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Theoretical and Practical Approaches

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Introduction

Norman Weiß

Transitional justice has been a topic of both political science and national as well as international law throughout the 20th century. On occasion of a regime transformation, often linked with a military defeat, as was the case with Germany after 1918 and 1945, or on occasions of transition from conflict or authoritarianism in South America, Eastern Europe, and Africa, societies have to deal with the past in order to deal with the future.

Although the topic has a remarkable history, the term 'transitional justice' has only been used since the early- to mid-1990s, as the end of the Cold War allowed for a more active discussion on human rights and initiated a new wave of democratization. This brought together practitioners and researchers, international organizations, civil society, and political leaders to recognize and to establish transitional justice as a 'field'.[1]

Various models of transitional justice have been developed over time, which vary in terms of the degree of internationalization and of juridification. Today, a broad range of theories and concepts deals with the subject of transitional justice. As the field brings together a broad variety of academic disciplines and as its development is strongly driven by practice, a common theoretical language did not emerge easily. One may observe a critical discussion and continuous review of theories.[2] More and more, both national and international actors have become involved and different mechanisms have been established throughout time. Shaped by specific country situations and needs of society, a whole range of approaches

[1] See Quinn, 'The development of transitional justice' in Lawther, Moffett and Jacobs (eds.), Research Handbook on Transitional Justice, Edward Elgar Publishing 2017, 11–33 (11).

[2] Cf. Buckley-Zistel, Beck, Braun and Mieth (eds.), *Transitional Justice Theories,* Routledge 2014.

emerged,[3] ranging from amnesty laws over truth and reconciliation mechanisms to international(ized) criminal courts.[4]

This collection of essays stems from a seminar held at Alice Salomon Hochschule in summer 2018 as part of the master program 'Intercultural Conflict Management'.

In chapter 1, Stephanie Verlaan asks whether Western conflict and reconciliation theories are useful when applied to societies that do not share the basic assumptions of these theories. Using Sierra Leone as a case study, she finds that reconciliation theories focusing on truth telling are not fitting the local needs and ideas of conflict resolution.

Juan Francisco Vasquez Carruthers links settings of transitional justice to the political situation of a society by using political opportunism as a method of analysis. Based on a case study on Argentina, he is able to show that choosing or discarding a specific mechanism serves to achieve a concrete political goal in a specific situation.

In her chapter, Theresa Mair goes back to Germany's colonial genocide in Namibia, which took place from 1904 to 1908, in order to analyze whether such a case, traditionally blocked by the doctrine of intertemporal law can be dealt with under a transitional justice framework today.

Sean Conner looks at the situation in Nicaragua; where two transitions occurred within a period of eleven years. His analysis shows that although no formal mechanisms of transitional justice were established, substantial institutional and socioeconomic changes contributed to the intended transformational process.

In chapter 5, Lucas Maaser presents a case study on the effects of a bottom-up transformation process, mainly driven by nonviolent resistance. The Nepalese case shows that a nonviolent transformation does not automatically lead to a successful transitional justice process subsequently.

In the concluding chapter, Livia Röthlisberger applies the concept of transformative justice to the situation in South Sudan in order to achieve a societal transformation and contribute to sustainable peace and justice.

3 Early standard reference: Kritz (ed.), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes,* three volumes, United States Institute of Peace Press 1995.

4 See Mallinder, *Amnesty, Human Rights and Political Transition. Bridging the Peace and Justice Divide,* Hart Publishing 2008; Rothberg and Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions,* Princeton University Press 2000; Ratner, Abrams and Bischoff (eds.), *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy,* 3rd edition, Oxford University Press 2009.

This book addresses theoretical and conceptual challenges for the concept of transitional justice in current situations in which societies are dealing with their past. Fresh perspectives and the innovative combination of ideas provide the reader with new insights and contribute to the ongoing debate about transitional justice.

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The Misapplication of Western Conflict and Reconciliation Theories on New World Wars

Stephanie Verlaan

Abstract This chapter deals with the problem that theories of peace building, conflict resolution and reconciliation were predominately created in the West and, therefore, do not necessarily fit the understanding of peace, conflict, and resolution in non-Western societies and cultures. Within these societies, the acceptance of suffering may also be higher, which leads to different priorities of conflict resolution approaches. Furthermore, this chapter deals with the question of whether the current understanding of wars and the nature of conflict change the basis of established conflict theories. These theoretical approaches are then applied in Sierra Leone as a non-Western negotiation scenario.

1. Introduction

Theories of peace building, conflict resolution and reconciliation were predominately created by Western* theorists and therefore strive to create or restore societies to a state that embodies Western values. The reasons why theories characterising the conflict discourse are prevailing and the associated implications of this will be addressed throughout this paper. It will draw links between founding theories of reason and religion with examples of contemporary conflicts to tangibly demonstrate its impacts. Beginning with Christianity (in its broad sense), being the predominant religion of the West has therefore been a primary (albeit subconscious at times) influencing factor in the construction of these theories. Despite the West becoming increasingly secularized, the values derived from Christianity continue to endure within the folds of its societies[1]. The value on

* The term 'Western', in the context of this paper refers to the cultures of the United States and Western Europe.

1 Fukuyama, 'By way of an Introduction', in The end of history and the last man (2006), xi–xxiii.

which Christianity places the greatest worth above all others is that of peace and this weighting appears to be exclusive to Christianity[2]. Salem argues that because of this other values such as justice or equality are not given the space they warrant by theorists with peace being somewhat overvalued. Despite democratic institutions denouncing allegiance to all religions, thereby proclaiming themselves representative of all its constituents regardless of faith, the values underpinning liberal democracy continue to be strongly emphasized even in societies in which Christianity is not and never has been dominant (e.g. Islamic states)[3]. This overvaluation has led to a rather black and white approach to conflict of: peace = good and war = bad. Such an approach leaves little flexibility to consider other possibilities, for example that communities co-existing peacefully may not necessarily be just, and who is to say that a peaceful society is better than a just society? Fukuyama's 'The End of History and the Last Man' postulates the notion that the West's societal model of liberal democracy has reached "the end point of mankind's ideological evolution" and that this is "the final form of human government"[4]. It is here that Fukuyama suggests the demise of earlier forms of government to be due to defects vital to its long-term endurance, but which modern democratic systems have learnt from and thus been able to eradicate. It seems to be a prevailing perception that if communities are able to co-exist peacefully under a democratic system, regardless of the presence of other negative factors (i.e. poor quality of life, high inequality), then the most important criteria has been fulfilled and there remains little argument for a system restructure. It is from this perception (i.e. that all governments should and do aspire to operate under the apparently superior democratic system) that peace and conflict theories were devised and are applied.

Also inherent within Western conflict theories, and conceptualized with a rather black and white lens, is the assumption that pain or discomfort is bad and pleasure or comfort is good[5]. From a Marxist approach, the industrial revolution significantly reducing occupations and tasks requiring hard or manual labor and the consequential minimization of physical demands on the human body supports the impression that Western societal models are the epitome. The extension of the average lifespan and reduction in situations of discomfort as measures of the West's evolutionary

2 Salem, 'A critique of Western Conflict Resolution from a Non-Western Perspective', *9*(4) Negotiation Journal 1993, 361–369.
3 Fukuyama (note 1).
4 Fukuyama, (note1).
5 Salem (note 2).

success, it is no wonder why the people were so willing to lay themselves at the mercy of the capitalist to continue this evolutionary process[6]. The resulting changes in expectations around minimal standards of living and what is considered acceptable levels of discomfort were dramatic, distorted even. The minimalization of discomfort and situations where one may experience pain or suffering became one of the primary drivers of the West's evolution. In a similar vein to peace and war, pain and pleasure have come to be viewed under the simplistic bilateral division of being all good or all bad. However, a mistake inherent to this notion is the tendency to overlook the prospect that experiencing pain could serve a constructive purpose. In taking the reductionist view, suffering caused by conflict, particularly that involving violence, is immediately pigeonholed as bad with no flexibility to consider that there may be justifications. That enduring suffering caused by conflict could be justified by the outcome, victorious or not, is not a concept conflict theories based on Western ideals are able to compute. In societies whose socioeconomic infrastructures lag behind the West, suffering is likely a more familiar and accepted component of life, therefore the need to resolve conflict-causing suffering does not carry the same sense of urgency. Within these cultural contexts, a just outcome is more likely to justify collateral suffering and is considered more important than simply ending conflict for the sake of stopping suffering[7].

In addition to differences in cultural perceptions on what is and is not justified by conflict, theorists need to consider the changing landscape of the nature of conflicts as we transition into a new global era. Millar put forward the term, 'new world wars', referring to conflicts able to be conceptualised as *post-identity*[8]. According to Millar, the historical success of prevailing conflict theories was attributable to their disposition as being identity-based (i.e. Ireland, Israel/Palestine, Rwanda), meaning the end goals were to preserve sovereignty, reinforce a collective identity and assumed the desire for power and control to be the drivers[9]. In the traditional Westphalian state context, power refers to the ability to manipulate official government bodies and decision-makers (e.g. politicians, parliament, policy) and control refers primarily to the capacity to

6 Fukuyama (note 1).

7 Schmidt, "'Peace, peace, they say, when there is no peace' (Jer. 6: 14) Revisiting Salem's Critique of a Western Ideology of Peace", JSPC 2014, 59–68.

8 Millar, "Our brothers who went to the bush": Post-identity conflict and the experience of reconciliation in Sierra Leone', *49*(5) Journal of Peace Research 2012, 717–729.

9 Ibid.

influence mechanisms controlling and driving a state's economy. However, the reduction of state power as a result of globalization and migration (and consequently the allegiance of individuals to a State identity) has seen states' circumstances shift out of alignment with realism and control being placed into the hands of entrepreneurs, multinational corporations and cartels. This power shift has also resulted in the concurrent rise of intra- and interstate inequality, which Millar argues, has replaced the struggle for identity as the new primary driver of conflict.

By this token, many of the assumptions by which conflict theories attempt to guide negotiations are at of risk becoming obsolete. Hobbes's theory of social contracts serves as the foundation of logic on which these assumptions were previously able to be safely made. According to Hobbes, what prevents the outbreak of anarchy at any point as individuals strive to obtain what is necessary to survive is the existence of a social contract between parties, a "common master"[10] or in modern terms, a government. The entire basis of society and the laws by which governments operate and enforce order is that of the social contract. The theory posits that members of a society surrender certain rights to the government in exchange for the protection of their remaining rights. All individuals and parties willingly enter, understand and agree to adhere to this contract for the sake of the common good. The key element, which must be present for social contracts to be effective, is trust. Each party to the contract must at some point trust in the good faith of the other to uphold the agreement. Further, before there can be trust in the other there must be trust in the efficacy of the process and, by extension, trust in the enforcer once the contract has begun[11]. The problem with applying these principles to new world conflicts, particularly those involving non-state actors in power positions and which are often able to circumvent international and national laws, is that trust cannot be an assumed present element.

The application of such theories to state contexts that do not reciprocate the same values on which they are derived and attempting to establish makes very little sense and contributes little to the discourse. The evidence of this misapplication is clear in the likes of Mozambique, Sierra Leone and Haiti[12]. These states' experiences of transitional justice did not adhere to the preferred recipe for democratization and had to advocate

[10] Fukuyama, 'The Worldwide Liberal Revolution' in *The end of history and the last man* (2006), 39–51.

[11] Schmidt (note 7).

[12] Shaw, 'Rethinking truth and reconciliation commissions: Lessons from Sierra Leone', USIP 2005, 1–12.

against certain mechanisms the international community believed to be essential to the process and attempted to impose. In Mozambique, for example, the people had to advocate to not have a mechanism for truth seeking. Due to the widespread practice by forces on each side of recruitment by kidnapping, victims were manipulated via psychological and psychotropic means into committing atrocities against their own family members. This led to the conception that reconciliation processes should occur privately within families rather than publicly and through formal mechanisms[13]. The conflict resolution community now understands that the blanket application of prevailing conflict theories is not realistic, however, there remains a great deal of confusion around why this is the case and uncertainty as to what the alternatives are.

