ALICE PANEPINTO

Transitional Justice: International Criminal Law and Beyond

CONTENTS: 1. Introduction – 2. Conceptualising Transitional Justice. – 3. International Criminal Law. – 4. International Human Rights Law. – 5. International Humanitarian Law. – 6. The Local Informal Norms of Transitional Justice. – 7. Conclusions.

1. Introduction.

Societies facing a past of gross human rights violations during authoritarianism, conflict or other forms of violence have sought to creatively design and implement means to address that suffering, often with the participation of international actors. Law, including international law and local conceptions of justice, may provide means for victims and societies as a whole to address the past and set out a more just future, based on human rights, a decent standard of living, freedom from violence and the possibility to participate in the governance of one's community. In addition to specific mechanisms, such as trials, truth commissions, lustrations, amnesties, memorialisations, institutional reform and constitutional adjustments (to name a few), the distinctive force of transitional justice is its potential to uncover and challenge the past to rebuild the future.

Transitional justice describes the dynamic, composite processes of policies and mechanisms that seek to address the legacy of serious abuse carried out in authoritarian regimes or conflicts. However, transitional justice conceals a deeper meaning, revealing a distinctive conception of law and legality linked to periods of radical political change. The goals of transitional justice - truth, accountability and reconciliation - can be achieved through a variety of means, some of which may require a flexible approach to the applicable legal framework in deference to political necessities. For that reason, the discovery of the truth about past abuse, and the possibility to manage competing versions of it, constitutes the prelude for real change in times of transition.

2. Conceptualising Transitional Justice.

'Transitional justice' has become a panacea for addressing the legacy of grave widespread human rights abuses, applicable to both post-authoritarianism and

post-conflict situations[1]. One of its principal advocates has described transitional justice, with a hint of irony, as "a universal policy tool" that "resolves an apparently endless number of problems"[2]. Under the scope of transitional justice are included a variety of mechanisms, processes and policies, some rather ordinary and others radically extraordinary[3], that seek to deal with serious human suffering related to political shifts. The effects of transitional justice bear significance for individuals as well as societies more broadly, as truths are uncovered, responsibilities apportioned, and the foundations for a more just community are laid[4]. It has been noted that definitions of transitional justice reflect two - not necessarily competing - approaches to the topic. The former indicates an umbrella term for the "full range of processes and mechanisms" that make up transitional justice, while the latter captures the more theoretical "modified notion of justice inherent in these policies"[5]. On the international plane, the UN has presented transitional justice as follows:

---

[1] On transitional justice and post-authoritarianism/democratisation, see inter alia: Neil J Kritz (Ed), Transitional justice: how emerging democracies reckon with former regimes (United States Institute of Peace Press, Sep 1, 1995); Luc Huyse "Justice after transition: On the choices successor elites make in dealing with the past" (1995) 20.1 *Law & Social Inquiry* 51; on transitional justice and post-conflict/peacebuilding, see inter alia: Wendy Lambourne 'Transitional justice and peacebuilding after mass violence' (2009) 3(1) *International Journal of Transitional Justice*, 28; Chandra Lekha Sriram, "Justice as peace? Liberal peacebuilding and strategies of transitional justice" (2007) 21.4 *Global society*, 579.

[2] Pablo De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', Journal for Human Rights / Zeitschrift für Menschenrechte, Oct2011, Vol. 5 Issue 2, p98-128.at 98; discussed in person with the author at the 2013 Antonio Cassese Initiative Summer School: Transitional Justice in Post Conflict Societies: Issues and Challenges, 8-12 July 2013, Geneva.

[3] For a general discussion on this, see inter alia: Posner, Eric A., and Adrian Vermeule. "Transitional justice as ordinary justice." *Harv. L. Rev.* 117 (2004): 761-2804; and Aukerman, Miriam J. "Extraordinary evil, ordinary crime: A framework for understanding transitional justice." *Harv. Hum. Rts. J.* 15 (2002): 39.

[4] On the effects at different levels of transitional justice see, inter alia: Judy Barsalou, 'Trauma and transitional justice in divided societies' (April 2005) United States Institute for Peace Special Report, 135; Elster, Jon. "Emotions and transitional justice." *Soundings* (2003): 17-40; Oskar NT Thoms, James Ron, and Roland Paris, "State-level effects of transitional justice: What do we know?" (2010) 4.3 *International Journal of Transitional Justice* 329; David Mendeloff, "Trauma and vengeance: Assessing the psychological and emotional effects of post-conflict justice" (2009) 31.1 *Human Rights Quarterly* 592; Kevin Avruch, "Truth and reconciliation commissions: Problems in transitional justice and the reconstruction of identity" (2010) 47.1 *Transcultural Psychiatry* 33; Rama Mani, "Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development" (2008) 2.3 *International Journal of Transitional Justice* 253.

[5] James A. Sweeney, The European Court of Human Rights in the Post-Cold War Era: Universality in Transition, Routledge 2013, at 22. An example of how transitional justice has been discussed as an umbrella term can be found in Lutz Oette, 'Law reform in times of peace processes and transitional justice: The Sudanese dimension' in Lutz Oette (Ed), Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan (Ashgate, 2013), 18.

> The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with different levels of national involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof[6].

On the basis of the above, the UN recognises that transitional justice does not amount to a static moment or act, but a dynamic, on-going process originating from a society's willingness to confront egregious past violations of rights. This process comprises three specific and mutually reinforcing aims: ensuring accountability, serving justice and achieving reconciliation. This pragmatic approach encompasses both judicial means and non-judicial ones, at domestic, regional and international levels, that seek to address serious past abuse. Therefore, a given transitional justice process may include a combination of the following measures: successor trials (both criminal and non-criminal), truth commissions[7], lustrations (vetting)[8], restorative measures (reparations, restitutions, etc)[9], constitutional and legal reform[10], reforming the security sector[11], opening and granting access to secret files, memorialisations[12], public

---

[6] Notably, in: United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* S/2004/616, 23 August 2004, as also discussed in Sweeney, The European Court of Human Rights in the Post-Cold War Era, at 22.

[7] On this see inter alia: Hayner, Priscilla B. Unspeakable truths: Facing the challenge of truth commissions. Vol. 21. New York: Routledge, 2002; Hayner, Priscilla B. "Fifteen truth commissions-1974 to 1994: A comparative study." *Hum. Rts. Q.* 16 (1994): 597; Landsman, Stephan. "Alternative responses to serious human rights abuses: of prosecution and truth commissions." *Law and Contemporary Problems* (1996): 81-92.

[8] Inter alia: De Greiff, Pablo. "Vetting and transitional justice." Justice as Prevention: Vetting Public Employees in Transitional Societies (2007): 522-544.

[9] See inter alia: Llewellyn, Jennifer J., and Robert Howse. "Institutions for restorative justice: The South African truth and reconciliation commission." *University of Toronto Law Journal* (1999): 355-388, McEvoy, Kieran, and Harry Mika. "Restorative justice and the critique of informalism in Northern Ireland." *British Journal of Criminology* 42.3 (2002): 534-562; David, Roman, and Susanne YP Choi. "Victims on transitional justice: Lessons from the reparation of human rights abuses in the Czech Republic." *Human Rights Quarterly* 27.2 (2005): 392-435; Allen, Tom. "Restitution and Transitional Justice in the European Court of Human Rights." *Colum. J. Eur. L.* 13 (2006): 1.

[10] See inter alia: Preuss, Ulrich K. "Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization." *NYL Sch. L. Rev.* 51 (2006): 467; Horowitz, Donald L. "Conciliatory institutions and constitutional processes in post-conflict states." *Wm. & Mary L. Rev.* 49 (2007): 1213.

[11] Inter alia: Wulf, Herbert. "Security sector reform in developing and transitional countries." Security Sector Reform. Potential and Challenges for Conflict Transformation, Berlin (2004): 9-27.

[12] See inter alia: Barsalou, Judith Marie, and Victoria Baxter. The urge to remember: the role of memorials in social reconstruction and transitional justice. Washington, DC: United States Institute of Peace,

apologies[13], state-building (and trust-building) activities[14], amnesties[15], and more, linked to the rule of law[16], democratisation and human rights.

The 'basket of policies' vision of transitional justice adopted by the UN seems to respond to the need of tracing specific interventions in order to monitor and evaluate their impact on a given society facing radical political change. This reflects the requirements of 'results-based management'[17], widely employed by international development actors and donors and now expanding to human rights as an integral part of the development agenda[18]. However, this approach fails to capture the complexities of addressing human rights violations in a relatively unstable transitional context for two main reasons. Firstly, there are apparent difficulties in identifying appropriate indicators for appraising the 'success' of individual transitional justice mechanisms. It has been noted that many evaluation methods and impact assessments are unsuited to capturing gradual, subtle and long-term effects of transitional justice[19]. Secondly, it appears reductive to focus on the linear combination of various mechanisms and policies: transitional justice is greater that the sum of its parts, as attested by the rich scholarship developing around the subject. In addition, transitional justice ought to take into account the needs and wishes of those affected by authoritarianism, violence or conflict – the broad category of 'victims'; as such, the design of a process ought to be oriented by and for victims, even if that means adopting a more flexible approach to black-letter law.

