The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field

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Introduction

The field of transitional justice has expanded significantly in recent years. Transitional justice is no longer exclusively, or even predominantly, discussed as a matter of whether and how the state ought to deploy various tools aimed at advancing accountability, truth, and victims’ redress in the context of dealing with human rights violations committed by a prior authoritarian regime. Notably, the state is no longer perceived as the only actor relevant for deciding and implementing transitional justice solutions, and debates about transitional justice now take place in contexts where there has been no regime change, or the transition is not from dictatorship to democracy.

This has led some commentators to speak of a ‘normalization of transitional justice’. This normalization is said to materialize in an increased prevalence of institutions that pursue accountability, truth, and redress for past human rights violations. Transitional justice, it is argued, is no longer the exception, but the norm (Teitel 2003: 90-3; McEvoy 2008: 16). Teitel notes that the new millennium appears to be associated with a
normalization of transitional justice, whereby ‘what was historically viewed as a legal phenomenon associated with extraordinary post-conflict conditions now increasingly appears to be a reflection of ordinary times’ (2003: 89-90).¹

While these arguments point to important features of the contemporary field, the perception that transitional justice is now normalized, as opposed to extra-ordinary, does not fully reflect recent developments. Rather than simply speaking of one overarching tendency, such as ‘normalization’ or ‘globalization’, this chapter suggests that it is more fitting to speak of various forms of expansions – and at least a partial disintegration – of the field.

First, the field has expanded in the sense that actors above and below the state level are increasingly perceived as being relevant for shaping and implementing transitional justice solutions. This chapter proposes the term ‘vertical expansion’ to refer to the increased importance and attention paid to different actors and levels where transitional justice can take place or be promoted from.

Second, the concept of transitional justice is no longer reserved for analyzing justice tools in liberalizing political transitions. Instead, justice tools are being conceptualized as transitional justice in highly diverse contexts, including undemocratic political transitions, transitions from violent conflict to a more peaceful order, and situations where there is no ongoing transition, political or otherwise. This chapter discusses this
development introducing the term ‘horizontal expansion’.

As claims for inclusion multiply in the field of transitional justice, it has become increasingly difficult to operate with one common framework for understanding and evaluating the use of justice tools engineered to deal with violence and repression. Having described the expansions in the field mentioned above, the chapter moves on to discuss how we as observers can approach transitional justice in different contexts. Consequently, the chapter presents a critical account of the concept of transitional justice and developments in the academic field, which aims at laying the ground for a more nuanced understanding of what transitional justice can and should achieve in different contexts and the often complex roles of different actors in promoting these goals.

Current Trends in the Field of Transitional Justice

The Vertical Expansion: The Internationalization and Localization of Transitional Justice

Some trace the concept of transitional justice to the Nuremberg trials following World War II (Teitel 2003: 70), and some even to Ancient Greece (Elster 2004: 3-23). However, prosecuting those responsible for Nazi atrocities in an international tribunal
and other historical attempts at rendering justice for serious crimes were not at the time conceptualized as ‘transitional justice’. It is therefore more correct to state that contemporary debates about transitional justice originate in discussions about how the emerging democracies in Latin America should address serious human rights abuses committed by the prior dictatorships (Arthur 2009). With some exceptions, these discussions were based on a state-centric understanding of agents and forums for accountability, truth-seeking and other ways of addressing gross human rights violations committed during the reign of the military dictatorships.

Accordingly, the early field of transitional justice tended to view the state, or more precisely the executive branch of the government, as the key decision-maker concerning transitional justice. Whereas civil society as well as international actors were seen as capable of offering critical input, ultimately the decision to deploy various forms of transitional justice was thought to rest with the new political leadership. Seemingly influenced by the so-called transition to democracy scholarship (Huntington 1991; Linz and Stepan 1996), which had emphasized democratization as the outcome of elite choices, transitional justice theory similarly implied that the development of transitional justice policies was essentially an elite choice, potentially restrained by other (outgoing) elites. Consequently, the focus in the early literature was primarily on how various forms of political transitions would impact the new leadership’s approach to transitional justice, as opposed to how different actors could shape or take control of transitional justice solutions devoid of potential political restraints arising out of the particular nature of the transition. Whereas the early scholarship was characterized by a rich debate concerning the justice decisions made by new democracies, most studies thus
took for granted that these tools were to be established at the state level (Kritz 1995a; Kritz 1995b; McAdams 1997).