The current paper aims to discuss the efficacy of peace, conflict and reconciliation theories which are predominately modelled on Western ideals when applied to societies that do not share these views. Examples of popular conventional conflict and reconciliation theories and why they are largely incompatible with 'new world' conflicts are used. The first chapter discusses negotiation tactics, which allow assumptions derived from Western influenced logical thought to be the primal points of reference. It consists of three subsections: 1.) discusses negotiation scenarios in which the primary assumptions of the social contract have not been met; 1.1) discusses the tendency for negotiation tactics to assume opposing parties cannot be simultaneously right in their claims; and 1.1.1) discusses how the rapidly evolving political landscapes and shifts in power systems from the State to private corporations are upturning the conflict discourse. The second chapter focuses on reconciliation theory and its primary components and assumptions, consisting of three subsections: 2) discusses the mistaken attempts to directly transpose components of successful reconciliation models across contexts; 2.1) discusses the increasing emphasis of performative truth telling within truth commissions and the tendency to assume its cultural appropriateness; and 2.1.1) elaborates on the assumed need to break down identity solidifying barriers preventing reconciliation. The third chapter discusses the misapplication of reconciliation theory and consequent repercussions in post-conflict Sierra Leone, also consisting of three subsections: 3) provides a brief summary of the war and explains its conceptualization as a post-identity conflict; 3.1) discusses the presence of the client-patron relationship and how the international communities

[13] Mani, 'Rebuilding an inclusive political community after war', *36*(4) Security Dialogue 2005, 511–526.

failure to understand this dynamic resulted in the truth commission being largely ineffective; and 3.1.1) delves into the distinct missing presence of the 'other' concept within the Sierra Leone culture, also highlighting how the international community's failure to understand this aspect of the culture rendered much of the reconciliation efforts ineffective, even counterproductive.

2. Negotiation scenarios

2.1 Negotiating with "have-nots"

Locke's take on the social contract theory advocated for a liberal government as opposed to Hobbes's authoritarian ideal. According to Locke, the rights needing protection under his ideal were "life, liberty and property"[14] and it is on this assumption that modern negotiation theories operate. Negotiation theories assume that parties to the conflict are primarily concerned with preserving that which they already have. Complementing this, are the assumptions that parties also have something to lose and something to gain. By assuming that all three assumptions are true for both parties, it would appear the chips have been equally distributed, the playing field levelled and thereby the setting meets criteria for effective negotiation. The oversight of negotiation theories here is that there may be some parties that have nothing to lose, nothing to preserve but everything to gain[15]. What then, according to social contract theories, is preventing one party from abandoning protocol to seize by whatever means that which they need to leverage their standpoint? These are the situations in which many communities experiencing conflict are finding themselves and which negotiation theories are failing to resolve. The problem is that aside from pleading to the good will and conscience of the dominant party to allow the underdog the opportunity preserve at least some integrity; there is little space for real negotiation to occur[16].

Communities residing under authoritarian government systems represent 'have-not' scenarios, of which there are many (Bahrain, Belarus, Saudi Arabia, and North Korea as examples[17]). The conditions under

14 Fukuyama (note 10).
15 Salem (note 2).
16 Schmidt (note 7).
17 Salem (note 2).

which their governments have forced them to live leaves little worth in preserving their current situations. It is in these situations that collateral suffering and death are likely considered justified sacrifices; the fear of suffering being the last remaining tie of the social contract to be broken. These are circumstances where suffering is already prevalent and will inevitably continue, through physical and structural violence, regardless of the people's choice to allow conditions to prevail or to challenge the status quo: a 'catch 22'. If safety and well-being needs are not being met and are unlikely to ever be under one set of circumstances, there remains no reason to continue the way of existence and every reason to change it: nothing to lose, nothing to preserve and everything to gain. It is within these contexts that conflict theories do not fit and have been unable to successfully resolve conflicts.

2.2 The zero-sum game

The idea that the perspectives of two parties to a negotiation can be both right and contradicting simultaneously is not something modern conflict theories are currently able to decrypt. Aristotle's theory of logical deductive thought being the foundation on which Western thought processes have been predominately built informs current negotiation tactics[18]. The theory posits that something must either be "A or not A". In a post-modern context this would be more like 'it is A here, and not A there'[19]. This approach to critical thinking also attempts to reduce analytical processes to seek solutions on a "zero-sum" basis[20]. Meaning that the extent to which one party is considered right, the other must be wrong. For every dollar that a car salesman relents to lose in a price negotiation, the purchaser is able to retain. Such black and white approaches to thought make it difficult to come to solutions that both parties feel to be fair and equitable, as it is inevitable one party will have been forced to forfeit some of its principles and therefore the integrity of its argument. A classic example is negotiating state borders, where for every meter one State relents, the other gains. Of course, it is more than simply just about the soil with historic and spiritual connections to an area fuelling the fight.

18 Ibid., 366.
19 Ibid.
20 Ibid.

The Israel-Palestine conflict is possibly the epitome of this tug-of-war type conflict in the post-modern era. Kelman's [secondary citation] analysis supported a two-state solution proposal in which Jerusalem was shared, reasoning it to be the only solution that would meet the needs of both parties and preserve each peoples' identity[21]. The main determinant in formulating what each party would receive at the outcome was the United Nations recognition of each State's entitlements thus also deciding what the wider international community should formally acknowledge as sovereign. What Kelman's analysis appeared to overlook was that both party's claims to historical land rights could be legitimate and to compromise would be considered gravely detrimental to each State's collective identities. Moreover, had the representatives of each party accepted a solution compromising State identity on the behalf of its people it is likely conflict would have erupted internally, creating factions and further fracturing its identity. In this instance, a zero-sum approach completely disregards the possibility that both Israel and Palestine could be right, that both claims are legitimate, and that compromise would be as good as admitting claims to be false.

2.3 Changing landscapes

The conception of what is war requires constant re-evaluation within the quickly evolving landscape of State composition. Ruzza chose the following definition to describe the conventional idea of war:

> *"an armed struggle among states or coalitions aimed at resolving an international controversy, more or less motivated by true or false (but partial in any case) conflicts of interests or ideologies"*[22].

Noted by Ruzza was that all common definitions of war refer to the State, the intention here being to highlight the deep connection between the two. Mild deviations from a strict definition of the State are permitted such as insurgency groups or political party factions as they share State-like aspirations. These actors are termed 'para-states' and are accepted as

[21] Al-Aberdine, 'Western Theories on Conflict Resolution and Peace Building: A Critique', *3* (12) IJMAS 2017, 83–92.

[22] Ruzza, 'Asymmetric war or post-Westphalian war? War beyond the state', Standing Group on International Relations Turin Conference 2007.

actors by common definitions of war. Under this conventional conceptualisation the State is able to legitimately wage war, monopolizing using the power of force within or across borders[23]. Historical drivers of wars have centered on divides derived from religion, ethnicity and race, all serving to strengthen the divides between groups or States and solidify the collective identity. Carl Schmitt's 1932 work titled "The Concept of the Political" attempted to explain the friend versus enemy complex, positing enmity to be political and a publicly, not privately, occurring phenomenon. Schmitt ascribes this distinction to an "utmost degree of intensity of a union or separation, of an association or dissociation"[24]. The "utmost degree" of unity is one's readiness to fight with and die alongside one's group members whilst its polar of "utmost degree" of disassociation is one's readiness to kill others for no other reason than being a member of the opposing group[25]. Schmitt's theory demonstrates how the creation of in-group and out-group dichotomies essentially encourages the "otherizing" of opposing sides[26]. Within this frame, it becomes easier to dehumanize ones opponent and view them as unequal to the members of ones own group. It is from this angle that conflict and reconciliation theories operate, aiming to break down such divides by finding and reinforcing similarities between groups to promote empathy and tolerance of the 'other'.

There is a growing emergence of literature[27, 28] attempting to demonstrate that conflicts occurring in the modern world do not submit themselves to the definition of a war between States or para-states[29], such as a faction of a political party or insurgency group. For example, the Revolutionary United Front (RUF) rebel group in Sierra Leone were considered insurgents due to their inception being due to dissatisfaction with the government at the time and its militant structure[30] (to be discussed further in the fourth section). That is, they are not characterized by the divides

23 Ibid.
24 Schmitt, '*The concept of the political: Expanded edition*'. University of Chicago Press, 2008, 26.
25 Vinx, 'Carl Schmitt: *The Concept of the Political* and the Critique of Liberalism', Stanford Encyclopaedia of Philosophy, 2010.
26 Millar (note 8).
27 Albert, 'On boundaries, territory and post-modernity: An international relations perspective', 3 Geopolitics 1998, 53–68.
28 Benhabib, Strange multiplicities: The politics of identity and difference in a global context. 4(8) MI 1997, 27–56.
29 Ibid.
30 Millar (note 8).

within which war has historically been understood (i.e. religion). The rise of globalization has had the effect of eroding the relevance and power of statist systems with sovereignty carrying less and less weight as alternative systems of control gain power, such as corporations and cartels. Conflicts occurring within these new systems are rather characterized by inequality, poverty and stagnation. Take, for example the Sinaloa drug cartel in Mexico. Despite having no clear political ideology or genuine political interests, the cartel has colluded with the government numerous times in order to secure its trade position and protect against persecution[31]. This is indicative of the cartel's intentions to manipulate the political parties to pursue its own agenda, however the conventional approach to analyzing the cartel's movements remains a straight forward cost-benefit one[32]. Millar considers conflicts characterized by such drivers as 'post-identity' in that they are not about promoting, preserving or uniting a group under the traditional banners of identity. The effects of globalization has afforded opportunities for private businesses to expand into economic spaces that were not there before or were previously filled by the State. Relationships have developed between corporations and warlords resembling gangster-like operations, coming together under the shared goals of profit and power but creating a gray area for international law. Take, for example, the relationship between the US tire company, Firestone, and the Liberian rebel group of the National Patriotic Front (NPFL), known for its prolific use of child soldiers. Firestone, its largest rubber plantation being located in Liberia, entered into an agreement with the NPFL to allow its continued access to the plantation following its take-over by a large group of NPFL child soldiers in 1990[33]. Desperate to regain control of the plantation (it provided 40% of Firestone's raw material) whilst the NPLF recognized it as an opportunity to finance its operations, the two parties entered an agreement despite repeated warnings by US diplomatic actors on the dangers (and immorality) of this. Firestone remains a significant foreign investor in Liberia even after the NPFL leader with whom Firestone struck the deal, was imprisoned for war crimes[34]. Actors holding power equivalent to a State but without accountability to a people throws

31 Davila, 'Mexican Drug Cartels and the Art of Political Puppetry', The Huffington Post, 2017.

32 Duncan, 'Drug trafficking and political power: oligopolies of coercion in Colombia and Mexico'. *41*(2) LAP 2014, 18–42.

33 Fry, 'When companies do business with warlords', Fortune 2014.

34 Johnson, 'A critical examination of Firestone's operations in Liberia: A case study approach' (2010), 65–84.

out the balance created by and necessary for social contracts. Such actors are excluded from the jurisdiction of laws designed to maintain order between States (i.e. the Geneva Convention). Under these new structures of control, few safeguards exist able to manipulate these powerful actors into order. Consequently, as States have less and less regulatory power inequality has risen spurring this new genre of conflict[35].

Post-identity conflicts as described above, do not serve to create or reinforce in-group and out-group dichotomies because this is not what they are about. As such, conflict, peace and reconciliation theories designed to combat identity-based conflicts have suddenly become near obsolete. This much is clear however locating the next best approach is something the conflict theorists are yet to grasp.

