
1. The development of transitional justice

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INTRODUCTION

This volume is focused on transitional justice, an ‘epistemic community’ that is quickly becoming a ‘field’ in its own right.¹ Yet what it is and what it seeks to do must be underpinned by an understanding of its origins and its development across time and space. Considering the depth and breadth of scholarship that now coalesces around this theme, it is remarkable that the term ‘transitional justice’ was not commonly used until the early- to mid-1990s. Until that time, scholars referred to their work in this area as ‘justice after atrocity’ or ‘retroactive justice’. Often they worked in isolation, sometimes coming across the work of another scholar doing something similar, and then often only by happenstance. This came about, in part, because scholars themselves came out of different academic traditions, including political science and law. They came to this work through one of two main understandings: (a) the cessation of the Cold War created an opening for the protection of human rights, and made possible an accounting for abuses that had previously been committed; or (b) because the end of the Cold War meant that countries were suddenly able to transition to democracy, and were therefore able to begin to put in place instruments and policies that would consolidate that democracy.

The chapter is divided into three parts. The first part traces the development of transitional justice, beginning in the modern era with the post-Second World War tribunals convened at Nuremberg and Tokyo, and continuing to the present. The chapter focuses on four of the most widely used instruments of transitional justice (criminal prosecutions, reparations, amnesty and truth-telling), but many countries opted to use other instruments and approaches that deserve mention as well. Much has been written, for example, about policies of ‘official forgetting’² and ‘leaving the past alone’,³ which have not been covered here. Likewise, although policies of lustration were frequently used throughout Eastern Europe, they are not addressed here.⁴

¹ Elin Skaar and Eric Wiebelhaus-Brahm, ‘The Drivers of Transitional Justice: An Analytical Framework for Assessing the Role of Actors’ (2013) 31(2) *Nordic Journal of Human Rights* 127; Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3(1) *International Journal of Transitional Justice* 5.

² For example, Spain’s *Pacto del Olvido*: Paloma Aguilar, *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (Mark Gordon Oakley tr, Berghahn Books 2002).

³ Priscilla Hayner, *Unspeakable Truths* (Routledge 2001) 183–205; Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (United States Institute of Peace 2005).

⁴ See Stan Chapter 25, this volume.

The second part outlines the development of transitional justice approaches and instruments around the world. Those same four commonly used instruments are utilized as a means of comparing experiences across continents. As readers will note, while some instruments have taken root in specific contexts, that has certainly not been the experience in others. Read against the context of the first part, in which the development of the instruments themselves is detailed, the progression and growth of transitional justice itself is clear.

The third part focuses on the ‘growing pains’ of the scholarship and practice of transitional justice. The questions raised have arisen because the field has matured to the extent that critical questions can and must be asked. Six of these are considered: deepening international engagement; the effect of contagion; simultaneity and the problems it brings; the call to address economic, social and cultural rights; the limits of what transitional justice can actually address; and the parameters of the transition in question.

THE DEVELOPMENT OF TRANSITIONAL JUSTICE: A TIMELINE

Arguably, the debates that surround the questions with which transitional justice is chiefly concerned – who should be held responsible, what to do to right the wrongs that have been committed, and how to rebuild following struggle – have been central to every conflict that has been waged. Societies have talked and written about them since at least 500 BC; in *The Oresteia*, for example, Aeschylus himself grappled with these age-old questions, with a fierce debate about what sort of punishment Orestes should face for his role in the cyclical violence that had occurred.⁵ Elster traces the origins to the transition to democracy in ancient Athens in 411 and 403 BC.⁶ He draws other lessons from the English Restoration in the seventeenth century⁷ and the French Restorations after 1814 and 1815.⁸

In the modern era, the argument is frequently made that the end of the Cold War in the late 1980s and the breakdown of tensions between the East and the West, and the liberalization of the international community following the end of the Cold War, permitted the growth of transitional justice.⁹ Certainly, the development of international law and international individual criminal accountability were interrupted by the Cold War. Teitel, for one, has argued that the ‘hopes of a new peace’ after the Cold War, which were followed quickly by the outbreak of intra-state conflict, elicited a ‘range of

⁵ Aeschylus, *The Oresteia* (Robert Fagles tr, Viking Press 1975).

⁶ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (CUP 2004) 4–23.

⁷ Jon Elster, *Retribution and Reparation in the Transition to Democracy* (Jon Elster ed, CUP 2006) 318.

⁸ Elster, *Closing the Books* 24.

⁹ Ruti G. Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 71, criticizes the Cold War narrative as ‘a nice story which conceals the fact that transitional justice only became useful as a tool in democracy promotion’. David Anton Hoogenboom, ‘Justice as Im-Possibility’ (PhD diss, The University of Western Ontario 2014) 3.

interventions and engagements undertaken in the name of “humanity”¹⁰. The absence of communist ideology and hostile tit-for-tat policy-making, as the intense Cold War tensions and conflicts of the late 1970s and early 1980s began to abate, it is argued, provided an opening for change in two ways: human rights and a third wave of democratization.

Human Rights

First, countries began to turn to the many human rights instruments that had been developed and ratified in the years since the creation of the United Nations in 1945, but which had in many ways lain dormant during the Cold War, as the full extent of their might could not be tested.¹¹ Many have argued that, as the world turned its ‘attention away from a polarized struggle between communism and anti-communism ... a more permissive atmosphere for holding former repressive leaders of whatever ideological stripe accountable for past human rights violations’ was created.¹² In the wake of the Cold War, the full power of a range of human rights instruments was brought to bear. Scholars and activists like Zalaquett have argued that the growing importance of human rights internationally prompted political change, and that ‘human rights organizations ... entered this new area applying, by extension, the normative standards and techniques’ of human rights.¹³

The establishment of an international criminal tribunal through which to deal with crimes including genocide, war crimes and crimes against humanity could not have been envisioned during the Cold War. Neither could its sanction under Chapter VII of the Charter of the United Nations, which deals with the peaceful settlement of disputes. During the Cold War, the kind of trusteeship required for an international tribunal existed only in the indirect conflict, proxy warfare and partisan protection offered by the Soviet Union and the United States. Yet as the Cold War faded, persistent and ‘continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia’ surfaced. When it was determined that this ‘constitute[d] a threat to international peace and security’, the international community was prompted to create a permanent court to adjudicate what was considered international crime.¹⁴

Even the key ideas embedded in the kind of decision detailed above would have been unheard of a few years earlier. The coalescing of the international community on this pivotal issue could not have happened in the years of animosity between East and West.

¹⁰ Ruti G. Teitel, *Humanity’s Law* (OUP 2011) 3.

¹¹ These include, but are not limited to, the United Nations Charter (1945), Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966) and the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

¹² Kathryn Sikkink, *The Justice Cascade* (WW Norton 2011) 246.

¹³ José Zalaquett, ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints’ in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (United States Institute of Peace Press 1995) 3.

¹⁴ United Nations Security Council, Resolution 808, 1993, S/RES/808, 22 February 1993, 2.

