Preface

To show that justice has its practical and ideological limitations is not to slight it. The entire aim is rather to account for the difficulties which the morality of justice faces in a morally pluralistic world and to help it recognize its real place in it – not above the political world but in its very midst.¹

Scholars and practitioners of transitional justice have begun to articulate a sense that the field is in what might be called a ‘fourth phase’² or fourth ‘generation’;³ that is, an extension of the field’s familiar three-phase paradigm of post-World War II origins, post-Cold War normalization and a millennial steady-state stage.⁴ This fourth phase is primarily characterized by a willingness to reconsider the boundaries of the field, most notably by extending the scope of moral and legal inquiry to encompass a wider set of outcomes like development, poverty alleviation and redistribution. A core element of this expansion has been to rewrite the dominant scripts evident in scholarship and practice. These dominant scripts foreground familiar institutions (trials, truth commissions, reparations, lustration), familiar abuses (usually bodily integrity abuses) and familiar teleologies (liberal democracy, civil rights protection).⁵ Though the alternatives to this dominant script are varied, many now cohere in a commitment to redressing economic injustice for a variety of reasons. Some wish for transitional justice to become development-sensitive,

¹ Judith Sklar, Legalism (Harvard University Press 1964) 122–23.
some wish for economic, social and cultural (ESC) rights to be prioritized, some want the field to address social minima or subsistence harms. Others want it to serve as a vehicle for (re)distributive justice, while yet another group urges the field to catalyse fundamental change in the economic structures that underpin poverty, inequality and social exclusion. There is no sense of rival schools (yet), either in practice or in the developing advocacy-cum-scholarship literature. This may be because the sheer urgency felt to redirect the field towards issues of economic justice smothers disagreement over what precisely economic justice should look like. The urgency flows from a widespread acceptance that transitional justice is essentially limited, and any progress towards peace or democracy is likely to prove ephemeral, unless attention is paid to the economic root causes of conflict like poverty, horizontal inequality and underdevelopment. Field-based analysis and population surveys suggest that employment, income, public safety, clean water, housing, education and healthcare are more desired forms of justice for people than accountability and truth in relation to past atrocities. Scholars who support this re-orientation insist that transitional justice will lack credibility, appear merely symbolic or even appear ‘cheap and spurious’ if it does not resolve economic injustice, discrimination or deprivation.6

This book explores this redirection of transitional justice towards economic justice. It does not address the what or the why questions of this re-orientation. The revised normative aspirations of what transitional justice should emphasize (development-sensitivity, ESC rights prioritization, social minima, (re)distribution and structural change) have been outlined comprehensively in a number of articles and books in the last dozen years. These arguments are referred to throughout this book, but not recapitulated. The related question of why transitional justice should embrace issues of economic injustice has also been explored exhaustively in many of the same works. Again, these are referred to herein but not recapitulated in detail. This book does not address the question of how transitional justice as a body of practices, a base of knowledge and site of activist endeavour might go about turning these commitments into

results. In contradistinction to the questions of the what and the why, this question of how has been far less comprehensively addressed in the literature. As Chapter 2 argues, the fourth generation of transitional justice scholarship is characterized by a calculated opacity when it comes to demonstrating how a revised approach to justice among scholars and practitioners can translate into transformed development patterns, rights-holding or structural transformation in the site of intervention. Theory-building has far outstripped empirical exploration of the relationship between economic structures and transitional justice. Even the limited theoretical work undertaken so far has generated little by way of theories of change that would articulate how and why a transitional justice intervention would effect a specific transformation of economic structures or enjoyment of socio-economic rights. As Haldemann and Kouassi put it:

It is one thing to explain why socio-economic rights should be integrated into the transitional justice framework; it is quite another to address the question of how this could be done. This is a crucial issue. If the ESC rights thesis is to be more than an empty abstraction, one should be able to describe the ways and means of putting it into practice.

Furthermore, there has been a conspicuous lack of non-ideal theorists who have outlined the most pervasive of the obstacles to change in those ‘burdened societies’ that lack the political and cultural traditions, human capital or material resources needed to be well-ordered, or proposals to overcome them. The overall lack of a theory of change or programme pathway that would connect transitional justice activities to outcomes is

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7 As one group of scholars notes, ‘Local ownership, prevention, better analysis and the “springboard thesis” are the reasons why economic and social rights matter. The “why” question has effectively been answered; the “how” question is now the biggest hurdle for our research agenda’. (Paul Gready et al. ‘Transformative Justice – A Concept Note’ (unpublished manuscript, October 2010) 6 <http://www.wun.ac.uk/files/transformative_justice_-_concept_note_web_version.pdf> accessed 20 July 2016.)


problematic because without concrete proposals for how transitional justice can achieve these aspirations, it is difficult to engage critically with, or build upon, the transformative turn as a practical endeavour.

