted drafting period has now spilled over to the equally long-winded exercise of its formal negotiation and adoption by states.⁶⁹ Since the ILC transmitted its final draft to the UNGA in 2019, discussions in the UNGA Sixth Committee have repeatedly stalled efforts towards the formal negotiation of the convention.⁷⁰ The “technical rollovers” that continually postpone progress over the Convention cast doubt over its realization any time soon.⁷¹

With regards to armed conflict, the Geneva Conventions establish a duty to prosecute “grave breaches” of the latter.⁷² Yet, the ICRC did not initially consider a duty towards prosecution a “priority” in its drafting compared to peacekeeping and humanitarian concerns.⁷³ General human rights treaties such as the ICCPR contain no explicit duty to prosecute.⁷⁴ Instead, a duty to prosecute has been derived to various extents from the ‘right to remedy’ and obligations to ‘protect’ and ‘ensure’ human rights.⁷⁵ A general duty to prosecute based on such teleological inferences is not particularly convincing.⁷⁶ Other instruments are often invoked to evidence a duty to prosecute, yet only contain a duty to investigate or criminalize. For example, the ICERD obliges states to prohibit racial discrimination as an “an offence punishable by law,” and offers “effective protection and remedy” as opposed to an explicit duty to prosecute racial discrimination.⁷⁷

Nevertheless, in the late 1990s, the OHCHR endorsed a comprehensive study on impunity for human rights violations. Updated in 2005, the resultant Principles to Combat Impunity outline a “general obligation” to combat impunity—qualifying the UN’s understanding of TJ in terms of

⁶⁹ Leila Nadya Sadat, 'Towards a New Treaty on Crimes Against Humanity: Next Steps' (*Just Security*, 13 September 2021) <<https://www.justsecurity.org/78063/towards-a-new-treaty-on-crimes-against-humanity-next-steps/>> accessed 10 August 2022; Leila Nadya Sadat and Akila Radhakrishnan, 'Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes its Work' (*Just Security*, 7 December 2021) <<https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/>> accessed 10 August 2022.

⁷⁰ Sadat, 'Towards a New Treaty on Crimes Against Humanity'.

⁷¹ Sadat and Radhakrishnan, 'Crimes Against Humanity: Little Progress on Treaty'.

⁷² See, for example, International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Adopted on 12 August 1949) 75 UNTS 287 Article 146.

⁷³ See Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 30 citing Paola Gaeta, 'Grave Breaches of the Geneva Conventions' in Andrew Clapham and others (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2015).

⁷⁴ Orentlicher nonetheless claims they impose a “duty to investigate.” See Orentlicher, 'Settling Accounts' 2540.

⁷⁵ Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 11.

⁷⁶ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 144.

⁷⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965) 660 UNTS 195 Article 2, 4-6.

individual criminal accountability.⁷⁸ For a non-binding soft law instrument, the Principles are remarkably mandatory in their language—states “shall” investigate violations and “ensure” that their perpetrators are “prosecuted, tried, and duly punished.”⁷⁹

The Rome Statute is, as Lee puts it, “delightfully ambiguous” in this regard.⁸⁰ Before its drafting the existence of a duty to prosecute was considered “controversial.”⁸¹ Reflecting this dissensus, the Statute contains no explicit duty to prosecute.⁸² The preamble recalls the duty to “exercise criminal jurisdiction,” yet this alone may not be sufficient to create a binding legal obligation.⁸³ The complementarity regime of the Statute may also imply a duty to prosecute, yet this interpretation is also not without its detractors.⁸⁴ Nevertheless, Schabas notes that “genuine but non-judicial efforts at accountability ... would ... [convince] the Prosecutor to set priorities elsewhere”—meaning the complementarity regime may not require as comprehensive of a duty to prosecute anyways.⁸⁵

A vivid example of this “positive complementarity” lies in Colombia.⁸⁶ In 2016, the Colombian government signed a Final Agreement with the FARC-EP guerilla group, a historic step toward ending the country’s conflict.⁸⁷ The agreement reflects a delicate balance between ensuring state

⁷⁸ UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action To Combat Impunity (8 February 2005) E/CN4/2005/102/Add1; Grover, 'Transitional Justice, International Law and the United Nations'. On ESCRs see El Hadji Guissé, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)* (27 June 1997) E/CN.4/Sub.2/1997/8.

⁷⁹ Principles to Combat Impunity principle 19.

⁸⁰ Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 427.

⁸¹ Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999); Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study With a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Springer 2009) 29.

⁸² Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009).

⁸³ Rome Statute preamble para. 6; Jan Wouters, *The Obligation to Prosecute International Law Crimes* (2005), citing Christian Tomuschat, 'The Duty To Prosecute International Crimes Committed by Individuals' in Hans-Joachim Cremer and others (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002); Lee, *The International Criminal Court*.

⁸⁴ See Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

⁸⁵ William Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 199.

⁸⁶ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* 155.

⁸⁷ *Ibid.*

duties to prosecute and implementing a “national reconciliation” plan that includes “amnesty, pardons, and alternative sanctions.”⁸⁸ In line with the Geneva Conventions, the Final Agreement grants “the broadest possible amnesty” to ex-FARC-EP combatants.⁸⁹ Yet, the Final Agreement precludes crimes against humanity, genocide, and other grave crimes from amnesty, instead stipulating a tiered accountability regime with varying sanctions.⁹⁰ Upon admitting to “truth and responsibility” before being charged under the agreement’s dedicated criminal tribunal, perpetrators are sentenced to a restriction of liberty and an obligation to assist in community reparations efforts.⁹¹ Meanwhile, those who admit to their responsibility during judicial proceedings or refuse to do so face stricter sentences of up to 20 years.⁹²

The Final Agreement thus challenges the “normative default” of criminal accountability.⁹³ Indeed, its system of amnesties and alternative sanctions “pays a high deference” to more reparative forms of accountability.⁹⁴ The Agreement has since successfully dissuaded the ICC from further intervention. ICC Prosecutor Bensouda commended the “historic” agreement and praised the parties’ “determination ... to ensure *genuine* accountability.”⁹⁵ Moreover, the OTP recently closed its preliminary examination of the situation in Colombia.⁹⁶

The duty to prosecute is a notable product of deep-set norms towards accountability and anti-impunity in TJ. Yet, international law has had limited success in solidifying this duty as a binding legal rule. Despite more unequivocal language in non-binding instruments such as the Principles to Combat Impunity, the duty to prosecute remains limited to certain acts. In practice, political pragmatism may prefer alternative sanctions that limit the extent of the duty. Nevertheless, as the

⁸⁸ Ibid 156.

⁸⁹ Ibid 158, citing International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted on 8 June 1977) 1125 UNTS 609 Article 6 (5).

⁹⁰ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* 159.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Orentlicher describes the duty to prosecute as the “normative default” of international law. See Diane F. Orentlicher, “Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’ (2007) 1 *International Journal of Transitional Justice* 10-22 21.

⁹⁴ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* 159.

⁹⁵ Ibid, citing International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia (10-13 September 2017)* (13 September 2017).

⁹⁶ International Criminal Court, *ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice* (28 October 2021).

next section contends the imposition of such legalistic ideals over TJ may result in more exclusionary TJ processes.

2.1.2 Ownership & Sustainability

Top-down, UN-sponsored accountability conflicts with local “bottom-up” approaches.⁹⁷ In this regard, international law “responds poorly” to local communities when they oppose its “normative worldview.”⁹⁸ Indeed, the brand of accountability preferred by the likes of the UN reflects a Western-formulated, criminally-centered variety that is presented as “neutral, universal, and apolitical.”⁹⁹ Yet in reality this prevailing idea of accountability subjects local traditions to rules that are divorced from social context and greatly limit local agency over TJ processes.

As a result, local communities often make great efforts to challenge the accountability paradigm.¹⁰⁰ The ICC’s difficulties in Northern Uganda are illustrative of this dynamic, wherein the local Acholi community wished to implement traditional, non-retributive accountability measures and were met with the ICC’s determination to apply “a consistent international anti-impunity norm.”¹⁰¹ The Acholi argued that their local practices ensure accountability in a way that is more relevant to their community, particularly in that they are collective, voluntary, and restorative.¹⁰² Nevertheless, while international law seemingly gives “due regard” to local traditions, it paradoxically envisions their “conformity with international standards.”¹⁰³

Yet, standards such as the Principles to Combat Impunity do not readily integrate such practices.¹⁰⁴ Instead, local measures must become sufficiently “judicialized” while somehow retaining their relevance and indigenous character.¹⁰⁵ In this context, INGOs insisted that for Acholi initiatives to adequately respond to international crimes, local rituals must become individual, retributive

⁹⁷ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 63.

⁹⁸ *Ibid* 63.

⁹⁹ Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21 *Global Society* 579-591; Vieille, 'Transitional Justice: A Colonizing Field?' citing Barbara Oomen, 'Donor-Driven Justice and its Discontents: The Case of Rwanda' (2005) 36 *Development and Change* 887-910 893.

¹⁰⁰ Drumbl, *Atrocity, Punishment, and International Law*.

¹⁰¹ Max Pensky, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics & Global Politics* 1-40 1.

¹⁰² Nouwen, *Complementarity in the Line of Fire*.

¹⁰³ UN Secretary General, *2010 Guidance Note* Principle 7.

¹⁰⁴ Frank Haldemann, Thomas Unger and Valentina Cadelo, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018) 53.

¹⁰⁵ Vieille, 'Transitional Justice: A Colonizing Field?' 66.

accountability mechanisms.¹⁰⁶ All the while, Acholi leaders continuously argued the merit of their practices through legalistic discourse. Nouwen, for example, recounts *mato oput* as a ritual described to

[encompass] the same principles of truth, accountability and compensation ... as other justice processes. It is both an *independent* and *transparent* process, where elders act as *neutral* arbitrators of disputes.¹⁰⁷

Moreover, the Acholi definition of *mato oput* insists it is a

ritual performed by the Acholi after *full accountability* and reconciliation ... between parties formerly in conflict, after *full accountability*.¹⁰⁸

To be sure, criminal accountability duly reflects the interests of some communities. Yet, promoting criminal accountability and a duty to prosecute international crimes as a categorical reflection of societal interests or as a precondition for peace can be problematized as a top-down approach that undermines the agency and voice of local communities.¹⁰⁹

Indeed, transitioning communities may prioritize peace and security over accountability, particularly if it may induce a reaction by violent actors.¹¹⁰ For example, mere minutes after the ICC issued the arrest warrant against Al-Bashir, Sudanese authorities initiated a violent crackdown on humanitarian NGOs, civil society, and human rights defenders in the country.¹¹¹ Meanwhile, rebel groups called for an escalation of conflict.¹¹² In this regard, absolute adherence to criminal accountability can be unsound, if not reckless.

¹⁰⁶ Sarah M.H. Nouwen and Wouter G. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2014) 13 *Journal of International Criminal Justice* 157-176.

¹⁰⁷ Nouwen, *Complementarity in the Line of Fire* 153 (emphasis added).

¹⁰⁸ Ibid ("The deliberate duplication suggests that in the LRA delegation's view it could not be stressed enough that local justice practices, like the ICC, pursue 'full accountability.'").

¹⁰⁹ Kenneth A. Rodman, 'Duty to Prosecute' in Deen K. Chatterjee (ed), *Encyclopedia of Global Justice* (Springer Netherlands 2011) 286.

¹¹⁰ Chandra Lekha Sriram and Brad R. Roth, 'Externalization of Justice: What Does It Mean and What Is at Stake?' (2001) XII *Finnish Yearbook of International Law* 58.

¹¹¹ Sarah M. H. Nouwen, 'Justifying justice' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge Companions to Law, Cambridge University Press 2012) 336.

¹¹² Ibid citing Sudan Tribune, 'Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case' (*Sudan Tribune*, 2009) <<https://sudantribune.com/article30211/>> accessed 10 July 2022.

Over-emphasizing accountability may neglect the many variables that determine the feasibility, choice, and scope of TJ measures.¹¹³ Opponents of the duty to prosecute prefer a contextual “case by case” examination of transitional settings.¹¹⁴ Meanwhile, even the strongest proponents of the duty to prosecute advocate for a “flexible” approach, whereas a “selective prosecution” regime may target the most responsible perpetrators.¹¹⁵ In this regard, sequencing ‘accountability’ as a central norm of TJ is a delicate matter, its impact on the representativeness and sustainability of TJ processes should not be taken lightly. In the next section, ‘justice’ is examined as a similarly over-stated norm in terms of its representativeness of transitioning communities.

2.2 ‘Justice’

Lutz and Sikkink famously declared a “justice cascade” characterized by the “rapid shift” towards enforcing criminal justice.¹¹⁶ Here accountability and anti-impunity contribute to a broader normative aim of achieving ‘justice’ for transitioning societies. Yet ‘justice’ is not a static value, it is shaped by diverse individual, societal, spiritual, and cultural views that may readily change.¹¹⁷

Nevertheless, international law narrowly conceives of ‘justice’ as a retributive endeavor giving force to criminal accountability for crimes that emphasize CPR violations. Justice beyond these crimes remains obscure while pursuing justice for these crimes crowds out other TJ objectives.¹¹⁸

¹¹³ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 699.

¹¹⁴ See Nino, 'The Duty to Punish Past Abuses of Human Rights' 2619; See further Jose Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints International Human Rights Symposium' (1990) 13 Hamline L Rev 623 637, 642-646.

¹¹⁵ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 146; Orentlicher, 'Settling Accounts' 2599; Orentlicher, "Settling Accounts' Revisited' 14 (“[States] could satisfy their treaty obligations through exemplary prosecutions focusing, for example, on those who appear to bear principal responsibility ... governments should not be called upon to ‘press prosecutions to the point of provoking their own collapse.’”); Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, vol I, General Considerations (United States Institute of Peace Press 1995) 134.

¹¹⁶ Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chi J Int'l L 1 4; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (1st edn, W.W. Norton & Co. 2011) 10; Sikkink's findings were notably held as “overstated” by contending scholarship, see Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Beyond the Justice Cascade' in Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter (eds), *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, vol a (U.S. Institute of Peace 2010).

¹¹⁷ Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge Research in International Law, Routledge 2014).

¹¹⁸ Frédéric Mégret, 'What Sort of Global Justice is ‘International Criminal Justice’?' (2015) 13 Journal of International Criminal Justice 77-96 96.

These developments result in, as Mani contends, “[severe] conceptual shortcomings.”¹¹⁹ Indeed, TJ tends to overlook divergent local attitudes by conflating ‘justice’ as a universal norm while the “overriding focus” on retribution simultaneously neglects local agency.¹²⁰

2.2.1 *External Justice*

International law is a “powerful frame” for characterizing injustice.¹²¹ In this regard, the institutionalization of retributive justice can have significant effects on local attitudes. One such risk of pursuing ‘justice’ through the international sphere is its ‘externalization’ to the local communities it hopes to serve.¹²² In these cases, global institutions may contrast the “ideals” of justice that they serve on one hand and the “institutional and political realities in which they operate” on the other.¹²³ To elaborate, a ‘disconnect’ may arise when justice is pursued through unfamiliar mechanisms due, for example, to their physical distance from transitioning societies and their formal, legalistic nature.¹²⁴ The brand of ‘justice’ pursued there may be more palatable for international stakeholders at the cost of its receptibility by the local community.¹²⁵

Moreover, externalized justice may be particularly selective. Limited acts are categorized as international crimes, while a handful of transitional situations experience international intervention that in turn targets a fraction of the total perpetrators.¹²⁶ The discretion of global institutions such as the ICC to select cases may favor those more likely to convict an accused, depending on variables such as the gravity of the crimes, the prospects of state cooperation, and resource constraints.¹²⁷ To this end, ‘justice’ is funneled narrow institutional parameters that turn a ‘universal’ ambition into a highly confined legal-political exercise.

¹¹⁹ Lundy and McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' 274 citing Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press; Blackwell Publishers Inc. 2002).

¹²⁰ Ibid.

¹²¹ Nouwen and Werner, 'Monopolizing Global Justice' 161.

¹²² Sriram and Roth, 'Externalization of Justice: What Does It Mean and What Is at Stake?'

¹²³ Nouwen and Werner, 'Monopolizing Global Justice' citing J. M. Balkin, 'Being Just with Deconstruction' (1994) 3 Soc & Legal Stud 393.

¹²⁴ Drumbl, *Atrocity, Punishment, and International Law*; McEvoy and others, *Transitional Justice from Below*.

¹²⁵ Drumbl, *Atrocity, Punishment, and International Law*; As further scholarship contends, these measures more commonly appear “donor-driven” rather than representative of local communities, see McEvoy and others, *Transitional Justice from Below* 103; Oomen, 'Donor-Driven Justice'; Ismael Muvingi, 'Donor-Driven Transitional Justice and Peacebuilding' (2016) 11 Journal of Peacebuilding & Development 10-25.