2007.

[13] See inter alia: Jenkins, Catherine (2007) 'Taking Apology Seriously.' In: du Plessis, M. and Pete, S., (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses.* Intersentia, 53-81.

[14] Inter alia: Cole, Elizabeth A. "Transitional justice and the reform of history education." *International Journal of Transitional Justice* 1.1 (2007): 115-137.

[15] See inter alia: Mallinder, Louise. Amnesty, human rights and political transitions: bridging the peace and justice divide. Hart Publishing, 2008; Laplante, Lisa J. "Outlawing amnesty: the return of criminal justice in transitional justice schemes." *Va. J. Int'l L.* 49 (2008): 915; McEvoy, Kieran, and Louise Mallinder. "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy." *Journal of Law and Society* 39.3 (2012): 410-440.

[16] On this relationship, inter alia: Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge, 2013).

[17] For a background on this, see inter alia: United Nations Development Group, Results-based Management handbook, October 2011, available at *www.undg.org*.

[18] See inter alia on this: Alston, Philip. "Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium Development Goals." *Human rights quarterly* 27.3 (2005): 755-829.

[19] De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', at 103 et seq.

For the reasons outlined above, understanding transitional justice requires a deeper theoretical engagement and an awareness of its limitations. Kai Ambos describes justice in the context of transitions as "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs"[20]. Although originally the concept of transitional justice emerged in the context of post-authoritarianism[21], thanks to its perceived usefulness and success it rapidly expanded to post-conflict scenarios[22], sometimes extending even to ongoing conflict.[23] Today, it has found a place on the international peace and security agenda at the UN Security Council[24]. However, this progressive enlargement of the transitional justice agenda has been identified as problematic[25]. In particular, it ought to be noted that transitional justice is not always able to deliver the desired results, due to the complexities of transition that render justice aims more ambitious than in non-transitional settings.

Writing in his academic capacity, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr Pablo de Grieff aptly cautions that "in the wake of massive abuses, some of the "ordinary" expectations concerning what justice requires will not be satisfied"[26]. Indeed, contexts of political instability and social insecurity justify as much as they hinder the realisation of transitional justice towards laudable goals of truth, accountability and reconciliation. It has also been noted that transitional justice tends to serve the interim purposes of a dynamic process rather than

[20] Kai Ambos, *op. cit.*, at 7, referring to the Report of the UN SG on Transitional Justice *op. cit.* para 7.
[21] De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', at 110. See also the second phase of transitional justice as outlined by Ruti Teitel, 'Transitional justice genealogy', *16 Harvard Human Rights Journal* (2003), 69.
[22] see on this inter alia Van Zyl, Paul. "Promoting transitional justice in post-conflict societies." Security and Governance in Post-Conflict Peacebuilding. Munster, Germany: Lit Verlag Munster (2005); Mobekk, Eirin. "Transitional Justice in Post-Conflict Societies–Approaches to Reconciliation." After Intervention: Public Security Management in Post Conflict Societies-from Intervention to Sustainable Local Ownership, Vienna: Bureau for Security Policy at the Austrian Ministry of Defence (2005); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity/Blackwell 2002).
[23] On this point, see, inter alia: Engstrom, Par, Transitional Justice and Ongoing Conflict (November 1, 2011). Available at SSRN: *ssrn.com* or *dx.doi.org*; Laplante, Lisa J., and Kimberly Theidon. "Transitional justice in times of conflict: Colombia's Ley de Justicia y Paz." *Mich. J. Int'l L.* 28 (2006): 49.
[24] Secretary-General Ban Ki-moon, Security Council, 18 October 2013, Remarks at Security Council open debate on Women, Rule of Law and Transitional Justice in Conflict-Affected Situations, available at: *www.un.org/focus*.
[25] Pablo De Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice', Journal for Human Rights / Zeitschrift für Menschenrechte, Oct 2011, Vol. 5 Issue 2, 98 at 109 et seq.
[26] Pablo De Greiff (2012) 'Theorizing transitional justice' in Nagy, Elster and Williams (Eds) *Transitional Justice*, Nomos Li, NYU Press 2012 (31-78), at 58.

permanent goals[27]. Moreover, as indicated by de Greiff, coherence and sequencing of various transitional justice measures and the related risks of fragmentation may undermine the entire project[28]. Indeed, it seems more appropriate to understand transitional justice as a longer-term process encompassing a diverse range of mechanisms seeking to address the past systemically and to lay the foundations for a more just future.

A notable example of how transitional justice conceptions have enabled creative responses to massive past abuse is the case of South Africa's Truth and Reconciliation Commission (TRC) after decades of apartheid[29]. In that scenario, instead of pursuing the various masterminds of systematic human rights violations and organised violence through ordinary criminal trials with a punitive intent, key political actors, including prominent religious leader Archbishop Desmond Tutu (chairman of the TRC)[30], advocated for social reconciliation to be prioritised over individual punishment. In a letter to the South African Sunday Times on 4th December 1996, Tutu stated that the TRC 'remains a risky and delicate business but it remains the only alternative to Nuremberg on the one hand and amnesia on the other'[31].

Indeed, it was understood by the proponents of the TRC that uncovering the truth about the past would facilitate social healing more than simply punishing alleged perpetrators[32]. The establishment and the work of the TRC sought to facilitate the process of victims' healing and social reconciliation after a long period of institutionalised discrimination and violence between communities. The aims of the TRC were based on a few key premises: on the one hand, in

---

[27] CHANDRA LEKHA SRIRAM, *Confronting past human rights violations* (2004) discussed in Leebaw, Bronwyn Anne. "The irreconcilable goals of transitional justice." *Human Rights Quarterly* 30.1 (2008): 95, at 118.

[28] DE GREIFF (2012) 'Theorizing transitional justice', 58 et seq.

[29] For an overview of this topic, see inter alia: Wilson, Richard. The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state. Cambridge University Press, 2001; Gibson, James L. "Does truth lead to reconciliation? Testing the causal assumptions of the South African truth and reconciliation process." *American Journal of Political Science* 48.2 (2004): 201-217.

[30] For a personal account of his involvement in the TRC see Desmond Tutu, *No Future Without Forgiveness: A Personal Overview of South Africa's Truth and Reconciliation Commission*, Random House: 1998.

[31] As cited in GESLIN, NICOLE. "Using past events to construct the present: Voices at the Truth and Reconciliation Commission hearings." *Southern African Linguistics and Applied Language Studies* 19.3-4 (2001): 197-214, at 197.

[32] GIBSON, JAMES L. "The Contributions of Truth to Reconciliation Lessons From South Africa." *Journal of conflict resolution* 50.3 (2006): 409-432. On reconciliation, see also: WILSON, RICHARD A. "Reconciliation and Revenge in Post-Apartheid South Africa." *Current Anthropology* 41.1 (2000): 75-98; Norval, ALETTA J. "Memory, identity and the (im)possibility of reconciliation: The work of the Truth and Reconciliation Commission in South Africa." *Constellations* 5.2 (1998): 250-265.

a clear break from the former state of affairs, it was based on the recognition of the equal, shared humanity of all South Africans, regardless of ethnic heritage; on the other, those different groups were for the first time recognised as equal citizens with equal rights who had to coexist as partners within the reformed South African society. In other words, victims and perpetrators could not dwell on the past: instead, they needed to acknowledge responsibilities, forgive when possible, and work together to reconstruct society.

Through time, however, the South African TRC has been analysed in a more critical light. Some, like Mamdani, have identified the limitations of that experience, which include the individualisation of victimhood, instead of the systematic nature of apartheid.[33] Others have been more radical, suggesting that in fact truth commissions do not provide healing for victims, as opposed to what was assumed.[34] Notwithstanding the criticism levied at the TRC, its intent is clear: address past abuse in order to reconcile society for a better future.