In contrast, contemporary transitional justice discourses perceive the state as only one among several actors with the ability to shape and implement transitional justice. The most obvious indication of this externalization from the state concerns the rise of criminal justice institutions within the international system. Though Teitel’s claim that the entrenchment of the ‘Nuremberg Model’ of transitional justice turns the prosecution of war crimes, genocide and crimes against humanity into ‘a routine matter under international law’ may overstate the prevalence of international trials (Teitel 2003: 90), there can be little doubt that international actors, including international tribunals, play an increasingly prominent role in shaping transitional justice solutions. This internationalization of transitional justice is important because it in principle allows that justice be pursued in instances where the political leadership lacks commitment to accountability principles. This has ramifications for the field in that transitional justice obtains new relations with domestic politics through a potential impact on governance and electoral politics which is fundamentally different from state-driven transitional justice. In Kenya, for example, the ICC has charged two prominent politicians of the country, who subsequently created a powerful coalition aimed at ending the ICC process and gaining power in the 2013 presidential elections (Hansen 2011; Sriram and Brown 2012). As a result, transitional justice, in its internationalized form, significantly influences succession politics in the country, while at the same time it has a complex impact on peace and security in the country (Hansen 2011).
Furthermore, the internationalization of transitional justice is evident from the enhanced role played by international actors, such as UN agencies, international development partners and international NGOs, in supporting and implementing transitional justice tools at various levels, including the local, the national and the international. These actors increasingly see it as their role to provide technical advice and assist governments and others that attempt to create and implement a transitional justice solution. Transitional justice is thus no longer viewed as an exotic task dealt with by specialized departments in ‘extra-ordinary’ political circumstances, but rather tends to form an integrated part of good governance, human rights and peace building programmes in the developing countries where these agencies work (Duthie 2008; UN Secretary-General 2011).

In part due to the strengthened role of international actors in transitional justice processes some commentators have started to criticize transitional justice solutions that rely overly on international ‘best practices’ and a ‘top-down design’, which is said to neglect the voices of victims and the communities affected by violence. Miller, for example, speaks of a ‘consistency of language and terminology employed in a wide diversity of post-conflict contexts’, which points to a ‘global phenomenon and its seemingly successful export/import from one country or region to another over the course of the past several decades’ (2008: 271). Cavallaro and Albuja identify a similar tendency with respect to truth commissions which, often supported financially and morally by international actors, replicate each other across borders (2008). These and a number of related tendencies make Oomen note that transitional justice has become a
‘donor-driven project’ (Oomen 2005). The resistance to ‘top-down’ transitional justice has led segments of the scholarship to call for local-level and participatory approaches to transitional justice. Accordingly, consultation and involvement of civil society and local communities are emerging as benchmarks for the legitimacy of transitional justice processes (Lundy and McGovern 2008). The critique of transitional justice as a project that externalizes justice from those affected by it has thus produced increased interest for modes of transitional justice that (supposedly) draw on local communities’ understandings of justice, often with reference to ‘tradition’ (Huyse 2008).

While increased attention to the role of international actors as well as local communities’ conception of justice presents a positive development for transitional justice, the debate about whether international or local solutions to transitional justice are preferable sometimes takes almost ideological dimensions, and is often based on general considerations, as opposed to deliberations that take their starting point in the type of case in question. Before elaborating on when and how different actors should attempt to influence or take control of transitional justice, it is first necessary to describe another trend in the contemporary field, namely the horizontal expansion of transitional justice, which implies a proliferation of transitional justice discourses to cases that are not characterized by a liberalizing political transition.

*The Horizontal Expansion: Transitional Justice beyond Liberalizing Political Transitions*
As noted above, the field of transitional justice originates in deliberations over how the new democracies of the mid and late 1980s in Latin America ought to respond to gross human rights violations committed under the prior military dictatorships. The starting point of these discussions was that as much justice as possible should be achieved without endangering the democratic transition - or even better, that justice should contribute to the consolidation of a liberal democratic order (Albon 1995). These premises for the new field of transitional justice were in part the consequence of the conditions of its origin, namely as a merger between the normative frameworks of human rights and the transition to democracy discourses, influenced by scholars such as Huntington, Linz and Stepan (Huntington 1991; Linz and Stepan 1996). To put it simply, the field of transitional justice made the question of justice central to democratic transitions, but also made the question of political transformation central to the agenda of justice.

Because liberalizing political transitions were perceived as an uncommon phenomenon - as something extraordinary - transitional justice also came to be viewed as something fundamentally apart from other forms of justice. The justice tools in question, it was argued, were utilized in a special, or even unique, political context, and as opposed to ‘ordinary justice’ these tools should serve essentially political purposes, such as promoting acceptance of the new democracy (Nino 1996; Malamud-Goti 1991: 3-13).
For these reasons, a number of prominent lawyers insisted (and they did so largely unchallenged)\(^3\) that there was a need for a distinctive notion for this form of justice; that transitional justice should be discussed in idiosyncratic terms, rather than in a continuation of general debates about criminal, restorative and other forms of justice. In line with this, Teitel, who claims to have coined the notion, defined transitional justice as ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’ (2003: 69). By political change, Teitel meant to ‘the move from less to more democratic regimes’ (2000: 5).