The importance of violations of human rights and, by extension, of international humanitarian law of the kind embedded in the Universal Declaration of Human Rights, Geneva Conventions and elsewhere, would have been dealt with internally, if at all. Likewise, threats to international peace and security had never before been used in this way – even though international treaties and charters had been signed to this effect. The end of the Cold War provided an opportunity for the pursuit of these new objectives. Today, ‘Knowing the truth is a right’ is the mantra of transitional justice non-governmental organizations.¹⁵

Third Wave of Democratization

Alternatively, the origins of transitional justice are traced to the third wave of democratization.¹⁶ Arthur argues that ‘[t]he field of transitional justice, so defined, came directly out of a set of interactions among human rights activists, lawyers and legal scholars, policymakers, journalists, donors, and comparative politics experts concerned with ... the dynamics of “transitions to democracy,” beginning in the late 1980s.¹⁷ Scholars like Elster focus solely on ‘democratic transitional justice’ and on the return to democracy.¹⁸ Kritz’s influential *Transitional Justice* volumes keenly focused on ‘the new historical era ... [which] offer[ed] the most exciting opportunity for durable peace since the end of the First World War’.¹⁹

Many scholars of the time asserted that ‘democracy, particularly in its difficult early years, requires instruments that allow the opposition, if willing to abide by the law, to have a significant share of power’²⁰ – and those instruments in question were the very instruments that have become associated with transitional justice, and are detailed elsewhere in this volume: trials, truth commissions, reparations, political apologies, amnesties and so on. In contrast to the *human rights* argument made above, the democratic consolidation argument (also called ‘democratic deepening’²¹) was very

¹⁵ International Center for Transitional Justice, ‘Knowing the Truth is a Right’ <<http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>> accessed 24 November 2013.

¹⁶ The term ‘third wave of democratization’ was coined by Samuel P. Huntington, who described ‘the transition of some thirty countries from nondemocratic to democratic political systems ... [that] occurred between 1974 and 1990’. Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) xiii.

¹⁷ Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31(2) *Human Rights Quarterly* 324.

¹⁸ See, generally, Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (CUP 2006).

¹⁹ Charles Duryea Smith, ‘Introduction’ in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (United States Institute of Peace Press 1995) xv.

²⁰ Juan J. Linz, ‘The Breakdown of Democratic Regimes: Crisis, Breakdown, & Reequilibration’ in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (United States Institute of Peace Press 1995) 123.

²¹ Alexandra Barahona de Brito, Paloma Aguilar and Carmen González-Enríquez, ‘Introduction’ in Alexandra Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (OUP 2001) 2.

conscious of 'the extent to which the various policies adopted with respect to retroactive justice have had any repercussions on the way in which democracy functions'.²²

The kind of social and political freedom that grew from rapid democratization around the globe had been unthinkable during the Cold War. Blatant challenges to authoritarian regimes had resulted in the death or imprisonment of thousands in places like Chile under General Augusto Pinochet (1973–1980) or in South Africa during Apartheid (1948–1994). The opportunities that came with the opening of democratic discourse and eventually its wholesale adoption brought broad changes including widespread institutional reform and a willingness to look backward and seek accountability. None of these could have been imagined even a few years earlier.

THE DEVELOPMENT OF TRANSITIONAL JUSTICE OVER TIME

Transitional justice encompasses far more than criminal accountability and prosecutions – although this is one of the key pillars of scholarship and practice. Transitional justice has been defined as 'the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law'.²³ Transitional justice comes from a number of different philosophical positions, each of which aims at dealing with this legacy. These different philosophies are only loosely tied together, so that the scholars and practitioners themselves only vaguely speak the same 'language'. Scholars of restorative justice come from significantly different philosophical positions, for example, and are much more likely to promote community-centred processes that value the participation of the victim than are the drafters of the Rome Statute of the International Criminal Court. As such, the instruments with which they work are very different both qualitatively and quantitatively, not to mention the differences in the expected outcomes of each.

The 'field' of transitional justice, which is often thought to accommodate many different traditions and disciplinary approaches, is in fact only a web of tangentially connected practices and philosophies. Tiemessen has questioned the conception of the transitional justice epistemic community as 'one big happy principled family'.²⁴ As she points out, 'we're not all on the same page and the fissures are cross-cutting'.²⁵ This recognition in itself marks a significant development, and one that is fairly recent.

In large part, the philosophical understandings and beliefs of any particular scholar or practitioner or advocate depend on his or her discipline and its originating myths. In turn, this greatly influences the manner in which he or she will pursue transitional justice. For example, if one buys into the idea that the Cold War allowed the human rights agenda to proliferate, which in turn allowed transitional justice instruments to

²² Ibid. 2.

²³ Rachel Kerr and Eirin Mobekk, *Peace and Justice* (Polity Press 2007) 3.

²⁴ Alana Tiemessen, 'International Justice Scholars and Advocates: One Big Happy Principled Family?' <<http://www.whiteoliphant.com/duckofminerva/2011/06/international-justice-scholars-and.html>> accessed 23 November 2013.

²⁵ Ibid.

take hold, then one is also likely to espouse the kinds of instruments that will reinforce and protect those rights. This might mean, for example, that the person would reject the granting of amnesty because it would stifle the rights of victims. Conversely, if one espouses the idea that the third wave of democracy provided the opportunity for transitional justice, then he or she is also likely to pursue the kinds of instruments that will further strengthen and consolidate that democracy. It seems likely that the person would favour strong courts and tribunals, which serve to undergird the judiciary and build the rule of law, thereby laying a stronger foundation for democratic development.

The development of transitional justice must, therefore, be considered with an eye to the inherent diversity of the approaches, instruments and agents that constitute it. A number of different traditions grew up at the same time, each with the goal of dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law – but in a fundamentally different way. Four of these are considered below: criminal accountability; reparations; amnesty; and truth-seeking.

Criminal Accountability

Even before the Cold War, individuals were held to account for their actions. Immediately following the Second World War, alongside national-level courts and reparations schemes, the victorious Allied powers convoked international tribunals in both Germany and Japan. These are seen as the modern foundations of transitional justice. The International Military Tribunal (IMT) was established pursuant to the Inter-Allied Resolution on German War Crimes, signed in 1942 at the height of Nazi aggression in the Second World War. The IMT was established ‘for the just and prompt trial and punishment of the major war criminals of the European Axis’.²⁶ Its charter, colloquially referred to as both the Nuremberg Charter and the London Charter, was signed by the United States, France, the UK and the Soviet Union. Each of these countries provided a judge and an alternate, as well as a prosecutor. The tribunal sat in Nuremberg, Germany, and heard evidence related to 24 persons accused of crimes against peace, war crimes, and crimes against humanity. In 1946, 12 of the accused were convicted and sentenced to death, seven received prison sentences and three were acquitted.²⁷

The International Military Tribunal for the Far East (IMTFE) was established in 1946 by special decree of General Douglas MacArthur, the Supreme Commander of the Allied Powers. The charter of the court was established to try and to punish ‘the major war criminals in the Far East’²⁸ and had jurisdiction over crimes against peace, conventional war crimes, and crimes against humanity.²⁹ Twelve judges were appointed from the nine signatories to the Instrument of Surrender, plus India and the Philippines.

²⁶ Charter of the International Military Tribunal (1945) art. 1.

²⁷ The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22 August 1946 to 1 October 1946) 411.

²⁸ Charter of the International Military Tribunal for the Far East (1946) art. 1.

²⁹ Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial* (Princeton University Press 1971) 3.

In late 1947, 16 of the 28 defendants were convicted and sentenced to life imprisonment, three died in prison and the other 13 were eventually paroled. The judgment itself was controversial, and five of the judges wrote dissenting opinions.

These courts were seen as critically important for three reasons. First, in an attempt to solidify international law, they ‘enlarg[ed] the reach of law beyond conventional war crimes ... placing previously unreachable conduct under the domain of international law’.³⁰ Second, they were meant to establish a ‘new jurisprudence’ for the new societies in whose creation they played an essential part.³¹ Third, they were expected to ‘provide a model of the rule of law to re-educate Germany and inspire the peoples of other nations’.³² Both courts were subject to criticism. Critics argued, first, that justice was applied *ex post facto* or retroactively, in that the criminality of certain acts was changed after they were already committed.³³ The second relates to what is commonly called ‘victor’s justice’.³⁴ The Germans and Japanese were harshly dealt with, while no Allied crimes were ever heard in these tribunals. The third relates to the charge of selectivity, meaning that not all of those who could have been held to account were, in fact, ever tried:³⁵ 24 (in the case of Germany) and 28 (in the case of Japan) persons were not, by themselves, guilty of carrying out every criminal act that had taken place.