Instead of addressing the how question, this book might be understood as addressing a question which should logically precede it, namely where? It is something of a cliché that transitional justice must be context-specific and adapted to the ecology in which it is pursued. However, few generalized treatments of how the field should be re-oriented to pursue economic justice disaggregate the different contexts in which transitional justice will be secured. Post-authoritarian states obviously offer different opportunities and obstacles than post-conflict states. Both post-conflict and post-authoritarian contexts present different challenges to developed or underdeveloped states undergoing nothing recognizable as transition but which are nevertheless addressing past human rights abuses. This book addresses one particular site of transitional justice, namely post-conflict states. Post-conflict states are arguably those where transitional justice is most necessary and most common, as familiar examples from Rwanda, Guatemala, El Salvador, Bosnia, Kosovo, Nepal and Sudan make clear. Contemporary processes of transitional justice in the likes of Côte d’Ivoire, Libya and Colombia (and potential future ones like Syria or Eastern Ukraine) occur at a time when the demands made of transitional justice are ever greater but many of the generic challenges and obstacles imposed by peacemaking remain the same.

A book specifically dedicated to the challenges for fourth generation transitional justice in addressing issues of economic justice in post-conflict states is necessary as it is clear that this specific ecology raises challenges for economic justice that have barely been explored in the literature. Since at least the time of the Bosnian and Rwandan conflicts, the post-conflict ecology has been considered as one of the two paradigmatic transitions that define the field alongside post-authoritarian regime alteration. However, it is rare for any treatment of transitional justice’s potential to catalyse socioeconomic change in this context to specifically engage with war, its ontological and epistemological underpinnings, and how it alters the political economy of states. Many of the assumptions made are based on rather underdeveloped concepts and causal claims that

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11 Readers are directed towards other work by the present author that outlines some of the more evident limitations of the field’s existing institutions. See Padraig McAuliffe, ‘Rhetoric and Realpolitik: Interrogating the Relationship between Transitional Justice and Socio-Economic Justice’ (2012–13) 23 Finnish Yearbook of International Law 239.
do not capture the complexity of post-conflict ecologies and the fluid
dynamics of the national political economy that shape opportunities for
change. Processes that are predominantly controlled by domestic actors
like the modalities of warfare and war conclusion, the means by which
peace is negotiated, the terms of agreements and the use of power-sharing
tend to obstruct, as opposed to facilitate, the transformation of those
structures which gave rise to conflict in the first place. Scholars, activists
and practitioners implore the field to address poverty, inequality or
discriminatory structures, and they confidently assert that it has a (rather
underspecified) potency to do so. However, one is struck by the near total
failure to address obvious impediments to economic transformation like
the state’s weak administrative capacity, the tendency of peace agree-
ments to consolidate the power of existing and emerging elites and the
likely veto power of those powerful social forces that stand to lose from
any erosion of discriminatory structures they benefit from. The fourth
generation of transitional justice scholarship is premised on the assump-
tion that transition to a post-conflict environment makes these states
essentially malleable and that processes of significant change are under-
way that the field can inform or capitalize upon (though it should be
made clear that few presume it will be straightforward or easy). What is
striking about these assumptions of malleability is that none of the core
domestic barriers to economic justice that development actors or peace-
builders identify as salient in the post-conflict context (spoilers, elite
entrenchment, neopatrimonialism or the weak administrative capacities of
under-developed states) are ever addressed in this literature.

The aspirations of fourth generation transitional justice presume that
transformative outcomes can be produced, legitimized and stabilized as
matters of intention and design, and that transitional justice can catalyse
desired economic dynamics and outcomes. One of the main problems
with this literature is that it is almost entirely concerned with transitional
justice’s own debates, norms, institutions and values, as opposed to the
actual context to which they will apply. Though undoubtedly rooted in a
moral concern for post-conflict states and the obvious needs of victims,
little attention is paid to those political and economic factors that make
states or the communities therein more or less malleable or amenable to
change. Proposals always lay in the realm of that which we as scholars or
practitioners can control – the rights that should be propagated, the
bottom-up approaches we can catalyse, the reform of the mechanisms we
support – but never in those state institutions, informal material relations
or pre-existing social structures that obviously condition the prospects for
improved insight or norm advocacy to translate into transformation on
the ground.
The critical focus is seldom the limited but policy-relevant reasons endogenous to the state why aspects of justice are more or less feasible. Instead, fourth generation literature primarily addresses the theoretical, exogenous reasons why the international community does or does not propound this or that (expansive) vision of transitional justice. This is most evident in the notion that liberal peacebuilding’s top-down imposition of external legal frameworks and institutional templates represent the ‘foundational’ limitations to a more transformative transitional justice.12

Transitional justice has excluded from its remit those who suffer from structural violence on account of the traditional preoccupation with violations of bodily integrity. The failure to address socio-economic rights is attributed to the prioritization of civil and political rights over ESC rights, a discourse that depoliticizes justice and marginalizes agendas of structural reform. These objections to the field’s liberal bias are perfectly valid. However, they ignore the obvious point that even if transitional justice actors (and the wider peacebuilding apparatus they operate alongside or within) embrace economic injustice, this reorientation in and of itself does not make domestic structures that heretofore have underpinned poverty or structural inequality (and may endure and consolidate after conflict) any more malleable than they were before. One of the core arguments made by critics of contemporary transitional justice is that systematic, structural violence that disenfranchises distinct sectors of society must be deliberately sustained by a domestic political system that distributes power and resources unequally.13 However, the implications of this for transitional justice in terms of endogenous barriers raised to transformation are never explored.