While these normative dimensions relating to the promotion of liberal democratic values continue to influence transitional justice discourses, it is also clear that the selfsame discourses increasingly analyse and debate justice processes in cases that are fundamentally different from the type of cases around which the field was formed. For example, debates about transitional justice now occur in Kenya, Uganda, Colombia, Sudan and many other countries that have not (yet?) experienced a fundamental political transition and/ or where large-scale human rights abuses are still ongoing. In other cases, such as Rwanda, a fundamental political transition has indeed taken place when a transitional justice process is launched, but this transition is not best understood using terms such as ‘liberalizing’. Transitional justice discourses thus increasingly engage with contexts where there is no liberalizing political transition, including illiberal transitions and transitions which seem predominantly to concern an already existing or attempted move from armed conflict, usually of some internal nature, to relative peace.
This expansion of the field from providing a framework for discussing justice in democratic transitions towards a more inclusive, but seemingly less well-defined, perception of ‘transition’, has led to debates about definitions and how far the borders of the field should extend.

Although attempts to replace the notion of ‘transitional justice’ with ‘post-conflict justice’ have by and large been dismissed by the scholarship, some commentators have started to use definitions of transitional justice that embrace justice after authoritarian rule as well as justice after civil war. According to Roht-Arriaza, for example, transitional justice can be understood as a ‘set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law’ (2006: 2). In line with this, some scholars have noted that contemporary ‘transitional justice discourses frequently conflate at least two primary kinds of transition: that from authoritarianism to democracy, and that from war to peace’ (Aolán and Campbell 2005: 212).

This perception could be seen to imply that the field has developed simply as a consequence of the fact that legal and quasi-legal measures resembling those used in contexts of liberalizing political transitions, such as criminal tribunals, truth commissions and reconciliation efforts, are now utilized in situations like Sierra Leone,
Uganda, Colombia and others where the abuses are closely connected to the existence of a past, or sometimes still ongoing, armed conflict. The fact that these measures are debated as transitional justice are thus seen as a kind of generation shift that simply reflects a change in world affairs where serious abuses increasingly take place in the context of civil wars.

However, speaking of two main forms of transition, namely a liberalizing political one and one from conflict to peace, does not embrace all the scenarios where debates about transitional justice currently take place. Furthermore, developing new definitions does not necessarily answer the more profound question of whether transitional justice theory is sufficiently equipped to deal with the very diverse set of cases in which some form of justice process is launched to address human rights abuses and/or breaches of international humanitarian law.

On the one hand, some scholars suggest that the dominant normative framework for transitional justice, which emphasizes the value of a liberal democratic order, is also suitable for understanding new types of transition dealt with by the scholarship. For example, in their account of transitional justice in ‘conflicted democracies’, Aoláin and Campbell argue that ‘the end goal of transition in conflicted democracies is the same as that in paradigmatic transitions: the achievement of a stable (and therefore peaceful) democracy’ (2005: 174).
On the other hand, some commentators argue that the expansion of the field also implies, or should imply, an expansion of the goals of transitional justice. Nagy, for example, argues that ‘[a] narrow, legalistic focus on gross violations of civil and political rights overlooks the ways in which structural violence and gender inequality inform subjective experiences of political conflict, injustice and their consequences’, and suggests that transitional justice must address issues like these which are not captured in the dominant conception of transition (2008: 287). In a similar vein, Lundy and McGovern argue that dominant ideas about transition may be too narrow because they prioritize a ‘liberal and essential Western formulation of democracy’, and ignore the ‘problem that human rights abuses may continue to take place in circumstances where, in theory at least, the norms of liberal democratic accountability prevail’ (2008: 101). Without explicitly addressing the expansion of the field discussed here, Clark also points to the need for relying on a broader range of goals of transitional justice, including ‘reconciliation, peace, justice, healing, forgiveness and truth’ (Clark 2008a: 193).