The legal advances made by the IMT and IMTFE, including the development of international instruments, and the expansion of international jurisprudence, might have been cause for celebration, for these advancements were unquestionably important. However, at that point the forward momentum of international criminal justice stopped. It was not until nearly 50 years had passed that the international community came together again in the same way, this time to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY), in May 1993.³⁶ Sitting at The Hague, Netherlands, the tribunal was entitled to hear cases of grave breaches of the Geneva Conventions, genocide and crimes against humanity committed from 1991 onward. The ICTR was set up as an *ad hoc* body to exist for a specific period of time and then close its doors.³⁷ A similar tribunal was established to deal with the 1994 genocide in Rwanda. Called the International Criminal Tribunal for Rwanda (ICTR), the court was established in November 1994 by United Nations Security Council Resolution 944 to hear cases of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. It officially closed in December 2015. Like the ICTY, the court was set up on an *ad hoc* basis, with its seat in Arusha, Tanzania.³⁸ These courts have been subject to criticisms similar to the IMT and

³⁰ David Luban, ‘Chapter 7: The Legacies of Nuremberg’ in *Legal Modernism* (The University of Michigan Press 1994) 335.

³¹ Elster, *Retribution and Reparation in the Transition to Democracy*, 57.

³² Luban, ‘Chapter 7: The Legacies of Nuremberg’, 335.

³³ Minear, *Victors’ Justice*.

³⁴ Gary J Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002) 8.

³⁵ *Ibid.*

³⁶ The ICTY was established pursuant to United Nations Security Council Resolution 827 of 1993.

³⁷ At the time of writing, it was estimated that the ICTY would complete its work by 2017.

³⁸ At the time of writing, the ICTR’s closure is projected to take place in 2014.

IMTFE, including selectivity, but also for being too far removed from the scene of the crime, and therefore of little relevance to the people in the country in which the crimes were committed.³⁹

Other criminal courts with an international dimension were also established, but these 'hybrid' courts were jointly managed and run by the international community and the country in which specified crimes had taken place. 'In some cases they are part of the judiciary of a given country, while in others, they have been grafted onto the local judicial system'.⁴⁰ They were needed because the respective judiciaries 'lacked sufficient resources and expertise to undertake such a complex task, especially given the magnitude of the crimes'.⁴¹ Hybrid courts were established as *ad hoc* bodies, but located in the country where the violations occurred, thereby making the court much more relevant to the people most affected by the violations. The first of these was the Special Court for Sierra Leone (SCSL), established jointly between the Government of Sierra Leone and the United Nations in 2002, and sitting in Freetown, Sierra Leone. The SCSL is entitled to hear cases concerning crimes against humanity, war crimes, other serious violations of international humanitarian law and specific crimes as defined under Sierra Leonean law. This was followed closely by the creation of the Extraordinary Chambers of the Courts of Cambodia in 2003, a joint enterprise of the Government of Cambodia and the United Nations, which sits in Phnom Penh, Cambodia. The court may hear cases concerning crimes under Cambodian law (homicide, torture, religious persecution), genocide, crimes against humanity and war crimes, as well as destruction of cultural property and crimes against internationally protected persons.

In 1998, the Rome Statute of the International Criminal Court was signed, and a permanent International Criminal Court (ICC) came into being in July 2002. The Court is intended as a court of last resort, reserved for when state parties are deemed unwilling or unable to prosecute the crimes taking place within their own borders. It sits at The Hague, Netherlands. The court may hear cases of genocide, crimes against humanity and war crimes⁴² as referred by any state party, the United Nations Security Council, or by the Prosecutor, *proprio motu*. The first situation referred to the ICC was the situation in Northern Uganda.⁴³ The Court's first verdict was delivered against Thomas Lubanga Dyilo of the Democratic Republic of Congo, who was 'found guilty,

³⁹ See Sharp, chapter 7, this volume.

⁴⁰ 'Hybrid Courts', Project on International Courts and Tribunals <<http://www.pict-pcti.org/courts/hybrid.html>> accessed 21 November 2013.

⁴¹ Extraordinary Chambers of the Courts of Cambodia, 'Why is the United Nations involved?' <<http://www.eccc.gov.kh/en/faq/why-united-nations-involved>> accessed 20 November 2013.

⁴² The crime of aggression was also included in the Rome Statute, although at the time of writing, it had not been defined or specified for inclusion in the competency of the court.

⁴³ Ugandan President Yoweri Museveni officially referred the situation to the ICC in December 2003. It has been commonly assumed that Museveni approached the Court first. Information has surfaced that the Chief Prosecutor actually approached Museveni to ask him to refer the situation. The significance of this influence is hotly debated. Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, March 2008) 43. There is a great deal of debate about what this discrepancy means.

in 2012, of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities; he was sentenced, in 2012, to a total of 14 years of imprisonment'.⁴⁴

Reparations

Reparation is the provision of payment or other assistance to someone who has been wronged. This kind of compensation can come in the form of the actual return of the property that was taken; or in the form of a symbolic monetary payment; or in the form of an apology.⁴⁵ Whenever possible, it is argued, the actual property should be returned,⁴⁶ although this is hotly debated.⁴⁷ Often the property itself no longer exists or has been badly damaged, making restitution impossible.

In the modern era, paralleling the development of instruments of criminal accountability, and often also in the same jurisdictions, the act of reparations can be traced to post-Second World War Germany, when in 1952 the Reparations Agreement between Israel and West Germany was signed. Germany agreed to pay to cover immigration costs, rehabilitation of Holocaust victims and the costs of litigation for the compensation of individuals claiming Nazi persecution. In return, 'Israel agreed to pay the Germans for secular property that was relocated to Israel'.⁴⁸ The German government has paid approximately \$85 billion in total compensation, although this number continues to climb.⁴⁹

Another frequently cited example concerns reparations paid to Canadian citizens of Japanese ancestry in 1988, more than 20,000 of whom were sent to internment camps after the Japanese attack on Pearl Harbor in 1941. The families of many of them had lived in Canada for generations and were citizens of Canada, but they were suspected of aiding Japanese authorities in military espionage. Many of the men were taken to work camps. Their homes, fishing boats and other property were seized by the Government and sold without permission. While they were released at the end of the war in 1945, they were banned from living near the coast, where many had lived prior to the war, until 1950 and were unable to reclaim their property.⁵⁰ In 1950,

⁴⁴ *The Prosecutor v Thomas Lubanga Dyilo*, International Criminal Court Trial Chamber I, ICC-01/04-01/06 <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx> accessed 20 November 2013.

⁴⁵ Pablo de Greiff (ed.), *The Handbook of Reparations* (OUP 2006); Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Norton 2000).

⁴⁶ Martha Minow *Between Vengeance and Forgiveness* (Beacon Press 1998) 107.

⁴⁷ Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4; Richard Vernon, 'Against Restitution' (2003) 51 *Political Studies* 542.

⁴⁸ Lisa Weissnar, 'German Reparations to Israel', UCLA Younes and Soraya Nazarian Center for Israel Studies <<http://www.international.ucla.edu/media/files/Weissnar---German-Reparations-to-Israel-xj-ut0.pdf>> accessed 20 November 2013.