The need to prioritise reconciliation over retribution has been identified in formal legal settings as well. A notable example is provided by the workings of the International Criminal Tribunal for former Yugoslavia (ICTY), in which the links between reconciliation and plea bargains (introduced by rule 62 ter of 13 December 2001) was clearly traced.[35] In addition to this specific ad hoc court, the "sensitive and controversial question" of how reconciliation operates in relation to the jurisdiction of the International Criminal Court (ICC) was addressed in the context of drafting the Rome Statute.[36] A persuasive interpretation provided by Robinson (who participated in the negotiations) suggests that although the primary goal of the ICC is to pursue criminal investigations, in some exceptional transitional justice circumstances it may not be in the interest of justice to interfere with a reconciliation mechanism, even when "that mechanism falls short of prosecution of all offenders".[37] Thus, and in light of article 53 of the Rome Statute, "non-prosecutorial reconciliation measures would be the exercise of prosecutorial discretion not to proceed

[33] Mamdani, Mahmood. "Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)." *diacritics* 32.3 (2005): 33-59.
[34] Borer, Tristan Anne. "Reconciling South Africa or South Africans? Cautionary Notes from the TRC." *African studies quarterly* 8.1 (2004): 19-38.
[35] On this point, see Clark, Janine Natalya. "Plea bargaining at the ICTY: Guilty pleas and reconciliation." *European Journal of International Law* 20.2 (2009): 415-436.
[36] ROBINSON, DARRYL. "Serving the interests of justice: Amnesties, truth commissions and the International Criminal Court." *European Journal of International Law* 14.3 (2003): 481-505.
[37] ibid at 483.

with an investigation"[38]. As such, it seems that even the ICC favours reconciliation through non-punitive mechanisms over criminal prosecutions and punishments, to the extent that it may exercise jurisdictional restraint and choose to defer a matter to another measure in the interest of justice and future social healing.

Ruti Teitel has famously described the dual orientation of transitional justice as "caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective (...)"[39]. She highlights that the peculiarity of transitional justice is related to its temporal reach, spanning between the past regime, and the desired (liberal) shift[40]. Indeed, the historical events linked to the original understandings of transitional justice, including post World War II trials and most notably the dissolution of the USSR and the shift away from authoritarianism in Latin America[41] (and more in general so-called "third wave of democratisation"[42]) present such features[43]. Given its close links to nation-building, transitional justice is also deeply political.[44] Relatedly, others have highlighted that the results of transitional justice may only emerge in the long term[45]. Indeed, it has been noted that transitional justice is assessed through political criteria (political reforms, democratic process, judicial system, etc)[46]. However, this lack of "clear rules and criteria" to guide transitional justice has pushed scholars such as Kai Ambos to call for a "judicializ[ation] the politics of transitional justice"[47], which has been partially met by the prevalence of international law notions in this field.

---

[38] ibid at 486.
[39] TEITEL, *Transitional Justice,*, at 6.
[40] TEITEL, *Transitional Justice,* at 5-6.
[41] RUTI G. TEITEL, 'Editorial Note-Transitional Justice Globalized'*, International Journal of Transitional Justice, Vol. 2, 2008, 1–4,* at 1. See also Ruti G. Teitel, 'How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?' in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Neil J. Kritz ed., 1997).
[42] SAMUEL P. HUNTINGTON, *The third wave: democratization in the late twentieth century* (1991). This work has been recurrently cited in the introductory sections of many books and articles on transitional justice.
[43] See RUTI G. TEITEL, 'Transitional justice genealogy', *16 Harvard Human Rights Journal* (2003), at 71.
[44] RUTI G. TEITEL, 'Transitional justice genealogy', *16 Harvard Human Rights Journal* (2003), at 71 and 76 ff and RUTI G. TEITEL, 'The law and politics of contemporary transitional justice', in *38 Cornell Int'l L.J.* 837 2005.
[45] Regarding gradual, subtle, long term effects, see DE GREIFF, 'Some Thoughts on the Development and Present State of Transitional Justice', at 103 et seq.
[46] KAI AMBOS, *The legal framework of transitional justice*, 2007, at 7.
[47] KAI AMBOS, *The legal framework of transitional justice*, 2007, at 14, quoting Ivan Orozco.

In essence, according to Teitel, transitional justice is a "self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule"[48]. Put more simply, it is the "conception of justice associated with periods of political change"[49]. Thus, on the one hand, politics inform and characterise the legal aspects of transition[50]. At the same time, however, the law itself is also used to shape and advance the transformation and any related political outcomes[51]. As such, the conceptions of justice during times of political transition are inherently modified - regardless of whether the transitional justice mechanisms adopted are ordinary (such as trials) or extraordinary (such as truth commissions or amnesties). Ruti Teitel recognises normative shifts as one of the defining features of transitions, whereby "legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation"[52].

These considerations remain valid even in the most recent phase of transitional justice, indicated as "steady-state transitional justice" by Teitel[53]. This moment is characterised by the normalisation of previously exceptional measures, due to the existence of ongoing conflicts that require a response. In particular, according to Teitel, the existence of the International Criminal Court (ICC) illustrates this steady-state transitional justice, entrenching the "Nuremberg model" through "the creation of a permanent international tribunal appointed to prosecute war crimes, genocide, and crimes against humanity as a routine matter under international law"[54].

3. International Criminal Law.

The most recognisable transitional justice mechanisms are criminal trials, both at national and international level. These are perceived as an essential step to "achieve some degree of justice" in order to "draw a line between the old and new governments"; or, on the other hand, they may simply be "show trials, unbefitting a democracy" and mere "manifestations of victor's justice"[55]. Given the gradual push to internationalise transitional justice, international criminal trials have emerged as an obvious means to deal with a legacy of past abuse.

---

[48] TEITEL, 'Editorial Note-Transitional Justice Globalized', at 1.
[49] RUTI G. TEITEL, *Transitional Justice,* OUP: 2000, at 3.
[50] TEITEL, 'Editorial Note-Transitional Justice Globalized', at 2. Also, Teitel, *Transitional Justice*, at 4.
[51] RUTI G. TEITEL, 'Transitional Justice: post war legacies' in *27 Cardozo Law Review* 1625 (2005-2006), at 1616 ff.
[52] TEITEL, *Transitional Justice*, at 215.
[53] TEITEL, RUTI G. "Transitional justice genealogy." *Harv. Hum. Rts. J.* 16 (2003): 69, at 89 et seq.
[54] TEITEL, "Transitional justice genealogy" at 90.
[55] NEIL KRITZ, The Dilemmas of Transitional Justice, in Transitional Justice (Neil Kritz ed.) USIP 1995, at xxi.

The Nuremberg Trials[56] at the end of the Second World War have been indicated as the catalyst for what Teitel terms 'the first phase of transitional justice' (TJ)[57]. That moment was also highly relevant for the development of both international criminal law (ICL) and international human rights law (IHRL)[58]. In this phase of transitional justice, "a striking innovation (...) was the turn to international criminal law and the extension of its applicability beyond the state to the individual", in order to seek accountability[59]. Today, the work of the ICC (and prior to its creation, the ad hoc tribunals for former Yugoslavia and Rwanda) indicates that in some instances, certain types of gross human rights violations carried out in times of conflict have seen a formal global response in international law institutions. Some scholars have called for a more proactive leadership of the ICC in order to coordinate transitional justice efforts[60], although scepticism surrounding the ICC would command extreme caution in that regard[61]. Most notably, the activation of ICC proceedings through a Security Council (UNSC) referral[62] suggests that specific situations of human suffering in times of conflict may amount to questions of international peace and security, under Chapter VII of the UN Charter[63]. To date, this has occurred in relation to Darfour (Sudan) and Libya[64]. However, Secu-

[56] For general readings on the International Military Tribunal at Nuremberg, see *inter alia* Eugene Davidson, *The Trials of the Germans: An Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg*. University of Missouri Press, 1966; George A. Finch, The Nuremberg Trial and International Law, *The American Journal of International Law* , Vol. 41, No. 1 (Jan., 1947), pp. 20-37; Quincy Wright, 'The Law of the Nuremberg Trial' *The American Journal of International Law* , Vol. 41, No. 1 (Jan., 1947) , pp. 38-72; Christian Tomuschat, 'International criminal prosecution: The precedent of Nuremberg confirmed' *Criminal Law Forum*. Vol. 5. No. 2-3. Kluwer Academic Publishers, 1994;

[57] RUTI TEITEL, Transitional Justice Genealogy, 16 *Harv. Hum. Rts. J.* 70, 2003, at 70 and 72 *et seq.*

[58] WILLIAM A. SHABAS, Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights, *J. Int'l Crim. Justice* 9 (2011), 609, at 609.

[59] TEITEL, "Transitional justice genealogy" at 73.

[60] HAFNER, DONALD L., and ELIZABETH BL KING. "Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together." *BC Int'l & Comp. L. Rev.* 30 (2007): 91.

[61] For example: Mills, Kurt. "" Bashir is Dividing Us": Africa and the International Criminal Court." *Human Rights Quarterly* 34.2 (2012): 404; Gegout, Catherine. "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace." *Third World Quarterly* 34.5 (2013): 800; GOLDSTON, JAMES A. "More Candour about Criteria The Exercise of Discretion by the Prosecutor of the International Criminal Court." *Journal of International Criminal Justice* 8.2 (2010): 383.

[62] Art 13(b) Rome Statute of the International Criminal Court, document A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002.

[63] Charter of the United Nations, 26 June 1945 (UN Charter), Chapter VII 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'.