¹²⁶ Drumbl, *Atrocity, Punishment, and International Law* 151.

¹²⁷ Ibid; Nouwen and Werner, 'Monopolizing Global Justice'.

One dramatic example is the STL, which was created to investigate the 2005 assassination of Lebanese prime minister Rafic Hariri.¹²⁸ The STL’s mandate is remarkably limited in the context of Lebanon—a state that has endured a protracted civil war, multiple foreign occupations, and ongoing socio-political instability.¹²⁹ Despite this, the STL is confined to the bombing that led to Hariri’s death and closely-related attacks of sufficient gravity.¹³⁰ In this regard, the STL’s ‘numbers’ are staggering—171,081 pages of evidence, 497 court hearings and an annual budget exceeding 50 million euros are dedicated to five defendants and “centered on the crime of one man’s murder.”¹³¹

To be sure, there may be merit to some measure of externalized justice, particularly where insecurity or a lack of capable institutions threatens any form of justice prevailing.¹³² Yet, what is not equally compelling is the notion that “externalized justice is better than no justice at all.”¹³³ Indeed, “outsourcing” justice to external institutions always runs the risk of its distortion by an inherently “western, legalistic” mindset that may capture a form of justice that neglects the local context.¹³⁴ On the other hand, there are also risks of distortion in ‘indigenous’ processes.

2.2.2 Local Justice

As previously described, international actors may subject local mechanisms to ‘international standards.’¹³⁵ Yet, what is also disconcerting is the cooption of local mechanisms by transitioning states. For instance, in Rwanda the UNHCR advised against excessive government “intrusion” or the tribunalization of Gacaca.¹³⁶ Nevertheless, the Rwandan government made Gacaca appear “as

¹²⁸ See United Nations Security Council, Resolution 1757 (30 May 2007) S/RES/1757.

¹²⁹ Michelle Burgis-Kasthala, 'Defining Justice During Transition? International and Domestic Contestations Over the Special Tribunal for Lebanon' (2013) 7 International Journal of Transitional Justice 497-517.

¹³⁰ United Nations Security Council, Statute of the Special Tribunal for Lebanon (2007) S/RES/1757 (Annex) Article 1 (“The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri ... If the Tribunal finds that other attacks ... are connected ... and are of a [similar] nature and gravity ... it shall also have jurisdiction.”); See further *Prosecutor v. Ayyash et al.* (Interlocutory Decision) STL-11-01 (16 February 2011).

¹³¹ Burgis-Kasthala, 'Defining Justice During Transition?' 514; See further Special Tribunal for Lebanon, 'The STL in numbers' 37 <<https://www.stl-tsl.org/en>> accessed 10 July 2022; Special Tribunal for Lebanon, *Tenth Annual Report (2018-2019)* 37 (“the Tribunal’s budget for 2019 was approved at EUR 55.1 million”).

¹³² Drumbl, *Atrocity, Punishment, and International Law*.

¹³³ *Ibid* 129.

¹³⁴ Vieille, 'Transitional Justice: A Colonizing Field?' 58.

¹³⁵ See [Ownership & Sustainability](#).

¹³⁶ Bert Ingelare, 'The Gacaca Courts in Rwanda' in Lucien Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation After Violent Conflict: Learning From African Experiences* (International IDEA 2008) citing Office of the High Commissioner for Human Rights, *Gacaca: Le Droit Coutumier Au Rwanda* (1996) LIB/AFRICA/RWA/24.

legal as possible” to appease international expectations.¹³⁷ The government sought to “modernize” the process, changing Gacaca from a traditional dispute resolution mechanism to a pseudo-judicial system.¹³⁸ The government eliminated its voluntary nature, instead launching “sensitization campaigns” to shore up support and imposing fines and civil sanctions for not attending Gacaca hearings.¹³⁹ Formal court processes such as appeal mechanisms were adopted, and perpetrators faced severe criminal sentences including life imprisonment.¹⁴⁰

The organic, community response to disputes thus became a retributive campaign tightly regulated by the state. The legitimacy gained through its voluntary nature was displaced by an “unpopular participatory justice,” and Gacaca’s symbolic, restorative aims were replaced with punitive sanctions.¹⁴¹ As a result, Gacaca came to be viewed by some Rwandans as an “instrument of the state.”¹⁴² The state capture of Gacaca and its marketization along the lines of ‘transparency’ and ‘good governance’ redirected scrutiny from the government’s own past abuses.¹⁴³ Indeed, during the conflict RPF soldiers also committed serious human rights violations, yet the government prevented any investigations into these acts.¹⁴⁴ The context of Rwanda’s transition is particularly illustrative—the RPF’s military overthrow set the stage for its cooption of the transitional process.¹⁴⁵ Today, the RPF-led government has consolidated power through an oppressive, dictatorial regime.¹⁴⁶

‘Local justice’ mechanisms may reflect politically expedient “invented traditions.”¹⁴⁷ In turn, local justice—particularly that endorsed by the state—may reproduce the same systems of exclusion of international institutions. They can diminish any sincere reflection of the local communities they

¹³⁷ Vieille, 'Transitional Justice: A Colonizing Field?' 66 citing Mark A. Drumbl, 'Sclerosis: Retributive Justice and the Rwandan Genocide' (2000) 2 *Punishment & Society* 287-307.

¹³⁸ Ingelare, 'The Gacaca Courts in Rwanda' 37.

¹³⁹ Shaw, Waldorf and Hazan, *Localizing Transitional Justice*; Ingelare, 'The Gacaca Courts in Rwanda' 49.

¹⁴⁰ Dustin N. Sharp, 'Transitional Justice and 'Local' Justice' in Hakeem O. Yusuf and Hugo Van der Merwe (eds), *Transitional Justice: Theories, Mechanisms and Debates* (Routledge 2022); Ingelare, 'The Gacaca Courts in Rwanda'.

¹⁴¹ Ingelare, 'The Gacaca Courts in Rwanda' 49.

¹⁴² *Ibid.*

¹⁴³ Shaw, Waldorf and Hazan, *Localizing Transitional Justice* citing Oomen, 'Donor-Driven Justice'.

¹⁴⁴ Muvingi, 'Donor-Driven Transitional Justice and Peacebuilding' citing Human Rights Watch, *The Rwandan Patriotic Front* (1999).

¹⁴⁵ Ingelare, 'The Gacaca Courts in Rwanda'.

¹⁴⁶ Hansen, 'The Time and Space of Transitional Justice' 44.

¹⁴⁷ Ingelare, 'The Gacaca Courts in Rwanda' 6.

claim to represent.¹⁴⁸ Sequencing such ‘indigenous’ mechanisms without sufficient regard to their legitimacy before their constituents may produce responses that are just as alien as far-away international mechanisms. Meanwhile, sequencing external justice mechanisms without sufficient outreach and local participation may ostracize the same communities.

2.3 Conclusion

International law tends to overstate a universal concept of ‘justice’ in TJ while overemphasizing legalistic ideals of accountability.¹⁴⁹ At the same time, TJ understates the contestation of ‘justice’ and the complexity of achieving accountability with local agency.¹⁵⁰ The myopic focus on anti-impunity overlooks the multitude of factors that determine the feasibility of criminal accountability, and can ultimately do little to address the harms suffered by transitioning communities in a meaningful way.¹⁵¹ Indeed, agency over TJ processes can be severely curtailed by overly-legalizing customary mechanisms. At the same time, TJ’s propensity for legal responses may result in highly selective, “externalized” measures that may neither represent nor effectively contribute to their respective transitional settings.

The “momentum” towards justice and accountability is not readily enjoyed by other TJ norms.¹⁵² To this end, sequencing such heavily contested ideals may produce inconsistent responses that are as obscure as they are practically limited. Here, international law’s normative dogmatism clashes with the inherent diversity of transitioning societies—failing to resolve this “internal contradiction” can create more obstacles for TJ.¹⁵³

As shall be elaborated in the next chapter, these norms translate into certain rights that are vital to TJ processes. Yet, the prevalence of justice and accountability as central norms results in a skewed rights landscape that governs TJ.

¹⁴⁸ Sharp, 'Transitional Justice and 'Local' Justice'.

¹⁴⁹ Vieille, 'Transitional Justice: A Colonizing Field?' citing Oomen, 'Donor-Driven Justice' 891; Burgis-Kasthala, 'Defining Justice During Transition?'

¹⁵⁰ Ibid.

¹⁵¹ Mégret, 'What Sort of Global Justice is 'International Criminal Justice?''

¹⁵² Fletcher, 'International Criminal Law and the Subordination of Emancipation' 702.

¹⁵³ Brooks, 'The New Imperialism' 2334.

3 Sequencing Rights: Uncovering Implicit Relationships

In a seminal 1997 piece, Méndez outlines “emerging international law principles” that establish state duties towards prosecution, disclosure, reparations, and lustration.¹⁵⁴ These duties correlated with rights to justice, truth, reparations, and guarantees of non-recurrence.¹⁵⁵ A “new generation” of rights emerged centered around a ‘victim-centered’ approach to mass atrocities.¹⁵⁶ They were ultimately enshrined in the Principles to Combat Impunity and Principles on the Right to Remedy.¹⁵⁷ In addition, in 2011 the HRC established the office of an SR specifically dedicated to these rights.¹⁵⁸ The SR notes that addressing legacies of abuse “means primarily giving force to those human rights norms that were systematically or grossly violated.”¹⁵⁹

Compared to the previous chapter on norms, this chapter aims to highlight the rights landscape of TJ. This chapter reveals the underlying assumptions—fueled by previously analyzed norms—that distort the right to justice and subsequently disenfranchise the rights to truth and reparations. As a result, similar patterns of incoherence and underrepresentation are revealed.

3.1 Right to Justice

Opposite the normative force that fuels the pursuit of justice and accountability is a parallel right of victims to justice.¹⁶⁰ The IACtHR pioneered this right in the landmark *Velásquez Rodríguez* case, in which the Court held that states must “prevent, investigate and punish any violation of the rights recognized by the [ACHR].”¹⁶¹ Beyond the Inter-American circuit, human rights bodies have hesitated to embrace a right to justice, acknowledging its remedial aspects yet holding short of declaring a standalone right.¹⁶² Yet, the Principles to Combat Impunity unequivocally declare

¹⁵⁴ Juan E. Mendez, 'Accountability for Past Abuses' (1997) 19 Hum Rts Q 255 259-261.

¹⁵⁵ *Ibid.*

¹⁵⁶ Seibert-Fohr, *Prosecuting Serious Human Rights Violations* 197.

¹⁵⁷ Principles to Combat Impunity principle 1; UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) A/RES/60/147 preamble para. 11.

¹⁵⁸ See Human Rights Council, *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (13 October 2011) A/HRC/RES/18/7.

¹⁵⁹ United Nations General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo De Greiff* A/HRC/21/46 para. 21, 60.

¹⁶⁰ See Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 Vanderbilt Journal of Transnational Law 1399-1502 1415.

¹⁶¹ *Velásquez-Rodríguez v. Honduras* (Judgement) Ser. C No. 4 (29 July 1988) para. 165-166, 174-176.

¹⁶² Seibert-Fohr, *Prosecuting Serious Human Rights Violations* 191.

victims' 'right to justice,' underpinned by the state duty to ensure that perpetrators are "prosecuted, tried and duly punished."¹⁶³ As the following sections shall reveal, the right to justice entails retribution for an obscure set of human rights concerns. As a result, the right appears both understated and overstated in its capacity to target victims.

3.1.1 Economic, Social, and Cultural Rights

The right to justice nominally includes both CPRs and as ESCRs.¹⁶⁴ The Final Report relating to ESCRs in the OHCHR's study of impunity asserted an obligation to "protect and promote *all* human rights" whilst punishing and compensating the harm resulting from their violation.¹⁶⁵ Yet, significant scholarship problematizes the "dominant script" of TJ for its emphasis of CPRs over ESCR violations and its situation of the latter as "daily life concerns."¹⁶⁶

Briefly, classical human rights scholarship views ESCRs as "less justiciable and less achievable."¹⁶⁷ Consequently, scholars such as Waldorf view TJ as an "inherently short-term, legalistic, and corrective" endeavor that "should focus on accountability for gross violations of [CPRs]."¹⁶⁸ The underlying assumption is that ESCRs are—conversely—long-term, programmatic policy goals that do not concern discrete violations or immediate correctives. On the other hand, the more radical scholarship seeks to widen the scope of 'justice' to "systemic violence" and "structural inequality."¹⁶⁹ Much of this scholarship exceeds the relatively narrow capacity of ESCRs to address such concerns by assuming that ESCRs inherently relate to "root causes of conflict."¹⁷⁰

¹⁶³ Principles to Combat Impunity Principle 19.

¹⁶⁴ UN Secretary General, *2010 Guidance Note* principle 9. See further United Nations General Assembly, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23 para. 5.

¹⁶⁵ Guissé, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)* para. 22 (emphasis added).

¹⁶⁶ Cavallaro and Albuja, 'The Lost Agenda' 125; Evelyne Schmid and Aoife Nolan, 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 362-382 376; Sharp, 'Emancipating Transitional Justice' 160 citing Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 266-291.

¹⁶⁷ Turner, 'Transitional Justice and Critique' 64 citing Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Hum Rts Q* 321.

¹⁶⁸ Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 *Social & Legal Studies* 171-186 179.

¹⁶⁹ Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017) 32.

¹⁷⁰ Schmid and Nolan, 'Do No Harm'?'.

For present purposes, neither camp is persuasive. On the former, overlooking ESCR harms and their potential for straightforward correctives grossly under-addresses the large-scale victimization caused in transitional settings. The conceptual ambiguity of the latter school reinforces earlier assumptions on the nature of ESCRs as long-term, systemic-institutional issues.¹⁷¹ For example, Sankey claims that

[ESCRs] remain focused on ... fulfilment, rather than direct deprivations, and cover much broader issues, such as the right to education, which fall beyond the scope of [TJ].¹⁷²

Sankey argues that ESCRs obscure “the direct nature of harms ... [as] negative, often deliberate, rights violations.”¹⁷³ Yet it is unclear how the deliberate act of demolishing a school does not constitute a direct deprivation of the right to education. In such a case, the state can offer immediate remedy by rebuilding the school or compensating the victims.

Emerging practice has examined violations of both ESCRs and CPRs — particularly by TRCs.¹⁷⁴ In Timor-Leste, the CAVR analyzed ESCR abuses, noting that “the impact of the conditions in which [the population] lived ... was equally damaging and possibly more long-lasting.”¹⁷⁵ The CAVR connected violations of the rights to food, housing, and healthcare with the right to life to address crimes such as famine and forced displacement.¹⁷⁶ Its final report concluded that these abuses fell under Indonesia’s failure as an occupying power “to provide for certain basic needs.”¹⁷⁷

¹⁷¹ Ibid 374.

¹⁷² Diana Sankey, 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2013) 8 International Journal of Transitional Justice 121-140 123-125.

¹⁷³ Ibid.

¹⁷⁴ See Laplante, 'On the Indivisibility of Rights'.

¹⁷⁵ Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 International Journal of Transitional Justice 331-355; See further Commission for Reception Truth and Reconciliation in East Timor (CAVR), *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (31 October 2005) 140 (Executive Summary).

¹⁷⁶ Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (1 January 2014) HR/PUB/13/5; Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 International Journal of Transitional Justice 310-330.

¹⁷⁷ Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights*; Laplante, 'Transitional Justice and Peace Building'. See further CAVR, *Chega! Final Report* 141, see further Part 2, Part 6, Part 7.

While engaging with legal rights, the CAVR simultaneously acknowledged the “root causes” of conflict, including its colonial and occupational history.¹⁷⁸

To be sure, addressing structural abuses can be an integral part of a holistic vision of ‘justice.’ Yet, both scholarship that understates and overstates the capabilities of ESCRs overlooks a wide spectrum of violence at the expense of those who hold a ‘right’ to justice. Therefore, TJ may need to abolish its distinctions between CPRs and ESCRs in favor of alternative metrics for sequencing such as the gravity of violations or their timing in the local context.¹⁷⁹

3.1.2 Dissonance

A certain dissonance appears whenever the nature of ‘justice’ needs to be defined in TJ. Conflating one aspect of justice for ESCRs as the cure-all for deeply rooted issues blurs the line between ESCRs as part of a ‘right to justice’ and ‘social justice’ as a policy ambition. A skewed understanding of such legal rights may reinforce impracticable assumptions on the capabilities of law to achieve broader TJ outcomes.

As far as TJ places ‘justice’ at the center of its interventions, failing to question its nature and adequacy “encourages a false faith in legal solutions”—a phenomenon broadly captured by the idea of “magical legalism.”¹⁸⁰ To this end, some states refute certain abuses by pointing to the myriad of national law and international conventions that criminalize their conduct.¹⁸¹ A “disconnect” emerges between the lived reality of transitioning societies and the legal reality of its elites.¹⁸² For example, the transitional experience of Colombia contrasts the “laws upon laws” of IHRL standards that govern the state and the everyday violence endured by average Colombians.¹⁸³

¹⁷⁸ Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights*.