⁴⁹ 'Holocaust survivors, family to get money from \$60M fund', *New York Post*, 5 December 2014 <<http://nypost.com/2014/12/05/holocaust-survivors-family-to-get-money-from-60m-fund/>> accessed 16 February 2016.

⁵⁰ Roy Miki and Cassandra Kobayashi, *Justice in Our Time: The Japanese Canadian Redress Settlement* (Talonbooks 1991).

CAD\$1.3 million in claims was awarded to 1434 Japanese Canadians, based solely on claims for lost property. In 1988, the Government awarded CAD\$21,000 to each Canadian of Japanese ancestry who had been interned, under the Japanese Canadian Redress Agreement. A similar agreement was reached between the United States and Japanese-Americans.⁵¹ Monetary reparations are, however, often seen as inadequate, because they are at best a ‘symbolic ... substitute for the loss of time, freedom, dignity, privacy and inequality ... Yet money remains incommensurable with what was lost ... [and falls] short of repairing victims or social relationships after violence’.⁵²

A symbolic act of reparation might consist in an apology. For example, in Australia thousands of Aboriginal people were forcibly removed from their parents and given to white families or institutions to raise between 1915 and 1969, and who remain the country’s poorest and most disadvantaged group. An inquiry into these policies was held in 1997, and a report was released. A decade later, the new Prime Minister, Kevin Rudd, issued a formal apology for the actions of the Government of Australia from 1915 to 1969.⁵³ Many Aboriginals believed that the apology was a poor substitute for a billion-dollar compensation package that Aboriginal campaigners had been calling for, while others were relieved that the government had acknowledged its complicity. Apologies, it turns out, are equally complicated.⁵⁴

Amnesty

At the same time, policy-makers increasingly turned to the use of amnesties as a means of official pardon from prosecution, ‘legal measures adopted by states that have the effect of prospectively barring criminal prosecutions against certain individuals accused of committing human rights violations’.⁵⁵ Freeman notes that ‘[t]here are few issues of law and policy as complex and divisive as the question of when and whether to grant amnesties for atrocities’.⁵⁶ He points out that, while amnesties were once considered a tool to be used in support of the promotion of human rights, since 1991 they have become a hindrance, and now ‘contribute to impunity rather than ... safeguard human rights’.⁵⁷ In contrast, Mallinder argues that amnesties can be used as tools or incentives for accountability or truth.⁵⁸

⁵¹ See Yamamoto in de Greiff; and Minow *Between Vengeance and Forgiveness* 94.

⁵² Minow, *Between Vengeance and Forgiveness* 102; Moffett, chapter 19, this volume.

⁵³ Kevin Rudd, ‘Apology to Australia’s Indigenous Peoples’, Parliament of Australia, *House Hansard*, 13 February 2008, 167.

⁵⁴ Jennifer Lind, *Sorry States: Apologies in International Politics* (Cornell University Press 2008); and Rhoda Howard-Hassmann, with Anthony P. Lombard, *Reparations to Africa* (University of Pennsylvania Press 2008).

⁵⁵ Francesca Lessa and Leigh A. Payne, ‘Introduction’ in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 4.

⁵⁶ Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (CUP 2009) 1.

⁵⁷ *Ibid.* 1.

⁵⁸ Louise Mallinder, *Amnesty, Human Rights, and Political Transitions* (Hart 2008). See Hadden, chapter 18, this volume.

Amnesties have been implemented throughout the post-Second World War period to varied effect. In Chile, the Amnesty Decree Law was passed in 1978 by General Augusto Pinochet to shield all individuals who committed human rights violations between 1973 and 1978 from criminal prosecution. It therefore applied mainly to military and paramilitary officials, including Pinochet himself.⁵⁹ The amnesty law has not been applied by Chilean courts recently, but it remained in force in domestic law at the time of writing.⁶⁰ 'The law forecloses the possibilities for many relatives of victims to at least discover the truth surrounding the crime which took place against their loved ones'.⁶¹

An amnesty of a different sort was granted in South Africa, concurrently with the Truth and Reconciliation Commission (TRC). As part of the Promotion of National Unity and Reconciliation Act (1995), the TRC appointed an Amnesty Committee, which was to offer amnesty in exchange for testimony before the TRC. The Promotion of National Unity and Reconciliation Act envisioned that '[a] grant of amnesty would be the carrot to get perpetrators' cooperation in the process, and the threat of prosecution would be the stick'.⁶² Eventually, amnesties were granted to approximately 15% of those who applied.⁶³ The simultaneous processes of truth-seeking, criminal investigations and amnesty-granting complicated matters, as perpetrators' testimony was obtained and its veracity tested under investigation, while at the same time amnesty was not secure. The contemporaneous granting of amnesty in truth-seeking exercises is also common in many Latin American transitional contexts.

Truth-seeking

At the same time as instruments for criminal accountability were proliferating, quasi-judicial instruments for determining the truth about past events were increasingly put to use. Hayner defines truth commissions as 'those bodies that share the following characteristics: (1) truth commissions focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord)'.⁶⁴

⁵⁹ Edward C. Snyder, 'The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995' (1995) 2(2) *Tulsa Journal of Comparative and International Law* 268.

⁶⁰ Amnesty International, *Chile: 40 years on from Pinochet's coup, impunity must end*, 10 September 2013 <<http://www.amnesty.org/en/news/chile-40-years-pinochet-s-coup-impunity-must-end-2013-09-10>> accessed 20 November 2013.

⁶¹ Snyder, 'The Dirty Legal War', 268.

⁶² Hayner, *Unspeakable Truths*, 99.

⁶³ Louise Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa', *Beyond Legalism: Amnesties, Transition and Conflict Transformation Working Paper No. 2*, Institute of Criminology and Criminal Justice, Queen's University Belfast (February 2009).

⁶⁴ Hayner, *Unspeakable Truths*, 14.

It is generally agreed that the Commission of Inquiry into Disappearances of People in Uganda was the first truth commission. Established by President Idi Amin under Legal Notice 3, on 30 June 1974, the commission was to consider evidence of the disappearance of hundreds of Ugandans.⁶⁵ Yet '[t]he Commission of Inquiry into Disappearances of People in Uganda had little or no impact. Its findings were kept secret. Since they were presented to the man responsible for the disappearances in the first place, it was an artificial enterprise from the start ... [This was] also the only commission to be set up under a dictatorial regime.'⁶⁶

Truth commissions were convoked in Bolivia (1982), Argentina (1983) and elsewhere. The most infamous of these is the South African TRC, which was established under the *Promotion of National Unity and Reconciliation Act*, No. 34 of 1995, and was based in Cape Town. Its mandate was to 'establish ... as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date [1994], including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings'.⁶⁷ At the time of writing, more than 40 truth commissions had been established worldwide.

Hayner notes that 'official truth-seeking, it turns out, is a cumbersome and complicated affair'.⁶⁸ She notes three main problems:

First, the expectations for truth commissions are almost always greater than what these bodies can ever reasonably hope to achieve ... Second, many of the most difficult problems confronted by truth commissions seem to be almost universal to these kinds of inquiries, as each new commission stumbles on many of the same questions and false assumptions ... The third fact, which is becoming apparent only in recent years, is that these truth bodies can have significant long-term consequences that may be entirely unexpected at the start. This is especially true, it seems, in the realm of justice and accountability.⁶⁹

TRACING THE GEOGRAPHIC ROOTS OF TRANSITIONAL JUSTICE

While transitional justice may have grown out of the experiences of the Allied Powers in Europe and Japan following the Second World War, glimpses of this evolving field are evident further back, in the examples provided by Ancient Greece, or even

⁶⁵ Government of Uganda, *Report of the Commission of Inquiry into Disappearances of People in Uganda* (1975) 4.