[64] Darfour: UNSC 1593 (2005), 31 March 2005; Libya: UNSC Resolution 1970 (2011), 26 February 2011.

rity Council referrals to the ICC remain contentious,[65] and as such their usefulness in relation to transitional justice is to be evaluated with extreme caution, on a case-by-case basis.

Naomi Roht-Arriaza identifies two main approaches to understanding the relationship between transitional justice and international criminal law (ICL): interrelated, or parallel[66]. Specifically, the former is based on broad conceptions of transitional justice and international criminal law: thus, transitional justice can be a precursor to ICL, fill in any gaps left by ICL or, as ICL expands to reparations, an alternative to it[67]. Conversely, the other, narrower, approach presents the two domains as irrelevant to each other, given that the primary aim of ICL is merely to "enforce the law" regardless of the circumstances[68]. However, another interpretation of this relationships could suggest that transitional justice is intimately linked to ICL because ICL is a branch of international law, which has come to dominate the current understanding of transitional justice. As such, ICL forms part of the international legal framework of reference for transitional justice, alongside international human rights law (IHRL) and international humanitarian law (IHL).

In its ICL dimension, transitional justice is based on the principles that guide that legal regime. However, the uniqueness of the process means that there may be a degree of flexibility as to how the principles of ICL are interpreted and applied. Ruti Teitel identifies the "rule of law dilemma" as one of the core problems of transitional justice[69]. More specifically, Teitel considers whether in transitions "such criminal justice [is] compatible with the rule of law"[70]. In fact:

> In fledgling democracies, where the administration of punishment can pose acute rule-of-law dilemmas, the contradictions to the uses of the law may become too great. These profound dilemmas were recognized in the

[65] For a selection of positions on UNSC referrals to the ICC, see inter alia: Akande, Dapo. "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities." *Journal of International Criminal Justice* 7.2 (2009): 333; Condorelli, Luigi, and Annalisa Ciampi. "Comments on the Security Council Referral of the Situation in Darfur to the ICC." *Journal of International Criminal Justice* 3.3 (2005): 590; Akande, Dapo. "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC." *Journal of International Criminal Justice* 10.2 (2012): 299; Stahn, Carsten. "Libya, the International Criminal Court and Complementarity A Test for 'Shared Responsibility'." *Journal of International Criminal Justice* 10.2 (2012): 325.

[66] Naomi Roht-Arriaza, 'Editorial Note', IJTJ (2013) 7 (3): 383, at 390.

[67] ibid at 389.

[68] ibid.

[69] Ibid. at 12 *et seq.*

[70] Ibid.

deliberations preceding the decisions in many countries to forego prosecutions in favor of alternative methods for truth-seeking and accountability[71].

Teitel attempts to solve this dilemma by distinguishing between the positivist and the natural law approaches described in the jurisprudential debate between Lon Fuller and H.L.A. Hart; in essence, positivists attach special value to procedural regularity (in breaking with the past) natural lawyers focus instead on elements of substantive justice[72]. Contextually, she suggests that positivists would yield to politics for a solution; on the other hand, proponents of natural law would assume the "transformative role of law", and as such previous "putative law (...) lacked morality and hence did not constitute a valid legal regime"[73]. Teitel concludes that "in these extraordinary periods [of radical political transition], rule-of-law norms do not constitute universals"; instead, "the rule of law is defined in relation to past politics"[74]. With reference to critical legal perspectives, she highlights the "challenge posed by the boundedness of law's political action"[75]. In essence, in times of transition, political necessities affect ordinary applications of criminal law, resulting and allowing for some flexibility.

3.1. Transitional justice and the partial flexibility of the rule of law.

The political flux and uncertainties that characterise transitional justice bring to the fore the possibility of derogations from the principles of legality and of non-retroactivity. This is a serious matter, if we accept that "the principle of legality is a manifestation of the broader notion of the rule of law"[76]. This accepted principle of criminal justice as a manifestation of public law involving the relationship between individuals and the state may carry normative repercussions on any aspect involving state authorities as central regulators of society. This may encompass, for instance, the redistribution of property, the disclosure of secret files or the allocation of social security, none of which directly flow from criminal law.

In assessing the principle of non-retroactivity in the general context of the rule of law (in times of peace/democratic rule), Magaret Jane Radin discusses instrumental and substantive aspects of the rule of law, drawing from Lon Fuller

[71] R. G. TEITEL, 'Transitional Justice Genealogy' in 16 *Harvard Human Rights Journal* 69, 2003, at 77.
[72] TEITEL, *Transitional Justice,* at 14.
[73] Ibid.
[74] Ibid at 25.
[75] Ibid.
[76] KENNETH GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, CUP 2009, at 15, as discussed in Mark Drumbl, Book Review: The Principle of Legality in International and Comparative Criminal Law, Human Rights Quarterly 31 (2009) 801-806, at 801.

and John Rawls[77]. On the one hand, the instrumental approach focuses on the necessity of the legal system to "work to structure behaviour" (i.e. to achieve the government's ends, whatever they may be), and on the other, the substantive approach relies on the desirable objectives of "fairness, human dignity, freedom and democracy" (i.e. to achieve the "goals of the social contract: liberty and justice")[78]. For both models, she argues that the principle of non-retroactivity remains constant[79].

Through a pragmatic reinterpretation of the rule of law, Radin argues that "rules are not made merely by legislatures or other authoritative entities", but are instead made "public wherever strong social agreement exists in practice"[80]. This reflects Wittgenstein's social practice conception of rules, "in which agreement in responsive action is the primary mark of the existence of a rule"[81]. In Radin's view, law is "not just a set of rules laid down", but "include[s] an evolving complex of political commitments to the flourishing of the community and the individuals in it"[82]. This description is fitting for transitional justice, in which the norms applicable to a process may be partially modified to suit the aims of transition. In fact, adopting a more fluid approach to the rule of law allows for the legal framework to respond better to the purposes of transitional justice.

A strict positivistic approach, "*too much* legality", has been criticised as "undermin[ing] the legitimacy of law", "conflict[ing] with seemingly self-evident natural law aspirations" when it comes to punishing perpetrators or seeking redress for victims of serious crimes[83]. As suggested by Mark Drumbl, "law as *technique* may fall short of law as justice"[84]. Consequently, he suggests a "bifurcated approach" to differentiate the principle of legality for "mass atrocity crimes" and for "ordinary common crimes"[85]. This method would be suited to accommodating the objectives of international criminal law better through

---

[77] MARGARET JANE RADIN, 'Reconsidering the Rule of Law', 69 Boston University Law Review, 781 (1989). The main works referred to in her analysis of the two approaches (instrumental and substantive) are: L. FULLER, *The Morality of Law*, 1969; and J. RAWLS, *A Theory of Justice,* 1971.
[78] *Ibid* at 791 *et seq.*
[79] *Ibid* at 814.
[80] *Ibid* at 815.
[81] *Ibid* at 798, citing Wittgenstein, *Philosophical Investigations*, 1968.
[82] *Ibid* at 819.
[83] KENNETH GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, CUP 2009, at 15, discussed by MARK DRUMBL, 'Book Review: The Principle of Legality in International and Comparative Criminal Law', *Human Rights Quarterly* 31 (2009) 801-806, at 804.
[84] *Ibid.*
[85] *Ibid*, at 805.

the development of a *sui generis* approach "in light of the *sui generis* nature of the evils it proscribes"[86].

The principle of legality, expressed by the maxim *nullum crimen nulla poena sine lege*, expressly applicable to criminal matters[87], bans backward-looking justice and retroactive applications of the law. The most notable fudge of the principle of legality can be traced back to the post WW2 Nuremberg trials. The International Military Tribunal (IMT) rejected complaints by Nazi defendants of the breach of the principle of legality[88]. Schabas goes on to state that "with respect to war crimes, the Tribunal was able to point to some precedent, including the Hague Conventions. For crimes against humanity, however, it had no real authority, nor did it even try seriously to demonstrate that such acts had been punishable under international law in the past"[89]. He recalls a quote from the Nuremberg judgment that sheds some light on this approach:

> the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. (...) [The Nazi leaders] must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression[90].

By contemporary human rights standards, this approach may seem to disregard the basic fair trial guarantees applicable to all parties in criminal trials. Indeed, at present, there are very few accepted derogations to the principle of non-retroactivity that satisfy IHRL. A notable exception was proposed by the European Court of Human Rights (ECHR) in *Scoppola v Italy (2)*, in which

---

[86] *Ibid*, at 805.