3. Transposing reconciliation models

3.1 Reconciliation theory

Transitional justice discourse argues truth telling to be a form of justice in itself and that to allow wrongful acts to remain hidden is little better than the acts themselves. The literature often advocates for the right to truth to be recognized as a human right under international law[36]. Reconciliation experts also argue the desire to know the truth to be innate to the human condition. However, similar to the assumptions described in the previous section this argument is also derived from what is considered important according to Western societies. Rotberg describes the trend for reconciliation literature to discuss the deep desire by people affected by conflict, such as the populations of Bosnia and Cambodia, to learn the truths about what happened to them and who was responsible[37]. However, investigations into these cases actually found very little evidence that knowing the truth provided the people with additional closure or supported healing[38].

The overwhelming success of the Nuremberg trials, truth-seeking mechanisms and remembrance initiatives in supporting those affected by the Nazi regime in Germany, re-established the country as a respec-

35 Millar (note 8).

36 Millar, 'Performative memory and re-victimization: Truth-telling and provocation in Sierra Leone', *8*(2) Memory Studies 2015, 242–254.

37 Rotberg, 'Truth commissions and the provision of truth, justice, and reconciliation', *PUP* 2000, 3–21.

38 Ibid.

table partner State embodying peace and respect for its people. As a consequence of this success, this model came to be considered the archetype transitional justice model[39]. The success of Germany's reconciliation appears to have given license to the conflict theorists to assume knowing the truth to be essential if a society is to remain stable and prosper post-conflict. Critics of dominant reconciliation theories such as Mendeloff, question this assumption, arguing that not all cultures benefit from or value knowing the truth about wrongdoing as do the West.

Mendeloff lists eight claims commonly purported by truth-telling advocates as to how truth telling promotes reconciliation.

1. *Social healing and reconciliation*
2. *Promotes justice*
3. *Establishes an official historical record*
4. *Serves to educate the public*
5. *Institutional reform*
6. *Promotes democracy*
7. *Pre-empts future atrocities*
8. *Deters future atrocities*[40]

Included within Mendeloff's critique of reconciliation theory is the questioning of the most common assumptions that have the least amount of supporting evidence. First, the assumption that the principles of individual psychology can be applied to the collective is discussed. This assumption directs interpretation toward conceptualizing trauma sustained by an individual and which manifests as post-traumatic stress disorder (PTSD) to present itself as a similar pattern within a group context[41]. This interpretation extends to the notion of repressed memories; if a community does not correctly recollect memories of traumatic events then recovery is not considered possible. Simply understanding that theories devoted to understanding internal thought processes in order to enact cognitive change require the presence of a 'psyche' immediately raises the question of do nations have a psyche? In a sense, yes (for example the Jungian take on Freudian theories of the psyche) but not in the same way as an

[39] Rotondi & Eisikovits, 'Forgetting after War: A Qualified Defense', in Claudio Corradetti & Nir Eisikovits(eds.), Theorizing transitional justice (2015), 13–28.

[40] Mendeloff, 'Truth-seeking, truth-telling, and post-conflict peace-building: Curb the enthusiasm?', 6(3) International Studies Review 2004, 355–380.

[41] Ibid.

individual does[42]. Application of reconciliation theories based on such an asymmetrical comparison does not offer any validity to the assumption. Second, even if the above assumption was valid there is no consensus amongst the psychology community as to the best approach to healing victims of trauma. There are many methods used to support overcoming trauma in individuals each with their own grounding in theory, but to which each individual's response is unique. Determining which is the best approach for any given individual is a journey and decision therapist and patient must do together. From this perspective the individual and the collective are similar, in that no two are the same and a tailored approach is always required. Whilst there have certainly been successful truth seeking commissions (TRC), take South Africa for example, follow-up studies of these successes have found little evidence demonstrating long-term benefits of truth seeking. Mendeloff noted the tendency for literature to, despite finding little evidence of efficacy, conclude truth-seeking processes serve a significant and important purpose. "Assertions are frequently presented as empirical fact when they are merely untested hypotheses. In short, truth-telling advocates claim more about the power of truth-telling than logic or evidence dictates"[43]. Third, assuming that both the above assumptions (a connection between truth and healing; and individual and national healing) are valid there remains no clear link that either necessarily contributes to peace building. Mendeloff points to the tendency for the terms 'peace' and 'reconciliation' to be used interchangeably within the literature but are in fact completely different concepts. The clear distinction is demonstrated in examples of nations that have emerged from conflict and have successfully established peace without there necessarily being reconciliation. A prime example again being South Africa as racism remains prominent within its society[44]. Few studies on transitional justice case studies have examined the relationship between peace and reconciliation; hence the tendency for mechanisms on each to co-exist is based on an assumed correlative relationship[45]. Is there a causal relationship between the two and if so, is one always the catalyst or is their order interchangeable? The fourth assumption follows closely, in that the discourse does not request evidence that truth telling or knowing is nec-

[42] Zoja, 'Trauma and abuse: the development of a cultural complex in the history of Latin America' in Thomas Singer & Samuel Kimbles (eds.), The cultural complex: Contemporary Jungian perspectives on psyche and society (2004), 94–105.
[43] Mendeloff (note 40), 356.
[44] Mendeloff (note 40).
[45] Ibid.

essary for reconciliation. Again, the literature offers examples of emerged nations from conflict that have successfully established peace where truth telling was both a part of the healing and was not[46]. That case outcomes resemble peace regardless of the design discredits the assumption that truth is essential for reconciliation. Assumption five, that justice is a prerequisite for peace also has minimal supporting (and often conflicting) evidence. Again, this is able to be demonstrated using case examples of where justice has been sought and achieved (El Salvador, Rwanda, South Africa) and where it has not (Namibia, Mozambique, Cambodia), and yet a society embodying a peaceful existence has emerged from the conflict in each case[47]. In the latter examples, justice was sought only for those responsible in positions of high authority and the majority of perpetrators of low or no authority had their matters settled via informal or indigenous processes[48]. The logic behind this assumption is that if formal justice is served, the desire to seek justice via acts of vigilante revenge by victims or their families should be reduced, and thus reducing the chance of a relapse into conflict. Whilst there is some sense in this claim, the case studies do not support its blanket application. Mendeloff's analysis demonstrates the tendency for peace and conflict theorists to mistakenly assume applicability of reconciliation theories to be appropriate regardless of cultural needs. This contributes to the broader argument that theories based on Western values have little relevance to cultures that do not identify with the West.

3.2 Performative truth telling

Early truth commissions were closed to the public, their primary purpose to investigate allegations of abuse and interview witnesses and victims to provide an official record to government. As reconciliation theory developed, increasing emphasis was placed upon the benefits of performative truth telling. This describes the process by which perpetrators and victims would make public testimonies of their experiences[49]. The adjustments in theory were in concurrence with the growing belief that reconciliation required participation of the collective in some form of apology and forgiveness ceremony. The theory posits that this type of group catharsis

46 Gibson, 'On legitimacy theory and the effectiveness of truth commissions', 72 Law & Contemporary Problems 2009, 123–141.
47 Mendeloff (note 40).
48 Ibid.
49 Millar (note 8).

has a reversal effect on the psychological traumas inflicted on the group. Victims having their experiences publicly acknowledged and perpetrators admitting their actions to their fellow community members is somehow deemed to be of greater benefit than had it occurred privately.

Millar discusses the socially generative nature of performative truth telling and how reconciliation theory hypothesises its benefits. The generation of the self-concept is posited as constructed by responses to the person's projection of behavior onto their audience. A positive response reaffirms to the individual that they are behaving in an appropriate manner. Such feedback serves to build on this concept of the self as they internalize the norms known to exhibit this positive affirmation. The combined effect of individual performances generates a concept of the social collective, essentially characteristics that make each community unique. However, in order for any of this to occur the audience must be convinced that each performance is true, which first requires that it be understood. It is here that Millar connects the theory with performative truth telling, or conversely discusses the lack of connection within many cultural contexts where the process has occurred. Millar drew attention to examples of truth commissions (i.e. Sierra Leone) where performative truth telling occurred and did not receive the audience confirmation necessary to generate a new social concept of community post-conflict because the concept did not align with cultural norms or expectations. In some respects, performative truth telling processes can result in further harm by way of re-traumatising the participants with experts retrospectively admitting the performative aspect was not necessary[50]. Millar's argument adds to the discourse supporting an understanding that theories derived from Western values cannot be assumed to be applicable across all cultural circumstances.

3.3 Otherizing

Schmidt suggests four types of "energies"[51] to be involved in reconciliation processes: truth, mercy, justice and peace[52]. These are recognized as often contradicting within conflicts, with advocates for each clashing in ideals. In particular, mercy and peace are thought to clash with truth and justice. Through these adverse forces clashing, when none can be agreed upon as

[50] Millar (note 36).
[51] Schmidt (note 7), 66.
[52] Ibid.

a priority or legitimate, a community is forced to divide itself creating a "false dichotomy"[53]. Such a dichotomy is not actually present, but the passion each feels for that which they have chosen to value most reinforces the divide. Conflict and reconciliation literature refers often to *in-groups* and *out-groups,* where the in-group is one's own and the out-group consists of those who threaten the in-group's integrity. This is how opposing sides within a conflict are conceptually created. When the two groups do not share the same values, the in-group disassociates further from identifying with the out-group. The literature often terms this "otherizing"[54], removing the factors that allow identifying the self with the enemy from conscious conception makes it easier to dehumanize the out-group and pursue the goals of the in-group with little guilt, even if harm to the out-group results.

Advocates for truth telling argue that the process supports the deconstruction of in-group/out-group dichotomies post-conflict. By providing a mutual space within which both perpetrator and victim are able to verbalize their experiences, the in-group is supposedly better able to view the out-group as something else than the 'other'. The discourse views this as something of a "collective storytelling therapy"[55]. This performance, drawing on the socially generated concept of the self discussed in the previous section, as reconciliation theory posits should generate a new national identity and collective memory outside the former in-group/out-group paradigm[56]. In turn, a new shared collective memory should minimize the capability of the public discourse to enable un-truths to continue in circulation, thus supporting greater transparency between community members and groups.

As is also discussed in the introduction of this paper, prevailing peace, conflict and reconciliation theories are wholly based on the assumption that conflicts are identity based and by much of the same token this also provides the rationale for truth telling. The literature frequently cites the South African TRC as the exemplar of truth-telling success. The conflict being about an apartheid fit nicely into the theories of both collective healing and the in-group/out-group paradigm. However, there are other factors which contributed to the South African TRC's success and which cannot always be replicated in other state contexts. First, a com-

53 Ibid., 66.
54 Millar (note 8), 1.
55 Millar (note 36), 9.
56 Ibid.

mission must have the ability to attract the attention of the people. This is generally achieved by ensuring that it appeals to the people's perceived needs and convinces them that its purpose is to serve them. In the South African context, the presence and capability of the South African media to broadcast the proceedings and findings of the TRC to the nation ensured the people were well aware of its presence and purpose. The media succeeded in creating and projecting a powerful profile of the TRC to the entire population. Not only was the media able to organize itself to deliver timely and relevant updates but the people also had the ability to access and understand the information. It cannot be assumed that all states will have a well established media, that populations will have adequate literacy levels, have access to print media, television, the Internet, the radio or even that the necessary infrastructure is in place for any of this to be possible. In fact, many do not have any of these things[57]. Second, it is necessary that the commission be perceived as legitimate, achieved mostly through the commission's propensity to be fair in its decisions[58]. In the South African case, the wider population felt the strength in leadership of Nelson Mandela and Desmond Tutu and came to hold the leaders in very high esteem. The vocal support of and participation in the TRC by Mandela and Tutu provided the TRC with a significant amount of credibility greatly supporting its perceived legitimacy by the people and therefore their willingness to listen[59]. Again, not all states having emerged from conflict have done so with an established respected government or even a stable leadership figure with the necessary qualities to unite the masses. Furthermore, it also often happens that community elites participate in truth commissions or act as representatives of a community. This risks presenting a version of events, perception or belief that does not reflect that of the wider community. Further still, if a community elite is perceived negatively in any way by constituents and makes a contribution as their representative this will likely be unfavorably received by the majority. The lessons to be learnt here are that truth commissions need to ensure that they are actually serving the people, the whole community, and not just those with the loudest voice.