⁶⁶ Joanna R. Quinn, 'Commission of Inquiry into Disappearances of People in Uganda: Transitional Justice Institutions and Organizations' in Nadya Nedelsky and Lavinia Stan (eds), *Encyclopedia of Transitional Justice*, vol. 1 (CUP 2012) 63.

⁶⁷ Republic of South Africa, *Promotion of National Unity and Reconciliation Act*, 1995, art. 3.1.

⁶⁸ Hayner, *Unspeakable Truths*, 8.

⁶⁹ Hayner, *Unspeakable Truths*, 8. See also Lawther, chapter 17, this volume.

seventeenth and nineteenth century Great Britain and France. It did not end there; rather, many different traditions grew up in different regions of the world.⁷⁰

Europe

As outlined above, criminal accountability measures in Europe began, at least in their modern incarnation, with Nuremberg and spread further to the *ad hoc* ICTY and permanent ICC, both of which sit at The Hague, Netherlands. Outside of this more formal structure, two hybrid courts have also been established: the Regulation 64 Panels in the Courts of Kosovo, and the War Crimes Chamber of the Court of Bosnia and Herzegovina. At the end of the Cold War, Eastern European countries held national trials for the authoritarian and repressive leaders of their former regimes, including the former head of the politburo of the Bulgarian Communist Party, Todor Zhivkov, who was tried and sentenced in the early 1990s.⁷¹ Similar trials were held in many other countries across Eastern Europe, although in places like Romania, ‘court trials have been few in number and deficient in procedure’.⁷² Today, in Europe, a relatively strong regional system of human rights protection exists, particularly in Western Europe.⁷³

Little has been paid in the way of reparations. Reparations paid by Germany to Israel and to individual survivors of the Holocaust are outlined above. While other reparations were paid following the Second World War, these reparations were state-to-state reparations, and not intended for individual remedy. The Paris Peace Treaties of 1947, for example, worked out a settlement whereby Italy would pay Yugoslavia, Greece, the Soviet Union, Ethiopia and Albania, and Finland would repay the Soviet Union, and so on; this was one of many reparations agreements of the time.⁷⁴ Similarly, few amnesties have been granted in Europe. Only in Spain, following the death of Franco, was a general amnesty declared.⁷⁵

Likewise, European states have established relatively few truth commissions. Commissions have been created in Bosnia and Herzegovina (2001), Serbia and Montenegro (2002–2003) and two in Germany (1992 and 1995), and a national forum for discussion was created in Cyprus, with similar aims to a truth commission. Research and documentation centres have been established in the Czech Republic and Poland. There

⁷⁰ Countries have been grouped into regions generally corresponding to the following: Europe, Latin America, Africa, Asia (including Oceania), Middle East and North Africa, and North America.

⁷¹ Zhivkov was eventually exonerated by a court decision in 1995. John Bell, ‘Democratization and Political Participation in “Postcommunist” Bulgaria’ in Karen Dawisha and Bruce Parrott (eds), *Politics, Power, and the Struggle for Democracy in South-East Europe* (CUP 1997) 378.

⁷² Lavinia Stan, ‘Civil Society and Post-communist Transitional Justice in Romania’ in Olivera Simić and Zala Volčič (eds), *Transitional Justice and Civil Society in the Balkans* (Springer 2013) 21. See Stan, chapter 25, this volume.

⁷³ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Cornell University Press 2003) 138.

⁷⁴ ‘Paris Peace Treaties’ in Jan Palmowski (ed.), *A Dictionary of Contemporary World History*, 3rd ed. (OUP 2008).

⁷⁵ ‘La Ley de Amnistía de España’, 46/1977 (15 October 1977).

have been calls for truth commissions to be established in the former Yugoslavia and Spain, and a regional commission for the Balkans, although they had not yet been established at the time of writing.

Latin America

Latin America, on the other hand, has been much more active on all fronts. Courts have been active in the area of criminal prosecutions throughout the region, but particularly in Argentina, Guatemala, Peru and Chile, and prosecutions are now beginning in Colombia. Of note is the case of former Peruvian President Alberto Fujimori, who was arrested, tried and convicted by Peru's Supreme Court for a number of crimes related to corruption and human rights abuses that occurred during his government.⁷⁶ Civil society throughout the region has been particularly active, with groups like the *Asociación Madres de Plaza de Mayo* vocally lobbying and demonstrating in front of the Presidential Palace in Argentina, despite threats from the government. The Inter-American Commission of Human Rights is likewise effective, and has 'vigorously exploited [its] autonomy, especially in the 1970s and 1980s, in the face of strongly resistant states'.⁷⁷

Latin American governments have also been at the forefront of reparations payments, and reparations have been central to the recommendations made by many of the truth commissions that have operated in Latin American countries. Monitoring bodies have frequently been established to ensure that the reparations are paid appropriately. Chile, for example, is estimated to have paid approximately \$1.6 billion in reparations between 1996 and 2008,⁷⁸ at a true cost of \$13 million per year.⁷⁹ The cost for Argentina's reparations program was estimated at approximately \$500 million.⁸⁰ Other countries, including Peru and Guatemala, are working through their own reparations schemes at the time of writing.⁸¹

Many Latin American countries have also granted amnesties, and their success has certainly complicated many other forms of transitional justice. Amnesties were granted in Argentina, Brazil, Chile, El Salvador, Paraguay, Peru and Uruguay. For the most part, these amnesties were granted well *before* any of the other interventions. In El Salvador, however, a blanket amnesty was declared *after* the truth commission report was released.⁸²

⁷⁶ Jo-Marie Burt and Carlos Rivera (eds), *The National and International Significance of the Trial and Conviction of Alberto Fujimori* (in Spanish) (Instituto de Defensa Legal 2011).

⁷⁷ Donnelly, *Universal Human Rights in Theory and Practice*, 142.

⁷⁸ International Center for Transitional Justice, 'Reparations: Types of Reparations' <<http://www.ictj.org/our-work/transitional-justice-issues/reparations>> accessed 24 November 2013.

⁷⁹ Hayner, *Unspeakable Truths*, 314.

⁸⁰ *Ibid.* 317.

⁸¹ See also Naomi Roht-Arriaza and Katharine Orlovsky, 'Chapter Five: Complementary Relationship: Reparations and Development' in *Transitional Justice and Development: Making Connections*, eds. Pablo De Greiff and Roger Duthie (International Center for Transitional Justice, 2009), 170–213.

⁸² Hayner, *Unspeakable Truths*, 91.

As this suggests, a number of truth commissions have been established in the region. In fact, many of the earliest truth commissions were established in Latin America: the second-ever commission to be convoked was in Bolivia (1982), although it disbanded before finishing its report.⁸³ The third-ever truth commission was established in Argentina (1985), and its final report, entitled *Nunca Más*, became a bestseller and has been constantly in print since 1984.⁸⁴ In many ways, the Argentine commission set the standard for truth commissions to come. Other commissions have since been established in Brazil (2011), Chile (1990, 2003), Colombia,⁸⁵ Ecuador (1996, 2007), El Salvador (1992), Guatemala (1997), Haiti (1995), Panama (2001), Paraguay (2004), Peru (2001) and Uruguay (1985), among others.