¹⁷⁹ See Juan Carlos Ochoa-Sánchez, 'Economic and Social Rights and Transitional Justice: A Framework of Analysis' (2019) 18 *Journal of Human Rights* 522-542; Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer 2014).

¹⁸⁰ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 709.

¹⁸¹ McEvoy, 'Beyond Legalism' 419 citing Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Wiley 2013).

¹⁸² McEvoy, 'Beyond Legalism'.

¹⁸³ *Ibid* 419 citing Michael T. Taussig, *Law in a Lawless Land: Diary of a “Limpieza” in Colombia* (New Press 2003).

Taken further, this magic legalism lingers under a distorted understanding of the capability of legal rights to dispel it. To elaborate, the systemic dimension of abuses can be scrutinized without overlooking their qualification as ESCR violations. Acknowledging this legal dimension can shed light on how ESCRs can limit more effective measures. For example, Roma women continued to face systemic discrimination in the form of forced sterilization after the Czech transition from communism.¹⁸⁴ In this case, the systemic abuse is a violation of the obligations of the Czech Republic under the ICESCR.¹⁸⁵ Yet, the magic legalism surrounding ESCRs persists not only upon the ratification of its respective treaty but the failure to acknowledge immediate correctives, particularly under the guise of ‘progressively responsible’ interventions.¹⁸⁶

When ESCRs are deliberately or unknowingly subverted, bleak realities persist as unattainable illusions rather than changeable conditions. Sequencing a ‘right to justice’ in such cases affords an empty-handed right that fails to fully acknowledge victims’ suffering. As described in the following sections, the right to justice tows along similarly contentious rights.

3.2 Right to Truth

The right to truth relates to access to a “truthful” account of past abuses and the context in which they occurred.¹⁸⁷ It was pioneered in IHRL by the IACtHR in *Velásquez*—while initially confined to enforced disappearances, it became “increasingly juridified” to include all serious human rights violations.¹⁸⁸ However, in binding treaty law only the ICPPED guarantees an explicit right to truth for enforced disappearances.¹⁸⁹ Regional bodies such as the IACtHR implicitly derived the right

¹⁸⁴ Morag Goodwin, 'Holding Up a Mirror to the Process of Transition? The Coercive Sterilisation of Romani Women in the Czech Republic Post-1991' in Ruth Margaret Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Hart Publishing 2014).

¹⁸⁵ The Czech Republic succeeded to the ICESCR on 22 Feb 1993, shortly after the fall of the Communist regime in January 1993. See United Nations, 'Status of Treaties - International Covenant on Economic, Social and Cultural Rights' (*United Nations Treaty Collection*, 2022) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4#9> accessed 10 August 2022.

¹⁸⁶ For a pertinent analysis of progressively responsible obligations to the right to health, see John Tobin, 'The Progressive Obligation to Realize the Right to Health' in John Tobin (ed), *The Right to Health in International Law* (Oxford University Press 2011).

¹⁸⁷ Cecilia Bailliet and Kjetil Mujezinović Larsen, *Promoting Peace Through International Law* (1st edn, Oxford University Press 2015) 165.

¹⁸⁸ *Velásquez-Rodríguez* para 181; Leora Bilsky, 'The Right to Truth in International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (2020) 476.

¹⁸⁹ ICPPED preamble para. 8, Article 24 (2).

to truth from other rights such as the right to remedy before qualifying it on its own.¹⁹⁰ Consequently, the status of the right to the truth as an “autonomous right” remains obscure.¹⁹¹

Yet, the Principles to Combat Impunity are again more accommodating. Principle 2 proclaims an “inalienable” right to the truth held not only by victims but society as a whole.¹⁹² The right to truth is also considered “non-derogable” and “not subject to limitations,” despite the privacy and security concerns that could necessitate such interventions.¹⁹³ The Principles on the Right to Remedy provide further recognition to the right to truth as a form of reparations.¹⁹⁴ These non-binding instruments provide a broad basis for a right that has not consolidated itself in binding legal rules, obscuring its exact scope.¹⁹⁵

Truth-telling is assumed to rehabilitate victims, restore their dignity and offer closure.¹⁹⁶ To this end, truth-seeking was pioneered by truth commissions in Latin America and South Africa that were praised for their victim-centered platform to share experiences and facilitate national dialogue.¹⁹⁷ Yet, sans material benefits, the truth alone can be undesirable, if not damaging.

3.2.1 Right to Forget

Alongside the right to truth, the Principles to Combat Impunity outline a “duty to preserve memory,” while the Principles on the Right to Remedy consider memorialization a form of

¹⁹⁰ Marloes van Noorloos, 'A Critical Reflection on the Right to the Truth about Gross Human Rights Violations' (2021) 21 Human Rights Law Review 874-898; Dermot Groome, 'Principle 2. The Inalienable Right to Truth' in Frank Haldemann, Thomas Unger and Valentina Cadelo (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018) 66.

¹⁹¹ van Noorloos, 'Critical Reflection on the Right to Truth' 875-877 citing James A. Sweeney, 'The Elusive Right to Truth in Transitional Human Rights Jurisprudence' (2018) 67 International and Comparative Law Quarterly 353-387.

¹⁹² Principles to Combat Impunity principle 2, 4 Groome, 'The Inalienable Right to Truth' 60.

¹⁹³ van Noorloos, 'Critical Reflection on the Right to Truth' citing Office of the High Commissioner for Human Rights, *Study on the Right to the Truth* (8 February 2006) E/CN.4/2006/91 para. 60.

¹⁹⁴ Principles on the Right to Remedy Article 21 (b), 24.

¹⁹⁵ van Noorloos, 'Critical Reflection on the Right to Truth'.

¹⁹⁶ Peter R Baehr, 'How to Come to Terms with the Past' in Edel Hughes, William Schabas and Ramesh Thakur (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press 2007) 16; Michelle Parlevliet, 'Considering Truth - Dealing with a Legacy of Gross Human Rights Violations' (1998) 16 Neth Q Hum Rts 141.

¹⁹⁷ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Taylor & Francis Group 2010) 10; UN Secretary General, *2004 Report* para. 50; Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Springer 2009) 40.

reparations by satisfaction.¹⁹⁸ The duty assumes an intuitive, “universal” desire for such a record that overrides individual and societal ideals for remembering the past.¹⁹⁹ Further, it assumes that this ‘collective memory’ shall remain uncontested.²⁰⁰

Yet, victims may equally have a right to forget. The Principles on the Right to Remedy, for example, suggest that truth-seeking should be pursued “to the extent that such disclosure *does not cause further harm*.”²⁰¹ To this end, the “rush to commemorate” assumes a healing effect that is far from proven and overlooks the harms it can cause between disputes over the memory record, the rekindling of divisive narratives, and the possibility to retraumatize victims.²⁰²

For example, many Sierra Leoneans believed that “directed forgetting” better achieved societal healing and allowed them to rebuild their lives.²⁰³ Consequently, victims who testified before the Sierra Leone TRC assumed that the process would grant them “material benefit.”²⁰⁴ They contrasted the funding and resources of the TRC with their deprivation and “perceived [the TRC] as a site of resources [and] opportunity.”²⁰⁵ While truth-seeking was assumed to be a liberating exercise, its lack of material benefit fueled resentment and disillusionment. Recounting trauma was assumed to be part of a “reciprocal” transaction, wherein victims could trade their harmful memories for resources to secure a better future.²⁰⁶ For this reason, many victims testified in particularly dissociated manners to minimize their re-traumatization.²⁰⁷ Yet, victims were placated with the “vague promise of [future] government action” and the value of “rebuilding the nation.”²⁰⁸

¹⁹⁸ Principles to Combat Impunity Principle 3; Principles on the Right to Remedy Article 22 (b); Julia Viebach, 'Principle 3. The Duty to Preserve Memory' in Frank Haldemann, Thomas Unger and Valentina Cadelo (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018) 72.

¹⁹⁹ Rosalind Shaw, 'Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 183-207 185.

²⁰⁰ Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573-639 588.

²⁰¹ Principles on the Right to Remedy Article 22 (b).

²⁰² Viebach, 'The Duty to Preserve Memory' 71, 77.

²⁰³ Shaw, 'Memory Frictions' 195.

²⁰⁴ *Ibid* 197.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid* 203-205.

²⁰⁷ *Ibid* 200.

²⁰⁸ *Ibid* 202.

In some cases, ‘truth’ can be weaponized by states to control post-conflict accounts, rekindling divisive narratives or fostering a “cult of martyrdom” surrounding certain groups or events.²⁰⁹ To this end, the “glorification” of truth weighs against its ability to promote peace and reconciliation.²¹⁰ Acknowledging the merit of truth-seeking should therefore not take for granted the underlying assumption that truth shall heal victims and transitioning societies.²¹¹

3.2.2 Subordination

The recognition of the past is considered fundamental to ‘justice’ as far as it contributes to societal ‘healing.’ By the same token, seeking ‘truth’ seems to be fueled by an underlying aim to “foster accountability” and end impunity.²¹² The right to truth appears subordinate to these norms, and thus to the right to justice. Truth commissions are viewed to “ideally complement or prepare criminal prosecution.”²¹³ In Sierra Leone, the TRC’s objectives included “[addressing] impunity” and existed alongside the SCSL.²¹⁴ In situations where the ICC and TRCs coexist, the OTP specifically envisions bringing the latter’s work into its fold.²¹⁵ In Kenya, the OTP endorsed a “three-pronged response”—imagining ICC prosecution for “those most responsible,” national proceedings via a special tribunal for other perpetrators, as well as a truth commission to “shed light” on events.²¹⁶

Several truth commissions have supported criminal sanctions and provided their findings to authorities who continued with criminal proceedings.²¹⁷ In some cases, truth commission findings directly contributed to the convictions of top figures.²¹⁸ For example, the Argentinean CONADEP served a “critical role” in the prosecution of the former military junta, whereas criminal trials were

²⁰⁹ van Noorloos, 'Critical Reflection on the Right to Truth' citing Office of the High Commissioner for Human Rights, *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice* (2020) A/HRC/45/45 para 39-40.

²¹⁰ van Noorloos, 'Critical Reflection on the Right to Truth' 896.

²¹¹ *Ibid.*

²¹² See UN Secretary General, *2004 Report* para. 50 (“Truth commissions have the potential to be of great benefit in helping ... *foster accountability*, preserve evidence, [and] *identify perpetrators*.”) (emphasis added); Hayner, *Unspeakable Truths* 22.

²¹³ Ambos, Large and Wierda (eds), *Building a Future on Peace and Justice* 43.

²¹⁴ Shaw, 'Memory Frictions' 196 citing Truth and Reconciliation Commission Act (2000) (Sierra Leone) Part III.6.1.

²¹⁵ Hayner, *Unspeakable Truths* 114.

²¹⁶ International Criminal Court, *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya* (30 September 2009).

²¹⁷ Hayner, *Unspeakable Truths* 22.

²¹⁸ *Ibid* 93.

considered “impossible” if not for its findings.²¹⁹ Meanwhile, the Peruvian TRC had a dedicated unit tasked with preparing cases for prosecution, and even the South African TRC urged for prosecutions for serious crimes despite granting amnesties.²²⁰ When criminal prosecutions are not feasible outright, it is considered strategic to start with a truth commission as it may eventually induce the conditions for accountability.²²¹

The prospect of accountability being rendered through non-judicial bodies such as TRCs was a point of tension during the drafting of the Rome Statute.²²² Under the Statute’s complementarity regime, state responses are preferred over the ICC unless national authorities are unwilling, unable, or disingenuously pursue crimes.²²³ Yet, state authorities may contend that truth-seeking alone better reflects national ideals on accountability.²²⁴ In most cases this would not satisfy complementarity, as the Statute envisions investigations towards prosecution, and not purely truth-seeking.²²⁵ As seen with the Colombian Final Agreement, genuine efforts that offer a more nuanced balance of truth and accountability are attainable.²²⁶ Even then, alongside its Commission for the Identification of the Truth, the Final Agreement established a dedicated judicial body to prosecute the “worst culprits” of the conflict.²²⁷

All told, the scope of the right to truth remains obscure in IHRL.²²⁸ On the one hand, the right to truth appears retributive in its aims and subsumed within the framework of the right to justice. Yet the right to truth is sometimes invoked as part of alternative processes that emphasize amnesties and confessions.²²⁹ In any case, the retributive variety prevails, skewing the sequencing of the right to truth towards criminal proceedings.²³⁰ The emphasis on such an outcome minimizes the voices

²¹⁹ Ibid 94.

²²⁰ Ibid 93, 95.

²²¹ Ibid 92.

²²² McEvoy and others, *Transitional Justice from Below* 24.

²²³ Hayner, *Unspeakable Truths* 113.

²²⁴ Ibid.

²²⁵ Complementarity may be satisfied depending on the mandate and purpose of the truth commission or related prosecution authorities, e.g. when truth commissions are created to precede criminal prosecution, or when prosecutors are legally required to consider truth commission findings. Ibid 114.

²²⁶ See [Duty to Prosecute](#).

²²⁷ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* 158.

²²⁸ van Noorloos, 'Critical Reflection on the Right to Truth'.

²²⁹ Ibid.

²³⁰ Ibid citing Patricia Naftali, 'Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?' (2016) XIII Champ Pénal.

of local communities that have diverging expectations for truth and memorialization. To this end, the prevalence of narrow judicial standards is further explored within the right to reparations in the next section.

3.3 Right to Reparations

The right to reparations includes a “substantive” duty to provide redress and a “procedural” duty to provide an effective remedy.²³¹ Reparations can stem from individual criminal accountability and state responsibility. The Rome Statute, for example, envisions reparations ordered “directly against a convicted person.”²³² The Court further accommodates broad initiatives of “symbolic, preventative or transformative value.”²³³ In *Lubanga*, for example, the TFV introduced “commemoration centers” and “mobile memorialization” efforts through public broadcast and “community sensitization” campaigns.²³⁴

On the other hand, the landmark *Chorzów Factory* case declared the state obligation to provide reparations a “principle of international law.”²³⁵ A more contemporary affirmation appears in the *Wall* advisory opinion, wherein Israel was held to have an obligation to provide reparations, including restitution for seized property and compensation for material damage.²³⁶ In treaty law, the CAT asserts a duty to provide “adequate compensation” and “full rehabilitation,” which broadly includes “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”²³⁷ In the regional circuit, the IACtHR in *Velásquez* declared a state obligation to

²³¹ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes* (2008) HR/PUB/08/1 6.

²³² Rome Statute Article 75 (2); M. Cherif Bassiouni, 'Victims' Rights and Participation in ICC Proceedings and in Emerging Customary International Law' in Richard H. Steinberg and M. Cherif Bassiouni (eds), *Contemporary Issues Facing the International Criminal Court* (Brill | Nijhoff 2016).

²³³ *Prosecutor v. Germain Katanga* (Reparations Order) ICC-01/04-01/07-T (24 March 2017) para. 297.

²³⁴ *Prosecutor v. Thomas Lubanga Dyilo* (Information Regarding Collective Reparations) 13 February 2017 (13 February 2017) para 130-134; Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 *The International Journal of Human Rights* 1204-1222.

²³⁵ *Factory At Chorzów (Germany v. Poland)* (Series A No 17) (1928) para. 73.

²³⁶ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Rep 04 136) (9 July 2004).

²³⁷ Torture Convention Article 14; Committee Against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties* (19 November 2012) CAT/C/GC/3 para. 2.

“restore the right violation and provide compensation,” and the Court has also ordered symbolic measures such as public apologies and commemoration monuments.²³⁸

Soft law instruments are more ambiguous. The Principles to Combat Impunity, for example, declare a general right to reparation, adding that “*any* human rights violation gives rise to a right to reparation.”²³⁹ Meanwhile, the Principles on the Right to Remedy concern “gross violations” of human rights—adding a gravity requirement to a similar set of reparations measures.²⁴⁰ As a result, the contours of the right to reparations under international law are obscure.

International law is yet to capture non-state actors, such as non-state armed groups, under its reparation regime.²⁴¹ No binding instrument currently requires such reparations, and the criminal responsibility of such groups is unclear.²⁴² The Principles on the Right to Remedy offer an ambiguous opening in this regard. Principle 15 states that when “a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation.”²⁴³ Yet, the drafting of the principle reflects a hesitation to explicitly require such a duty, whereas the term “should” was selected to reflect a relatively “less mandatory” sentiment.²⁴⁴ State practice on the matter is also sparse, yet the Colombian Final Agreement is a breakthrough example.²⁴⁵ The Final Agreement requires the FARC-EP as a non-state actor to participate in reparations measures based on their “group responsibility” in the conflict.²⁴⁶

²³⁸ *Velásquez-Rodríguez* para 166; See further *Moiwana Community v. Suriname* (Judgement) Series C No. 124 (15 June 2005) para. 216, 218; *Mapiripán Massacre v. Colombia* (Judgement) Series C No. 134 para. 315.