[87] This principle is crystallised in numerous international law instruments, *inter alia*: International Human Rights Law: Art. 11 *Universal Declaration of Human Rights* (1948); Article 15(1) *International Covenant on Civil and Political Rights* (1966); Article 7(1) *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); Article 7(2) *African Charter on Human and Peoples' Rights* (1981); International Humanitarian Law: Article 67 *IV Geneva Convention* (1949); Article 75(4)(c) *Additional Protocol I to the Geneva Conventions* (1977); International Criminal Law: Articles 22(1), 23, 24 *Rome Statute of the International Criminal Court* (1998). The principle of legality also constitutes a customary rule under IHL, identified by the ICRC as customary law (Customary IHL Rule 101) applicable to international and non-international armed conflicts and recognised in most national laws and military manuals (*www.icrc.org*).

[88] WILLIAM A. SCHABAS, Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights, J. Int'l Crim. Justice 9 (2011), 609, at 613 et seq.

[89] Ibid.

[90] France et al v. Goring et al (1948) 22 Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945-1 October 1946 (IMT) 203, at 426, quoted in Schabas, ibid, at 614.

the Grand Chamber (by a majority of 11 to 6) considered "that the respondent State failed to discharge its obligation to grant the applicant the benefit of the provision prescribing a more lenient penalty which had come into force after the commission of the offence"[91]. The principle of *lex mitior* proposed in that case has been since discussed in relation to transitional justice in *Makatouf and Damjanovic v Bosnia and Herzegovina,* and in particular detail in the concurring opinion of Judge Pinto de Alburquerque[92].

Going back to Nuremberg, the circumstances and facts considered then must be appreciated in their political context, which in hindsight can be viewed as a juncture for international law[93]. Among the supporters of the decision to institute a military tribunal in Germany, it has been argued that victors are "not bound to respect the law of a defeated enemy which are repugnant to their principles of law, justice, and individual rights"[94]. Early enthusiasts of the IMT tried to get round the apparent deadlock by openly admitting to the novelty of 'crimes against humanity' as a punishable category of offence, but believed it acceptable, because the Nazis had to be held accountable for their actions somehow. As natural lawyer Hans Kelsen put it:

> To punish those who were morally responsible for the international crime of the Second World War may certainly be considered more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions[95].

The reasons for this flexible approach to the principle of legality can be traced to the functions of the rule of law in transition, which has been described as both "forward-looking and backward-looking, as settled versus dynamic"[96]. Those who favour a stricter view of the principle of non-retroactivity express discomfort at this tension, as it contradicts one of the cardinal tenets of the legal order at both international and domestic levels. Posner and Ver-

---

[91] Scoppola v Italy (No 2) App no 10249/03 (17 Sept 2009), at 120, in which a violation of article 7 was found.
[92] Makatouf and Damjanovic v Bosnia and Herzegovina, App nos. 2312/08 & 34179/08 (18 July 2013)
[93] See, notably: U.N. International Law Commission, Nuremberg Principles, published in *Report of the International Law Commission Covering its Second Session, 5 June-29 Duly 1950*, Document A/1316, 11-14.
[94] GEORGE A. FINCH, The Nuremberg Trial and International Law, *The American Journal of International Law*, Vol. 41, No. 1 (Jan., 1947), pp. 20-37, at 22.
[95] HANS KELSEN, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law', *1 Int'l L.Q 153*, 1947, at 165, quoted in Schabas, ibid, at 615.
[96] TEITEL, *Transitional Justice*, at 11.

meule have put forward the notion of legal continuity in transitional justice[97]; this assumption could explain the partial derogation at times of a strict application of the principle of non-retroactivity, reflecting how the law naturally evolves in times of non-transition/peace. In other words, the concept and applications of law during times of transition stem from the law as a whole – thus allowing for a degree of flexibility – as opposed to a radically new idea of the law. This view contrasts with that of Teitel, who on the other hand maintains the uniqueness of the law of transitional justice[98]. Consequently, for Teitel, the flexibility of the law during times of transition would not only be acceptable, but is at the heart of the process and defines it.

Eric Posner and Adrian Vermeule discuss various ways in which the rule of law can be understood in relation to the peculiarities of political transitions[99]. They identify four categories of law applicable to transitional justice: (1) new law, applied retroactively; (2) old law, which was never enforced; (3) old law, which was not enforced against the perpetrators from the old regime; and (4) international law[100]. The last three types of laws applicable in transitional settings are rooted in and flow from a pre-existing normative framework and culture (be it domestic or international). Thus, they pose little formal concerns for rule of law purposes, as long as the official procedures for adoption under the laws existing at the time have been satisfied (reflecting the positivist approach illustrated by Teitel). However, the substantive validity of these three categories of laws may be flawed or questionable, in the context of the political renegotiation of the content and application of laws which characterises transitional justice experiences.

New law applied retroactively, raises *prima facie* concerns of procedural validity[101], especially from a positivist standpoint, in addition to posing questions of substantive validity of content. Posner and Vermeule argue that the rule of law dilemma can be circumvented through various techniques, which enable retroactive law applied in transitional justice endeavours to be brought back to an existing legal framework[102]. The first mechanism used is the appeal to a higher pre-existing law, for instance constitutional law, international law or the norms of *jus cogens*[103]. Alternatively, existing norms from the previous re-

[97] Posner & Vermeule, 'Transitional Justice as Ordinary Justice', 117 Harv. LR (2004), 761.
[98] TEITEL, *Transitional Justice*, at 11-26.
[99] E. POSNER and A. VERMEULE, 'Transitional Justice as Ordinary Justice', 117 *Harvard Law Review* 762, 2004.
[100] *Ibid*, at 767.
[101] *Ibid.* at 791 *et seq.*
[102] E. POSNER and A. VERMEULE, *'Transitional Justice as Ordinary Justice'*, at 793 *et seq.*
[103] *Ibid.* at 793 *et seq.*

gime, which were not enforced, could be applied[104]. An additional method could involve the enactment of interpretative statutes, giving new meaning to the previous regime's positive law[105]. Finally, by adjusting the time limits of statutes of limitations, the new order may prosecute old crimes[106].

The techniques described by Posner and Vermeule are used to anchor transitional justice law – including new and retroactive norms – to existing, ordinary (i.e. non-transitional) normative provisions. This analysis thus seems to achieve its proposed objective of considering transitional justice as a development and part of ordinary justice, and not an extraordinary type of justice. However, it does not seem to fully resolve the problems posed by the rule of law dilemma and the principle of legality.

Conversely to Posner and Vermeule, David Gray argues that transitional justice constitutes an extraordinary form of justice, and as such its laws may be divorced from the preceding legal order, which emanated from what he terms an 'abusive public face of the law'[107]. He contends that said 'abusive public face of the law' determines the paradox of the rule of law, noting that different courts facing this dilemma have come to different conclusions[108]. For instance, some courts may hold that "the revolutionary role of law as an agent of change could not trump the principles of predictability international to the rule of law" (i.e. the principle of legality and non-retroactivity discussed above), whereas others may choose the "transformative potential of the law over its formal duties of predictability and fair warning"[109].

More recently, Pablo de Grieff has proposed a 'third way' interpretative lens to make sense of the extraordinary/ordinary justice debate: "transitional justice is neither in itself a distinctive form of justice nor a mere compromise but rather a principled application of justice in distinct circumstances"[110].

---

[104] *Ibid.* at 794.
[105] *Ibid.* at 795.
[106] *Ibid.*
[107] D. GRAY, *'What's so special about transitional justice? Prolegomenon for an excuse-centred approach to transitional justice'* in *Proceedings of the annual meeting (American Society of International Law)*, Vol. 100, 147, 2006, and D. GRAY, *'An Excuse-Centered Approach to Transitional Justice' 74 Fordham Law Review* 2621, 2005-2006.
[108] D. GRAY, *'An Excuse-Centered Approach to Transitional Justice'*, at 2636 *et seq.* The author discusses a case at the Constitutional Court of Hungary for the "review of a law allowing prosecutions for those responsible for the suppression of the 1956 uprising" – reported by Gray in f.n. 141 as Judgment of March 3, 1992, [Constitutional Court] MK. No. 11/1992 (Hung.), translated in 1 J. const. L. in E. & Cent. E. 129 (1994); and the so-called German Border Guards Case – reported by Gray as Berlin State Court, No. (523) 2 Js 48/90 (9/91).
[109] *Ibid.*
[110] PABLO DE GREIFF (2012) *'Theorizing transitional justice'* in Nagy, Elster and Williams (Eds) Transi-

The arguments presented rest on very different conceptions of what the law of transitional justice is, how it is derived from the legal tradition, and how it ought to operate in concrete scenarios. Consequently, sometimes the probability of the law of transitional justice conflicting with the principle of legality is greater, as it is conceived as a novelty; conversely, where the law of transitional justice flows uninterruptedly from a pre-existing legal tradition, it will be less likely for there to be a breach of the principle of legality/non-retroactivity. On this basis, we will expect a very narrow margin of flexibility (i.e. departure from the principle of non-retroactivity) in instances of high international involvement/strictly judicial mechanisms (such as the ICC), and a higher degree of flexibility in domestic/local/non-strictly judicial transitional justice initiatives. However, this ambiguity may in fact be a positive feature of the normative principles applicable to transitional justice, inasmuch as they provide a sufficient degree of flexibility to respond to each context while being situated within the framework of international law.