However, there are also those who have started to query whether not the expansions of the field may turn out to threaten the strength of its postulations, noting that the field is now in a sort of ‘mid-life crisis’. Most notably, Bell argues that transitional justice has reached a ‘paradoxical moment of fieldhood’, where increased claims for inclusion cause a confusion, in which it becomes difficult to map out the borders of the field, and it becomes open to criticism that the concept is too vague or is being manipulated by actors with questionable agendas (Bell 2009: 13).
Interrogating the Field’s Expansion and Disintegration: Legitimate Goals and Relevant Actors in Transitional Justice Processes in Different Types of Cases

As opposed to simply broadening the scope of transitional justice goals in general or rejecting the expansion of the field, this chapter suggests a more suitable approach which involves the use of a differentiated framework for understanding and evaluating the highly diverse set of cases where attempts to deal with a legacy of violence or repression are conceptualized as transitional justice. This section outlines the key scenario in which a justice process may occur to deal with large-scale human rights abuses and reflects on how we as observers can determine what goals of transitional justice are legitimate and feasible as well as the role of different actors in promoting them. Accordingly, the section investigates the consequences of the vertical and horizontal expansion of the field, and how these two trends interrelate.

Transitional Justice in Liberalizing Political Transitions

It seems reasonable to suggest that promoting democratization and the rule of law are central goals of transitional justice in liberalizing political transitions, such as in the Latin American countries undergoing profound political transformation in the mid and late 1980s; Central and Eastern Europe following the collapse of communist rule; and South Africa after the end of Apartheid rule in 1994. Arguably, some of the more recent examples of transitional justice in the Arab World - what was originally labelled the
‘Arab Spring’, but has often turned out to be a more complex and lengthy process than many had initially hoped for - may also prove to occur in liberalizing transitions. Although there are of course very significant differences between these cases, it is a reasonable expectation that new democratically elected leaderships will tend to support transitional justice to the extent that such processes do not conflict with other top priorities of the new regime, including, but not limited to, maintaining stability. This support will typically derive from the new leadership’s commitment to the rule of law and human rights; its perceived need to distance itself from the past authoritarian order; its sympathy with victims’ calls for justice; and for other reasons which would usually be perceived legitimate. Turned around, the main reason why these new leaderships from time to time oppose (certain modalities of) transitional justice has to do with a perception that justice could jeopardize the consolidation of a new democratic order, for example because if seriously challenged, members of the outgoing regime may have the ability to shake or overthrow the new leadership. In Spain, for example, decisive parts of the new democratic leadership were opposed to transitional justice because it was thought to put at risk the emerging democratic order due to the continued influence of Franco loyalists (Aguilar 2001).

Mainstream transitional justice theory, with its emphasis on liberal democratic values, thus fits relatively well for analyzing this type of cases. However, there are at least three major problems with these discourses. First, they tend to rely on an elite conception of decision-making, which means that sufficient attention has not always been paid to the question of how civil society and other actors perceive and try to influence transitional justice (Sharp 2013). Second, these discourses have often failed to
analyze whether and how the use of transitional justice actually helps to consolidate a liberal democratic order (Hazan 2006: 19-48). Third, transitional justice theory, especially in the early days of the field, has tended to overlook the question of whether evaluating these cases should not take place using other measures of success, including redistribution of resources and other forms of more structural change (Mani 2002; Nagy 2008).

Though civil society and other non-state actors can and should play an important role in shaping transitional justice solutions in liberalizing political transitions, allowing the new political leadership a central role is usually compatible with creating a legitimate transitional justice solution. Importantly, accepting that the state is a central actor in framing transitional justice approaches in these types of transition offers the new political leadership an opportunity for pursuing nation-building (for example by creating a shared narrative concerning the wrongdoing of the past) and strengthening the rule of law and democratic ideals (for example by showing its commitment to punish those who in the past violated the law as well as supporting the victims’ right to justice). To illustrate: Though it is difficult to empirically verify that Nino was right in arguing that Argentina’s transitional justice process - driven by the new leadership but influenced by civil society - helped consolidate democracy, it is certainly a reasonable assumption that the decision to prosecute members of the Junta disseminated a picture of the new political leadership as being committed to the rule of law and may have laid the foundation for creating a more just, albeit not perfect, democratic order (Nino 1996: 145-8).
Because a transitional justice solution created by a democratically elected (or clearly democratically oriented) new leadership will generally be legitimate to the extent the voices of victims and civil society are duly taken into account, international actors - including the ICC - should exercise some level of caution attempting to take control of transitional justice in this type of cases. Of course, international standards, including accountability norms, fair trial standards, victims’ right to a remedy and other norms enshrined in international human rights law, remain important benchmarks for a legitimate transitional justice process. Yet, some compromises to these standards may be acceptable if a new democratic leadership convincingly argues that such compromises are necessary to avoid jeopardizing the democratic transition itself, and for other reasons compatible with a liberal democratic order and deemed acceptable by the communities most affected by the decision. Even in cases such as South Africa where many victims of the Apartheid crimes may have been reluctant to accept the new leadership's decision to exclude criminal trials from the transitional justice process, the moral standing and democratic nature of the new leadership makes the ‘amnesty for truth’ deal an acceptable, though not necessarily ideal, solution to dealing with past human rights abuses (Boraine 2006).