It is necessary, both for the coherence of fourth generation scholarship and to one day address the how question in detail, to better comprehend how malleable structures of poverty and inequality post-conflict societies are. Above all, it is necessary to engage in some form of power analysis of these states, given that any realization of socio-economic rights claims, redistribution or structural reform in states where there are not enough goods and services to supply all demands is likely to give rise to the

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perception or reality of what Boulding labels (with reference to the remark made in Wonderland to Alice) as ‘the Duchess’s Law’: ‘The more there is of yours, the less there is of mine’.14 Any change or challenge to the structures of exploitation will inherently engage with, and run up against, opposing structures of power and interest. These structures, be they state institutions, informal elite control of the economy or social norms, have played a role in moulding extant conditions and, in conjunction with those groups and actors whose interests maintain them, may serve as obstacles to change. As Chapter 3 goes on to argue, the means by which peace is agreed often tends to reinforce such obstacles. Any model of transformative transitional justice must understand and relate to the power relations at play in the distinct post-conflict context. Without grounding theory in the realities of post-conflict states, socio-economically inclined transitional justice advocacy at times resembles what Cain describes as the ‘human rights cheerleading’ of international human rights organizations, a form of ideological support devoid of any realistic or pragmatic strategy to actually address the deprivations identified and with little regard for what can reasonably be accomplished.15

Any intervention by outside actors like transitional justice becomes itself part of the conflict system in the state and the contemporaneous attempts to build peace by international actors. This book therefore tries to answer the question of what transitional justice should look like if it was immersed in peacebuilding theory, not merely in the comfortable philosophical language of (anti) liberalism, but in the pragmatic political choices that need to be made in the real world of spoilers, institutional incapacity, elite economic control and status quo-preserving peace agreements. In so doing, I do not employ the phraseology of fourth generation transitional justice but instead label the field’s ongoing reorientation as its ‘transformative turn’. It may seem questionable to subsume normative goals as different as promoting ESC rights, redistributing wealth or fostering welfarism under this rubric. Nevertheless, I use this term primarily because a number of other scholars explicitly use the language of ‘transformation’,16 while other conceptualizations like structural

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justice are essentially synonyms for it.\(^{17}\) I also use the language of transformation because something distinctly greater than stasis or reform, but something falling short of revolution, is being proposed in this literature. Pleas to redistribute wealth,\(^{18}\) to redress subsistence harms\(^{19}\) or reform social blueprints to expand life choices\(^{20}\) are deeply transformative in societies where neither historical developments nor economic incentives prior to transition generated more equal economies, serious poverty alleviation or welfare. Even more circumspect pleas to make transitional justice more development-sensitive\(^{21}\) or to foreground socioeconomic rights may mark a significant departure from what domestic elites have historically proven willing to concede, as Chapters 3 and 4 make clear.\(^{22}\)

This book, therefore, is less about a substantive notion of transformative transitional justice (after all, many have articulated visions of this, albeit with a fairly consistent vagueness) than the context in which it may or may not be realized. In order to spark a critical and constructive dialogue, I concentrate the discussion on some shortcomings evident in the supporting assumptions of the transformative turn – that the discourse adopted within transitional justice establishes the bounds of what projects can be pursued (Chapter 2), that peace agreements and post-conflict reconstruction are inherently transformative moments of constitutional reform and social reordering (Chapter 3), that liberal interventionary actors involved in transitional justice or peacebuilding exert decisive


\(^{20}\) Selim and Murithi (n 6) 64.

\(^{21}\) Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009).

influence on patterns of inequality and redistribution (Chapter 4), that bottom-up approaches can trickle upwards towards the larger national community (Chapter 5). The book focuses only on one particular issue, namely the impact of post-conflict and peacebuilding politics on the malleability of those structures of injustice that transitional justice supposedly addresses. Some obvious stones have therefore been left unturned, like the question of the field’s loss of distinctiveness or coherence as it expands,23 the gendered dimensions of economic violence,24 the limitations imposed by globalization and structural adjustment that lie far beyond the control of peacebuilders or transitional justice actors, and the core question of whether the field should be abandoned for a more expansive conception of ‘transformative justice’.25 Though these are important dilemmas, an editorial decision has been made to forgo an exploration of these issues in the interests of more fully developing the book’s core interests. The book is designed to contribute a more context-specific discourse on economic violence by providing a framework and language with which to analyse the experiences of structural harms in post-conflict justice. It attempts to point out some of the deficiencies in a currently fashionable discourse that has marched into new territory without securing its conceptual supply lines. Finally, it hopes to provide one way of taking a grossly simplified debate forward by make practical choices clearer and giving barriers to transformation greater exposure.