57 Millar, 'Between Western theory and local practice: Cultural impediments to truth-telling in Sierra Leone', 29(2) Conflict Resolution Quarterly 2011, 177–199.
58 Gibson (note 46).
59 Ibid.

4. Problems faced in Sierra Leone's reconciliation

4.1 Sierra Leone—reconciliation theory's mistakes

The Sierra Leone's civil war offers an excellent example of a post-identity conflict and which reconciliation theory was unable to successfully consolidate. The civil war spanned 11 years, the opposing forces consisting mostly of a rebel group called the Revolutionary United Front (RUF) and the Sierra Leonean military. The Sierra Leonean government had been characterized by deep corruption leading up to, during and after the civil war[60]. The country's political elites had partnerships in private companies that exploited the country's rich natural resources (alluvial diamonds), and it was the elites alone who benefitted from these ventures leaving the remainder of the country in deep poverty. Ultimately, the mismanagement of funds resulted in the government's bankruptcy and being unable to pay the wages of its schoolteachers. With the forced closure of schools, the country's youth took to roaming the streets, crime and forming gangs. This also created a primary recruiting ground for the RUF. Additionally, many people who did not have access to land in order to farm or had lost access due to the mines opted to join the RUF for the convenience of opportunities to pillage whatever was needed to survive[61]. The literature often describes the war to have been disorganized but that the acts of violence as extreme. Opposing groups appeared to employ little strategy in their methods, attacks occurred without any obvious intention to gain control of an area or assert its authority over the State. Villages appeared to be targeted at random and were raided, destroyed and then abandoned within a few hours. The movements of each group appeared to be catalyzed by the failure of each party's leadership to subdue their infantry into order or provide a clear objective[62]. Disorganization was particularly obvious within the RUF, as its driver was dissatisfaction with the government's corruption and yet it did not assemble itself as a united front with a clear intent or strategy to establish a new government.

Following the conclusion of the war, the United Nations facilitated the establishment of two institutions to support peace and reconciliation, the Special Court of Sierra Leone (SCSL) and the Truth and Reconcili-

60 Sierra Leone Truth and Reconciliation Commission, 'Historical Antecedents to the Conflict' in Witness to Truth: Final Report of the Truth and Reconciliation Commission 3 (2004), 3–31.

61 Millar (note 57).

62 Millar (note 8).

ation Commission (TRC). The SCSL was reserved for those who bore the greatest responsibility for acts and was supposed to provide "retributive"[63] justice[64]. The TRC was designed to be a platform open to the public, its purpose to provide "restorative"[65] justice and reconciliation on both the individual and collective level[66]. The work of the TRC occurred through "a series of thematic, institutional and event-specific hearings"[67] in the capital of Freetown, and four days of public hearings and one day of closed hearings in each of the twelve districts across the country[68]. In each hearing, witnesses, victims and perpetrators presented their stories in the presence of a commissioner and leader of evidence with the support of a counselor. The purpose of these hearings was not the collection of data or evidence as this had already been completed through an earlier process, but solely to facilitate "inter-group catharsis"[69] and reconciliation. Each of these processes was based on the assumption that an in-group/out-group paradigm had been present throughout the conflict.

On investigation into the impacts of the TRC on the reconciliation process in Sierra Leone, studies generally concluded that very little constructive effects to have resulted[70, 71, 72, 73]. This has been primarily attributed to a lack of understanding by international actors of Sierra Leonean culture and consequentially what factors would constructively contribute to reconciliation and those that would not. The concept of re-telling and remembering violence was contradictory to the Sierra Leonean indigenous methods of healing, which was more akin to "social forgetting"[74] and was the preferred method for the significant majority. Shaw drew attention to the fact that there was a small but very persistent minority of local elites that advocated for the telling of truth regarding the violence, who in

63 Ibid., 6.
64 United Nations Security Council, 'Statute for the Special Court for Sierra Leone, Article 1', 2000.
65 Millar (note 8), 6.
66 The Truth and Reconciliation Commission Act, Part III: Functions of Commission, Sierra Leone, 2000.
67 Millar (note 8), 6.
68 The Truth and Reconciliation Commission Act (note 63).
69 Millar (note 8), 7.
70 Ibid.
71 Millar (note 36).
72 Sesay, 'Does one size fit all?: The Sierra Leone Truth and Reconciliation Commission revisited', 36 Nordiska Afrikaninstitutet 2007, 5–54.
73 Young, 'Transitional Justice in Sierra Leone: A Critical Analysis, 1 (1) United Nations Peace and Progress 2013, 3–17.
74 Shaw (note 12).

the end got their way. Shaw highlighted that the "unspoken goal"[75] of the TRC was "to transform a population that preferred to heal through forgetting into truth-telling subjects who would, after adequate sensitization, recognize their "need" to talk about the violence."[76]. Not only is this an attempt to fit a context into a theory instead of molding a theory to fit the context (square peg, round hole) but it is also an example of international intervention where, despite being well intentioned, the outcome was not justified by the means to achieve it. The international community essentially pushed its own ideas of what was required onto a people whose own existing culture was already adequately capable of serving this purpose.

4.2 The client and the patron

Deeply embedded in Sierra Leonean culture is that of the client-patron relationship. This reciprocal system is characterized by a "big man"[77] (the patron), traditionally a chief, agreeing to provide material support (i.e. school fees, medicine) and protection to dependents (the client) in exchange for their submission to the big man's authority. A dependent's request to a big man is called "begging"[78] and it is something all Sierra Leoneans must do to meet their daily needs and which they are not shy about. The cultural manifestation of this dynamic is that a high value is placed on human labor and by extension there is an underlying concept of "wealth-in-people"[79]. As long as the big man's consumption of privileges is balanced by generosity, this relationship is considered to be within the construed cultural norms. However when a big man is perceived to "over do"[80] their privileges they are seen to be acting outside the acceptable parameters of the client-patron system.

In contemporary Sierra Leone the role of the big man is filled by politicians, religious leaders, businessmen, and representatives of non-government organizations. Within this frame, the TRC was also perceived as a big man. Therefore, when people who gave testimonies at the TRC were asked if they had any further comments at the end, they would often

75 Ibid., 3.
76 Ibid., 4.
77 Millar (note 57), 188.
78 Ibid., 188.
79 Ibid., 187.
80 Ibid., 188.

request material support from the TRC[81]. The people were suffering from living in a post-conflict dysfunctional state, and the TRC was seen as an opportunity for the community to "beg the assembled"[82] patrons to help them. This would have been well within the standard Sierra Leonean construal of the client-patron dynamic. Such an exchange, information and participation for material aid, would have "represented the closing of the circle, the completion of the performative drama"[83]. Unfortunately, the purpose of the TRC was solely to facilitate reconciliation, at no junction did it ever intend to provide aid in material or monetary form to the Sierra Leonean people. In this way the TRC failed to meet the expectations of the people, thus the patron-client transaction cycle remained incomplete and left the clients, the people, feeling cheated.

In Millar's analysis of the TRC, the role of the victim is also presented as a factor that contributed to the misapplication of reconciliation theory in Sierra Leone. A component required by performative truth telling is that the participants take on and internalize the role of the victim. This role applied not only to victims of the violence but also to perpetrators of that violence, who were victims of the circumstances that had been forced upon them by their corrupt government. The intention of the TRC creators was that the victim role be internalized on a national level, and succeed in this it did. Masses of people attended the hearings as part of the audience or listened to them via the radio and identified with the stories of those giving testimony, thus a national victim narrative was created. The socially generative function of performative truth telling succeeded, however not in the way the theory predicted. By all people identifying as a victim, no one was left to identify or play the "saviour"[84] and a vacuum was created. This led the people to experience the TRC to be rather provocative. It requested deep traumas be relived and yet did not offer any culturally appropriate justification for its request. Whilst a truth commission cannot be judged negatively for not providing that which it is not designed to, it is appropriate to criticize it for claiming its purpose is to help a bereaved people but failing to understand what culturally relevant post-war aid is required for it to actually be helpful[85]. Misunderstanding or failing to recognize a significant component of a cultural system such

81 Millar (note 36).
82 Ibid., 24.
83 Ibid.
84 Ibid.
85 Millar (note 57).

as the client-patron relationship and how this may interact with a foreign system demonstrates a clear lack of effort by actors to properly understand the needs of a population.

4.3 Sierra Leone's lack of 'otherizing'

The primary driver of the Sierra Leone conflict being inequality as a result of government corruption enables its categorization as *post-identity*. Despite the clear presence of two dominant and clashing parties responsible for the violence, that the conflict did not present as a tug-of-war for control of government systems makes difficult for conventional conflict theories to create a clear analysis. The concept of the 'other' discussed in previous sections of this paper is also relevant to the overall picture of Sierra Leone's post-war recovery. 'Otherizing' is a concept that is created within conflicts to support the reaffirmation of group-identity and boundaries between in- and out-groups, making clear toward whom aggression should be targeted. As also mentioned previously, the objective of reconciliation theory is to deconstruct in- and out-group dichotomies, to reunite factions and cease the tendency to perceive the perpetrator as the 'other'.

Researchers within post-conflict Sierra Leone found very little evidence of 'otherizing', leading to the question of whether conventional reconciliation processes (i.e. truth telling) were relevant and necessary[86]. First of all, inherent within Sierra Leonean culture is a sense of togetherness that prevailed throughout the conflict. One particular group does not dominate neighborhoods and villages, there are no visual boundaries signifying where one neighborhood begins and ends, and everyone is referred to as a brother. Secondly, the starting point of conflict theories is to identify the opposing actors, by the factors that divide them and that which characterizes their group identity. Such factors would usually also have existed prior to a conflict, such as ethnicity or socioeconomic status. However, as Millar discovered dividers such as these were not present within the Sierra Leone conflict, with the conflicts described to be "Temnes against Temnes, Limbas fight[ing] against Limbas. Krios fighting against Krios" [secondary citation][87]. Here conventional conflict theories reach somewhat of a roadblock, unsure how to analyze a conflict where every actor is part of the

86 Millar (note 8).
87 Ibid., 11.

in-group. A further complicating factor was the "Sobel"[88] phenomenon, which referred to the tendency for armed individuals to alternate between being soldiers and rebels (i.e. fighting for or with the military vs. fighting with or for the RUF)[89]. This also highlights the chaotic nature of the conflict, in that not even the oppositions were clear around who was in the in-group and accepted any mercenary without questioning how they were ideologically affiliated with the group. Moreover, many perpetrators who took up arms were civilians, indeed many were children (recall schools had been forcefully closed), who were simply gripped by fear and frustration at the instability. That it was against their fellow community members they perpetrated and the frequent changing of the banner under which they acted, clouded further the distinction of in-group/out-group memberships.

Millar noted a lack of language applying negative connotations to perpetrators by victims, even the opposite occurring. Victims were noted to refer to perpetrators as brothers rather than the enemy highlighting a distinct lack of "otherizing". Consistent in the literature is the recognition of the highly forgiving nature of the Sierra Leoneans[90, 91, 92], the people readily accepted perpetrators back into the folds of the community, resuming collegial and neighborly interactions. An interesting note of Millar's was the use of the term 'rebels' to refer to the RUF and 'soldiers' to the military, indicating civilians clearly recognized that two opposing parties existed and that their acts were wrong. Yet despite this, reference to members of either party was never accompanied by the intonation that the individuals belonged to a separate identity group, only that they had performed the actions[93]. From this point, that the Sierra Leonean people did not even slightly identify perpetrators to be the "other" provides very little ground for the application of conventional conflict and reconciliation theories which assume an in-group/out-group dichotomy.