In sum, there should be a preference for a nationally conceived (and driven) transitional justice process in cases of liberalizing political transitions. Although international actors may provide valuable assistance to national actors responsible for implementing transitional justice, they should generally refrain from taking control of the processes to the extent a new democratically elected regime creates transitional justice processes in
good faith; takes into account the voices of victims and others affected by the past abuses; and with reasonable respect of fundamental international standards.

Transitional justice in Non-Liberal Political Transitions

Another type of cases that are increasingly debated within a transitional justice framework concerns instances where criminal trials, truth-seeking, victims’ redress and other tools are utilized to deal with past abuses in contexts where a profound political transition has taken place, but this transformation does not have a democratic nature. In Rwanda, for example, various forms of transitional justice have been pursued following the 1994 RPF-takeover, but the RPF-led regime can hardly be described as democratic and continues to violate a number of basic rights (Reyntjens 2004). Uzbekistan offers another example of transitional justice in a clearly non-liberal political transition. President Karimov decided to launch a truth commission to deal with abuses committed in the Soviet era, but Karimov’s regime is clearly undemocratic and responsible for serious human rights abuses, most well-known, perhaps, the massacre of demonstrators in Andizhan in 2005 (Grodsky 2008). The so-called Red Terror trials in Ethiopia, which took place following the overthrow of the highly repressive Mengistu regime, but under the auspices of another authoritarian regime, similarly offers an example that transitional justice can take place in the context of a fundamental political transition that is not liberalizing (Tiba 2007; Harbeson 1998). Similarly, the establishment of a truth commission in Chad, under the country’s authoritarian president Déby, to deal with the abuses committed during Habré’s regime presents an example of how a dictators may
pursue some kind of justice for the human rights abuses committed by their predecessors (Hayner 2001: 57-9).

Simply debating such cases using a framework that assumes transitional justice is a question of promoting democratization and rule of law abiding governance is obviously problematic. A key motivation for creating justice processes in such contexts may in fact be the opposite: to silence pro-democratic voices, indoctrinate the population and, ultimately, to consolidate (yet another) non-democratic and repressive regime. For example, Rwanda’s Ingando camps, officially claimed to offer a venue for eradicating genocide ideology, are alleged to disseminate a one-sided picture of Rwandan history and indoctrinate its participants according to RPF ideology (Mgbako 2005). Key actors in Rwanda’s transitional justice process have stated clearly that democratization was not seen as a desirable, or at least urgent, outcome of the transition: Then General Secretary of the National Unity and Reconciliation Commission, Aloysia Inyumba (who is also a prominent RPF leader), explained that ‘the ordinary citizens are like babies. They will need to be completely educated before we can talk about democracy’ (Reyntjens 2004: 183-4). Similarly, transitional justice in Uzbekistan seems to have aimed at consolidating the regime’s repressive grip on power. Grodsky notes that ‘the very repression that has allowed Karimov to control the state and most of society has created conditions that make transitional justice possible and even likely,’ in part because Karimov has a need for blaming his poor human rights record on something, such as difficulties in overcoming structures put in place during the Soviet era (2008: 289).
Despite these obvious challenges to legitimacy, certain aspects of transitional justice in non-liberal transitions may at the same time promote other, more legitimate goals, such as accountability principles, nation-building, reconciliation and victims’ redress. Further, promoting these values may sometimes entail that compromises be made to rule of law standards. In Rwanda, for example, the Gacaca Courts had inherent rule of law flaws and seem partly to have aimed at consolidating the RPF regime’s grip on power, but may nonetheless have provided a relevant and partially credible forum for accountability, reconciliation and victims’ redress (Clark 2007). Given the importance of these goals, it seems unjustified when some commentators (Fierens 2005; Sarkin 2001) entirely dismiss the legitimacy of the process on the grounds that it does not comply with all human rights standards. On the other hand, some scholars have argued that liberal democratic values and human rights are completely irrelevant assessing a transitional justice tool such as the Gacaca Courts (Drumbl 2002: 13-14). This is a far-reaching conclusion because basic fair trial standards may obviously have importance to some, including the suspects.