A recent illustration of how an international court engaging in transitional justice creatively circumvented the barriers posed by the principle of legality can be found in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). The most famous example is the *Tadic* case[111], in which the Trial Chamber severed the link between crimes against humanity and international armed conflict, which was however clearly set out in the Statute of the ICTY[112]. In that regard, Schabas reports that the Appeals Chamber stated that "the requirement of a connection with war was 'peculiar to the context of the Nuremberg Tribunal', citing a 1948 decision of an American Military Tribunal as evidence that no nexus was required by customary international law"[113]. This opinion is now commonplace in international law: it is reflected in the Rome Statute (Art 7 does not mention international armed conflict) and even ECHR decisions dealing with crimes against humanity omit the requirement of armed conflict[114]. Consequently, it seems that even recent transitional justice cases have sometimes derogated from the principle of legality, where this has appeared to be reasonable and necessary

---

tional Justice: Nomos Li, NYU Press 2012 (31-78), at 59.

[111] ICTY, Tadić (IT-94-1) all relevant documents available at *www.icty.org.*

[112] This is reported in Schabas, supra; a comprehensive analysis of the case is offered by Christopher Greenwood, International Humanitarian Law and the Tadic Case, 7 EJIL 1996 (265-283).

[113] Schabas, supra, at 617.

[114] See for instance Kolk and Kislyiy v Estonia (2006); Korbely v Hungary (2008); and Kononov v Latvia (2010), reported in Schabas, cit, at 617. For a more detailed analysis, see Eva Brems, Transitional Justice in the Case Law of the European Court of Human Rights, IJTJ, Vol. 5, 2011, 282-303, at 298 et seq.

for the development of the law in specific contexts. This allows for transitional justice to better respond to the needs of each scenario, but, given the inconvenience of openly derogating from the principle of legality, it forces any deviation to be fully supported by a strong motivation in the overall interest of 'justice' (as was the case for Tadic). Thus, the tension between transitional justice and human rights law may benefit the overall objectives of transitional justice, as it requires a thorough investigation of issues that may otherwise be ignored.

The description outlined above reflects, to an extent, what Francoise Tulkens calls "the offensive role of human rights", through which human rights principles and laws can "trigger(...) the application of criminal law"[115]. Quoting Jean Rivero, Tulkens observes that "criminal law enforcement sometimes serve[s] to protect individual freedoms"[116]. Referring to leading case law from the European Court of Human Rights, she recalls the necessity to effectively deter certain offences through criminal prosecution specifically[117]. In the context of transitional justice, criminal law is indeed a useful instrument for protecting human rights. The evolution of the conception of human rights as individual rights, as described by Tulkens drawing from Durkheim[118], is gradually placing individuals and groups of individuals at the heart of the law. Thus, the role of the victim (and their next of kin) of the violation of human rights is paramount –illustrated also in the growing role victims play in criminal law[119]. Consequently, it appears logical to accept and extend the centrality of the victim to transitional justice cases, to encompass families and others who may have been affected as well.

4. International Human Rights Law.

The links between transitional justice and international human rights law (IHRL) are widely acknowledged. The gradual – but significant – move towards the formal recognition of this intimacy is attested by the transfer of leadership at UN level to the Office of the High Commissioner for Human

[115] FRANCOISE TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, J. Int'l Crim. Justice 9 (2011), 577-595, at 577.
[116] Ibid, at 583, quoting JEAN RIVERO, *La protection des droits de l'homme dans les rapports entre personnes privees*, Paris 1971.
[117] X and Y v The Netherlands; Yasa v. Turkey, etc, reported in Tulkens, supra, at 585 et seq. These are not transitional justice cases, but some of the legal reasoning could provide useful insights for law in time of transition as well.
[118] DURKHEIM, *Deux lois de l'evolution penale*, (1900) cited by Tulkens, supra, at 594.
[119] Tulkens, ibid, at 594 et seq.

Rights (OHCHR)[120]. More specifically, the Human Rights Council has requested the OHCHR "to continue to enhance its leading role, including with regard to conceptual and analytical work regarding transitional justice, and to assist States to design, establish and implement *transitional justice mechanisms from a human rights perspective*" (*emphasis added*)[121]. Official statements by the High Commissioner for Human Rights[122] reaffirm that the UN deals with transitional justice in close connection to IHRL practice[123]. This institutional evolution is enshrined in the 2010 UN Secretary General Guidance Note on Transitional Justice, a document that reflects some of the ongoing debates in human rights on the approaches to transitional justice[124]. At regional level, the European Court of Human Rights has begun to acknowledge transitional justice[125], although not always referring to the exact term 'transitional justice'. Examples of such cases at the ECHR include proceedings relating to the war in the Balkans[126], the Romanian dictatorship[127], the conflict in Chechnya and Ingushetia[128], and events as far back in time as Soviet mass killings in Poland during the Second World War[129].

All this suggests that IHRL constitutes an integral part of transitional justice, both as a means to respond to a legacy of past abuse and as an end in of itself to build a better society. There is some proof that the combination of certain transitional justice measures improves the enjoyment of human rights and

---

[120] See A/61/636-S/2006/980 and HRC Resolution 9/10 in General Assembly, Human Rights Council, *Annual Report of the United Nations high Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Analytical study on human rights and transitional justice* (6 August 2009) (A/HRC/12/18).

[121] Human Rights Council, Resolution 9/10.

[122] LOUISE ARBOUR, *'Economic and social justice for societies in transition', 40 NYU J. Int'l L. & Pol.* 1 2007-2008 (1-27). This essay is based on a speech delivered on October 25, 2006 at the Second Annual Transitional Justice Lecture.

[123] Dialogue with Member States on rule of law at the international level organized by the Rule of Law Unit: "UN Approach to Transitional Justice" (Address by Navanethem Pillay, UN High Commissioner for Human Rights), 2nd December 2009, available at *www.unrol.org*. The UNHCHR stated: "In the last three decades, transitional justice has become a prominent and well-established feature of human rights law and practice."

[124] United Nations, *Guidance Note of the Secretary General: UN Approach to Transitional Justice*, March 2010,

[125] See in general: ames A. SWEENEY, *The European Court of Human Rights in the Post-Cold War Era*: Universality in Transition, Routledge 2013; Eva Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' IJTJ (2011) 5 (2): 282; Tom Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' *Columbia Journal of European Law* 2007 13, 1.

[126] Makatouf and Damjanovic v Bosnia and Herzegovina, App nos. 2312/08 & 34179/08 (18 July 2013)

[127] Association 21 December 1989 v Romania, App no 33810/07 and 18817/08 (ECHR, 24 May 2011).

[128] Aslakhanova and Others v Russia, Apps no 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (ECHR, 18 Dec 2012)

[129] Janowiek and others v Russia, Apps no 55508/97 and 29520/09 (ECHR 21 Oct 2013).

democratisation of a society[130]. Ruti Teitel discusses human rights in relation to the second phase of transitional justice, characterised by the events of post-authoritarianism in the Southern Cone[131]. With regards to the third phase, steady-state transitional justice (discussed above), Teitel laments the conflation between IHL, ICL and IHRL as a detriment to human rights, considered as the standard of reference[132]. Compared to ICL, IHRL encompasses a broader range of situations within the scope of transitional justice processes, beyond the four main crimes enumerated in the Rome Statute. As a corollary to that, the category of 'victims' in IHRL is wider than its equivalent in ICL. This paper contends that transitional justice ought to be understood primarily with reference to the IHRL framework.

In light of the above, there seems to be a dual human rights approach to transitional justice: violations of human rights may trigger transitional justice responses, which in turn are oriented towards rebuilding a fragmented society on the basis of a variety of human rights aims. Uncovering the truth about past violations may reinforce power structures and some narratives over others[133]; in the process, some significant portions of society, like women and girls, may be marginalised[134]. Human rights, at least theoretically, provide a basic framework for inclusivity and non-discrimination in participating in the reconstruction of the past, for example, through the right to a fair trial, and for the variety of points of view human rights enable through the right to freedom of speech and the right to access information. For these reasons, the right to the truth - a truth upon which responsibilities can be formally apportioned, assets rendered, resources redistributed more fairly, constitutions rewritten and institutions reformed, etc. - emerges as the cornerstone of transitional justice.