88 Ibid.
89 Ibid.
90 Gibson (note 46).
91 Shaw (note 12).
92 Millar (note 57).
93 Ibid.

5. Conclusion

There is clear evidence of a growing trend for conflicts occurring in the modern world to be considered as *post-identity*. Under this new genre, conflicts do not embody the characteristics of a war pertaining to a collective whose identity is under threat. The erosion of the State as a system of power and concurrent rise in corporate power systems has flipped the drivers of conflict from being that of religion, ethnicity or nationality to inequality, poverty and greed. Conflict theories derived from Western societal and democratic values assumes the presence of a strong sense of identity to a group to be the source of division preventing peace. Conflict and reconciliation theories operate under the intent to breakdown such divisions and highlight similarities, reducing the strength with which opponents are considered to be the 'other'. For the most part, conflict theories applied to these contexts have historically been successful. However, the new conditions under which societies are finding themselves threaten not the collective identity but the collective well-being. Within this new framework, the applicability of conflict theories is diminished, assumptions non-sound and approach to analysis no longer contextually relevant.

The international community's understanding that new systems of control result in new types of conflict and therefore that new approaches to resolution are also needed, is slowly developing. The development of this understanding appears to be contingent on failed theory application attempts providing evidence, which unfortunately has been at the expense of recovering communities the theories are claiming to aid. Not only are conventional conflict theories failing to grasp the reality of new world conflicts but also the unique cultural contexts in which they are being misapplied. The most common mistake is the tendency for actors within the academic conflict community to be rather rigid in approach to following theoretical guidelines in application. The assumption that if a reconciliation model was successful in one context then it will be in another is possibly one of the most significant mistakes and carries the greatest consequences. This assumption is formed from the rather ignorant perspective of the international community that assumes Western values are given the same weight across all societies and cultures. That the configuration of priority values could differ from that in the West and the society still function effectively is not an option given serious consideration. A more likely consideration is that having a value configuration alternative to that of the West is catalyzing conflict and the correct configuration needs to be restored to achieve peace. Not only does this assumption waste val-

uable resources in establishing mechanisms doomed to fail even before inception but also carries great risk at causing further harm to an already extremely damaged people.

Reconciliation theory and the weight it places on truth telling demonstrate this well. The tendency to compare the recovery needs of an individual with the needs of the collective is rather asymmetrical with studies providing little supporting evidence that this comparison is valid. And yet, there are plenty of advocates for this conceptual way of thinking within the literature because it aligns with Western values and makes sense to those conducting the analyses. The assumption that the desire to know the truth is an inherent human characteristic and essential to lasting reconciliation provides the reasoning for the significant emphasis upon truth telling by reconciliation theory. However what this immediately disregards is that there may be other methods to reconciliation and that truth telling could have harmful effects. The discourse does not consider that a community may have developed their own methods of collective healing that do not involve truth telling and that this could be more appropriate for their context. It is a significant point of disappointment (and an indicator of a somewhat arrogant attitude) that international actors claiming to help people recover do not see the efficacy in putting in the time to listen or investigate what the people's needs and values are in order to support a culturally appropriate and effective reconciliation model.

6. Recommendations

1. Local data collection
Legitimately seeking the input and guidance of the local civil society in establishing models for reconciliation. Although the processes required for this are time consuming and would prolong the proceedings, the ultimate outcomes produced would be of greater long-term benefit.

2. Inclusion of civil society
Members from all levels of society should be invited to contribute the model's design. It is common for only elite members of the civil society to have input into large-scale operations. Respected members of the common population that do not enjoy elite status or privileges should also be included. This minimizes and counters the risk of obtaining cultural input distorted by experiences exclusive to the elite and creating a culturally disconnected model.

3. Ongoing thorough monitoring of model effectiveness
From the outset of proceedings, mechanisms must be established to monitor the people's responses. Adverse responses need to be identified as early as possible so as to allow the facilitators opportunity to make accommodating adjustments.

4. Empirical links between peace and reconciliation
Future research efforts on reconciliation models should aim to locate and analyze factors linking peace with reconciliation. The literature should take care to avoid the interchangeable use of the two terms to ensure they be understood as separate distinct concepts.

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Transitional Justice and Political Opportunism

Juan Francisco Vásquez Carruthers

Abstract This paper aims to contribute a different approach to transitional justice, one in which political decisions are rocketed to the forefront of the research. Theory asserts that, after a transition to democracy, it is the constituency who defines the direction a country will take. Therefore, pleasing them should be at the fore of the responses taken by those in power. However, reality distances itself from theory. History provides us with many examples of the contrary, which indicates that the politicization of transitional justice is an ever-present event. The first section will outline current definitions and obstacles faced by transitional justice, focusing on the implicit ties between them and the aforementioned politicization. An original categorization of Transitional Justice as a method of analysis will also be introduced, which I denominate Political Opportunism. The case of Argentina, a country that is usually described as a model to export but that after 35 years is still dealing with the consequences brought by the contradictions of using several methods of justice, will then be reinterpreted through this perspective. At the end of the paper, the inevitable question will be posed: can this new angle be exported and implemented in every transition?

1. Introduction

The field of Transitional Justice is commonly traced back to the end of World War II and the Nuremberg trials. In the late 1980s and the beginning of the 1990s, the third wave of democratization and modernization has renewed its understating generating a brand-new array of contemporary scholars and researchers, which in turn expanded and established new jurisprudence. While still developing, a sizable amount of literature can be found where its theorization is refined and broaden. All the way from definitions, aims, failures, and successes, to recipe-like models and good practices aimed at countries emerging from periods of instability can be found in books, journals, and scientific papers. The politicization

of Transitional Justice, an intrinsic characteristic of every process that directly affects its outcome, is, on the other hand, barely described and often ignored. Whether as a result of philanthropic definitions surrounding the redress of human rights abuses or by placing it at the same level as less critical factors, political opportunism becomes the puppeteer behind every process of transition and frequently goes unnoticed. An in-depth analysis of Transitional Justice mechanisms will undoubtedly hint to its causes, influences, and explanations, but in order to identify the behavior of these instruments and have leverage in their outcome, the focus has to be redirected from "what causes different types of Transitional Justice?" to "who in power benefits from them?". This change in focus, which, as developed throughout this paper, entails a change in definition, implies a reality hardly found in contemporary literature: Transitional Justice is a political tool and, as such, it will be used accordingly by those in charge to grip and increase their own power.

This concept can clearly be seen in the main international tribunals, often described as victor's justice, where the political agenda of the Western powers highly influenced (if not decided) the methods of justice chosen after the transition. Take Yugoslavia as an illustrative example. The line appears to blur in mixed models, such as Cambodia, where the force of national politics unwilling to prosecute former members of the Khmer Rouge caused the closure of several cases. In nationally led transitional processes, this argument falls completely into the background.

Classifying Transitional Justice as politically opportunistic does not mean that its usual aims will consequently change and that its relationship to human rights will be forgotten. I do not aim to depict Transitional Justice as an additional area in which human rights take a secondary role and where, by navigating the ocean of politics, the hope of success is lost. Should this be the case, history would prove me wrong before I could even begin. On the contrary, by switching the paradigm and seeing Transitional Justice through a politically opportunistic lens, I aim to provide a new path by which those directly affected by human rights abuses, civil societies, or anyone else who wishes to hold wrongdoers to account have new tools to achieve their aims in a more efficient way. Just like in conventional definitions of the topic, the underlying truth-seeking, accountability, and peace are still at the forefront of this new criteria.

2. Shifting the spotlight

2.1 Rethinking transitional justice

The United Nations defines Transitional Justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"[1]. One if its guiding principles is to take into account the political context when designing and implementing Transitional Justice mechanisms. In a 2004 report addressed to the Security Council[2], the Secretary General recognizes the threat arising from States focusing more on the consolidation of power rather than the strengthening of the rule of law. He criticizes the international community for underestimating the extent of political will necessary to support the rule of law in post-conflict States, and remarks that justice and accountability must always be pursued.

In line with this definition, the International Centre for Transitional Justice (ICTJ), one of the leading non-profit organizations dedicated to pursuing accountability for mass atrocities and human rights abuses through Transitional Justice mechanisms, interprets it as a "set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses"[3]. In the aftermath of these transitions, political and legal institutions like parliament, the judiciary, the police and the prosecution service may be weak, unstable, politicized, and under-resourced. Hence, it characterizes Transitional Justice as "legitimate responses to massive violations under these real constraints". Throughout a more thorough description of the concept, the ICTJ recognizes the political implications involved in the process and how they affect its aim.

1 United Nations, 'United Nations Approach to Transitional Justice', United Nations 2010. [online] Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

2 United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General', United Nations 2004. [online] Available at: https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/.

3 International Center for Transitional Justice, 'What is Transitional Justice?', International Center for Transitional Justice 2018. [online] Available at: https://www.ictj.org/about/transitional-justice.

When examining the limitations of Transitional Justice, Charles Call[4] even considers its politicization as one of the main flaws, a fair price to pay in the name of advancing human rights. In the face of this defect, he argues, the only measure to overcome it is its vociferous denouncement. Other authors, on the other hand, dismiss putting the emphasis on this aspect of the topic. Jeremy Webber[5] considers Transitional Justice as a move from states of injustice to those of justice, from oppressive governments to those that respect the rule of law. He regards focusing solely on the trade-off of justice for political stability as a misconception of the issue. "[…] the problem of regarding law as morally superior to mere politics persists and is particularly acute in the world of transitional justice", says Duncan McCargo[6].

The point in question rising from these (and many other) definitions is the deliberate underlying aspects that are avoided. While it is theoretically coherent to discuss abstractly about these concepts, in reality, one needs to ask: What is justice? What is legitimate? Who decides what generates reconciliation, and when has it been achieved? Undoubtedly, answering these questions means stepping into the realm of the political. Contrary to these approaches, I argue that politicization is inherent in Transitional Justice, and rather than considering it a weakness, it needs to be accepted as a fundamental part of the process. This acknowledgment will eliminate the frustrations deriving from the gap between big-hearted expectations and reality that frequently occurs in post-transitional periods and, as mentioned, provide a new starting point for those seeking recognition and remedy. What is more, accepting this reality will enable them to address the issues by leveraging the right places.

2.2 Political opportunism

By proposing a genealogical analysis of Transitional Justice, Ruti Teitel demonstrated the close ties between the type of justice pursued and the surrounding political conditions. She defines transitional justice as "the

4 Call, 'Is Transitional Justice Really Just?', 11(1) The Brown Journal of World Affairs 2004, 101–113.

5 Webber, 'Forms of Transitional Justice', in Melissa S. Williams, Rosemary Nagy, and Jon Elster, Transitional Justice (2012), 98–128.

6 McCargo, 'Transitional Justice and Its Discontents'. 26(2) Journal of Democracy 2015, 5–20.

conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes"[7]. In her paper, she is able to demonstrate a trend toward an increased pragmatism in and politicization of the law, by breaking down the evolution of Transitional Justice into three stages and analyzing each of them separately. Phase I, post-World War II, aimed at accountability and turned to international criminal law applied to the individual. As Teitel determines, the Nuremberg trials were a justification and legitimization of the Allied intervention in the war. International justice was hence transformed and influenced by the international political context. The decline of the Soviet Union and the end of the Cold War characterize the beginning of Phase II, with transitions occurring in Eastern Europe, South America, and Central America. In this stage, it is crucial to recognize the political dynamics occurring at a national level in order to understand the outcome of this type of justice. The presence of national administered processes turned Transitional Justice into something "contextual, limited, and provisional"[8]. The traditional territory of ethics clashed with that of politics, and with political discourse finding its way into mainstream Transitional Justice ideas, the limits between one and the other were obscured. Universal rights, accountability and the rule of law became undermined by the politicization of new alternatives. Finally, the end of the 20th century, portrayed by violence and political instability, signals the beginning of Phase III. The unequivocal disregard for the rule of law was contrasted by the creation of the International Criminal Court, later accused of political bias and a tool of Western imperialism. Teitel concludes that the mere exportation of ideal rule of law models does not provide sufficient guidance as political and legal circumstances need to be taken into account.

Taking Teitel's analysis as a point of departure, I define transitional justice as:

> *A political tool used in periods of political change in order to confront and redress abuses from previous repressive regimes while consolidating the power of the new one.*

[7] Teitel, 'Transitional Justice Genealogy', 16(1) Harvard Human Rights Journal 2003, 69–94.