²³⁹ Principles to Combat Impunity principle 31.

²⁴⁰ Principles on the Right to Remedy Article 11, 15, 18-23.

²⁴¹ Olivia Hernan, 'Beyond the State of Play: Establishing a Duty of Non-State Armed Groups To Provide Reparations' (2022) 102 *International Review of the Red Cross* 1033–1056.

²⁴² *Ibid* citing International Committee of the Red Cross, *Commentary on the Third Geneva Conventions* (2020).

²⁴³ Principles on the Right to Remedy Principle 15; Hernan, 'Beyond the State of Play'.

²⁴⁴ Hernan, 'Beyond the State of Play' 1039-1040 citing Theo van Boven, *Introductory Note: The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2010); Office of the High Commissioner for Human Rights, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights* (27 December 2002) E/CN.4/2003/63*.

²⁴⁵ Hernan, 'Beyond the State of Play'.

²⁴⁶ *Ibid* 1040.

International law on reparations appears to lack uniformity and breadth in the targets of its reparation measures.²⁴⁷ Yet, in addition to any consensus—or lack thereof—on the scope of the right to reparations there exist significant limitations in the design of reparations regimes, with far-reaching consequences for the ‘victim’ at its center.

3.3.1 *Exclusivity*

Reparations have significant value to victims as they acknowledge their suffering and take tangible steps towards redress.²⁴⁸ For this reason, reparations are at the center of a ‘victim-centered approach.’ Yet, pursuing reparations appears to be a highly selective exercise determined according to its feasibility, choice of forum, and political context.²⁴⁹ The number of victims can be overwhelming, while institutions in transitioning states may be compromised and resource-scarce.²⁵⁰ Therefore, it may not be possible to give “full redress” to all victims, and only a “fraction of the total victimized population” may be targeted.²⁵¹ In these cases, the definition of the ‘victim’ is critical—whomever it constitutes is entitled to recognition, remedy, and ‘healing.’

Yet, there exists no unified formula for determining a victim, the harms that cause their victimization, or the institution that shall render their rights.²⁵² Every TJ institution can put forward divergent definitions that are partial to specific agendas. In the context of individual criminal accountability, for example, the construction of the victim filters their suffering through ever-narrowing selection criteria. To begin with, ‘human rights violations’ enshrined in specific legal texts are already narrow grounds for recognition. Even then, only specific violations constitute international crimes, whereas for the sake of pragmatism additional gravity thresholds filter these

²⁴⁷ International Commission of Jurists (ICJ), *The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners’ Guide* (2018) 15.

²⁴⁸ Luke Moffett, ‘Transitional Justice and Reparations: Remediating the Past?’ in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 381.

²⁴⁹ Jemima Garcia-Godos, ‘Victim Reparations in Transitional Justice - What Is at Stake and Why’ (2008) 26 *Nordic Journal of Human Rights* 111; See further Jemima García-Godos, ‘Building Trust Through Accountability: Transitional Justice in the Search for Peace’ in Cecilia Bailliet (ed), *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019).

²⁵⁰ In Cambodia, for example, upwards of two million people perished. See Ben Kiernan, ‘The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80’ (2003) 35 *Critical Asian Studies* 585-597.

²⁵¹ Moffett, ‘Transitional Justice and Reparations’ 380.

²⁵² Claire Garbett, ‘From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC’ (2016) 15 *Journal of Human Rights* 40-59.

crimes to the most serious instances.²⁵³ This underlying exclusivity to victimhood can exacerbate already contested victim identities.²⁵⁴

The process of recognition can further disenfranchise some victims. For example, victims at the ICC need to “claim” their right to reparation following the Court’s procedures.²⁵⁵ This involves complex applications that prove their status as a victim of harm linked to the crimes of the accused.²⁵⁶ In this regard, the Court’s idea of victims as capable of navigating such technical demands may not conform with the realities of transitioning societies.²⁵⁷ Certain groups, particularly “women, [the] elderly, and the disabled” can be excluded due to their infirmity, illiteracy, or owing to social stigmatization.²⁵⁸ Moreover, a lack of material access to information can further exclude victims.²⁵⁹ For example, requiring identification documents and medical records can be a significant setback where public institutions are compromised, inaccessible, or non-existent.²⁶⁰

3.3.2 *Derivation*

When international law characterizes complex transitional situations as a matter of holding certain perpetrators accountable, reparations become a by-product of this process.²⁶¹ The Rome Statute, for example, allows victims to seek reparations largely depending on the scope of existing proceedings, as the Court may only order reparations upon a successful conviction.²⁶² A conviction in turn depends on the OTP’s decisions over whom to prosecute, its selection of charges, and its collection of evidence.²⁶³

²⁵³ See Rome Statute Article 17 (1) (d); See further García-Godos, 'Building Trust Through Accountability' 419; Garbett, 'From Passive Objects to Active Agents' 42; Moffett, 'Transitional Justice and Reparations' 384.

²⁵⁴ Moffett, 'Transitional Justice and Reparations', citing Luke Moffett, 'Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms' (2015) 10 *International Journal of Transitional Justice* 146-167.

²⁵⁵ Garbett, 'From Passive Objects to Active Agents' 51-52.

²⁵⁶ *Ibid.* See further *Prosecutor v. Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06 (14 March 2012) para. 14.

²⁵⁷ Garbett, 'From Passive Objects to Active Agents'.

²⁵⁸ Moffett, 'Transitional Justice and Reparations' 398; Garbett, 'From Passive Objects to Active Agents' 54.

²⁵⁹ Garbett, 'From Passive Objects to Active Agents'.

²⁶⁰ *Ibid.* See further *Lubanga Judgement* para. 14; *Prosecutor v. Thomas Lubanga Dyilo* (Decision) ICC-01/04-01/06-119 (18 January 2008) para. 87-88.

²⁶¹ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 700.

²⁶² Rome Statute Article 75, 79.

²⁶³ Bassiouni, 'Victims’ Rights and Participation' 227; Balta, Bax and Letschert, 'Trial and (Potential) Error'.

For instance, in *Lubanga* the OTP's charges were limited to the crime of enlisting child soldiers, despite several victims' challenges to include sexual violence.²⁶⁴ The Court subsequently held that only the "direct victims" of Lubanga's conduct were entitled to Court-ordered reparations—i.e. the enlisted children.²⁶⁵ The Court further limited its recognition of "indirect victims" to include the parents of those child soldiers—excluding victims who were harmed as a result of the soldiers' conduct.²⁶⁶ In *Al-Mahdi*, the Court recognized that the accused's crimes were suffered "throughout Mali" yet limited the scope of reparations to the community of Timbuktu.²⁶⁷ Within this scope, the Court excluded those who suffered bodily harm and property damage during the attacks on the protected buildings that were chiefly considered.²⁶⁸ The Chamber subsequently admitted to its "limited scope" set against the broader abuses that occurred in Mali.²⁶⁹

In cases that are terminated due to acquittal, lack of evidence, or because the accused is unfit to stand trial reparations may never materialize.²⁷⁰ Thus, in the aftermath of *Ruto and Sang, Kenyatta*, and *Bemba* the Court struggled to meaningfully address victims.²⁷¹ The LRVs' final submission in *Bemba* is particularly disheartening, expressing on behalf of victims a "deep disappointment and hopelessness ... [resulting in] skepticism and distrust towards the Court" after waiting on 'justice' at the ICC for more than 15 years.²⁷²

In this sense, reparations may appear 'perpetrator-oriented,' in that the 'victim-oriented' aim is dependent on the successful prosecution of the accused, and compensation becomes secondary to individual criminal accountability.²⁷³ The ability of reparations to effectively target the harms

²⁶⁴ Moffett, 'Reparations for Victims at the International Criminal Court'.

²⁶⁵ Ibid 207.

²⁶⁶ See *Prosecutor v. Thomas Lubanga Dyilo* (Decision on Indirect Victims) ICC-01/04-01/06 (April 8, 2009) para. 44, 47; *Prosecutor v. Thomas Lubanga Dyilo* (Appeals Judgement Reparations) ICC-01/04-01/06-3129 (March 3, 2015); Balta, Bax and Letschert, 'Trial and (Potential) Error' 227-228.

²⁶⁷ See *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para. 51-52, 56; Balta, Bax and Letschert, 'Trial and (Potential) Error' 228.

²⁶⁸ Balta, Bax and Letschert, 'Trial and (Potential) Error' 228; See *Al Mahdi Reparations Order* para. 98-99, 108.

²⁶⁹ *Al Mahdi Reparations Order* para. 108 ("the Chamber emphasizes the relatively narrow scope of this case relative to the wider range of human rights violations alleged to have occurred in Timbuktu and elsewhere throughout Mali.").

²⁷⁰ Moffett, 'Reparations for Victims at the International Criminal Court'.

²⁷¹ Balta, Bax and Letschert, 'Trial and (Potential) Error'.

²⁷² *Prosecutor v. Jean-Pierre Bemba Gombo* (LRVs' Joint Submissions) ICC-01/05-01/08-3649 (12 July 2018) para. 2, 15; Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 *Leiden Journal of International Law* 749-769 764.

²⁷³ Nouwen and Werner, 'Monopolizing Global Justice' 171; Moffett, 'Reparations for Victims at the International Criminal Court' 1207.

suffered by victims and allow these victims to represent themselves in its processes contrasts the ‘right’ held by victims in theory and a narrowly applied policy ambition in practice.

3.4 Conclusion

Building on Nino’s critique, the ‘right to justice’ becomes more akin to a “collective policy goal” when it diminishes socio-economic harms in favor of civil-political harms.²⁷⁴ Similarly, the right to truth appears to be part of a campaign of collective memorialization that assumes a desire to ‘heal’ through truth-telling. Finally, reparations as an add-on to the right to justice subsume the ‘right’ under the narrow scope of criminal justice proceedings.

This policy-driven agenda reveals an implicit sequence that frontloads criminal accountability—via the right to justice—while leaving behind other ‘rights’ as secondary or derivative considerations. Fletcher describes a noticeable pattern of intervention

Prior to activating [ICL], UN bodies establish independent fact-finding commissions ... to make a determination as to whether there is evidence of international crimes. Affirmative findings provide a credible *prima facie* record that ... compels a legal and moral conclusion ... [requiring] criminal sanctions.²⁷⁵

To this end, a “dominant script” shaped by the central norms of TJ defines its rights landscape.²⁷⁶ The right to truth prepares the right to justice, and the right to reparations derives from the latter. Meanwhile, the underlying notions of ‘justice,’ ‘truth,’ and ‘reparations’ remain contested, diminishing genuine agency over their respective rights.²⁷⁷ Nevertheless, the frameworks analyzed in the preceding chapters are not the only ones relevant to transitional settings. As discussed in the next chapter, overlapping regimes in adjacent disciplines can further shape TJ responses.

²⁷⁴ Nino, 'The Duty to Punish Past Abuses of Human Rights' 2621.

²⁷⁵ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 702.

²⁷⁶ Sharp, 'Emancipating Transitional Justice' 153. See further Dustin N. Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique' (2013) 14 *Chicago Journal of International Law* 165-196 (TJ measures “have spread ... not necessarily by adapting themselves de novo to each new context, but through a process of "acculturation" whereby a dominant script or practice is replicated.”).

²⁷⁷ See Lundy and McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up'.

4 Sequencing Disciplines: Exploring Interdisciplinary Frameworks

The sequencing examined thus far concerned an internal dimension, coordinating TJ's internal norms, rights, and duties. Yet, an external dimension is also conceivable with other disciplines that overlap with TJ. This chapter is motivated by the notion that every transitioning society is a "complex phenomenon" that is better addressed with holistic, interdisciplinary interventions.²⁷⁸

To this end, peacebuilding literature has gradually moved towards "positive peace" that values social transformation.²⁷⁹ Meanwhile, development scholarship is increasingly cognizant of the need to broadly address inequality and redistribution.²⁸⁰ Applied to TJ, the field has similarly attempted to transcend narrower ideals.²⁸¹ Therefore, this chapter is devoted to the interdisciplinary landscape that bridges TJ with adjacent fields and argues that an interdisciplinary outlook can help fill in remaining gaps.²⁸²

4.1 Development

Both development and TJ are broadly concerned with societal improvement and employ a variety of interrelated, context-dependent measures.²⁸³ Yet, the junction between TJ and development remains underexplored.²⁸⁴ To this end, "social justice" issues that have so far escaped TJ may be bridged with a "development-sensitive" approach.²⁸⁵

A broad understanding of TJ and development is necessary to harness the potential at their intersection. Sen's understanding of development, for example, envisions the "conditions for all people to develop their fullest possible range of capabilities."²⁸⁶ Under this definition,

²⁷⁸ Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' 17-18.

²⁷⁹ McAuliffe, *Transformative Transitional Justice and the Malleability of Post-conflict States* 1.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Mani, for example, questions whether TJ can continue to ignore "social injustice" and inequality, resource costs, and TJ's limited scope of harm and violence. See Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253-265 253-254.

²⁸³ Pablo De Greiff and Roger Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council; John Wiley [distributor] 2010).

²⁸⁴ Ibid.

²⁸⁵ Mani, 'Dilemmas of Expanding Transitional Justice' 254. See further Roger Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 292-309.

²⁸⁶ De Greiff and Duthie, *Transitional Justice and Development* 173 citing Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

development is a bottom-up process that promotes social welfare and the critical infrastructure through which people can lead a dignified life.²⁸⁷ The more “transformative” turn in TJ emphasizes a similarly process-oriented, bottom-up approach that promotes local agency and tackles inequality.²⁸⁸ Such “capabilities-centered, bottom-up” models offer the closest connections between the fields, particularly regarding ESCRs and reparations.²⁸⁹

4.1.1 Human Rights-Based Approaches to Development

Human rights have become a “key benchmark” by which to evaluate development outcomes and their underlying theoretical bases.²⁹⁰ As a result, development bodies offer a breadth of frameworks that similarly aim to incorporate ‘international norms and standards.’²⁹¹ This indicates a shift towards a human rights-based approach (HRBA) that emphasizes development as an active service towards rights-holders rather than passive charity to helpless beneficiaries—the most notable product of this approach is the “right to development.”²⁹²

In 2003, several UN agencies consolidated a “Common Understanding” of HRBAs that emphasizes human rights mainstreaming and recognizes development as a contribution to the “capacities ... of ‘rights-holders’ to claim their rights.”²⁹³ The Common Understanding highlights human rights principles that can be strongly linked to TJ, including participation, accountability and the rule of law.²⁹⁴ As previously discussed, accountability is a central norm of TJ.²⁹⁵ The Common Understanding similarly envisions accountability for both states and “other duty-bearers” and redress on behalf of “aggrieved rights-holders.”²⁹⁶ Meanwhile, participation is

²⁸⁷ De Greiff and Duthie, *Transitional Justice and Development*.

²⁸⁸ Joanna R. Quinn, 'The Development of Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 31. See further Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice'.

²⁸⁹ De Greiff and Duthie, *Transitional Justice and Development* 205.

²⁹⁰ McEvoy, 'Beyond Legalism' 430.

²⁹¹ Ibid; Laplante, 'On the Indivisibility of Rights'.

²⁹² De Greiff and Duthie, *Transitional Justice and Development*; Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' 352.

²⁹³ United Nations Sustainable Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (September 2003) 1, 2.

²⁹⁴ Ibid.

²⁹⁵ See '[Accountability](#)'.

²⁹⁶ United Nations Sustainable Development Group, *Towards a Common Understanding* 2.

increasingly recognized as a ‘right’ of victims in TJ.²⁹⁷ Finally, the rule of law similarly reflects TJ in its “[compliance] with the legal norms and standards.”²⁹⁸ The Common Understanding has since been adopted by several agencies of the UN Sustainable Development Group, and is a “guiding principle” of the UN Sustainable Development Cooperation Framework.²⁹⁹

HRBAs are implemented via systems such as the PANEL Principles, a conceptual framework developed by several NHRIs in Australia, Scotland, and elsewhere.³⁰⁰ The Principles mirror the UN Common Understanding and reflect contemporary state practice in HRBAs to development. The PANEL principles similarly conceive of oversight and remedy through accountability, participation, and a principle of legality that is rooted in legal rules.³⁰¹

HRBAs to development offer the potential to address injustices that may fall outside the scope of TJ. For example, TJ can be brought to include ESCR injustices that, for the sake of feasibility, are limited by way of a gravity requirement to ‘gross’ violations.³⁰² For example, the widespread and systematic destruction of property can constitute a crime against humanity.³⁰³ Yet, a great deal of harm can occur that falls short of this threshold, particularly systemic and institutional violence that presents no clearly identifiable victims and perpetrators. Here, a general ‘right to development’ may provide recognition and redress for the ‘victims’ of poverty, discrimination, and dispossession via TJ mechanisms such as truth commissions.