A key advantage to adopting a human rights approach to transitional justice is that human rights theory and practice are better suited to accommodating

---

[130] OLSEN, TRICIA D., LEIGH A. PAYNE, and ANDREW G. REITER. "The justice balance: When transitional justice improves human rights and democracy." *Human Rights Quarterly* 32.4 (2010): 980-1007.
[131] Teitel, 'Transitional Justice Genealogy', at 81.
[132] ibid at 91-92.
[133] LEEBAW, BRONWYN ANNE. *"The irreconcilable goals of transitional justice." Human Rights Quarterly* 30.1 (2008): 95, at 118.
[134] Sources on gender and transitional justice include inter alia: Christine Bell and Catherine O'Rourke, "Does feminism need a theory of transitional justice? An introductory essay" (2007) 1.1 *International Journal of Transitional Justice* 23; Fionnuala Ní Aoláin, "Women, security, and the patriarchy of internationalized transitional justice" (2009) 31.4 *Human Rights Quarterly* 1055; Brandon Hamber, "Masculinity and transitional justice: an exploratory essay" (2007) 1.3 *International Journal of Transitional Justice* 375.

complementary visions of justice presented of course by domestic laws but also by customary norms. Moreover, the challenges and opportunities of culturally-responsive approached to transitional justice are key to designing processes that suit the needs of a given context[135]. Awareness of less formal normative sources (such as traditional or religious norms) is arguably crucial for developing transitional justice mechanisms that are resonant with the victims' visions of justice, which may in turn increase their involvement in transitional processes.

Economic and social rights (ESR) have also been included in transitional justice. In particular, Arbour draws upon the *Kupreskic* case considered by the International Criminal Tribunal of former Yugoslavia (ICTY), in which the judges found that the "comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent"[136]. This is consistent with the law derived from the Geneva Conventions, whereby "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies, is also recognised as an international crime"[137]. Consequently, Arbour is successful in demonstrating through relevant legal sources that there is the possibility to expand the current scope of international criminal law currently applied to transitional justice endeavours to include ESR rights[138].

5. International Humanitarian Law.

In the legal framework of transitional justice IHL can be seen as interstitial in light of the omnipresence of IHRL and ICL. Relatedly, there are three main reasons in support of the marginalisation of IHL in transitional justice. Firstly the subject matter of human suffering regulated in IHL is arguably already subsumed under ICL[139]. In particular, the Rome Statute of the ICC expressly lists war crimes as referred to in the Geneva Conventions[140] within its jurisdiction, alongside genocide, crimes against humanity and the crime of aggres-

---

[135] L. VIAENE and E. BREMS, *'Transitional justice and cultural contexts: learning from the Universality debate', Netherlands Quarterly of Human Rights,* Vol. 28/2, 199, 2010.

[136] LOUISE ARBOUR, *'Economic and social justice for societies in transition', 40 NYU J. Int'l L. & Pol.* 1 2007-2008 (1-27) at 15. The case is: *Kupreskic* case, Case No. IT-95-16-T, Trial Judgment, Jan 14, 2000.

[137] Ibid. at 15. See Protocols Additional to the Geneva Conventions 1949, and Relating to the Protection of Victims of International Armed Conflict (Prot I) art. 54 para. 1, 1977. See also Rome Statute of the ICC art 8 para. 2(b) (xxv).

[138] Arbour, *supra*, at 16.

[139] On this see inter alia: CASSESE *"On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law." European Journal of International Law* 9.1 (1998): 2.

[140] The Geneva Conventions of 1949 and their Additional Protocols constitute the backbone of IHL.

sion[141]. Therefore, it is likely that in theory grave violations of IHL will fit neatly within the jurisdiction of the ICC, regardless of whether or not they will be actually investigated. Likewise, the scope of victim status in IHL is much narrower than what is permitted in IHRL, so it seems paradoxical that a victim of a IHL violation, which is also an ICL violation, would not also be considered a victim under IHRL. Secondly, the state-centric approach of IHL seems outdated if compared to the centrality of the individual in the other two frameworks, either as a violator (ICL) or as a victim (IHRL). With regards to transitional justice, moreover, it may be impractical for political reasons to ascribe responsibility for violations to the state as a whole instead of identifying specific perpetrators (recall the rationale of the Nuremberg trials[142]). A third reason in support of the marginalisation of IHL in transitional justice today can be drawn from the very nature of IHL, which is inherently exceptional, transient, and linked to armed conflict. Instead, IHRL apply to times of war and peace alike[143], and the ICC allows for a constant, permanent potential forum for international crimes.

The interplay between IHL and IHRL merits further attention. Regardless of whether transitional justice is viewed as an exceptional response to past atrocity, which ought not to be normalised[144], the international human rights law framework provides a normative continuum to rely on. Due to the universal nature of its core provisions, IHRL extends to all human beings in times of both peace and war[145]. Indeed, with reference to armed conflict, a stringent *lex specials* approach to the laws of war trumping and derogating from IHRL is today surpassed[146]. The Committee on Economic, Social and Cultural Rights has clarified (with respect to Israel) that "fundamental human rights must still be respected, notwithstanding the existence of an armed conflict".[147]

---

[141] Rome Statute of the ICC, articles 5-9.

[142] On this see inter alia Kelsen, Hans. "Will the judgment in the Nuremberg trial constitute a precedent in international law." *Int'l LQ* 1 (1947): 153; Greppi, Edoardo. "The evolution of individual criminal responsibility under international law." *INTERNATIONAL REVIEW-RED CROSS* 81 (1999): 531-554; Wright, Quincy. "The Law of the Nuremberg Trial." *American Journal of International Law* (1947): 38-72.

[143] See ICJ Advisory Opinion Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, para 25. On this topic, inter alia: Stephens, Dale. "Human Rights and Armed Conflict-The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case." *Yale Hum. Rts. & Dev. LJ* 4 (2001): 1; DROEGE, CORDULA. *"Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, The". Isr. L. Rev.* 40 (2007): 310.

[144] TEITEL, 'Transitional justice genealogy', 93 *et seq.*

[145] CORDULA DROEGE, *'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' 40 Isr. L. Rev.*, 310 2007.

[146] ORNA BEN-NAFTALI & KEREN MICHAELI, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' *36 Cornell Int'l L. J.,* 233 (2003-2004) at 275.

[147] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 31 Au-

This approach reflects the International Court of Justice in the *Advisory Opinion on Nuclear Weapons* with regards to civil and political rights[148]. Thus, notwithstanding the limitations to the enjoyment of human rights posed by situations of armed conflict, the human right regime remains in place. In many transitional justice situations the threshold of armed conflict is not even met: as such, there ought to be no question as to the continued applicability of the entire human rights protection system. As such, human rights at domestic, regional and global level may provide victims with means to seek redress. For the reasons briefly outlined here, IHRL and ICL seem to provide a sufficient framework for transitional justice to operate without having to rely directly on IHL.

6. The Local Informal Norms of Transitional Justice.

The legal framework of reference for transitional justice is not limited to international law, and indeed not just to law understood as formal written norms, such as official state law[149]. Notwithstanding the obvious appeal to internationalise the topic in order to facilitate interventions of global institutions, bilateral interventions, and replicability of best practices, transitional justice finds its immediate sources in domestic legal systems. Moreover, forms of 'bespoke' transitional justice that eschew universalist visions of transitional justice allow - theoretically - for the incorporation of local justice that in turn bolsters legitimacy at the grassroots level[150]. Indeed, local informal norms may be able to further the aims of transitional justice set out in international law effectively, provided there is a sufficient teleological convergence and there are no gross discrepancies of means (such as the imposition of the death penalty).

The most obvious challenge for international actors is to avoid neocolonial approaches to transitional justice where formal justice sector institutions and laws are lacking. This may result in the imposition of neoliberal, 'North Atlantic' conceptions of human rights, hierarchy of needs and procedural mechanisms to redress past violations. For instance, Abdullahi An-Naim laments that:

---

gust, 2001, U.N. Doc. E/C.12/1/Add. 69 (Aug. 31, 2001), P 11; also discussed in Ben Naftali & Michaeli, at 263.

[148] ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, at 240, discussed in Ben Naftali & Michaeli, at 264.

[149] On the limitations of legalism in transitional justice, see KIERAN MCEVOY, *'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice'*, Journal of Law and Soceity 34(4) 2007, 411.

[150] JAYA RAMJI-NOGALES, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach', Michigan Journal of International Law, Vol. 32, No. 1, 2010.

> Preference is given to a standard of justice that is mandated by the international community over indigenous or 'traditional' practices that are unacceptable because they are inconsistent with 'universal' human rights norms[151].

In the 2004 report on transitional justice, the UN proposed its own laws and standards - presumably those set out in international treaties, conventions and other documents drafted under its auspices - as an overarching consensus:

> United Nations norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions[152].

This declaration indicates that, at least according to the UN, the range of legal systems and traditions from which transitional justice can draw is broad, and overlaps between different regimes may help identify a set of common principles capable of being applied to different scenarios. The cultural contexts in which transitional justice develops adds additional layers of relevant sources and normative principles. For these reasons, transitional justice occurs under a regime of legal pluralism[153], encompassing international and domestic laws, as well as informal norms.