[8] Teitel (note 7), 78.

This definition implies that if the chosen mechanism does not achieve, as the main goal, the consolidation of power of the new government, it will be left aside or its importance will be reduced. Moreover, as with any other political tool, power relations play a significant role. In democracies, the constituency, civil societies, the military, and many other relevant stakeholders also hold a significant amount of power (though considerably less than those in the new government do). When their influence is momentous, the transitional justice mechanisms chosen will align with those of their preference. In other cases, many of the decisions taken by the new governments will contravene the will of the masses, as they are not a central actor in the power-holding business.

Following from this definition and with the aim of facilitating the introduction of this new approach to the contemporary analysis of transitions, I propose categorizing transitional justice decisions in two groups:

- Covert politically opportunistic: while not actively recognizing it, they are aimed directly at increasing the power of the new government, disregarding the moral significance and impact on the victims of the previous regime or society at large.
- Overt politically opportunistic: these decisions increase the legitimacy and power of the elected government while corresponding to the aspirations of the community and human right standards.

Setting out to investigate transitions and their latter methods of justice while bearing this perspective in mind will prevent a narrow and idealized definition of justice, enabling an accurate study of reality, a rigorous diagnosis, and the discovery of a new set of alternatives that will aid the human rights movement to positively impact the outcome of transitions.

3. The Argentine Dilemma[9]

> *"I asked myself this question: why does a society allow itself to forget or undervalue its achievements, harassed by the myth of a so-called perfection before which nothing is ever enough?"*
> *Pepe Esliaschev*[10]

The last military dictatorship in Argentina took place between 1976 and 1983, and it is remembered as one of the darkest times in its history. Before relinquishing the government, the Junta leaders enacted what was formally called "National Pacification Law" but informally known as "self-amnesty laws". Evidently, the military recognized that there was a possibility of being prosecuted after they called for elections. This is why this law declared extinguished all criminal actions of any nature that arose from crimes committed with the objective of preventing, averting or putting an end to terrorist or subversive activities. The war against subversion was going to be the main narrative chosen by the military[11].

Other than the distinct escape from future justice, the hypothesis behind this law was that in order to achieve the consolidation of peace and stability needed for a national reconciliation, the recrimination of suffering was not going to bring about a harmonious coexistence nor a national unity. Noteworthy is the fact that all of the parties who fought in the so-called war were covered by the benefits of this law, meaning that the left-wing guerrilla groups were also included. Many soldiers were unsatisfied with this amnesty law, as they were convinced that they had done nothing wrong in the first place. The media, the church and some of the main political parties proclaimed themselves in favor of this law, describing it as a natural step towards reconciliation.

[9] For an in-depth analysis of the events occurred during the government of the Junta, commonly known as "the Dirty War", refer to the selected bibliography.

[10] Eliaschev, *Los hombres del juicio (The men of the trial), Sudamericana, 2011.*

[11] 'Ley de Pacificación Nacional (National Pacification Law)', Información Legislativa y Documental 1983. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/73271/norma.htm, last accessed 07 November 2018.

3.1 Revisiting the past: Ricardo Alfonsín and the return to democracy

When analyzing the politicization of Transitional Justice in Argentina, the starting point needs to be temporally situated just before democracy was reinstated. To be more precise, a quick look at the political campaigns of the main presidential candidates undoubtedly shows their stand towards justice and truth. Elections were held in August 1983 and the two main candidates, Ricardo Alfonsín and Italo Lúder, had opposite views on how to deal with past abuses. Alfonsín was in favor of repealing the amnesty laws that the Junta had imposed on themselves and campaigned emphatically on that. On the other hand, Lúder declared that, while not in favor this law, repealing it would be legally non-viable. The election was, essentially, a choice between impunity and penalty. Had Lúder won, it is highly likely that Transitional Justice would not have developed in Argentina, at least as fast as it happened under Alfonsín. Though in favor of punishment, Alfonsín's plan was to attribute different levels of responsibility to the different ranks within the military, in order to avoid an endless amount of trials during the newly found democracy. What Alfonsín wanted was some sort of limited Transitional Justice that would not jeopardize the weak transition by producing a military backlash.

Alfonsín was officially sworn in as president of Argentina on December 10th 1983, bringing democracy back to the country after thirteen years of military power. The first law he approved was law number 23040[12], which derogated the self-amnesty law on the grounds of being unconstitutional and null. This was the first step on what would become Argentina's long road towards the path of justice and that would initiate what today is known as "justice cascade"[13].

[12] 'Ley nº 23.040', Información Legislativa y Documental 1983. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28166/norma.htm, last accessed 07 November 2018.

[13] Sikkink, 'From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights', 50(1) Latin American Politics and Society 2008, 1–29.

CONADEP and the Nunca Más

Five days after Alfonsín started his government, he mandated, by executive decree number 187/83, the establishment of what would generally be known as the first[14] truth commission in the world: The National Commission on the Disappearance of Persons (CONADEP). Led by renowned author Ernesto Sábato, the commission's mandate was to "clarify the facts related to the disappearance of persons that took place in the country"[15]. For this, they were endeavored to receive testimonies and proof related to the events that occurred, determine the fate or whereabouts of missing people, including children, and produce a report after six months of its creation. They were explicitly not allowed to issue any type of judgement on the facts they discovered, as that constituted the job of the judicial power. Hence, their sole duty was to find out the truth about what had happened during the years of military rule.

The commission collected 50,000 depositions and released its final report in September 1984 in the form of a summarized book called "Nunca Más[16]" (Never Again), a term that would later be adopted by human rights organizations and activists as a slogan to fight the impunity that was yet to come. The book became a best seller considerably fast, shedding light on the atrocities committed the previous years.

A list of 8961 disappeared people[17] (even though it suggested the number was much higher because families were reluctant to report disappearances due to the fear of reprisals) and 340 clandestine centers of detention, where people were illegally detained and tortured, was reported. It likewise managed to prove that what had happened was a systematic plan of kidnapping-disappearance-torture and not, as some claimed, sporadic excesses of certain individuals. A file was handed to president Alfonsín which included the names of 1351 repressors from different backgrounds, including members of religious groups. Coordination and collaboration

14 Previous to the CONADEP, there were also truth commissions in Uganda in 1974 and Bolivia in 1982, even though they did not release a final report or achieve the national and global scale that the CONADEP did.

15 'Decreto 187/83', Información Legislativa y Documental 1983. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/263505/norma.htm, last accessed 07 November 2018.

16 Comisión Nacional sobre la Desaparición de Personas, *Nunca más (Never Again), EUDEBA, 1984.*

17 Even though the CONADEP left the door open for the number of disappeared to be much higher, many human right scholars and human right organizations assure that the final number of missing people is 30,000.

with the military of Chile, Uruguay, Paraguay, Bolivia, Nicaragua, Brazil, Guatemala and the United States was also proven. Throughout the approximately five hundred pages of the book, they managed to confirm the methodology by which the military acted, including accounts of torture, property theft, sexual abuse, rape, the stealing of babies, and murder (both of Argentines and citizens of foreign countries).

The creation of CONADEP was Alfonsín's decision to live up to his commitment towards fighting impunity and Human rights abuses. As an overt politically opportunistic move, it generated an increase in trust and legitimacy towards his government. This is due to the fact that, symbolically, the temporal facet of CONADEP's report represented much more than what its 50,000 depositions pronounced. It was more than pure proof of what had happened. In the Argentine collective mind, never again would silence and darkness serve as a pretext for impunity, as they were now protected by a democratic state.

The 1985 trials

On December 13th 1983, in the midst of demonstrations against the military government, Alfonsín issued two presidential decrees[18] in which he ordered the prosecution of the heads of the first three military juntas and of the guerrilla leaders, fulfilling his presidential campaign's promise. The legal concept of "mediate author" was assigned to the military leaders, meaning that even though they have used a third person as an instrument to achieve their goal (in this case: execution), they still held final responsibility. In fact, the responsibility of the subalterns was reduced, as they were considered to be part of a framework of psychological actions which could have led them to "an error on the moral and legal significance of their actions"[19]. There were, then, three implicit levels of responsibility: the military leaders who were in charge of making decisions and hence mediate authors; the ones who exceeded the orders given by their superiors; and those who were just following orders under the aforementioned psychological framework. Out of these categories, only the first two were to be prosecuted. Therefore, Alfonsín was effectively exempting all of those who had physically executed the kidnappings, torture and/or murders. This detachment of responsibility did not include the cases of property

[18] Decree 158/83 and Decree 157/83.

[19] 'Decreto 158/83', Desaparecidos 1983. [online] Available at: http://www.desaparecidos.org/nuncamas/web/document/nacional/decr158.htm, last accessed 07 November 2018.

theft and kidnapping of children, as those were de facto considered to be excesses to the orders received.

Originally, the trial of the Juntas fell under the jurisdiction of the Supreme Council of the Armed Forces, as military members could only be indicted by a military court. In essence, the military Junta was going to be prosecuted by its own Council and, naturally, what came next was not unforeseen: the military judges were friendly and supportive towards the commanders. After the original period of six months which the Court was assigned, little advancements in the investigation of the crimes committed were achieved. In fact, according to Carlos Arslanian (who was later one of the judges in the Civilian Court that tried the juntas), "instead of investigating and collecting useful evidence to prove the killings and the atrocities, the military was drafting all the ideological backgrounds of the victims"[20]. These delays, lack of will, and clear attempts to politicize the trial, became catalysers in the search for alternative solutions. While the Military Council stalled, a bill was sent to Congress to reform the Military Code, stating, among other things, that the military tribunal would only be allowed to try military offenses and that these offenses could be appealed by the Civilian Court[21]. It is by this avenue that the trial of the Junta leaders ended up in the Civilian Court, something which had not been originally planned by Alfonsín.

The trial officially began on April 22nd 1985, and it was welcomed with skepticism and low hopes. Due to the large number of cases that were taken to Court (more than 10,000), the prosecutor decided to follow the example of the European Council of Human Rights and consider only paradigmatic cases. The number was then reduced to 709, of which 281 were taken into account. The investigation undertaken by the judges reached the conclusion that the Junta leaders gave an illegitimate order that consisted in: detaining any person considered suspicious of having been a part of subversive actions, interrogating them using any necessary method in order to obtain confessions as fast as possible, and choosing either legalization of the person through the Executive Power or murder and disappearance. During the trial, senior army commander Videla was the only one who explicitly opposed to recognising the jurisdiction of the Chamber and, hence, did not present any statements. Every single remark done by the defense insisted that what happened in Argentina had been a war and that, in an attempt to justify themselves, all acts committed by the

[20] Eliaschev (note 10), 54.
[21] The bill was passed as law nº 23049.

military should be considered acts of war. As pointed out by the judges, even if categorized as war, Argentina was a signatory of the Geneva Conventions, which meant that the rules of war had to be followed: torture, murder, and illegal detention were, indeed, not permitted.

The ruling was finally read on December 9th 1985. It stated that each of the armed forces (Navy, Army, and Air Force) had acted independently and, consequently, ruled different sentences to their respective leaders. Out of the nine Junta members on trial, two were given life imprisonment, four were acquitted, and the other three were given different prison times. The sentence was, as well, very critical of the guerrilla forces and condemned their use of violence. Of particular importance was item number 30 of the ruling, which indicated that superior officials and everyone else who held operational responsibility in the actions committed should also be probed for their crimes regardless of the orders received by their superiors. This opened a door for a huge number of low-ranking officials to be investigated and possibly indicted.

The trial and its sentence were far from a stable process. Though a majority of the society was in favor of this process of justice, many were still displeased with its outcome, accusing the judges of enacting impunity. What is more, most politicians did not attend the trials out of fear, as many of the people who opposed them in the first place still held a lot of power within the Argentine community. The extent of this pressure to democracy was such that the recordings of the trials had to be smuggled into Norway as it was feared that, if a new coup was to happen, they were going to be destroyed.