²⁹⁷ See Claire Garbett, 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court' (2013) 16 Contemporary Justice Review 193-213; Jean de Dieu Sikulibo, 'Victims' Participation in International Criminal Proceedings Beyond Mere Witnesses: Opportunities and Challenges in Sexual Violence Cases', *Sexual Violence and Effective Redress for Victims in Post-Conflict Situations: Emerging Research and Opportunities* (IGI Global 2019); Bassiouni, 'Victims' Rights and Participation'.

²⁹⁸ United Nations Sustainable Development Group, *Towards a Common Understanding 2*.

²⁹⁹ United Nations Sustainable Development Group, 'Human Rights-Based Approach' (*United Nations*, 2022) <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 10 August 2022.

³⁰⁰ See Australian Human Rights Commission, 'Human Rights Based Approaches' (*Australian Human Rights Commission*, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-based-approaches>> accessed 10 August 2022; Scottish Human Rights Commission, *A Human Rights Based Approach: PANEL principles*; European Network of National Human Rights Institution, 'Human Rights-Based Approach' (*ENNHRI*, 2022) <<https://ennhri.org/about-nhris/human-rights-based-approach/>> accessed 10 August 2022.

³⁰¹ Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice'; Scottish Human Rights Commission, *A Human Rights Based Approach: PANEL principles*.

³⁰² Ochoa-Sánchez, 'Economic and Social Rights and Transitional Justice'; Sharp, *Justice and Economic Violence in Transition*.

³⁰³ Duthie, 'Toward a Development-sensitive Approach'.

A combination of TJ and development can more broadly tackle social injustices, ranging from discrete violations to root causes related to structural and distributional issues. Yet, the nexus of TJ and development also contains points of friction, particularly surrounding reparations.

4.1.2 Reparations & Development

Development can enhance TJ reparations measures. For instance, land restitution to previously disenfranchised communities can benefit from agricultural development.³⁰⁴ Yet, reparations measures may also conflict with development, particularly state reparations. Practically, both reparations and development may compete against the limited resources of fragile TJ states.³⁰⁵ Empirical research in this regard suggests that a transitioning state's economic condition correlates with its choice of TJ measures.³⁰⁶ Less wealthy states typically resort to more 'affordable' measures, such as amnesties, if any at all.³⁰⁷ The state may also prioritize economic development and securing foreign investment.³⁰⁸

Reparations and development assistance are often conceptually conflated. Reparations can be differentiated by their underlying legal as well as "moral and political" entitlement of victims to redress.³⁰⁹ On the other hand, while development assistance can have "reparative value," it more broadly targets the state's socioeconomic capacity and resource distribution.³¹⁰ In some cases, reparations can appear "development-like" yet retain some symbolic value as well as forms of compensation and restitution that aim to "repair" victims' harms.³¹¹

In practice, reparations programs are often morphed into "development-like measures" that undermine their reparative purpose.³¹² This discrepancy was explicitly recognized in the 2007 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, which cautions

³⁰⁴ Ibid.

³⁰⁵ Ruth Margaret Buchanan and Peer Zumbansen, *Law in Transition: Human Rights, Development and Transitional Justice*, vol 3 (Osgoode Readers, Hart Publishing 2014); De Greiff and Duthie, *Transitional Justice and Development*.

³⁰⁶ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'At What Cost?' in Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter (eds), *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace 2010).

³⁰⁷ Ibid 77.

³⁰⁸ Orlovsky and Roht-Arriaza, 'Reparations and Development'.

³⁰⁹ Ibid.

³¹⁰ Duthie, 'Toward a Development-sensitive Approach' 299.

³¹¹ Laplante, 'On the Indivisibility of Rights' 161.

³¹² Ibid.

states not to “undertake development instead of reparation.”³¹³ In Peru, for instance, the government’s implementation of its national reparations strategy—the PIR—diluted this reparative aspect to the extent that its measures were viewed as “pre-existing obligations” to development.³¹⁴

PIR initiatives consisted of many non-specific measures, meaning they did not specifically address victims’ harms and more closely resembled development assistance. For example, several budget-constrained ministries that were instructed to earmark a portion of their budget towards reparations instead folded victims into existent development initiatives, such as the “national health security program.”³¹⁵ The medical services provided under the program, for example, were concentrated in urban cities with overworked facilities that did not address illnesses that were prevalent among victims.³¹⁶ Moreover, government grants towards the PIR were fed through the “National Office of Development Cooperation,” which in turn funded general infrastructure such as schools and medical centers regardless of their damage during the conflict.³¹⁷ Finally, the government’s “poverty subsidy program” launched in the regions most affected by the conflict.³¹⁸ In turn, victim communities understood the subsidies as compensation for their suffering and resented them equally benefitting “non-victim-survivors.”³¹⁹

Instead of providing “recognition and reaffirmation” for victims, development measures implemented for the sake of practicality can do little to target the harms suffered by victims.³²⁰ Instead, governments can sidestep their obligation towards reparations when they “need only do what [they] should be doing anyway and slap a reparations label on it.”³²¹ Therefore, while HRBA may enhance the position of the ‘rights-bearer’ at the center of TJ and development processes, these efforts can have little practical relevance if not implemented with a clear distinction of the harms targeted on one hand, and the overall socio-economic capacities to be raised on the other.

³¹³ See International Federation for Human Rights, ‘The Nairobi Declaration on Women’s and Girls’ (International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, March 2007) Principle 3b.

³¹⁴ The Peruvian TRC had presented the PIR as a comprehensive framework toward reparations that included individual and collective initiatives. See Laplante, ‘On the Indivisibility of Rights’ 148.

³¹⁵ Ibid 162-163; Orlovsky and Roht-Arriaza, ‘Reparations and Development’.

³¹⁶ Laplante, ‘On the Indivisibility of Rights’ 162-163; Orlovsky and Roht-Arriaza, ‘Reparations and Development’.

³¹⁷ Laplante, ‘On the Indivisibility of Rights’ 163.

³¹⁸ Ibid 162.

³¹⁹ Ibid.

³²⁰ Ibid 164.

³²¹ Orlovsky and Roht-Arriaza, ‘Reparations and Development’ 192.

In the next section, peacebuilding is analyzed as a field with further practical and theoretical challenges.

4.2 Peacebuilding

Peacebuilding and TJ are both similarly concerned with interventions for post-conflict societies. To this end, TJ traditionally addressed human rights violations while peacebuilding more broadly tackled the rule of law and capacity-building efforts.³²² Yet, TJ may be essential to peacebuilding efforts when addressing past atrocities can prevent the recurrence of violence.³²³ In the eyes of the UNSG

“the consolidation [and maintenance] of peace ... cannot be achieved unless the population is confident that redress ... can be obtained through legitimate structures for [justice].”³²⁴

Salient TJ institutions have invoked a dual peacebuilding mandate—the ICTY aimed to “bring [perpetrators] to justice” to “contribute to the restoration and maintenance of peace.”³²⁵ When states failed to cooperate with the Tribunal, consequences were linked to EU membership, which in itself is a peacebuilding strategy.³²⁶ Moreover, contemporary TJ measures broadly overlap with peacebuilding mandates, including reconciliation, guarantees of non-recurrence and institutional reform that can address root causes of conflict.³²⁷

4.2.1 Institutionalization before Liberalization

TJ mechanisms can directly contribute to the emergent IBL doctrine of peacebuilding. Liberalization here refers to the proliferation of neo-liberal systems that emphasize global trade over social welfare.³²⁸ Liberalization asserts that reduced barriers to trade and investment can

³²² Catherine Baker and Jelena Obradovic-Wochnik, 'Mapping the Nexus of Transitional Justice and Peacebuilding' (2016) 10 *Journal of Intervention and Statebuilding* 281-301. Sharp further notes that TJ and peacebuilding are routine post-conflict responses. See Sharp, 'Emancipating Transitional Justice'.

³²³ Marcus Lenzen, *Roads Less Traveled? Conceptual Pathways for Development and Transitional Justice* (2009) (“If a society leaves the legacies of mass atrocities and abuse unaddressed, or deals with them insufficiently, sustainable peaceful coexistence may remain elusive.”).

³²⁴ UN Secretary General, *2004 Report* para. 2.

³²⁵ See United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009) (25 May 1993) S/RES/827 preamble para. 5, 6.

³²⁶ Baker and Obradovic-Wochnik, 'Transitional Justice and Peacebuilding'.

³²⁷ Sriram, 'Justice as Peace?' 584.

³²⁸ Jackie Smith, *Globalization, Social Movements, and Peacebuilding* (Syracuse University Press 2013).

develop local economies by creating capital and employment.³²⁹ To this end, a “symbiotic relationship” is assumed between economic and socio-political development, wherein greater economic capital presumably leads to better governance structures that in turn foster peace.³³⁰

Yet, liberalization tends to “hollow out” transitioning states by stripping them of their social welfare systems and emphasizing the protection of private property, usually to the detriment of marginalized communities.³³¹ As a result, the tendency of international organizations to focus on superficial “democratization and marketization” policies has brought scrutiny to its destabilizing effects.³³² For instance, protests in Sudan demanded the resignation of the transitional government over IMF-backed austerity measures that cut fuel and bread subsidies.³³³ In this case, economic ‘liberalization’ may come at the cost of peace and stability.

IBL was developed as a possible corrective, whereas it conceives of ‘institutionalization’ as the building of effective governance structures that raise institutional capacity and strengthen the rule of law.³³⁴ To be sure, the focus on institutional reform merely as a “prelude” to liberalization subjects it to similar critiques of over-emphasizing neo-liberal processes.³³⁵ The institutions built under IBL approaches may ultimately reflect “Western institutional preferences premised on ‘neoliberal policies of open markets.’”³³⁶ Traditional TJ mechanisms can similarly impose narrow liberal-legalistic assumptions on ‘justice’ and ‘accountability’ as a precondition for peace.³³⁷ Yet, contemporary TJ measures related to guarantees of non-recurrence and institutional reform may

³²⁹ Ibid.

³³⁰ Muvingi, 'Donor-Driven Transitional Justice and Peacebuilding' 11.

³³¹ Smith, *Globalization, Social Movements, and Peacebuilding* 5.

³³² Sriram, 'Justice as Peace?' See further Sharp, 'Beyond the Post-Conflict Checklist'.

³³³ Al Jazeera, 'Sudan Protesters Demand Gov't Step Down Over Economic Reforms' (*Al Jazeera Media Network*, 30 Jun 2021) <<https://www.aljazeera.com/news/2021/6/30/sudan-protesters-demand-govt-step-down-over-imf-backed-reforms>> accessed 10 August 2022.

³³⁴ Sharp, 'Beyond the Post-Conflict Checklist'.

³³⁵ Sharp, 'Emancipating Transitional Justice' 163.

³³⁶ Sharp, 'Beyond the Post-Conflict Checklist' 180 citing Neil Cooper, Mandy Turner and Michael Pugh, 'The End of History and the Last Liberal Peacebuilder: A Reply to Roland Paris' (2011) 37 *Review of International Studies* 1995-2007; Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, 'Promoting the Rule of Law: From Liberal to Institutional Peacebuilding' in Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman (eds), *Peacebuilding and Rule of Law in Africa: Just Peace?* (Taylor & Francis Group 2010).

³³⁷ Sriram, 'Justice as Peace?' 579.

still synergize with IBL approaches. Institutional reform measures, for example, related to judicial capacity-building and legal reform may contribute to the rule of law in transitional settings.³³⁸

For instance, the *MATRA* program by the Dutch MFA supports the transition of countries seeking to join the EU to a “democratic society, governed by the rule of law.”³³⁹ One project of the program—“Strengthening Ukraine’s Capacity to Investigate and Prosecute International Crimes”—combines TJ and peacebuilding to strengthen accountability for crimes while also supporting Ukrainian stakeholders through dedicated capacity-building measures.³⁴⁰ The project expresses classic TJ ideals to end impunity, provide redress, and disseminate truth while conceiving of a “long-term” contribution to the rule of law that displays a dual peacebuilding approach.³⁴¹ Yet, the project may also reflect IBL’s underlying liberalizing motives by seeking to open Ukraine to the EU internal market through first enhancing its governance structures. The impact of the program, however, particularly in the aftermath of current events remains to be seen.

TJ institutions such as TRCs can offer a “preliminary diagnostic tool” for peacebuilding efforts.³⁴² They can shed light on root causes of conflict and provide recommendations for reforms that are relevant to IBL agendas.³⁴³ As described in the example of the CAVR, TRCs can analyze both the socio-economic and civil-political dimensions of violence, providing much-needed context for institutional reform.³⁴⁴ TJ mechanisms such as TRCs may provide a platform for national reconciliation that temper its liberalizing aspects. The Peruvian TRC, for example, pursued “political reconciliation” that sought a “new social pact” with marginalized victim communities, while the Colombian Final Agreement similarly pursued a “national reconciliation” plan.³⁴⁵

³³⁸ Ibid.

³³⁹ See Rijksoverheid, 'NFRP-Matra: subsidie voor versterken rechtsstaat en democratie in de Europese regio' (*Rijksoverheid.nl*, <<https://www.rijksoverheid.nl/onderwerpen/europese-subsidies/nederlands-fonds-voor-regionale-partnerschappen-nfrp/nfrp-matra-subsidie>> accessed 10 July 2022 (Dutch); Kingdom of the Netherlands, 'The Matra Programme' (*Netherlandsandyou.nl*, <<https://www.netherlandsandyou.nl/your-country-and-the-netherlands/ukraine/and-the-netherlands/matra-programme>> accessed 10 July 2022).

³⁴⁰ See T.M.C. Asser Instituut and Global Rights Compliance, 'MATRA-Ukraine' (*Asser Institute*, <<https://www.asser.nl/matra-ukraine/>> accessed 10 July 2022; T.M.C. Asser Instituut, 'MATRA Ukraine - Strengthening Ukraine’s Capacity to Investigate and Prosecute International Crimes' (*Asser Institute Center for International & European Law*, <<https://www.asser.nl/projects-legal-advice/projects/?rId=1161>> accessed 10 July 2022).

³⁴¹ T.M.C. Asser Instituut, 'MATRA Ukraine'.

³⁴² Laplante, 'Transitional Justice and Peace Building' 347.

³⁴³ Ibid.

³⁴⁴ Ibid 347-348; See [Social Justice](#).

³⁴⁵ Ibid; Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State’s Response to Mass Atrocity* 156.

Besides their potential neo-liberal assumptions, such TJ and peacebuilding measures may still contribute to more effective peace and justice efforts.

The nexus between TJ and peacebuilding reveals similar concerns of Western-liberal bias. Despite instances of their integration, to successfully sequence common processes the assumptions behind TJ and development programs must be continuously interrogated. A similar approach in the following section explores how TJ can contribute to DDR programs.

4.2.2 Disarmament, Demobilization, and Reintegration

DDR relates to policies that facilitate the return of ex-combatants to civilian communities or their reassignment to newly reformed security services.³⁴⁶ DDR aims to promote peace through disarmament and restoring ties between ex-combatants and post-conflict societies.³⁴⁷ The social bonds it repairs can be essential for the success of subsequent TJ and development measures.³⁴⁸

While TJ proclaims to be ‘victim-centered,’ measures such as DDR may appear conversely ‘perpetrator-centered.’³⁴⁹ As a result, the traditional focus of TJ on justice and accountability may appear at odds with DDR. The reintegration aspect of DDR is often neglected when DDR programs emphasize short-term incentives over the long-term social and economic rehabilitation of ex-combatants.³⁵⁰ TJ’s concern with reconciliation may strengthen the relatively weaker reintegration component.³⁵¹ The engagement of victims and transitioning communities through reconciliation efforts can more effectively ensure DDR.³⁵² For example, local healing and cleansing rituals can

³⁴⁶ Karin Aggestam and Annika Björkdahl, *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Taylor & Francis Group 2012).

³⁴⁷ Sharp, 'Beyond the Post-Conflict Checklist'.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid 187.

³⁵¹ Ibid. See further Dustin N. Sharp, 'Bridging the Gap: The United Nations Peacebuilding Commission and the Challenges of Integrating DDR and Transitional Justice' in Chandra Lekha Sriram and others (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (Taylor & Francis Group 2012); Roger Duthie and Irma Specht, 'DDR, Transitional Justice, and the Reintegration of Former Child Combatants' in Ana Cutter Patel, Pablo De Greiff and Lars Waldorf (eds), *Disarming the Past: Transitional Justice and Ex-Combatants* (Advancing Transitional Justice, Social Science Research Council 2009).