A notable example of legal pluralism in relation to transitional justice is provided in Rwanda, in which the jurisdiction of the ad-hoc International Criminal Tribunal for Rwanda (ICTR), trials at domestic level and the grassroots *gacaca* courts coexisted[154]. Nandor Knust and Madalena Pampalk have ana-

---

[151] Abdullahi Ahmed An-Na'im, Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice, The International Journal of Transitional Justice, Vol. 7, 2013, 197–204, at 197.

[152] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict situations: Report of the Secretary General,* at 5.

[153] For an overview on this topic, see inter alia: S. E. Merry, 'Legal Pluralism', in 22 *Law and Society Review*, 869, 1988; Griffiths, John. "What is legal pluralism?." The journal of legal pluralism and unofficial law 18.24 (1986): 1-55; Teubner, Gunther. "Two Faces of Janus: Rethinking Legal Pluralism, The." *Cardozo L. Rev.* 13 (1991): 1443. The notion of normative space in relation to legal pluralism is discussed by de Sousa Santos, Boaventura. "Law: A map of misreading-Toward a Postmodern Conception of Law." *JL & Soc'y* 14 (1987): 279, and more recently in Anne Griffiths, Franz von Benda-Beckmann, Keebet von Benda-Beckmann 'Space and legal pluralism: an introduction' in Anne Griffiths, Franz von Benda-Beckmann, Keebet von Benda-Beckmann (eds) Spatializing Law: An Anthropological Geography of Law in Society (Ashgate, 2009) 1-30.

[154] For background on the ICTR see inter alia: Akhavan, Payam. "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment." *American Journal of International Law* (1996): 501-510; Schabas, William, *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone,* CUP 2006; at national level: Morris, Madeline H. "Trials of Concurrent Jurisdiction: The Case of Rwanda, The." *Duke J. Comp. & Int'l L.* 7 (1996): 349; and on the gacaca, see

lysed Rwanda as a case study for the positive complementary of different levels of transitional justice mechanisms[155]. In essence, this three-tier system of jurisdiction over the mass atrocities of the Rwandan genocide enabled different fora to deal with alleged perpetrators according to the overall gravity and scale of their actions. Therefore, the masterminds of the genocide ("persons responsible for genocide and other serious violations of international humanitarian law") fell within the jurisdiction of the ad hoc international tribunal, set up through a UN Security Council resolution under Chapter VII of the UN Charter[156]. Having established that "genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda", the Security Council determined that "the situation continues to constitute a threat to international peace and security"[157]. In addition to the tribunal in Arusha, the domestic Rwandan courts took over the majority of cases involving persons accused of participating the in the genocide[158].

However, these trials have been criticised as being excessively politicised and one-sided[159]. The third tier of justice, closest to the communities that transitional justice seeks to rebuild, has been devolved formally to the *gacaca* system. The *gacaca* are "based on indigenous models of local justice", "a middle path somewhere between the rigours of full-blown criminal prosecution and the moderate truth commission approach employed in many countries" - involving, according to some estimates, up to one million individuals.[160] The reception of the *gacaca* is ambivalent: some, like Phil Clark, have praised its achievements; others, like Lars Waldorf, have expressed serious scepticism[161]. In either case, the experience of the gacaca presents the opportunity to discuss the incorporation of local forms of justice within the transitional justice process.

---

in particular Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, CUP 2010.

[155] MADALENA PAMPALK and NANDOR KNUST "Transitional Justice und Positive Komplementarität", availabel at *zis-online.com/dat/artikel/2010_11_502.pdf*. Many of these themes were also discussed in a related conference paper: Nandor Knust, PMTJ - A Pluralistic Model of Transitional Justice, 2nd Symposium of the Young Penalist of the AIDP co-organized with the CEJEP "Transitional Justice", La Rochelle, 29 September 2011 (attended by the author of this paper).

[156] UNSC Res 955 (1994) of 8 November 1994 (S/RES/955 (1994)).

[157] ibid. preamble.

[158] Des Forges, Alison, and Timothy Longman. "Legal responses to genocide in Rwanda." *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 56 (2004): 55-56.

[159] ibid.

[160] SCHABAS, WILLIAM A. "*Genocide trials and Gacaca courts*". *Journal of International Criminal Justice* 3.4 (2005): 879-895, p 872.

[161] Based on conversations in person with these two commentators, on the occasion of seminars at the *Law and Conflict and Durham* series in 2013.

A more recent example of how local justice has been called into play alongside formal domestic or international law is found in the recent Arab Uprisings.[162] In the North African countries facing a political shift away from former dictatorships, such as Egypt, Libya and Tunisia, a crucial question became whether the Islamic *shari'ah* and transitional justice could work together. At a conference on "Criminal Justice and Accountability in Arab Transition Processes"[163], the participants[164] engaged in heated discussions around whether the principles of Islamic law are compatible with the key objectives of transitional justice such as accountability, truth, reparation, and reconciliation. A striking picture emerged: first of all, it was apparent that participants from Tunisia, Egypt and Libya Tunisia each had an opinion (which was shared with a great deal of passion in prolonged and heated debates) about what to do with Islamic law in relation to transitional justice, ranging from a total exclusion of any reference to it, to the development of an Islamic model of transitional justice. Secondly, proponents of Islamic law aspects in transitional justice processes did not seek to exclude international law standards: instead, the use of Islamic law seemed to be strategic for gaining popular legitimacy with the Muslim-majority societies facing transition, in accordance with international (criminal) law. Thirdly, and perhaps most importantly, Islamic law was discussed as fully compatible with the international law standards that underpin international developments on transitional justice: indeed, Islamic law principles were presented as instrumental to achieving the goals of transitional justice, accountability, democratisation and rule of law.

The example outlined above suggests that the cultural context in which a transitional justice process is designed and developed may be as important as the law formally applicable to it. Indeed, it has been noted that:

---

[162] For a background, see inter alia: Dalacoura, Katerina. "The 2011 uprisings in the Arab Middle East: political change and geopolitical implications." *International Affairs* 88.1 (2012): 63-79; Chatham House, Transitional Justice and the Arab Spring, 1 February 2012, report available at *http://www.chathamhouse.org/publications/papers/view/182300* (event attended by the author).

[163] "Criminal Justice and Accountability in Arab Transition Processes", Expert conference jointly organized by: The Center for International Peace Operations (ZIF), the Cairo Regional Center for Training on Conflict Resolution and Peacekeeping in Africa (CCCPA), and the Criminal Law and Judicial Advisory Service (CLJAS) of the United Nations Department of Peacekeeping Operations (UN DPKO), Cairo, 25 – 27 September 2012, report available at *http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/veroeffentlichungen/ZIF_Conference_Report_Arab_Transition_Processes.pdf* (attended by the author upon invitation).

[164] Diplomats, scholars, independent experts, politicians, jurists, and field practitioners, including representatives from the United Nations and other international organizations.

> In transitional justice, cultural challenges are part of a critical evaluation and reflection that is going on as part of the maturation process of the field. One of the outcomes of this process is the growing awareness among transitional justice scholars that the transitional justice template is highly abstract, general, legalistic and top-down. In a significant pendulum motion, academic thinking currently swings toward bottom-up, interdisciplinary, empirical and concrete approaches[165].

Nevertheless, Liselotte Viaene and Eva Brems issue a 'double caution' in relation to importing the cultural context to transitional justice: the first "concerns the need to avoid incorrect simplistic notions of culture or tradition" whereas the second "relates to the risk of abuse of cultural arguments in international relations by governments attempting to cover up their shortcomings in dealing with the past"[166].

7. Conclusions.

Each transitional justice experience is deeply contextual to its political, legal, social, cultural (and economic) realities, a full engagement with the local justice dimension (formal and informal) is appropriate in order to develop workable and effective processes. As such, international law can be complemented by local norms, which may be more palatable to victims and societies facing transition. This paper sought to provide an introduction to transitional justice and its applicable legal framework. In particular, it discussed some central themes in the main sources of transitional justice, namely international human rights and criminal law (including the principle of legality). Although this article did not sketch a blueprint for transitional justice design, it offered some key elements and perspectives from which to analyse and critically assess such processes.

In sum, transitional justice seeks to advance and defend norms, much like human rights, but additionally tries to systematise "knowledge about the cause-and-effect relationships between justice measures and transitions"[167]. As a result, transitional justice is inherently linked to the establishment of those beliefs around serious violations which are of deep political significance in

---

[165] L. VIAENE and E. BREMS, *'Transitional justice and cultural contexts: learning from the Universality debate', Netherlands Quarterly of Human Rights,* Vol. 28/2, 199, 2010, at 211.

[166] VIAENE and BREMS, '*Transitional justice and cultural contexts: learning from the Universality debate'*, at 220.

[167] Arthur, Paige. "How" Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31.2 (2009): 321, at 358.

times of radical change. The right of individuals and societies to participate in uncovering those truths rests at the heart of transitional justice.