Sub-Saharan Africa

At approximately the same time as these transitional justice measures were being used in Latin America, similar initiatives were being undertaken across sub-Saharan Africa.⁸⁶ Criminal prosecutions have been undertaken at the national level in countries including Rwanda⁸⁷ and Uganda.⁸⁸ As noted above, a hybrid tribunal, the Special Court for Sierra Leone, was established under the management and control of the Government of Sierra Leone and the United Nations, and the International Criminal Tribunal for Rwanda was established by the United Nations Security Council.⁸⁹

The ICC has been occupied with a preponderance of African cases and situations, indicating that states themselves are either unwilling or unable to prosecute crimes within their borders. In 2011, all eight of the situations under investigation by the ICC were African: the situations in Uganda, Democratic Republic of Congo, Central African Republic and Mali were referred by the Presidents of those countries; the situations in Darfur/Sudan and Libya⁹⁰ were referred by the United Nations Security Council; in both Côte d'Ivoire and Kenya, investigations were opened *proprio motu* by the

⁸³ Ibid. 291.

⁸⁴ Kathryn Sikkink, 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights' (2008) 50(1) *Latin American Politics and Society* 1.

⁸⁵ Lisa J. Laplante and Kimberly Theidon refer to the *Comision Nacional de Reparacion y Reconciliacion* in Colombia as a 'sort of truth commission.' Lisa J. Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' (2006) 28 *Michigan Journal of International Law* 93.

⁸⁶ It must be noted that Africa has experienced more violent conflict than other continents since the end of colonialism over the past 50 years. Anke Hoeffler, 'Dealing with the Consequences of Violent Conflicts in Africa: Background Paper for the African Development Bank Report 2008', Centre for the Study of African Economies, University of Oxford, 13 March 2008, 4 <<http://users.ox.ac.uk/~ball0144/consequences.pdf>> accessed 26 November 2013. Hoeffler also notes that African wars have also lasted longer than wars on other continents. 'On average they lasted about eight years while the global average is about six and a half years'.

⁸⁷ Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007).

⁸⁸ Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013).

⁸⁹ See Fichtelberg, chapter 16, and Sharp, chapter 7, this volume.

⁹⁰ For the purposes of this chapter, Libya is grouped with the Middle East and North Africa, although it is geographically located in Africa.

Prosecutor. Yet African countries have not utilized reparations, particularly, as a means of bringing about justice. The South African TRC did award reparations to victims of the Apartheid-era violence. At the time of writing, however, not all of the reparations had been paid and the reparations program remains controversial.⁹¹

Countries in Africa have granted somewhat more amnesties. The South African TRC granted amnesty in exchange for truth-telling, as noted above. A blanket amnesty was extended according to the Lomé Peace Agreement in Sierra Leone.⁹² Amnesties have also been declared in other countries, including Uganda (2000), Democratic Republic of Congo (2009) and Senegal (1993). African countries have, however, utilized truth commissions in a number of cases. As noted above, the first-ever truth commission is generally considered to have been established in Uganda in 1974, and the South African TRC is perhaps the best known. Other truth commissions have been established in Algeria (2003), Burundi (1995), Chad (1991), Côte d'Ivoire (2000), Democratic Republic of Congo (2003), Ethiopia (1993), Ghana (2003), Liberia (2006), Nigeria (1999), Kenya (2009), Rwanda (1993), Sierra Leone (2000), Uganda (1986), Mauritius (2009) and Zimbabwe (1985). A quasi-truth commission was carried out in Rwanda (1993) by Rwandan civil society groups and international non-governmental organizations.

Asia

Across Asia, several mechanisms for criminal accountability have been established. The legacy of criminal prosecutions in the modern era began with the International Military Tribunal for the Far East. As noted above, the Extraordinary Chambers of the Courts of Cambodia were jointly established by the United Nations and the Government of Cambodia, in a hybrid model. In Bangladesh, The International Crimes Tribunal was established in 2009 as a war crimes tribunal to investigate and prosecute suspects of genocide. The Special Panels of the Dili District Court (also called the East Timor Tribunal) worked from 2000 to 2006 as a hybrid court by the United Nations and the East Timorese Government to try cases of 'serious criminal offences' from violence there in 1999. Yet there have been few successful reparations programs: there have been calls for reparations in Indonesia, and Cambodia's ECCC has ordered collective reparations and an apology for the crimes against humanity that were committed. Likewise, there have been few, if any, amnesties declared.

Several truth commissions have been established. South Korea alone has convoked 10 truth commissions.⁹³ Others have been established in Sri Lanka (2010) and Timor-Leste (2002), and one other was established jointly by Indonesia and Timor-Leste (2005) to investigate the crimes committed in Timor-Leste by Indonesia. There

⁹¹ Mary Burton, 'Reparations: It is Still Not too Late' in Eric Doxtader and Charles Villa-Vicencio (eds) *To Repair the Irreparable: Reparation and Reconstruction in South Africa* (David Phillip 2004) 29.

⁹² Beth K. Dougherty, 'Searching for Answers: Sierra Leone's Truth & Reconciliation Commission' (2004) 8(1) *African Studies Quarterly* 40.

⁹³ Hun Joon Kim, *The Massacres at Mt. Halla: Sixty Years of Truth-Seeking in South Korea* (Cornell University Press 2014).

have also been a couple of false starts: Nepal passed legislation creating a truth commission in 2013, but it was not under way at the time of writing. A truth commission was created in the Philippines in 2010, but the order was invalidated by the next President. It should be noted that Kyrgyzstan has also experimented with quasi-truth commissions.⁹⁴

Oceania

One further dimension of transitional justice in what is loosely called 'Asia' concerns interesting developments that have taken place in Oceania.⁹⁵ A truth commission was established in the Solomon Islands in 2009. Likewise, Australia established what some consider to be a truth commission, the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, in 1995.⁹⁶ In Fiji, a truth commission was proposed in 2005, but a subsequent coup invalidated the tabling legislation and abrogated the Constitution.⁹⁷

Middle East and North Africa

Criminal accountability in the Middle East and North Africa has centred, generally, around three interventions. First, the Supreme Iraqi Criminal Tribunal (formerly the Iraqi Special Tribunal) was established by the Government of Iraq to hear cases of genocide, crimes against humanity, and war crimes. Its most famous case was that of Saddam Hussein in 2006.⁹⁸ Second, the Special Tribunal for Lebanon is a hybrid court established by the Government of Lebanon and the United Nations in 2007. Third, as noted above, the situation in Libya was referred unanimously by the United Nations

⁹⁴ Kyrgyzstan, for example, held parliamentary commissions, commissions of inquiry and other truth-seeking efforts in 2002, 2003, 2008; Marcie Mersky, Bogdan Ivanišević and Eugene Huskey, 'Assessing a Transitional Justice Approach for Kyrgyzstan: Kyrgyzstan Mission Report May 30–June 6, 2010', International Center for Transitional Justice (August 2010) <<http://ictj.org/sites/default/files/ICTJ-Kyrgyzstan-TJ-2010-English.pdf>> accessed 26 November 2013.

⁹⁵ 'Collectively [Oceania] combines all of Australia, New Zealand, Papua New Guinea, as well as the thousands of coral atolls and volcanic islands of the South Pacific Ocean, including the Melanesia and Polynesia groups. Oceania also includes Micronesia, a widely scattered group of islands that run along the northern and southern edges of the Equator.' 'Australia/Oceania' in World Atlas <<http://www.worldatlas.com/webimage/countrys/au.htm>> accessed 27 November 2013.

⁹⁶ 'Bringing them Home: The "Stolen Children" report (1997)', Australian Human Rights Commission <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>> accessed 16 February 2016.

⁹⁷ Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and its Aftermath* (ANU Press 2007).

⁹⁸ The Council was set up by the Coalition Provisional Authority (CPA), but the Statute of the Court was technically enacted by the Iraqi Governing Council, to which the CPA temporarily ceded authority, so that the decision could be said to have been taken by the Iraqis and not the CPA. Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer 2008) 347; also Beth K. Dougherty and Edmund Ghareeb, *Historical Dictionary of Iraq*, 2nd ed. (Scarecrow Press 2013) 313.