³⁵² Johanna Herman, Olga Martin-Ortega and Chandra Lekha Sriram, 'Beyond Justice Versus Peace Transitional Justice and Peacebuilding Strategies', *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Taylor & Francis Group 2012).

restore the ties between transitioning communities and ex-combatants, particularly former child soldiers.³⁵³

On the other hand, criminal accountability mechanisms may disincentivize ex-combatants from demilitarizing—if they fear prosecution by a national or international tribunal they may refuse to disarm and jeopardize peace prospects.³⁵⁴ The creation of the SCSL impacted DDR efforts in both Sierra Leone and neighboring Liberia.³⁵⁵ Meanwhile, the ICC’s intervention in Northern Uganda constantly jeopardized peace negotiations, and impeded DDR efforts with LRA soldiers.³⁵⁶ A nuanced approach to accountability may overcome this risk. For example, emphasizing the prosecution of the ‘most responsible’ may appease victims while simultaneously conveying to other combatants that they may reenter society.³⁵⁷ As in the Colombian Final Peace Agreement, a tiered accountability regime may incentivize ex-combatants to engage with TJ and peacebuilding processes to avoid heavier sanctions.³⁵⁸

Finally, DDR-related benefits for ex-combatants can conflict with more modest reparations for victims, causing frustration among the latter.³⁵⁹ Compensation for ex-combatants may be viewed as a “reward” for conduct that dismisses the harm suffered by victims.³⁶⁰ In South Africa, victims held on for six years for the TRC’s reparations recommendations, only to be awarded much more meager amounts than the “demobilization grants” and “special pensions” enjoyed by ex-combatants.³⁶¹ The relevant UN frameworks in this regard encourages a more effective integration of DDR and reparations. The IDDRSs, for example, are the jointly created guidelines of several

³⁵³ Ibid; Duthie and Specht, 'DDR, Transitional Justice, and the Reintegration of Former Child Combatants'.

³⁵⁴ Sharp, 'Beyond the Post-Conflict Checklist'; Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace '.

³⁵⁵ Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace 'citing Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (Taylor & Francis Group 2005) 110.

³⁵⁶ Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace '.

³⁵⁷ Sharp, 'Beyond the Post-Conflict Checklist' 189.

³⁵⁸ See [Duty to Prosecute](#) Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 159.

³⁵⁹ Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace ' 59-60 citing Chandra Lekha Sriram and Johanna Herman, 'DDR and Transitional Justice: Bridging the Divide?' (2009) 9 *Conflict, Security & Development* 455-474.

³⁶⁰ Sharp, 'Beyond the Post-Conflict Checklist'.

³⁶¹ Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace ' 60 See further Sriram and Herman, 'DDR and Transitional Justice: Bridging the Divide?'; Hugo van der Merwe and Guy Lamb, *Transitional Justice and DDR: The Case of South Africa* (2009) 22.

UN agencies forming the Inter-Agency Working Group on DDR.³⁶² The IDDRSs envision a “careful sequencing” that incorporates assistance for ex-combatants within broader community-based programs, adding that transitioning from individual ex-combatants to communities can mitigate feelings of resentment.³⁶³ In practice, requiring ex-combatants to contribute to reparations can fulfil a dual reintegration and reparations role. Recalling the example of Colombia, ex-FAR-EP combatants assisted with community reparations as a way of reentering society.³⁶⁴

4.3 Conclusion

As Quinn notes, the “potential breadth” of TJ lacks “any real consensus.”³⁶⁵ Yet, an interdisciplinary analysis of TJ reveals several nodes of connection with adjacent fields that can help delineate these conceptual borders, and bridge applicable ‘international norms and standards.’ Closely related fields such as TJ, peacebuilding, and development can fill in mutual gaps in their respective frameworks for more effective interventions. For example, development efforts can address the socio-economic injustices that tend to be underappreciated by TJ and peacebuilding.³⁶⁶ Such an approach may yield rights that are more effective to the extent that rights-holders enjoy equal participation and distribution.³⁶⁷ This approach can also enrich common norms that occupy the fields. For instance, DDR efforts can enhance the reconciliation sought in transitioning communities.

Despite the potential of HRBAs to development, the blurring of redress and redistribution may curtail the right to reparations. Meanwhile, despite correctives such as IBL, neo-liberal assumptions that occupy TJ and peacebuilding can persist through norms such as ‘justice’ and ‘accountability’ when pursued with ulterior motives. In sum, the landscape of TJ is complex and spans highly contested norms, rights, and duties. The contours of overlapping fields remain obscure yet display similarly rough topography. Coordinating the frameworks that shape such a

³⁶² United Nations Office for Disaster Risk Reduction, *Integrated Disarmament Demobilization and Reintegration Standards (IDDRS)* (1 August 2006).

³⁶³ *Ibid* section 4.1.1, 5.9; Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace' 60.

³⁶⁴ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 159.

³⁶⁵ Quinn, 'The Development of Transitional Justice' 32.

³⁶⁶ Baker and Obradovic-Wochnik, 'Transitional Justice and Peacebuilding' (“Transitional justice and peacebuilding tend to ignore the question of capital—economic, social and political—[and] ... often [leave] no room to examine the less tangible ways in which populations ... [are] affected by conflicts.”).

³⁶⁷ De Greiff and Duthie, *Transitional Justice and Development* 143.

rich terrain is no simple feat. Yet, a holistic vision of sequencing can more readily address synergies and tensions that can lead to more coherent, representative measures.

5 Conclusion

After releasing toil and plague upon the Earth, a distraught Pandora was comforted by hope, which was also released unto the world to ease its suffering.³⁶⁸ When it comes to TJ the contents of its ‘toolbox’ are ostensibly ‘neutral’ and ‘universal’ specters that escape uniform recognition. In practice, these norms, rights, and duties wreak havoc on the representativeness and coherence of TJ as a field. Pandora’s tale still offers a useful lesson to those who are struggling to reconcile with these metaphoric ‘toils’—there is yet hope.

Some correctives may be necessary to rid the field of certain astigmatic outlooks—the norms, rights, and duties at play may not appear as malicious if they are more clearly perceived. Indeed, in other accounts of the tale, the mythical box contained not evils, but blessings lost to humanity.³⁶⁹

5.1 Pandora’s Toolbox

The ‘universality’ of TJ values is evident in its ‘toolbox,’ wherein specific norms are promoted as international standards.³⁷⁰ Yet, indisputable global norms should be recognized as idealistic constructions that follow particular traditions rather than absolute representations of global mores. There is a significant gap between “declaring” and “realizing” norms that is particularly evident in transitioning societies.³⁷¹ Concretizing abstract, highly contested ideals, therefore, relies on a “sense of reality” that the normative idealism of international law seems to neglect.³⁷² To this end, TJ offers little guidance on how to “make real” what are otherwise moral aspirations translated into socio-political policy ambitions.³⁷³

Transitional justice places ‘accountability’ at the apex of its normative hierarchy, mutually reinforced by a parallel norm against impunity.³⁷⁴ Despite far-reaching language in some instruments, a consequent duty to prosecute international crimes remains limited, ambiguously

³⁶⁸ Hesiod, *Theogony and Works and Days* 62-96.

³⁶⁹ See Aesop, *Aesop's Fables* (Laura Gibbs, Oxford University Press 2008) 526 (Zeus and the Jar of Good Things).

³⁷⁰ Vieille, 'Transitional Justice: A Colonizing Field?'

³⁷¹ Haldemann, Unger and Cadelo, *The Principles to Combat Impunity* 347 (“[The] gap between declaring a norm and realizing it is further exacerbated in the aftermath of mass atrocity. Nowhere more than here does the concrete implementation of an abstract political ideal ... depend on the particularity of each situation.”).

³⁷² Ibid citing Isaiah Berlin, *The Sense of Reality: Studies in Ideas and Their History* (1st edn, Farrar, Straus and Giroux 1997).

³⁷³ Haldemann, Unger and Cadelo, *The Principles to Combat Impunity*.

³⁷⁴ Fletcher, 'International Criminal Law and the Subordination of Emancipation'.

derived, and otherwise carefully circumvented in practice.³⁷⁵ Even the Rome Statute is not helpful. The preamble alone may not create a binding legal obligation, and the Statute's complementarity regime does not in itself demand criminal accountability.³⁷⁶ As evidenced by the Colombian Final Agreement, a nuanced approach that allows for alternate sanctions may sufficiently satisfy 'accountability' without overemphasizing a duty to prosecute.³⁷⁷ Yet, such an approach is an elusive state practice, as instances beyond this example are scarce.

International law typically resorts to "top-down" forms of accountability rather than constructive "bottom-up" relationships.³⁷⁸ Hence, agency over 'accountability' can be called into question when local values are folded into international ones. Despite greater attention to traditional practices, international law ultimately envisions "conformity with international standards."³⁷⁹ Local accountability measures must therefore become sufficiently "judicialized" while somehow retaining their indigenous character.³⁸⁰ More broadly, transitioning societies may prioritize peace and security over criminal accountability, particularly if it rekindles violence.³⁸¹ Therefore, absolute adherence to criminal accountability is impracticable.³⁸² Even the strongest supporters of a duty to prosecute advocate for "selective prosecution."³⁸³

Meanwhile, the 'justice' promoted by international law claims to reflect a "global justice" movement that supposedly "transcend[s] the values, institutions and interests of directly affected communities."³⁸⁴ In this regard, justice in the retributive sense is assumed to have far-reaching powers—former ICC prosecutor Fatou Bensouda, for one, proclaims that "sustainable peace and

³⁷⁵ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity*; Seibert-Fohr, *Prosecuting Serious Human Rights Violations*; for a salient critique, see Nino, 'The Duty to Punish Past Abuses of Human Rights'. See further Genocide Convention Article 1, 4; Torture Convention Article 7; ICPPED Article 6 Fourth Geneva Convention Article 146.

³⁷⁶ Rome Statute preamble para. 4, 6; Wouters, *The Obligation to Prosecute International Law Crimes*, citing Tomuschat, 'The Duty To Prosecute International Crimes'; Lee, *The International Criminal Court*. See further Nouwen, *Complementarity in the Line of Fire*.

³⁷⁷ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 155.

³⁷⁸ Drumbl, *Atrocity, Punishment, and International Law* 133.

³⁷⁹ UN Secretary General, *2010 Guidance Note Principle 7*.

³⁸⁰ Vieille, 'Transitional Justice: A Colonizing Field?'

³⁸¹ Sriram and Roth, 'Externalization of Justice: What Does It Mean and What Is at Stake?' 58.

³⁸² Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 146.

³⁸³ Ibid; Orentlicher, 'Settling Accounts' 2599; Orentlicher, 'Settling Accounts' Revisited' 14; Kritz, *Transitional Justice* 134.

³⁸⁴ Nouwen and Werner, 'Monopolizing Global Justice' 158.

reconciliation are built on the *stabilizing pillar of justice*.³⁸⁵ Yet, ‘justice’ is not a static value.³⁸⁶ By conflating its retributive aspect, TJ tends to overlook divergent local attitudes. One risk of such a narrowed understanding is its ‘externalization’ to local communities.³⁸⁷ In these cases, global institutions ‘disconnect’ with transitioning societies through processes that are “remote, inaccessible, and unfamiliar.”³⁸⁸ Externalized justice is also particularly selective. Only a limited set of acts constitute international crimes, corresponding to action that targets a fraction of overall perpetrators.³⁸⁹ The ‘discretion’ of institutions such as the ICC may favor more promising cases, to the exclusion of various victims.³⁹⁰

Justice in the narrow retributive sense is not the exclusive conception in transitional settings.³⁹¹ Yet, local processes also run the risk of cooption by transitioning states. In Rwanda, the government fundamentally changed *Gacaca* from a traditional dispute resolution mechanism to a pseudo-judicial instrument.³⁹² A certain “sensitivity” to the local is, therefore, necessary to design locally relevant TJ interventions.³⁹³ Yet, it remains difficult to distinguish an approach that sufficiently defers to local agency without it being coopted by international or state interests.

5.2 Rights in Transition

The normative framework of TJ is operationalized through rights that emphasize victims as the recipients of certain duties.³⁹⁴ Likewise, TJ characterizes complex societal injustices as violations of legal rights that demand intervention.³⁹⁵ Yet, there is a stark contrast between ‘rights’ owed to victims and actual agency over their social realities. Freely exercised ‘rights’ are distinct from

³⁸⁵ International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a media briefing in Khartoum, Sudan* (20 October 2020).

³⁸⁶ Moffett, *Justice for Victims Before the International Criminal Court*.

³⁸⁷ Sriram and Roth, ‘Externalization of Justice: What Does It Mean and What Is at Stake?’.

³⁸⁸ McGregor, ‘International Law as a ‘Tiered Process’’ 51.

³⁸⁹ Drumbl, *Atrocity, Punishment, and International Law* 151.

³⁹⁰ Ibid; Nouwen and Werner, ‘Monopolizing Global Justice’.

³⁹¹ Shaw, Waldorf and Hazan, *Localizing Transitional Justice*.

³⁹² Ingelare, ‘The Gacaca Courts in Rwanda’ 49.

³⁹³ McGregor, ‘International Law as a ‘Tiered Process’’ 50 citing Mark A. Drumbl, ‘Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan’ (2003) 42 Colum J Transnat’l L 349 363.

³⁹⁴ De Greiff and Duthie, *Transitional Justice and Development* 58.

³⁹⁵ Fletcher, ‘International Criminal Law and the Subordination of Emancipation’ 709.

collective policies that are imposed in service of these rights. Refashioned as policy goals, rights appear more damaging, exclusionary, or neglectful of the abuses suffered by victims.³⁹⁶

Critical literature has advocated for expanding TJ to include violations of ESCRs, and more broadly to include social and structural injustices.³⁹⁷ Nevertheless, the same literature does not clearly distinguish ESCRs as legal rights that have limited capabilities to dispel the “magical legalism” of transitional realities.³⁹⁸ Much of this scholarship maintains a disconnect in what ‘justice’ entails for victims by perceiving socio-economic abuses as ‘needs’ as opposed to rights.³⁹⁹ In one set of studies, victims described the “availability of food, security, education, and restoring livelihoods” as pressing concerns.⁴⁰⁰ Yet subsequent scholarship would find that “‘the *need* for food and peace is far more pressing’ than the desire for justice” overlooking ‘justice’ for health, education or work as legal rights.⁴⁰¹ Nevertheless, the “artificial distinction” between CPRs and ESCRs is being slowly dismantled in practice.⁴⁰²

Meanwhile, the right to truth is a principal concern for TJ as far as it is a component of realizing the right to justice. For this reason, “non-judicial” truth-seeking is generally not a legitimate substitute for criminal prosecutions.⁴⁰³ Victims are also assumed to be ‘healed’ by truth-telling.⁴⁰⁴ The South African TRC was synonymous with *ubuntu*, or societal healing, yet most victims who testified found the process was far from healing—up to 60 percent reported being retraumatized

³⁹⁶ Ibid.

³⁹⁷ Turner, *Violence, Law and the Impossibility of Transitional Justice* 32. See further Cavallaro and Albuja, 'The Lost Agenda' 125; Schmid and Nolan, "Do No Harm"?' 376; Sharp, 'Emancipating Transitional Justice' 160 citing Miller, 'Effects of Invisibility'.

³⁹⁸ Fletcher, 'International Criminal Law and the Subordination of Emancipation' 709.

³⁹⁹ See [Right to Justice](#).

⁴⁰⁰ Schmid and Nolan, "Do No Harm"?' citing Phuong Pham and others, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda* (2005); Phuong Pham and others, *So We Will Never Forget: A Population-Based Survey On Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (2009).

⁴⁰¹ Ibid.

⁴⁰² Laplante, 'On the Indivisibility of Rights' 158 (arguing that transitional settings present an "important opportunity to begin melting the “artificial distinctions” between the two bodies of rights, showing they are “permeable” and “merging” despite ranking or designation.”).

⁴⁰³ Hayner, *Unspeakable Truths* 92.

⁴⁰⁴ Fletcher and Weinstein, 'Violence and Social Repair' 597-598.

and many regretted testifying.⁴⁰⁵ Transitional societies thus may just as much invoke a ‘right to forget’ as they do a ‘duty to remember.’

Finally, the right to reparations is only a right as far as capable victims exercise it in individual criminal proceedings. This reduces the overall ‘right’ to reparations to the outcomes of a criminal justice policy.⁴⁰⁶ For one, the ICC’s reparations system reveals a limited output—in over two decades only a handful of cases have reached reparations decisions.⁴⁰⁷ Put best by Moffet, this limitation is a result of saddling reparations on individual convictions with reparations “copied and pasted at the end.”⁴⁰⁸ This relationship casts doubt on the Court’s ability to “achieve anything beyond tokenism” with reparations.⁴⁰⁹

5.3 Interdisciplinary Realities

Mounting contestation and calls for expansion have blurred the conceptual borders of TJ.⁴¹⁰ As a result, contemporary views of TJ overlap with adjacent fields such as peacebuilding and development. Insights from these fields are particularly conducive to synergies and tensions that, if duly addressed, can lead to more sustainable transitional interventions.