It is essential to mention at this point that, by 1985, the terms "Transitional Justice" and "truth commissions" were not as coined as they are today. President Alfonsín was certainly leading the way with these trials and this was, by far, not an easy task when taking into account that the neighboring countries were still under military dictatorship (Chilean dictator General Augusto Pinochet, for example, did not leave power until 1990).

Full Stop and Due Obedience Law

Fast forward to December 24th 1986, almost a year after the verdict, when the government of Alfonsín sanctioned law number 23492[22]. Known as the Full Stop Law, it mandated the extinction of the criminal actions committed by any person during the military dictatorship who was not summoned to give a statement before sixty days from the moment the law was enacted. This excluded crimes that involved the subtraction and concealment of minors, and identity forgery. To put it simply, any crime that was not under investigation in that sixty-day window would prescribe.

The law was not welcomed by the Argentine public, especially by human rights organizations, who called for protests that gathered between 50,000 and 60,000 people, according to some media outlets[23]. Why then was this law, a political blow to Alfonsín's legitimacy, enacted? As a consequence of item 30 of the sentence, many new investigations began taking place, something that created discomfort among the military. Jorge Torlasco, another one of the judges in the Junta trial, remembers when and under which circumstances the idea of this law came up. After the ruling, he and the other judges were invited to have dinner with president Alfonsín, who said: "Gentleman, I need to have a way to limit this, and that we do not continue for twenty years investigating, processing and putting lieutenants in prison […] I tell you with all sincerity, when I go to bed at night I do not know if the next day I will continue being president of Argentina"[24]. Military pressure was mounting and that called for a review in strategy. It is rather apparent why this law was enacted: out of fear of losing democracy. In a clear example of a covert politically opportunistic decision, Alfonsín had to switch his priority from pleasing his voters to pleasing the military.

However, contrary to its purpose of alleviating pressure on democratic legitimacy, the law had an opposite effect. Instead of giving up under this recent impunity measure, thousands of lawyers rushed to file as many cases as possible before the deadline, becoming a "championship to see

[22] 'Ley nº 23.492', Información Legislativa y Documental 1986. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21864/norma.htm, last accessed 07 November 2018.

[23] Prieto, 'Más de 50,000 personas, contra la ley de 'punto final' en Argentina (More than 50,000 people against the "full stop" law in Argentina)', El País 1986. [online] Available at: https://elpais.com/diario/1986/12/21/internacional/535503616_850215.html, last accessed 07 November 2018.

[24] Eliaschev (note 10), 171.

who could prosecute the most people"[25]. It is estimated that around four hundred military personnel were charged during this period. Therefore, democracy would start to be threatened not only by the weak economy inherited from the dark years but also by military uprisings. A branch of the army known as the Carapintadas, in reference to the face paint they wore when appearing in public, exhibited discontent both towards its own military leadership and the civilian government. The pressure they imposed to have their demands met materialized in uprisings and coup attempts.

The first uprising happened in April 1987, a few months after the Full Stop Law was enacted. Many military officers who had been called upon to testify under chargers of torture refused to go and decided to riot, demanding a political solution to the trials without any judicial sentence. The uprisings were not welcomed by the civilian population. Spontaneous manifestations demanded the surrender of those rioting, which forced president Alfonsín to travel personally to negotiate with those participating.

A month and a half later, and only a few months after the Full Stop Law, on June 4th 1987, law number 23521[26] was enacted. Known as the Due Obedience Law, it established a presumption (without admitting proof of the contrary) that at the date when the crimes were committed, every personnel under the rank of colonel acted under due obedience (obeying orders from a direct superior) and hence were not punishable. It was considered that they had acted under a state of coercion and subordination to a superior authority without the possibility to resist or to oppose. Whether this was a reality, it did not matter, as the law clearly stated that it was the presumption that would be taken into account.

When this law was enacted, it seemed as if Alfonsín had yielded to the pressure of the uprising, as the law satisfied many of their demands and reduced the legitimacy of his democratically elected government. However, the division of responsibilities according to the military position was something that Alfonsín had already announced during his electoral campaign. The uprisings were a catalyst for another covert decision that was to come sooner or later. Alfonsín wanted the process to be over and that was the only political avenue left to pursue. The more time that went by, the more affected his credibility could become.

[25] Eliaschev (note 10), 278.

[26] 'Ley nº 23.521', Información Legislativa y Documental 1987. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21746/norma.htm, last accessed 07 November 2018.

To add pressure to the mix, a second and third uprising took place in January and December 1988. With claims of saving the honor of the armed forces, their demands outlined amnesty for everyone involved in the previous uprisings and the extension of the Due Obedience law benefits to all of the already processed officers. These uprisings were swiftly contained.

Consolidating democracy

Lastly, though not falling exclusively under the category of Transitional Justice, it is worth mentioning some overt opportunistic decisions taken by the government of Alfonsín to redress the violations and injustices from one of the darkest periods in Argentina's modern history. Concerning international law, many international conventions[27] were ratified by the government, which meant that Argentina officially recognized the competence of their monitoring mechanisms. This added an additional layer to the policies of human rights protection that started after the fall of the Junta.

Nationally, a permanent Sub-secretariat of Human Rights was established as part of the Ministry of Interior, with the aim of continuing the tasks that were started by the CONADEP and working towards the development of human rights. In regard to the involvement of the military in the day to day running of the country, they were removed from their role in internal defense, laws were passed which increased the penalty for participation in military coups, and the budget allocated to them was reduced.

3.2 Forgive and forget: Carlos Menem and the national reconciliation plan

Due to hyperinflation, unemployment and general discontent, Alfonsín stepped down seven months before he was supposed to, which ended in Carlos Menem being sworn into presidency on July 8th 1989. The presidential elections that got Menem in power had one significant difference from the ones in 1983: fear was not a main determinant of the vote be-

[27] The American Convention on Human Rights in 1984, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights in 1986, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987.

cause democracy was already seen as a secure thing. Therefore, Transitional Justice was not the main focus of the political campaigns. On the contrary, the economy was. Unlike Alfonsín, Menem did not see the military as a pressing issue. He was more amiable to them and received a significant share of their votes. Regardless of this, reports of human rights abuses kept mounting and pressure from the military to be pardoned intensified.

Covert Solutions

Right from the start, Menem understood that the Supreme Court would represent an obstacle if his goals were to be achieved without judicial opposition. This is why in 1990 he decided to reshape its composition, firstly by pursuing the voluntary resignation of the judges, and, once that failed (as only one out of the five resigned), by enlarging the composition of the Court from five to nine members, arguing that they were falling behind in their work. Denying this, the four judges that were left expressed their concern at the loss of autonomy that this change would bring. In reality, appointing these new judges gave the president an automatic loyal majority that would back his impunity measures, something that, as we have seen, was achieved during his mandate.

Albeit lenient on the military, Menem still managed to keep them under control by cutting budgets and reducing its size while, at the same time, raising salaries and allowing them to return to their role in the internal security of the country. Under Menem, impunity measures were taken to a new level, beginning a process of what he called "pacification"[28]. First on October 7th 1989 (only three months after his election) and then on December 29th 1990, Menem granted presidential pardons to several military members, guerrilla leaders and civilians in a move to reconcile and pacify the country. In total, around 1200 people were pardoned, most of whom had been previously sentenced for crimes of murder, torture, and forced disappearance, among others. This included around 400 military members whose trials were still in process, 290 jailed people who were immediately released, and also the leaders of the Junta who had been previously sentenced in the 1985 Trials[29]. Despite national dis-

[28] Aznares, 'Menem justifica el indulto en 1990 a los condenados por la guerra sucia (Menem justifies the 1990 pardon to those condemned by the dirty war)', El País 1995. [online] Available at: https://elpais.com/diario/1995/05/05/internacional/799624808_850215.html, last accessed 07 November 2018.

[29] The presidential decree which pardoned the leaders of the Junta was number 2471/90. For a list of the other beneficiaries check: Decree 1002/89, Decree 1003/

content, Menem was convinced "millions (of people) will surely applaud this step"[30].

It is at this point that one certainly wonders what the reasoning behind a clear covert political opportunistic decision was. Some of the official arguments behind Menem's decision can be found by giving Decree 2741 a quick glance: "permanent reconciliation", "the only solution to heal wounds", and "mutual forgiveness", are some of the expressions found throughout the text[31]. Yet, remembering the time when the pardons were enacted, the trial's prosecutor Julio Strassera emphasized how untrue that statement was, mentioning that social demand for the pardons was absent, including from the armed forces themselves (with the exception of the Carapintadas, who were the minority). Indeed, he considered the pardons a mechanism to favor groups who supported the military and still held a great amount of power, such as the church[32].

Truth is that, as friendly as their relationship could have been, there was still military unrest under Menem's government. On December 3rd 1990, a new uprising threatened peace in the country. This time around, the rebellion had all the indications of a coup attempt. Menem's government was accused of interfering in the military and of being a puppet of the United States' administration. The rebellion was quelled in less than 24 hours but was, by far, the bloodiest one. Less than a month later, the second round of pardons was enacted. Adding these pardons to the list of amnesty laws sanctioned under Alfonsín (Full Stop and Due Obedience), the efforts to prosecute those responsible for what had happened in Argentina seemed to have hit a dead end. From this perspective, Menem's Argentina was choosing to forget and move forward, rather than to remember and convict.

89, Decree 1004/89, Decree 1005/89, Decree 2472/90, Decree 2473/90, Decree 2474/90, Decree 2475/90 and Decree 2476/90, last accessed 07 November 2018.

30 The New York Times, 'Pardon of Argentine Officers Angers Critics of the Military', The New York Times. 1989. [online] Available at: https://www.nytimes.com/1989/10/09/world/pardon-of-argentine-officers-angers-critics-of-the-military.html, last accessed 07 November 2018.

31 'Decreto 2741/90', Educar 1990. [online] Available at: https://www.educ.ar/recursos/129103/decreto-274190-carlos-saul-menem-indulta-a-comandantes-juntas-militares, last accessed 07 November 2018.

32 Eliaschev (note 10), 355.

On resistance

What needs to be understood about covert politically opportunistic decisions is that the "society at large" that is being disregarded will, in most cases, fight back. Argentina is no exception to this rule, though its resistance came from surprisingly different fronts.

In April 1995, only a few months before his re-election for a second term, an unprecedented event happened. General Martin Balza, by then head of the Argentine Army, apologized publicly for the crimes committed by his institution between the period of 1976 and 1983. During prime time, he appeared in a TV show and broke the silence kept by the Army for almost twenty years:

> *"[…] I take on our share of responsibility for the mistakes in this fight between Argentines. […] despite the efforts made by the different Argentine policies, we believe that the desired moment of reconciliation has not yet arrived"*[33]

Balza's words and timing were seen by some as a way to delegitimize Menem before his campaign. Others felt his apologies were genuine. Menem, worried about the spillover effect towards his election campaign, opposed "rubbing salt into old wounds"[34] and, in a defiant tone, challenged people to "march as much as they wanted"[35], a precise illustration of his disregard towards their opinion and lack of influence.

In an era of impunity and with seemingly no alternatives, the Argentine community creatively decided to take matters into their own hands and search for loopholes which would allow at least a glimpse of justice to be done. By reinterpreting the American Convention of Human Rights, to which Argentina was a party[36], lawyers argued that victims had a right

[33] Balza, 'Declaración del General Martín Balza (General Martín Balza's declaration)', Desaparecidos 1995. [online] Available at: http://www.desaparecidos.org/nuncamas/web/document/militar/balza95.htm, last accessed 07 November 2018.

[34] Huser, *Argentine Civil-Military Relations, Center for Hemispheric Defense Studies, 2002.*

[35] Ares, 'Menem descalifica la indignación popular en Argentina por los indultos (Menem disregards popular indignation about the pardons)', El País 1991. [online] Available at: https://elpais.com/diario/1991/01/02/internacional/662770808_850215.html, last accessed 07 November 2018.