A number of factors are relevant when assessing the legitimacy of transitional justice processes in non-liberal transitions, including the question of when some compromises to democratic and rule of law standards are acceptable. First, the kind of injustices dealt with by transitional justice must be examined. To the extent the abuses of the past were carried out through mass participation, a more flexible approach to democratic and rule of law standards may be necessary. In Rwanda, for example, the massive participation in the 1994 genocide meant that any transitional justice process inevitably had to balance accountability norms with fair trial standards and other legitimate concerns,
such as nation building and reconciliation (Schabas 2002). Second, attention must be paid to the context in which transitional justice unfolds. To the extent transitional justice takes place in a context defined by an ongoing armed struggle or other highly instable situations, it may be unrealistic to expect that the justice tools utilized should primarily aim at promoting liberal democratic values. Achieving stability and security may be seen as more pressing needs in such situations, though of course it must be recognized that the continued rejection of liberalization and democratization are often underlying causes of conflict. Third, the level of poverty as well as the existence of well-functioning state institutions must be taken into account. If transitional justice takes place in a context where the government is commencing a post-conflict reconstruction and no basic judicial infrastructure is in place, compromises to rule of law standards and other liberal values may be more acceptable than in states, such as many of the Latin American, where relatively well-functioning state institutions already existed.

Whereas transitional justice at the state level should therefore not automatically be labelled an entirely illegitimate affair in all instances of a non-liberal political transition, it is important to consider how other actors can promote aspects of change that the government is unlikely to advance. Though the involvement of civil society and the communities affected by violence in transitional justice is desirable, it is often unlikely that these actors can operate in a manner where they, free of the government’s control, can promote accountability, truth-seeking or victims’ redress. Still, there are instances where a highly centralized and oppressive government creates space for local communities to shape transitional justice, perhaps unwitting that these communities
may utilize the process in ways that the government deems undesirable. Again with the
Gacaca Courts as an example, it has been argued that although Gacaca was re-invented
by the state to serve a clearly defined set of partially self-promoting goals, communities
have sometimes been able to shape the process and to use it to open democratic space
(Clark 2008b: 313). Consequently, despite the government’s clear opposition and
prohibition (Corey and Joireman 2004: 86-7), Gacaca hearings, especially at the
periphery of the country, have sometimes addressed the serious human rights abuses
committed by the RPF in the context and aftermath of the civil war that surrounded the
1994 genocide (Stefanowicz 2011). Though it will usually be difficult for non-state
actors to become formally involved in creating transitional justice processes in instances
of a non-liberal political transition, an entry point for local communities to influence
transitional justice may thus ironically be offered by mechanisms of transitional justice
that are essentially conceived by the state to promote its own agenda.

Determining a suitable and feasible role of international actors is equally complex in
this type of transitions. On the one hand, international support to transitional justice
processes that do not satisfy basic human rights standards and other benchmarks for
legitimacy discussed above should in principle be avoided, especially if the support
could strengthen a non-democratic regime’s ability to oppress the population. On the
other hand, international support can take different dimensions, and particular aspects of
a transitional justice process may sometimes be worth supporting, even in instances
where the overall goals of the transitional justice process may conflict with democratic
and rule of law standards and for other reasons be questionable. In Rwanda, for
example, international donors supported the training of paralegals (known as Judicial
Defenders) to offer legal assistance and representation in the genocide cases pending before the national courts. Although the accountability process itself suffered from serious flaws, the decision to support the paralegals significantly enhanced access to justice, not only with regard to the genocide cases but also in other ways because the paralegals subsequently moved on to deal with various other areas of the law (Hansen 2008). Because attempting to positively influence domestic transitional justice processes may not always be feasible or sufficient for ensuring that important goals are served, international actors can also promote transformation relying on other tools. In particular, international justice could play an important role in dealing with crimes that the state is unwilling to prosecute, in this way strengthening accountability principles and victims’ right to justice. From this perspective, it is regrettable that the Arusha-based ICTR has opted to prosecute only genocide crimes, but not the serious crimes committed by the RPF. As noted by Des Forges and Longman, the ICTR’s decision to prosecute ‘only one party to the Rwandan war has naturally given the impression to some people that the tribunal is working in the interest of one side only’ (2004: 55). In future cases, the ICC could play an important role in non-liberal transitions, where the state may be willing to prosecute certain categories of crimes and offenders, but not others. This could strengthen the Court’s potential as a deterrent, while at the same time helping to overcome some of the legitimacy problems facing the ICC itself, including the perception that international justice is biased in favour of those in power.

Transitional justice in the Absence of a Political Transition
Next, there are cases where no fundamental political transition has taken place, at least at the point where the justice processes are launched, but these processes are nonetheless conceptualized within a transitional justice framework. This category of cases is extremely diverse - ranging from societies such as Uganda or Colombia, which were still affected by armed conflict and serious human rights abuses at the point where a transitional justice process was launched, to power-sharing and failed (or at least disputed) transitions such as that in Kenya, and consolidated democracies such as Canada or Australia. Given this diversity, these cases can hardly be understood and evaluated using a single framework, though there may be certain similarities between them, including a disconnection between transitional justice and the pursuit of fundamental political change.