Security Council to the ICC in 2011, although at the time of writing, the one case remaining before the Court has been declared ‘inadmissible before the ICC as it was currently subject to domestic proceedings conducted by the Libyan competent authorities and that Libya is willing and able genuinely to carry out such investigation’.⁹⁹ In addition, the Moroccan truth commission, the *Instance Équité et Réconciliation*, had recommended accountability measures be taken, but at the time of writing, these have not yet been pursued.

Reparations have been less common in the region. Morocco’s IER made recommendations for reparations.¹⁰⁰ At the time of writing, Iraq was working to draft legislation on reparations. Amnesties have been granted in three cases. Passed in 2007, an amnesty law in Afghanistan prevents prosecution of people for war crimes.¹⁰¹ In Algeria, a Presidential decree was issued in 2006, preventing prosecution for human rights abuses.¹⁰² In Lebanon, an amnesty was declared in respect of any crimes committed prior to 1991.¹⁰³ Truth commissions have not caught on in the Middle East and North Africa in the way that they have in other regions, although Tunisia established the Truth and Dignity Commission in 2014.¹⁰⁴ Truth commissions have also been established in Bahrain in 2009 – organized by a coalition of civil society actors – and in 2011 and also in Morocco in 2004.

North America

While North America is not traditionally thought of as having undergone any kind of transition, nonetheless, historical injustices and systemic inequalities exist surrounding the legacies of slavery and the treatment of Indigenous peoples. Truth commissions have been established to deal with some of these issues: In Greensboro, North Carolina, a truth commission was established to look at the events surrounding 3 November 1979. The Maine Wabanaki–State Child Welfare TRC was established in 2013 to investigate high rates of Indigenous children placed in non-Indigenous homes.¹⁰⁵ The Qikiqtani Truth Commission was established in 2007 in the Canadian High Arctic by a civil society group to examine the ‘truth surrounding the alleged dog slaughter,

⁹⁹ ‘Situations and Cases: Situation in Libya’, International Criminal Court <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 27 November 2013.

¹⁰⁰ International Center for Transitional Justice, ‘The Rabat Report: The Concept and Challenges of Collective Reparations’ (International Center for Transitional Justice, 1 February 2009); Christopher K Lamont and Héra Boujneh, ‘Transitional Justice in Tunisia: Negotiating Justice during Transition’ (2012) 49(5) *Politička misao* 32.

¹⁰¹ Human Rights Watch, ‘Afghanistan: Repeal Amnesty Law: Measure Brought into Force by Karzai Means Atrocities Will Go Unpunished’ (Human Rights Watch, 10 March 2010).

¹⁰² ‘Algeria: Briefing to the Human Rights Committee’, AI Index: MDE 28/017/2007 (Amnesty International, September 2007).

¹⁰³ International Center for Transitional Justice, ‘Lebanon: Failing to Deal with the Past: What cost to Lebanon’ (International Center for Transitional Justice, January 2014).

¹⁰⁴ Christopher K. Lamont, ‘The Scope and Boundaries of Transitional Justice in the Arab Spring’ in *Transitional Justice in the Middle East and North Africa*, ed. Chandra Lekha Sriram (OUP 2016), 83–100.

¹⁰⁵ <www.mainewabanakitrc.org>.

relocations and other decisions made by the Canadian government up until 1975, and to consider the effects of these decisions on Inuit culture, economy and way of life'.¹⁰⁶ The Qikiqtani Truth Commission also recommended that reparations be paid. In 2008, as a result of the settlement of the largest-ever class-action lawsuit in Canadian history, the Government of Canada created a truth commission to address the legacy of the Indian Residential Schools, a system of forced separation of Aboriginal children from their families, and the site of significant emotional, physical and sexual abuse. That commission issued its final report in December 2015.¹⁰⁷

GROWING PAINS

As the field of transitional justice has developed, complications have arisen that might not have been anticipated. As the amount of scholarship in the area of transitional justice has grown, and with it the number of scholars, a series of questions has arisen about how and why particular choices have been made, and about what kinds of mechanisms and instruments ought to be employed, that have necessitated a degree of growth. Six of these are discussed here.

Deepening International Engagement

From the Second World War until the creation of the ICC, there was significant and growing involvement by the international community in the form of various organs of the United Nations. Most prominently, the Secretary-General released a landmark report in 2004 in which then-Secretary General Kofi Annan outlined his vision for the United Nations in transitional justice:

Recent years have seen an increased focus by the United Nations on questions of transitional justice and the rule of law in conflict and post-conflict societies, yielding important lessons for our future activities. Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice ... The United Nations must therefore support domestic reform constituencies, help build the capacity of national justice sector institutions, facilitate national consultations on justice reform and transitional justice and help fill the rule of law vacuum evident in so many post-conflict societies ... Our main role is not to build international substitutes for national structures, but to help build domestic justice capacities.¹⁰⁸

The United Nations has been involved in transitional justice in different ways for many years. In El Salvador, for example, the United Nations brokered a peace agreement between the government and leftist guerrillas called the Farabund Martí National

¹⁰⁶ <<http://www.qtcommission.com/actions/GetPage.php?pageId=87>> accessed 27 November 2013.

¹⁰⁷ Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' [final report] <<http://nctr.ca/reports.php>> accessed 16 February 2016.

¹⁰⁸ United Nations Secretary General, *Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations*, 2004, S/2004/616, 1.

Liberation Front, and then administered and funded the truth commission that had been negotiated as part of the peace accord.¹⁰⁹ The United Nations has likewise been involved in all the *ad hoc* tribunals, the hybrid tribunals, and in cooperating with the permanent ICC. It is important to recognize that as reflected in the Secretary General's 2004 report, the United Nations both sees and is committed to supporting and working alongside the instruments that are developed.¹¹⁰

Contagion or Copy-cat?

It is important to take into account the influence that transitional justice initiatives in one country have had on other countries. One good example of this is the spate of truth commissions that were established following the 'success' of the South African TRC, particularly in other African countries, including Nigeria, Ghana, Sierra Leone and Liberia. This kind of 'cross-contamination' can help to explain decision-making and particular nuances in individual cases. In the Ugandan Commission of Inquiry into Violations of Human Rights (1986), for example, José Zalaquett, a former commissioner from the Chilean Rettig Commission, consulted on the Ugandan process, bringing his expertise and experience from Latin America to the African case.¹¹¹ Kritz has been explicit about the kind of benefit that can be derived from this kind of information sharing, and noted as early as 1995 'the extent to which the Central and Eastern Europeans and former Soviets who were just emerging from communist rule could learn any useful lessons from the Latin American transitions of the previous decade'.¹¹²

This sort of sharing continues, although much more needs to be learned about how and why this duplication takes place. For example, a Ministry of Human Rights and Transitional Justice was created in Tunisia in early 2012. A decade earlier, in 2002, the Solomon Islands had established the Ministry of Reconciliation, Peace and National Unity. It seems likely that any government that is beginning to consider transitional justice strategies might search for best practices to replicate. Influential organizations like the International Center for Transitional Justice, based in New York, have encouraged this sort of activity in cases around the globe, and their signature characteristics appear on a number of transitional justice institutions and mechanisms.

Simultaneity

The second significant development is the persistent simultaneity of mechanisms, and the concurrent institutions and jurisprudence that have resulted. The 2004 Report of the

¹⁰⁹ Hayner, *Unspeakable Truths*, 38.