TJ and development are mutually reinforcing fields.⁴¹¹ With this in mind, a rights-based approach to development has emerged that conceives of individuals as active rights-holders, as opposed to passive beneficiaries. This HRBA offers a similar breadth of frameworks as TJ centered around the ‘right to development.’⁴¹² The UN Common Understanding, implemented in certain states via

⁴⁰⁵ Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 55-56; Shaw, 'Memory Frictions' citing Hayner, *Unspeakable Truths* 144.

⁴⁰⁶ See Garcia-Godos, 'Victim Reparations in Transitional Justice - What Is at Stake and Why'.

⁴⁰⁷ The latest case at the time of writing is *Ntaganda*, see *Prosecutor v. Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659 (8 March 2021). See further Moffett, 'Reparations for Victims at the International Criminal Court' 1205; Moffett and Sandoval, 'Tilting at Windmills'.

⁴⁰⁸ Moffett, 'Reparations for Victims at the International Criminal Court' 1204.

⁴⁰⁹ Moffett and Sandoval, 'Tilting at Windmills' citing Carla Ferstman, 'Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd revised edn, Brill | Nijhoff 2020) 449.

⁴¹⁰ Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice'; Bell, 'Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’'.

⁴¹¹ See De Greiff and Duthie, *Transitional Justice and Development*.

⁴¹² McEvoy, 'Beyond Legalism'; Laplante, 'On the Indivisibility of Rights'; De Greiff and Duthie, *Transitional Justice and Development*; Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' 352.

the PANEL principles, offers clear links with TJ ideals related to accountability, participation, and legality.⁴¹³

HRBA offers the potential to address injustices that fall outside the scope of TJ. Harms that fall short of the gravity thresholds of TJ may fall under development assistance. On the other hand, development measures can conflict with reparations when both compete against limited resources.⁴¹⁴ Moreover, reparations and development assistance are often conceptually conflated. While reparations are characterized by an underlying entitlement to redress, development assistance more broadly targets socioeconomic distribution.⁴¹⁵ In practice, reparations programs are morphed into more feasible “development-like measures,” erasing their reparative purpose.⁴¹⁶ As LaPlante remarks, “approaching reparations as a means to ... development pits ‘the poor against the poor-victims.’”⁴¹⁷ Indeed, instead of expressing solidarity, ‘development-like’ reparations undermine the significance of repairing harm and fuel further resentment.⁴¹⁸

Meanwhile, viewing TJ as an integral part of peacebuilding may serve to transcend “the increasingly rote” TJ toolkit.⁴¹⁹ TJ mechanisms can contribute to the emergent IBL doctrine as a corrective to the liberalizing tendencies of certain international actors.⁴²⁰ Its emphasis on institutional capacity-building and the rule of law synergizes with TJ measures related to guarantees of non-recurrence and institutional reform.⁴²¹ For example, truth commissions can shed light on structural and institutional violence and provide relevant recommendations.⁴²² Meanwhile, institutional reform programs such as the *MATRA* Ukraine project can integrate TJ and peacebuilding, combining classical TJ aims along with long-term contributions to peace and the rule of law.⁴²³ Nevertheless, neo-liberal assumptions may still lurk within these measures.

⁴¹³ Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' See further Scottish Human Rights Commission, *A Human Rights Based Approach: PANEL principles*.

⁴¹⁴ Buchanan and Zumbansen, *Law in Transition: Human Rights, Development and Transitional Justice*.

⁴¹⁵ Orlovsky and Roht-Arriaza, 'Reparations and Development'; Duthie, 'Toward a Development-sensitive Approach' 299.

⁴¹⁶ Laplante, 'On the Indivisibility of Rights'.

⁴¹⁷ Ibid 164.

⁴¹⁸ Ibid.

⁴¹⁹ Sharp, 'Emancipating Transitional Justice' 152.

⁴²⁰ Sriram, 'Justice as Peace?'. See further Sharp, 'Beyond the Post-Conflict Checklist'.

⁴²¹ Sharp, 'Beyond the Post-Conflict Checklist'; Sriram, 'Justice as Peace?'.

⁴²² Laplante, 'Transitional Justice and Peace Building' 347.

⁴²³ T.M.C. Asser Instituut, 'MATRA Ukraine'.

TJ measures concerned with reconciliation can also strengthen the reintegration aspect of DDR, while accountability mechanisms may disincentivize ex-combatants from demilitarizing.⁴²⁴ A nuanced approach that emphasizes the prosecution of the ‘most responsible’ may mitigate this risk.⁴²⁵ DRR-related benefits for ex-combatants may also conflict with victims’ reparations. Victims may view compensation for ex-combatants as a “reward” for harm.⁴²⁶ A closer integration of DDR and reparations awards can mitigate these feelings. For instance, requiring ex-combatants to contribute to reparations initiatives can fulfil a dual reintegration and reparation role.⁴²⁷

5.4 Final Remarks

This thesis sought to argue that if TJ aims to sequence itself in transitional settings, it may not be sufficient to assume certain ‘international norms and standards’ that apply without question. It is necessary to critically interrogate these norms and the rights and duties they claim to produce. Indeed, if knowing “what you want” is essential to norm-creation, knowing what you want to sequence presupposes the act of sequencing itself.⁴²⁸ To this end, this thesis calls into question the ability of TJ to realize its aims if it pursues them with a narrow understanding of its core values.⁴²⁹

This thesis offered a limited analysis of the broader sequencing definition, focused on the normative dimension that informs TJ strategies. The methodology applied emphasized a normative analysis that resulted in highly theoretical findings and made limited use of empirical data. This thesis ultimately reflects a certain normative position on behalf of the author that requires further empirical support. Moreover, this thesis did not offer a deeper examination of its case studies nor related jurisprudence from other legal frameworks. Admittedly, several international ‘standards’ fell outside the scope of closer inspection.⁴³⁰

⁴²⁴ Sharp, 'Beyond the Post-Conflict Checklist'; Duthie and Specht, 'DDR, Transitional Justice, and the Reintegration of Former Child Combatants' Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace '.

⁴²⁵ Sharp, 'Beyond the Post-Conflict Checklist' 189.

⁴²⁶ Herman, Martin-Ortega and Sriram, 'Beyond Justice Versus Peace ' 59-60 citing Sriram and Herman, 'DDR and Transitional Justice: Bridging the Divide?'; Sharp, 'Beyond the Post-Conflict Checklist'.

⁴²⁷ Roberti di Sarsina, Schabas and Barbera, *Transitional Justice and a State's Response to Mass Atrocity* 159.

⁴²⁸ Brooks, 'The New Imperialism' 2333.

⁴²⁹ Teitel, 'Transitional Justice Genealogy' 71.

⁴³⁰ See for example Principles on Housing and Property Restitution for Refugees and Displaced Persons (28 June 2005) E/CN.4/Sub.2/2005/17.

To tackle these limitations, subsequent scholarship can explore the institutional and spatial-temporal aspects of sequencing left unaddressed. Empirical research can integrate data across these aspects and develop a technical understanding of sequencing to address the effectiveness of TJ mechanisms in different practical arrangements. Further scholarship can also explore sequencing other legal frameworks, such as international refugee law, and compare the jurisprudence of other courts such as the ECtHR.

This thesis concludes that any measure of sequencing first needs to evaluate its assumptions before questioning the specific modalities of its intervention.⁴³¹ To this end, TJ needs to resolve the normative inconsistencies that persist at its peripheries, including the question of local agency and socio-economic justice.⁴³² Efforts to sequence such inherently contested concepts may otherwise be “futile.”⁴³³ Assuming the sequencing of these concepts reduces their contestation to a technical product—a ‘toolbox’ used to determine what type of TJ mechanism applies when rather than a deeper interrogation of the field’s interventions in every context.⁴³⁴

Perhaps sequencing can only be addressed after abolishing certain paradigms, or by delineating borders with adjacent disciplines. To conclude with pertinent remarks by Hansen

One central question ... is whether we can operate with one coherent theory of what transitional justice is and what it can facilitate ... [Ultimately] it is not clear whether, to what extent, or under what conditions transitional justice is capable of fulfilling its prophetic ambitions.⁴³⁵

Considering the normative dilemmas that precede sequencing itself, it is nonetheless an area that merits further attention. In any case, a normatively sound sequencing strategy remains elusive.

⁴³¹ Fletcher, Weinstein and Rowen, 'Context, Timing and the Dynamics of Transitional Justice'.

⁴³² Sharp, 'Interrogating the Peripheries' 152.

⁴³³ Bell, 'Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’' 27.

⁴³⁴ Ibid.

⁴³⁵ Hansen, 'The Time and Space of Transitional Justice' 51.

Bibliography

Case Law

- Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Rep 04 136) (9 July 2004) (International Court of Justice)
- Factory At Chorzów (Germany v. Poland) (Series A No 17) (1928) (Permanent Court of Arbitration)
- Mapiripán Massacre v. Colombia (Judgement) Series C No. 134 (Inter-American Court of Human Rights)
- Moiwana Community v. Suriname (Judgement) Series C No. 124 (15 June 2005) (Inter-American Court of Human Rights)
- Prosecutor v. Ahmad Al Faqi Al Mahdi (Reparations Order) ICC-01/12-01/15 (17 August 2017) (International Criminal Court)
- Prosecutor v. Ayyash et al. (Interlocutory Decision) STL-11-01 (16 February 2011) (Special Tribunal for Lebanon)
- Prosecutor v. Bosco Ntaganda (Reparations Order) ICC-01/04-02/06-2659 (8 March 2021) (International Criminal Court)
- Prosecutor v. Germain Katanga (Reparations Order) ICC-01/04-01/07-T (24 March 2017) (International Criminal Court)
- Prosecutor v. Jean-Pierre Bemba Gombo (LRVs' Joint Submissions) ICC-01/05-01/08-3649 (12 July 2018) (International Criminal Court)
- Prosecutor v. Thomas Lubanga Dyilo (Information Regarding Collective Reparations) 13 February 2017 (13 February 2017) (International Criminal Court)
- Prosecutor v. Thomas Lubanga Dyilo (Decision on Indirect Victims) ICC-01/04-01/06 (April 8, 2009) (International Criminal Court)
- Prosecutor v. Thomas Lubanga Dyilo (Appeals Judgement Reparations) ICC-01/04-01/06-3129 (March 3, 2015) (International Criminal Court)
- Prosecutor v. Thomas Lubanga Dyilo (Judgement) ICC-01/04-01/06 (14 March 2012) (International Criminal Court)
- Prosecutor v. Thomas Lubanga Dyilo (Decision) ICC-01/04-01/06-119 (18 January 2008) (International Criminal Court)
- Velásquez-Rodríguez v. Honduras (Judgement) Ser. C No. 4 (29 July 1988) (Inter-American Court of Human Rights)

Legislation

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) A/RES/60/147

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984) UNTS 1465

Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948) UNTS 78

Draft Articles on Prevention and Punishment of Crimes Against Humanity (2019) A/74/10

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Adopted on 12 August 1949) 75 UNTS 287

International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 23 December 2010) A/RES/47/133

International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965) 660 UNTS 195

Principles on Housing and Property Restitution for Refugees and Displaced Persons (28 June 2005) E/CN4/Sub2/2005/17

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted on 8 June 1977) 1125 UNTS 609

Rome Statute of the International Criminal Court (adopted 17 July 1998) UN Doc A/CONF183/9*

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 7 July 2009) (25 May 1993) S/RES/827

Statute of the Special Tribunal for Lebanon (2007) S/RES/1757 (Annex)

Truth and Reconciliation Commission Act (2000) (Sierra Leone)

Updated Set of Principles for the Protection and Promotion of Human Rights Through Action To Combat Impunity (8 February 2005) E/CN4/2005/102/Add1

International Federation for Human Rights, 'The Nairobi Declaration on Women's and Girls' (International Meeting on Women's and Girls' Right to a Remedy and Reparation)

United Nations General Assembly, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23

Integrated Disarmament Demobilization and Reintegration Standards (IDDRS) (1 August 2006)

Resolution 1757 (30 May 2007) S/RES/1757

Secondary Sources

Aesop, *Aesop's Fables* (Oxford University Press 2008)

Aggestam K and Björkdahl A, *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Taylor & Francis Group 2012)

Al Jazeera, 'Sudan Protesters Demand Gov't Step Down Over Economic Reforms' (*Al Jazeera Media Network*, 30 Jun 2021) <<https://www.aljazeera.com/news/2021/6/30/sudan-protesters-demand-govt-step-down-over-imf-backed-reforms>> accessed 10 August 2022

Aldana-Pindell R, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399-1502

Ambos K, 'The Legal Framework of Transitional Justice: A Systematic Study With a Special Focus on the Role of the ICC' in Ambos K, Large J and Wierda M (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Springer 2009)

Ambos K, Large J and Wierda M (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Springer 2009)

Arthur P, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Hum Rts Q* 321

Australian Human Rights Commission, 'Human Rights Based Approaches' (*Australian Human Rights Commission*, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-based-approaches>> accessed 10 August 2022

Baehr PR, 'How to Come to Terms with the Past' in Hughes E, Schabas W and Thakur R (eds), *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press 2007)

Bailliet C and Larsen KM, *Promoting Peace Through International Law* (Oxford University Press 2015)

Baker C and Obradovic-Wochnik J, 'Mapping the Nexus of Transitional Justice and Peacebuilding' (2016) 10 *Journal of Intervention and Statebuilding* 281-301

Balkin JM, 'Being Just with Deconstruction' (1994) 3 *Soc & Legal Stud* 393

Balta A, Bax M and Letschert R, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29 *International Criminal Justice Review* 221-248

- Bassiouni MC, 'Victims' Rights and Participation in ICC Proceedings and in Emerging Customary International Law' in Steinberg RH and Bassiouni MC (eds), *Contemporary Issues Facing the International Criminal Court* (Brill | Nijhoff 2016)
- Bell C, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3 *International Journal of Transitional Justice* 5-27
- Berlin I, *The Sense of Reality: Studies in Ideas and Their History* (1st edn, Farrar, Straus and Giroux 1997)
- Bhat PI, *Idea and Methods of Legal Research* (Oxford University Press 2020)
- Bilsky L, 'The Right to Truth in International Criminal Law' in Heller KJ and others (eds), *The Oxford Handbook of International Criminal Law* (2020)
- Bollaert C, 'Anchoring Concepts: Sustainable Peace, Identity, Culture and Worldview' in Bollaert C (ed), *Reconciliation and Building a Sustainable Peace: Competing Worldviews in South Africa and Beyond* (Springer International Publishing 2019)
- Boraine A, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press 2001)
- Brooks RE, 'The New Imperialism: Violence, Norms, and the Rule of Law' (2002) 101 *Mich L Rev* 2275
- Buchanan RM and Zumbansen P, *Law in Transition: Human Rights, Development and Transitional Justice*, vol 3 (Osgoode Readers, Hart Publishing 2014)
- Burgis-Kasthala M, 'Defining Justice During Transition? International and Domestic Contestations Over the Special Tribunal for Lebanon' (2013) 7 *International Journal of Transitional Justice* 497-517
- Carranza R, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 *International Journal of Transitional Justice* 310-330
- Cassese A, *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009)
- Cavallaro JL and Albuja S, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in McEvoy K and others (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008)
- Cohen S, *States of Denial: Knowing about Atrocities and Suffering* (Wiley 2013)
- Commission for Reception Truth and Reconciliation in East Timor (CAVR), *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (31 October 2005)

- Committee Against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties* (19 November 2012) CAT/C/GC/3
- Cooper N, Turner M and Pugh M, 'The End of History and the Last Liberal Peacebuilder: A Reply to Roland Paris' (2011) 37 *Review of International Studies* 1995-2007
- De Greiff P and Duthie R, *Transitional Justice and Development: Making Connections* (Social Science Research Council; John Wiley [distributor] 2010)
- Drumbl MA, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)
- Drumbl MA, 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' (2003) 42 *Colum J Transnat'l L* 349
- Drumbl MA, 'Sclerosis: Retributive Justice and the Rwandan Genocide' (2000) 2 *Punishment & Society* 287-307
- Duthie R, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 292-309
- Duthie R and Specht I, 'DDR, Transitional Justice, and the Reintegration of Former Child Combatants' in Patel AC, De Greiff P and Waldorf L (eds), *Disarming the Past: Transitional Justice and Ex-Combatants* (Advancing Transitional Justice, Social Science Research Council 2009)
- European Network of National Human Rights Institution, 'Human Rights-Based Approach' (ENNHRI, 2022) <<https://ennhri.org/about-nhris/human-rights-based-approach/>> accessed 10 August 2022
- Ferstman C, 'Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness' in Ferstman C and Goetz M (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd revised edn, Brill | Nijhoff 2020)
- Fletcher LE, 'International Criminal Law and the Subordination of Emancipation: The Question of Legal Hierarchy in Transitional Justice' in Heller KJ and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford handbooks, 1st edn, Oxford University Press 2020)
- Fletcher LE and Weinstein HM, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *Human Rights Quarterly* 573-639
- Fletcher LE, Weinstein HM and Rowen J, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 *Hum Rts Q* 163
- Gaeta P, 'Grave Breaches of the Geneva Conventions' in Clapham A and others (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2015)