In cases such as Uganda and Colombia, for example, where the main type of transition taking place seems to concern an attempted move from armed conflict to peace, the ruling elites may choose to conceptualize an often limited or half-hearted attempt at addressing past or still ongoing abuses - often committed by various actors, including the incumbent regime itself - as transitional justice. By doing so, the regime may aim at avoiding international interference; shun more profound reforms of the system of governance; disseminate a particular, though not necessarily complete, picture of who is to blame for the abuses; and - perhaps most problematically - in order to target political opponents. For example, it has been argued that Ugandan President Museveni’s decision to refer to the ICC the situation relating to the conflict in the northern parts of the country should be seen as one weapon in the arsenal adding pressure on the Lord’s Resistance Army, still actively fighting at the time, while designed to avoid
prosecutions of atrocities committed by the Ugandan army (Moi 2006; Nouwen and Werner 2011: 946-54). With regard to transitional justice in Colombia, it has been noted that the mechanisms established with the 2005 Justice and Peace Law\(^6\) constitute ‘a flawed process of paramilitary disarmament’ that has ‘arguably not been about the widening, deepening or strengthening of democracy’, but rather disseminating a picture that the government is attentive to victim’s needs while in reality avoiding more profound political reforms as well as ICC intervention (Diaz 2008: 196). However, transitional justice can have its own dynamics and may end up partially satisfying victims’ calls for justice and contribute to reconciliation and peace-building. In Colombia, the information provided by ex-combatants in the re-integration process has led to investigations of high-ranking government officials and other positive developments (Human Rights Watch 2008: 36-47). In Uganda, the Juba Agreement, which was arguably conceived in an effort to end ICC prosecutions (once Museveni no longer thought the Court’s involvement benefitted his objectives), has contributed to the creation of community-driven reconciliation and re-integration processes in Northern Uganda (Greenawalt 2009; Beyond Juba 2009) as well as the establishment of a special division of the High Court to try the most serious crimes (which so far, however, has had little success advancing accountability principles) (Wegner 2012). Although democratic reforms are certainly relevant for limiting the risks that large-scale armed conflict continues or reoccurs, it is thus necessary to acknowledge that even if state-driven transitional justice processes in these contexts do not necessarily advance such reforms, these processes can still have some value if they contribute to a peaceful transformation and/or other goals, such as victims’ redress. Yet, due to the government’s potential interest in manipulating transitional justice, it is important that other actors, both below and above the state level, direct the process. Notably, even if
the ICC depends on the cooperation of states, the Court has a responsibility to ensure that international justice is not being captured by national political elites to promote their own narrow agenda, but rather serves to bring justice to the victims and deter new atrocities, irrespectively of the perpetrators’ connection to the ruling elites.

In other contexts, accountability, truth-seeking and reform measures are discussed as a matter of transitional justice, but no transition has occurred and the national political leadership has no or limited interest in supporting that these processes bring about meaningful transformation. Yet, due to pressure from civil society and the international community, some of these processes may nonetheless have potential for promoting political and peaceful transformation, for example because they end up targeting members of the political leadership. In Kenya, for example, the attempts made to address the country’s legacy of political violence are debated within a transitional justice framework, though the power-sharing deal which ended the 2007/8 post-election violence has not resulted in fundamental political change - and such change seems a prerequisite for creating a more peaceful and just society (Hansen 2013a).

Understanding the case of Kenya requires that attention be paid to the fact that large segments of the political elites remain opposed to a credible and independent transitional justice process because it is seen to jeopardize their privileges and status quo. Consequently, political elites have attempted and partly succeeded capturing and manipulating transitional justice to serve their own agenda and maintain a status quo. Kenya’s truth-seeking process, for example, has been almost entirely undermined by
political leaders (Hansen 2013a). As a result, the question of how to limit the state’s influence on these processes and empower civil society becomes a central concern when creating and implementing transitional justice tools. Further, special attention must be paid to the role of international actors, including how these actors can promote a credible transitional justice process in the absence of political will at the national level. For example, whereas the ICC’s decision to intervene in the Kenyan situation presents a positive move for addressing impunity and providing victims with some level of justice, the success of international justice may ultimately depend on whether the Court itself and members of the international community adopts strategies that can circumvent the resistance in the national political leadership (Hansen 2013b). Evaluating the success of transitional justice in a case such as Kenya requires acceptance that strengthening accountability norms and implementing far-reaching legal and institutional reforms are necessary to promote an eventual political transformation as well as to prevent future violence, while at the same time there is a need, as far as possible, to externalize transitional justice from political elites. But it is also necessary to acknowledge that, if pushed to a corner, these elites may have both the will and ability to mobilize masses and trigger new violence (Hansen 2011; Sriram and Brown 2012).