¹¹⁰ The Secretary-General released a second report in 2011, which was intended as a stock-taking of what had been accomplished since the first report. The 2004 report continues to serve as the standard that was set. United Nations Secretary General, *Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations*, 2011, S/2011/634.

¹¹¹ Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (UBC Press 2010) 73.

¹¹² Kritz, *Transitional Justice*, xix.

Secretary General spoke specifically to the importance of combined approaches: 'Strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof'.¹¹³

At times the concurrent operation of transitional justice instruments has proved difficult. Cohen thoroughly outlines the multiplicity of transitional justice processes that were carried out by the Allied Powers in Germany after 1945, and reveals some startling details about how those approaches were pursued.¹¹⁴ Schabas has written of the intricacies that arose from the simultaneous operation of the Sierra Leonean Truth and Reconciliation Commission with the Special Court for Sierra Leone.¹¹⁵ The difficulties that occurred with the tandem processes of amnesty and truth-telling and criminal prosecution in South Africa are outlined above. Yet lessons have been learned, and will continue to be learned. In other contexts, the synchronized operation of two or more instruments has been much less fraught. One thinks immediately of the Rwandan case, where the ICTR operated at the same time as national courts and *gacaca* courts, each one responsible for its own set of cases.¹¹⁶ Even the question of jurisdiction that is being worked out in cases like Uganda, where an amnesty, national courts and the ICC are operating simultaneously, appears to be resolving at the time of writing.¹¹⁷

Stretching Beyond Civil and Political Rights to include Economic, Social and Cultural Rights

While traditionally transitional justice is narrowly conceived, with a focus on seeking to remediate particular crimes, a newer understanding is that transitional justice must be broadly conceived, consciously seeking to include aspects of development, social injustice and patterns of inequality. There are calls for the redress of violations of economic, social and cultural rights as transitional justice, beyond civil and political rights. Alternatively, they discuss the idea of compensation for victims. There are three main strands to the 'transitional justice and development' argument, all of which are loosely related to development.¹¹⁸ The first is the question of reparations as development. The second is the inclusion of economic, social and cultural rights, and crimes

¹¹³ United Nations Secretary General, *Report of the Secretary General*, 9, at art. 26.

¹¹⁴ David Cohen, 'Transitional Justice in Divided Germany after 1945' in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (CUP 2006) 59.

¹¹⁵ William A Schabas 'Notes and Comments: The Special Court for Sierra Leone: Testing the Waters: Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2(4) *Journal of International Criminal Justice* 1082.

¹¹⁶ Alana Tiemessen, 'Transitional Justice: Lessons from Rwanda', a paper presented at the International Studies Association Annual Convention, Chicago, **IL**, **28** February 2007.

¹¹⁷ Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division* <http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf> accessed 20 November 2013.

¹¹⁸ The *International Journal of Transitional Justice* published a special issue on this question in 2008, edited by Rama Mani.

that violate these rights, in the theory and practice of transitional justice.¹¹⁹ The third concerns the incorporation of practices of post-conflict reconstruction, such as humanitarian aid, refolement, or Disarmament, Demobilisation and Re-Integration, into transitional justice.¹²⁰ However, the literature is not speaking with one voice: although the word ‘development’ is often used, it is employed very differently. To date, although leading scholars including Roht-Arriaza, Mani, and Miller have been working to address these questions, there is no real consensus about the potential breadth of transitional justice.¹²¹

Defining the Limits of Transitional Justice

Closely related to this is the question of definition, and calls are made for transitional justice to do many things, including security sector reform, or constitution-writing, or electoral reform, or peacebuilding, or law reform, and so on. There is no question that these sorts of endeavours are closely related to the situations in which transitional justice is at play. Neither is there any question that their success is very much tied to the success of transitional justice initiatives. However, a debate has emerged as to whether it is the case that transitional justice itself can and should engage with them, and to what extent. Sriram and García-Godos argue that ‘[t]ransitional justice is not a panacea for all of the social problems that societies in transition might experience ... They may nonetheless raise expectations, and processes that do not deliver on such expectations may weaken the delicate links of trust between local populations and victims’ groups, and governments’.¹²² Yet the debate about the connection of transitional justice to any one of a number of other post-conflict-related activities, or its role within them, continues.

Changing the Parameters of Transition

It is also important to note that, although Arthur, Elster, Sikkink and Teitel concentrate on the specific transition type, and on the role of democratization and human rights in the wake of the Cold War, the strict focus on absolute ‘transition’ appears to be shifting.

¹¹⁹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity/Blackwell 2002); also Lars Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’ (2012) 21(2) *Social and Legal Studies* 171.

¹²⁰ Chandra Lekha Sriram, Jemima García-Godos, Olga Martin-Ortega and Johanna Herman (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and ex-combatants* (United States Institute of Peace Press 2012).

¹²¹ Naomi Roht-Arriaza, ‘Reparations Decisions and Dilemmas’ (2003–2004) 27(2) *Hastings International and Comparative Law Review* 186; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity/Blackwell 2002) 179; and Zinaida Miller, ‘Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice’ (2008) 2(3) *International Journal of Transitional Justice* 267.

¹²² Chandra Lekha Sriram and Jemima García-Godos, ‘Conclusions and Considerations for Practitioners’ in Chandra Lekha Sriram, Jemima García-Godos, Olga Martin-Ortega and Johanna Herman (eds), *Transitional Justice as Peacebuilding* (Washington: United States Institute of Peace Press 2012) 258.

In recent years, themes and practices of ‘transitional justice’ have worked in consolidated democracies that are not in transition at all, or which outwardly exhibit no real need for the kind of transition normally evidenced in transitional societies.¹²³ To wit, a truth commission, the Greensboro Truth and Reconciliation Commission was established in the United States – a country that has demonstrated no particular transition, and which many would argue is a strong and open democracy, and free from authoritarianism, and therefore not in need of any kind of transition. Yet the Greensboro TRC considers not just particular acts of violence, but the ways in which racism and structural inequality have become institutionalized within the American system.¹²⁴ The argument is made that effectively dealing with this kind of racism and structural inequality *does* require transition and change, and that this can most successfully be brought about by using the mechanisms and institutions of transitional justice – in this case, the truth commission. The same kinds of processes have been undertaken in other so-called non-transitional countries, including Australia and Canada, as detailed above. This mainstreaming of transitional justice marks an innovation that scholars are only just beginning to grapple with.

CONCLUSION

Transitional justice has grown since its somewhat murky beginnings in the prosecution of war criminals at Nuremberg and Tokyo to now. The scholars working in what was to become this field came from different academic traditions and read different literatures. They espoused different philosophies, which is revealed in the different perceptions outlined above about the origins of the field. In the end their work is really only tenuously connected. Yet they continued to pursue this work, borrowing from each other and working alongside each other in many of the same debates and often in the same countries.

This chapter has identified a number of different instruments and approaches that are employed in transitional justice, and has detailed the different and sometimes divergent threads that developed, and which are elucidated further throughout this volume. The instruments themselves, along with the understandings of and encounters with them, have developed over time. Along the way, they have been modified as theoretical insights and practical experience has shaped them. They have also spread to all inhabited continents of the globe. While it is true that transitional justice scholars are not, as Tiemessen noted above, ‘one big happy family’, all are at least committed to finding a way of dealing with the legacy of the past.¹²⁵

¹²³ Sriram and García-Godos have called these ‘transitional justice without transition and “atypical” transitional justice’. Ibid. 265.

¹²⁴ David Androff, ‘Narrative Healing Among Victims of Violence: The Impact of the Greensboro Truth and Reconciliation Commission’ (2012) 93(1) *Families and Society* 38.

¹²⁵ Kerr and Mobekk, *Peace and Justice*, 3.