- Garbett C, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC' (2016) 15 *Journal of Human Rights* 40-59
- Garbett C, 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court' (2013) 16 *Contemporary Justice Review* 193-213
- Garcia-Godos J, 'Victim Reparations in Transitional Justice - What Is at Stake and Why' (2008) 26 *Nordic Journal of Human Rights* 111
- García-Godos J, 'Building Trust Through Accountability: Transitional Justice in the Search for Peace' in Bailliet C (ed), *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019)
- Gillespie I, *The Myth of Pandora's Box - Iseult Gillespie* (TED-Ed 15 Jan 2019)
- Goodwin M, 'Holding Up a Mirror to the Process of Transition? The Coercive Sterilisation of Romani Women in the Czech Republic Post-1991' in Buchanan RM and Zumbansen P (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Hart Publishing 2014)
- Gready P and Robins S, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339-361
- Green R, 'Draft Global Treaty on Crimes Against Humanity Reaches Critical Juncture' (*International Bar Association*, 29 September 2021) <<https://www.ibanet.org/draft-global-treaty-on-crimes-against-humanity>> accessed 10 August 2022
- Groome D, 'Principle 2. The Inalienable Right to Truth' in Haldemann F, Unger T and Cadelo V (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018)
- Grover L, 'Transitional Justice, International Law and the United Nations' (2019) 88 *Nordic Journal of International Law* 359-397
- Guissé EH, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)* (27 June 1997) E/CN.4/Sub.2/1997/8
- Haldemann F, Unger T and Cadelo V, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018)
- Hansen TO, 'The Time and Space of Transitional Justice' in Lawther C, Moffett L and Jacobs D (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017)
- Hansen TO, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Buckley-Zistel S and others (eds), *Transitional Justice Theories* (Routledge 2015)

- Hayner PB, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Taylor & Francis Group 2010)
- Herman J, Martin-Ortega O and Sriram CL, 'Beyond Justice Versus Peace Transitional Justice and Peacebuilding Strategies', *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (Taylor & Francis Group 2012)
- Hernan O, 'Beyond the State of Play: Establishing a Duty of Non-State Armed Groups To Provide Reparations' (2022) 102 *International Review of the Red Cross* 1033–1056
- Hesiod, *Theogony and Works and Days* (Oxford University Press 1999)
- Hoecke MV, *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing 2011)
- Human Rights Council, *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (13 October 2011) A/HRC/RES/18/7
- Human Rights Watch, *The Rwandan Patriotic Front* (1999)
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin L Rev* 83
- Ingelare B, 'The Gacaca Courts in Rwanda' in Huyse L and Salter M (eds), *Traditional Justice and Reconciliation After Violent Conflict: Learning From African Experiences* (International IDEA 2008)
- International Commission of Jurists (ICJ), *The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners' Guide* (2018)
- International Committee of the Red Cross, *Commentary on the Third Geneva Conventions* (2020)
- International Criminal Court, *ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya* (30 September 2009)
- International Criminal Court, *ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice* (28 October 2021)
- International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a media briefing in Khartoum, Sudan* (20 October 2020)
- International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia (10-13 September 2017)* (13 September 2017)

- Kiernan B, 'The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80' (2003) 35 *Critical Asian Studies* 585-597
- Kingdom of the Netherlands, 'The Matra Programme' (*Netherlandsandyou.nl*, <<https://www.netherlandsandyou.nl/your-country-and-the-netherlands/ukraine/and-the-netherlands/matra-programme>> accessed 10 July 2022
- Kritz NJ, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, vol I, General Considerations (United States Institute of Peace Press 1995)
- Langford M, 'Interdisciplinarity and Multimethod Research' in Andreassen BA, Sano H-O and McInerney-Lankford S (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017)
- Laplante LJ, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Develop' (2007) 10 *Yale Hum Rts & Dev LJ* 141
- Laplante LJ, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 *International Journal of Transitional Justice* 331-355
- Lee RS, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999)
- Lenzen M, *Roads Less Traveled? Conceptual Pathways for Development and Transitional Justice* (2009)
- Lundy P and McGovern M, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 *Journal of Law and Society* 265-292
- Lutz E and Sikkink K, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chi J Int'l L* 1
- Mani R, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press; Blackwell Publishers Inc. 2002)
- Mani R, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253-265
- McAuliffe Pd, *Transformative Transitional Justice and the Malleability of Post-conflict States* (Edward Elgar Publishing, Inc. 2017)
- McAuliffe Pd, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition' (2017) 2 *Journal of Conflictology* 30
- McEvoy K, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *Journal of Law and Society* 411-440

- McEvoy K and others, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008)
- McGregor L, 'International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level' in McEvoy K and McGregor L (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing Plc 2008)
- Mégret F, 'What Sort of Global Justice is 'International Criminal Justice'?' (2015) 13 *Journal of International Criminal Justice* 77-96
- Mendez JE, 'Accountability for Past Abuses' (1997) 19 *Hum Rts Q* 255
- Miller Z, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 266-291
- Minow M, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998)
- Moffett L, *Justice for Victims Before the International Criminal Court* (Routledge Research in International Law, Routledge 2014)
- Moffett L, 'Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' (2015) 10 *International Journal of Transitional Justice* 146-167
- Moffett L, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 *The International Journal of Human Rights* 1204-1222
- Moffett L, 'Transitional Justice and Reparations: Remediating the Past?' in Lawther C, Moffett L and Jacobs D (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017)
- Moffett L and Sandoval C, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34 *Leiden Journal of International Law* 749-769
- Muvingi I, 'Donor-Driven Transitional Justice and Peacebuilding' (2016) 11 *Journal of Peacebuilding & Development* 10-25
- Naftali P, 'Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?' (2016) XIII *Champ Pénal*
- Nagy R, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275-289
- Nino CS, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *The Yale Law Journal* 2619-2640

- Nouwen SMH, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013)
- Nouwen SMH, 'Justifying justice' in Crawford J and Koskeniemi M (eds), *The Cambridge Companion to International Law* (Cambridge Companions to Law, Cambridge University Press 2012)
- Nouwen SMH and Werner WG, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2014) 13 *Journal of International Criminal Justice* 157-176
- Ochoa-Sánchez JC, 'Economic and Social Rights and Transitional Justice: A Framework of Analysis' (2019) 18 *Journal of Human Rights* 522-542
- Office of the High Commissioner for Human Rights, *Gacaca: Le Droit Coutumier Au Rwanda* (1996) LIB/AFRICA/RWA/24
- Office of the High Commissioner for Human Rights, 'International Standards' (<<https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence/international-standards>> accessed 10 July 2022)
- Office of the High Commissioner for Human Rights, *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice* (2020) A/HRC/45/45
- Office of the High Commissioner for Human Rights, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights* (27 December 2002) E/CN.4/2003/63*
- Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes* (2008) HR/PUB/08/1
- Office of the High Commissioner for Human Rights, *Study on the Right to the Truth* (8 February 2006) E/CN.4/2006/91
- Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (1 January 2014) HR/PUB/13/5
- Olsen TD, Payne LA and Reiter AG, 'At What Cost?' in Olsen TD, Payne LA and Reiter AG (eds), *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace 2010)
- Olsen TD, Payne LA and Reiter AG, 'Beyond the Justice Cascade' in Olsen TD, Payne LA and Reiter AG (eds), *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, vol a (U.S. Institute of Peace 2010)
- Olsen TD, Payne LA and Reiter AG, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (U.S. Institute of Peace 2010)

- Oomen B, 'Donor-Driven Justice and its Discontents: The Case of Rwanda' (2005) 36 *Development and Change* 887-910
- Orentlicher DF, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1990) 100 *Yale LJ* 2537
- Orentlicher DF, "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *International Journal of Transitional Justice* 10-22
- Orlovsky K and Roht-Arriaza N, 'A Complementary Relationship: Reparations and Development' in De Greiff P and Duthie R (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council; John Wiley 2010)
- Parlevliet M, 'Considering Truth - Dealing with a Legacy of Gross Human Rights Violations' (1998) 16 *Neth Q Hum Rts* 141
- Payne LA, Pereira G and Bernal-Bermúdez L, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes' Lever* (Cambridge University Press 2020)
- Pensky M, 'Amnesty on Trial: Impunity, Accountability, and the Norms of International Law' (2008) 1 *Ethics & Global Politics* 1-40
- Pham P and others, *So We Will Never Forget: A Population-Based Survey On Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (2009)
- Pham P and others, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda* (2005)
- Provost R, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002)
- Przeworski A, 'Some Problems in the Study of the Transition to Democracy' in O'Donnell G, Schmitter PC and Whitehead L (eds), vol 3 (The Johns Hopkins University Press 1986)
- Quinn JR, 'The Development of Transitional Justice' in Lawther C, Moffett L and Jacobs D (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017)
- Quinn JR, *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen's University Press 2009)
- Quinn JR, 'Whither the "Transition" of Transitional Justice' (2014) 8 *Interdisc J Hum Rts L* 63
- Rijksoverheid, 'NFRP-Matra: subsidie voor versterken rechtsstaat en democratie in de Europese regio' (*Rijksoverheid.nl*, <<https://www.rijksoverheid.nl/onderwerpen/europese-subsidies/nederlands-fonds-voor-regionale-partnerschappen-nfrp/nfrp-matra-subsidie>> accessed 10 July 2022)

- Roberti di Sarsina J, Schabas W and Barbera A, *Transitional Justice and a State's Response to Mass Atrocity: Reassessing the Obligations to Investigate and Prosecute* (T.M.C. Asser Press 2019)
- Rodman KA, 'Duty to Prosecute' in Chatterjee DK (ed), *Encyclopedia of Global Justice* (Springer Netherlands 2011)
- Rothe DL and Ross JI, 'Private Military Contractors, Crime, and the Terrain of Unaccountability' (2010) 27 *Justice Quarterly* 593-617
- Sadat LN, 'Towards a New Treaty on Crimes Against Humanity: Next Steps' (*Just Security*, 13 September 2021) <<https://www.justsecurity.org/78063/towards-a-new-treaty-on-crimes-against-humanity-next-steps/>> accessed 10 August 2022
- Sadat LN and Radhakrishnan A, 'Crimes Against Humanity: Little Progress on Treaty as UN Legal Committee Concludes its Work' (*Just Security*, 7 December 2021) <<https://www.justsecurity.org/79415/crimes-against-humanity-little-progress-on-treaty-as-un-legal-committee-concludes-its-work/>> accessed 10 August 2022
- Sankey D, 'Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice' (2013) 8 *International Journal of Transitional Justice* 121-140
- Sarkin J and Daly E, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661-728
- Schabas W, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011)
- Schmid E and Nolan A, '“Do No Harm”? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 362-382
- Scottish Human Rights Commission, *A Human Rights Based Approach: PANEL principles*
- Seibert-Fohr A, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009)
- Sen A, *Development as Freedom* (Oxford University Press 1999)
- Sharp DN, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique' (2013) 14 *Chicago Journal of International Law* 165-196
- Sharp DN, 'Bridging the Gap: The United Nations Peacebuilding Commission and the Challenges of Integrating DDR and Transitional Justice' in Sriram CL and others (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (Taylor & Francis Group 2012)
- Sharp DN, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2014) 9 *International Journal of Transitional Justice* 150-169

- Sharp DN, 'Interrogating the Peripheries: the Preoccupations of Fourth Generation Transitional Justice' (2013) 26 *Harvard Human Rights Journal* 149
- Sharp DN, *Justice and Economic Violence in Transition* (Springer 2014)
- Sharp DN, 'Transitional Justice and 'Local' Justice' in Yusuf HO and Van der Merwe H (eds), *Transitional Justice: Theories, Mechanisms and Debates* (Routledge 2022)
- Shaw R, 'Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 183-207
- Shaw R, Waldorf L and Hazan P, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010)
- Sikkink K, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Co. 2011)
- Sikulibo JdD, 'Victims' Participation in International Criminal Proceedings Beyond Mere Witnesses: Opportunities and Challenges in Sexual Violence Cases', *Sexual Violence and Effective Redress for Victims in Post-Conflict Situations: Emerging Research and Opportunities* (IGI Global 2019)
- Smith J, *Globalization, Social Movements, and Peacebuilding* (Syracuse University Press 2013)
- Special Tribunal for Lebanon, 'The STL in numbers' (<<https://www.stl-tsl.org/en>> accessed 10 July 2022)
- Special Tribunal for Lebanon, *Tenth Annual Report (2018-2019)*
- Sriram CL, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (Taylor & Francis Group 2005)
- Sriram CL, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2007) 21 *Global Society* 579-591
- Sriram CL and Herman J, 'DDR and Transitional Justice: Bridging the Divide?' (2009) 9 *Conflict, Security & Development* 455-474
- Sriram CL, Martin-Ortega O and Herman J, 'Promoting the Rule of Law: From Liberal to Institutional Peacebuilding' in Sriram CL, Martin-Ortega O and Herman J (eds), *Peacebuilding and Rule of Law in Africa: Just Peace?* (Taylor & Francis Group 2010)
- Sriram CL and Roth BR, 'Externalization of Justice: What Does It Mean and What Is at Stake?' (2001) XII *Finnish Yearbook of International Law*
- Sudan Tribune, 'Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case' (*Sudan Tribune*, 2009) <<https://sudantribune.com/article30211/>> accessed 10 July 2022

- Sweeney JA, 'The Elusive Right to Truth in Transitional Human Rights Jurisprudence' (2018) 67 *International and Comparative Law Quarterly* 353-387
- T.M.C. Asser Instituut, 'MATRA Ukraine - Strengthening Ukraine's Capacity to Investigate and Prosecute International Crimes' (*Asser Institute Center for International & European Law*, <<https://www.asser.nl/projects-legal-advice/projects/?rId=1161>> accessed 10 July 2022
- T.M.C. Asser Instituut and Global Rights Compliance, 'MATRA-Ukraine' (*Asser Institute*, <<https://www.asser.nl/matra-ukraine/>> accessed 10 July 2022
- Taussig MT, *Law in a Lawless Land: Diary of a "Limpieza" in Colombia* (New Press 2003)
- Teitel RG, 'Transitional Justice Genealogy' (2003) 16 *Harv Hum Rts J* 69
- Tobin J, 'The Progressive Obligation to Realize the Right to Health' in Tobin J (ed), *The Right to Health in International Law* (Oxford University Press 2011)
- Tomuschat C, 'The Duty To Prosecute International Crimes Committed by Individuals' in Cremer H-J and others (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002)
- Turner C, 'Deconstructing Transitional Justice' (2013) 24 *Law and Critique* 193-209
- Turner C, 'Transitional Justice and Critique' in Lawther C, Moffett L and Jacobs D (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017)
- Turner C, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017)
- UN Secretary General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010) S/2004/616
- UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (2004) S/2004/616
- United Nations, 'Status of Treaties - International Covenant on Economic, Social and Cultural Rights' (*United Nations Treaty Collection*, 2022) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4#9> accessed 10 August 2022
- United Nations General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo De Greiff*) A/HRC/21/46
- United Nations Sustainable Development Group, 'Human Rights-Based Approach' (*United Nations*, 2022) <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 10 August 2022

- United Nations Sustainable Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (September 2003)
- van Boven T, *Introductory Note: The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2010)
- van den Herik L and Stahn C, *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012)
- van der Merwe H and Lamb G, *Transitional Justice and DDR: The Case of South Africa* (2009)
- van Noorloos M, 'A Critical Reflection on the Right to the Truth about Gross Human Rights Violations' (2021) 21 Human Rights Law Review 874-898
- Viebach J, 'Principle 3. The Duty to Preserve Memory' in Haldemann F, Unger T and Cadelo V (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law, 1st edn, Oxford University Press 2018)
- Vieille S, 'Transitional Justice: A Colonizing Field?' (2012) 4 Amsterdam Law Forum 58
- Waldorf L, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Social & Legal Studies 171-186
- Wouters J, *The Obligation to Prosecute International Law Crimes* (2005)
- Zalaquett J, 'Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints International Human Rights Symposium' (1990) 13 Hamline L Rev 623
- Zumbansen P, 'Transitional Justice in a Transnational World: The Ambiguous Role of Law' (2008) CLPE Research Paper No 40/2008