A rather different scenario emerges when consolidated and generally peaceful (at least internally) democracies utilize justice tools to address abuses, which usually took place in a relatively distant past. In Canada and Australia, for example, the governments have established truth-seeking and some measures of reparations to deal with the abuses committed against the indigenous populations. Though these measures are frequently
discussed as a matter of transitional justice, they do not seem to aim at achieving a political transition or other forms of fundamental transformation. These measures are nonetheless important because they can serve legitimate purposes, such as providing victims with redress and may lead to public acknowledgement of the past wrongdoing.\footnote{3} At the same time, it is necessary to critically analyze how consolidated democracies define their needs to address gross human rights violations. Consolidated democracies often support transitional justice, including criminal accountability processes, in developing countries, but this does not necessarily mean these countries are willing to hold accountable their own nationals for serious ongoing abuses, committed for example in the context of the War against Terrorism. Although it may be unrealistic to expect that the ICC will target powerful states in the West, the selective application of the transitional justice paradigm in some of these countries certainly merits a discussion of how other actors can advance justice for crimes that the state has no interest in addressing.

Conclusions

Discourses on transitional justice have moved to the very forefront of debates about democratization, conflict prevention and peace building. The enhanced normative power of the transitional justice paradigm seems to reflect an increased belief among important actors that the central question is no longer ‘whether something should be done after atrocity but how it should be done’ (Nagy 2008: 276). The strengthened position of the field is associated with increased claims for inclusion, but the field’s
expansion also poses challenges which must be addressed in order to ensure its continued relevance.

As a result of the expansion, transitional justice appears to have lost its connection to ‘an exclusive “moment” in time’ (McEvoy and McGregor 2008: 6), and conceptions are broadening concerning the kind of cases and actors relevant for the field. The transition, it has been noted, implies a ‘journey, with a starting point and a finishing point’ (Aoláin and Campbell 2005: 182), but with the expansion of transitional justice discourses, both the starting point and the finishing point of that journey have become increasingly unclear. The fact that ideas about transition are themselves in transition means that there is increased uncertainty concerning the main goals and actors of transitional justice. Specifically, are different goals and actors equally relevant to all types of cases where justice processes are considered within a transitional justice paradigm?

Although this chapter has dismissed the use of one coherent normative framework, it still acknowledges that the notion of transitional justice can be relevant to other types of cases than liberalizing political transitions. Certain goals, such as addressing impunity and providing victims with redress, reoccur in many different contexts. Further, transitional justice scholars, often emphasizing an inter-disciplinary approach to understanding the law’s ability to promote progressive societal change, have created useful tools to analyze accountability processes, truth-seeking and victims’ redress - tools that can be used to improve our understanding of justice processes in various contexts. Admittedly, there is a danger that the continued proliferation of transitional
justice discourses may, as noted by Bell, result in the field being constructed to mean ‘all things to all people’ (Bell 2009: 13). Yet, a crucial task of contemporary transitional justice scholarship involves analyzing the implications of the field’s expansion and partial disintegration, rather than insisting that transitional justice should alone focus on state-level responses to serious human rights abuses committed under a past authoritarian regime. Although this chapter does not claim to offer a conclusive framework for analyzing and understanding transitional justice in different contexts, it aims to open the debate on these central issues.

Bibliography


Notes

1 It should be emphasized that Teitel has later noted: ‘At present, we find ourselves in a global phase of transitional justice. The global phase is defined by three significant dimensions: first, the move from exceptional transitional responses to a ‘steady-state’ justice, associated with post-conflict-related phenomena that emerge from a fairly
pervasive state of conflict, including ethnic and civil wars; second, a shift from a focus on state-centric obligations to the far broader array of interest in non-state actors associated with globalization; and, lastly, we see an expansion of the law’s role in advancing democratization and state-building to the more complex role of transitional justice in the broader purposes of promoting and maintaining peace and human security’ (Teitel 2008: 2).

2 See generally the studies in Kritz (1995a; 1995b) and McAdams (1997).

3 For one of the few studies that questioned whether transitional justice should be seen as a special or unique form of justice, see Posner and Vermeule (2004). More recently, Ohlin has conducted a study which examines different conceptions of transitional justice, including the question of whether transitional justice is some other kind of justice, fundamentally different from justice during non-transitional moments, or if it is simply ordinary justice, a familiar end-state that remains elusive because a society has been ripped apart by mass violence (Ohlin 2007).

4 Such attempts were made in Bassiouni (2002). The notion is dismissed in various studies, including Roht-Arriaza, (2006).

5 For different approaches to the Rwandan case, see the essays in Clark and Kaufman (2008). See also Drumbl (2000).

6 For further details on the Law, see Laplante and Theidon (2006).
On these two cases, see further the Australian Human Rights Commission (2008).