[36] The constitutional reform of 1994 modified the hierarchy of norms in Argentina. Article 75 section 22 allocated international treaties a superior hierarchy than national laws. Until then, they were deemed to hold an equal status, with national laws prevailing in case of conflict between the two.

to truth. To put it differently, even though criminal justice could not be accomplished, the truth about the fate of the disappeared was something that the families of the victims could still aim to achieve. The right to truth was then guaranteed by the State via judicial proceedings by Resolution 18/98[37].

The practice of "truth trials" was a legal innovation that came about as a strategy to surpass the limitations established by the impunity laws. Once again, Argentina was leading the way in the Transitional Justice field, only this time it had been the public and civil societies who had conceived an entirely new form of lawfulness, based both on national and international legislation. The process opened new prospects for a past that was on the way to being forgotten.

The first trials took place in 1998 and they were a real innovation: it adopted elements from criminal justice tailored specifically for these proceedings. While the process was very similar to that of a criminal trial, the main distinction was that there were no defendants. By 2014, the bodies of 55 disappeared people had been recognized, of which 44 were returned to their families. Furthermore, an extra 112 were able to be identified by the Chamber[38]. This new Transitional Justice method, which began at the end of Menem's government and lasted many years beyond his rule, represented, for many, a step towards strengthening democratic power. By definition, there were neither sanctions nor arrest warrants after the trials. Forgiveness and reconciliation were not achieved. The truth trials were only a means towards a future goal of accountability.

Other relevant actions

By 1998, with his presidency coming to an end, two moves shook the human rights movement and brought the topic back to the collective mind. Firstly, in March, the Full Stop and Due Obedience laws were repealed. Though Menem originally said that he would veto the process[39], he later

37 'Resolución n° 18/98', Desaparecidos 1998. [online] Available at: http://www.desaparecidos.org/nuncamas/web/juicios/laplata/laplat03.htm, last accessed 07 November 2018.

38 Centro de Información Judicial, 'Cámara Federal de La Plata, Juicio por la Verdad (La Plata federal chamber, Truth trial)', Centro de Información Judicial 2014. [online]. Available at: http://www.cij.gov.ar/nota-14492-CAMARA-FEDERAL-DE-LA-PLATA---JUICIO-POR-LA-VERDAD.html, last accessed 07 November 2018.

39 La Nación, 'Promulgaron la derogación de la ley de obediencia debida (The repeal of the due obedience law has been promulgated)', La Nación 1998. [online] Avail-

changed his position and allowed what would become law 24952[40] to be sanctioned. It did not do much to reduce impunity, as repealing laws has no retroactive effect, but was nevertheless a step celebrated by the human rights movement.

The second act had its roots a year earlier when, in 1997, Spanish judge Baltasar Garzón released an international arrest warrant against the former president and Junta leader Galtieri, based on his involvement in the disappearance of 300 Spaniards[41]. Essentially, after the pardons and with the prosecution halted, many Argentines started seeking justice abroad, and therefore, foreign extradition orders began to appear. Again, a presidential decree was enacted by Menem in order to automatically deny any extradition request[42], arguing that, to begin with, those crimes had already been investigated and those responsible had been convicted, and that giving away jurisdiction would undermine the sovereignty of the country. Capitalizing from historical grievances, Menem added that "we are not going to let them colonialize us judicially."[43]

Lastly, there was an exception to the decade where policies of oblivion emanated directly from the government, and it should be mentioned. In an affable attempt to satisfy the victims of repression and gain their support, Menem's government implemented a policy of monetary reparations soon after he was elected, which included civilians who had been detained by military courts and family members of the disappeared people[44].

able at: https://www.lanacion.com.ar/93948-promulgaron-la-derogacion-de-la-ley-de-obediencia-debida, last accessed 07 November 2018.

40 'Ley nº 24.952', Información Legislativa y Documental 1998. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/50000-54999/50364/norma.htm, last accessed 07 November 2018.

41 La Nación, 'El juez Garzón libraría una orden de captura sobre Galtieri (Judge Garzón would issue an arrest warrant for Galtieri)', La Nación 1997. [online] Available at: https://www.lanacion.com.ar/64577-el-juez-garzon-libraria-una-orden-de-captura-sobre-galtieri, last accessed 07 November 2018.

42 'Decreto 111/98', Información Legislativa y Documental 1998. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/49092/norma.htm, last accessed 07 November 2018.

43 La Nación, 'Menem no extraditará a 98 represores (Menem will not extradite 98 repressors)', La Nación 1999. [online] Available at: https://www.lanacion.com.ar/159887-menem-no-extraditara-a-98-represores, last accessed 07 November 2018.

44 A complete description of the reparations systems can be found by reviewing Decree 70/91, Law 24043 and Law 24441.

3.3 Revoking justice: the Kirchner era

From 1999, when Menem was replaced by Fernando de la Rúa, to 2003, when elections were called, Transitional Justice's role operated behind the scenes. While still some truth trials unfolded, the economy still was the main element of conversation. The circumstances that brought Nestor Kirchner to power were far from conventional. Menem decided to run again and, despite the fact that he ended up in first place, he did not get enough votes to automatically succeed. A runoff between him and the runner-up candidate, Nestor Kirchner, was therefore announced. However, after the experience of being head of state for ten consecutive years, Menem's popularity levels were very low. In times when power is decided by the communities' vote, having ruled via covert decisions did not play in his favor. Polls predicted that in a second round, Kirchner would win by a landslide[45]. In a move to avoid embarrassment, Menem decided to pull out of the presidential race, something he was highly criticized for. When the Congress refused to call for new elections, Kirchner automatically became president of Argentina, turning him into the first Argentine president who made it into office with only 22.2% of the votes.

Kirchner took office as president on May 25th 2003. Right from the start, the new government made it clear that it would hold the military responsible for their crimes. To do so, there were several hindrances that had to be dealt with, both legal and political. Only five days after he was sworn, he warned the military to refrain from having a say in his political decisions[46], while also removed many high-ranking officers from their positions[47]. As part of his strategy to remove impunity barriers, his first step was getting rid of influential actors within the military that would oppose his future actions.

45 Goni, 'Menem bows out of race for top job', The Guardian 2003. [online] Available at: https://www.theguardian.com/world/2003/may/15/argentina.ukigoni, last accessed 07 November 2018.

46 Gallo, 'Dura réplica de Kirchner a Brinzoni (Hard response from Kirchner to Brinzoni)', La Nación 2003. [online] Available at: https://www.lanacion.com.ar/499877-dura-replica-de-kirchner-a-brinzoni, last accessed 07 November 2018.

47 Relea, 'El jefe del Ejército argentino asume su cese como el regreso de la intriga a los cuarteles (The head of the Argentine Army assumes his resignation as intrigue returns to the barracks)', El País 2003. [online] Available at: https://elpais.com/diario/2003/05/29/internacional/1054159204_850215.html, last accessed 07 November 2018.

Abolishing legal barriers

The main obstacles to Kirchner's pursuit of justice were, predominantly, of a legal nature. To put it simply: the Full Stop and Due Obedience law, and Menem's presidential pardons. Taking a political route, he decided first to reform the Supreme Court, which still depicted Menem's interests. Unlike Menem, Kirchner was looking to impose a new transparent judge selection method that would limit the President's arbitrariness, creating in that way a trustworthy and truly independent Court. "It is verifiable that at any point in our history the Court has served as an element of political support for the sitting president", said Kircher in June 2003[48]. His ideas resulted in a new process where a prospective judge's commitment to the defense of human rights, democratic values, and moral aptitudes, were a sine qua non condition for its election. Citizens, non-governmental organizations, professional associations, academics, and human rights entities were invited to provide feedback, questions, and recommendations during the selection process[49]. This system led not only to the possibility of having a Court constituted by more suitable judges, but also to an overall increase in its legitimacy. By 2005, the goal of the new government had been achieved: the Court was comprised of pro-Transitional Justice judges.

At the same time, Nestor Kirchner was also paving the way for the annulment of the Full Stop and Due Obedience laws, so that the trials against the military could be reopened. He expressed his views against those laws, calling them "unconstitutional" and "obtained under the extortion of a Coup d'état"[50]. He then declared his support for having Congress annul them. It was in August 2003 that the Argentine Congress declared those laws null and void[51]. Consequently, in September, two cases involving 700 military members were resumed. These measures brought

[48] Kirchner, 'Discurso de Néstor Kirchner para el cambio de la forma de designar jueces (Néstor Kirchner's speech to change the way judges are appointed)', Cristina Fernández de Kirchner 2003. [online] Available at: http://www.cfkargentina.com/discurso-de-nestor-kirchner-para-el-cambio-de-la-forma-de-designar-jueces/, last accessed 07 November 2018.

[49] 'Decreto 222/2003', Información Legislativa y Documental 2003. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/86247/norma.htm, last accessed 07 November 2018.

[50] Morosi, 'Kirchner, contra las leyes exculpatorias (Kirchner, against the exculpatory laws)', La Nación 2003. [online] Available at: https://www.lanacion.com.ar/515382-kirchner-contra-las-leyes-exculpatorias, last accessed 07 November 2018.

[51] 'Ley nº 25779', Información Legislativa y Documental 2003. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88140/norma.htm, last accessed 07 November 2018.

the impunity debate back to the front page, and in June 14th 2005, the Supreme Court, in a landmark ruling (7–1 vote), declared the amnesty laws unconstitutional, an act celebrated by Kirchner right after it happened[52]. The door was once again open for thousands of victims to seek criminal justice.

However, many military members were still protected by Menem's presidential pardons. It was only in 2006 when the courts started reversing these pardons, by reasoning that they contradicted international treaties which Argentina was a party to[53]. Finally, in July 2007, the Supreme Court declared Menem's presidential pardons unconstitutional, citing, in particular, the non-applicability of statutory limitations to crimes against humanity. This removed the last legal impediment in order to prosecute those involved in the crimes committed during the dictatorship.

Apologies

Kirchner's era is filled with cases of overt decisions, and it is not difficult to understand why: as a president-elect with only 22.2% of approval, he was in desperate need of increasing his popular support. In a symbolic move, in 2004 Kirchner turned the Higher School of Mechanics of the Navy (ESMA) into a museum for the disappeared victims. It was rebranded as a space for memory, promotion, and defense of human rights. The ESMA, originally built as an education facility for the navy, was the biggest and most famous clandestine center of detention during the dictatorship. It is estimated that around 5000 people were detained and tortured there, before being sedated and thrown alive into the ocean. Only 150[54] people are known to have survived imprisonment in the ESMA. The symbolism of this move arose not only from the fight against impunity, but also from the fact that in 1998 Menem had tried to demolish the place and replace it with a space where international heads of States would be welcomed to the country. In the end, his plan fell through, as it was highly rejected and

52 Andrada, 'Nos devuelve la fe en la Justicia, dijo Kirchner ("It returns our faith in Justice", said Kirchner)', La Nación 2005. [online] Available at: https://www.lanacion.com.ar/713046-nos-devuelve-la-fe-en-la-justicia-dijo-kirchner, last accessed 07 November 2018.

53 For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which, in a defiant move, had been ratified by Kirchner in 2003. This happened at the same time that the annulment of the Punto Final and Due Obedience laws was being debated.

54 Daniels, 'Argentina's dirty war: the museum of horrors', The Telegraph 2008. [online] Available at: https://www.telegraph.co.uk/culture/3673470/Argentinas-dirty-war-the-museum-of-horrors.html, last accessed 07 November 2018.

criticised by human rights groups. It was during a speech at the museum's inauguration that Kircher apologized to all citizens in the name of the state for having been "shamefully silent for the past twenty years" and ended up affirming: "we want justice"[55].

In conjunction with the inauguration of the museum, Kirchner ordered the removal of the pictures of two of the biggest military repressors, who occupied the presidency of Argentina during the dictatorship, from the precinct where they were being honored. "(…)It is the Argentine people, via the vote and the decision this represents, who decide the destiny of Argentina", Kirchner said during the event[56].

Additional symbolic moves

Right from the start, Kirchner proclaimed himself in favor of finding a mechanism that would allow the extraditions of the military involved in crimes of foreign citizens. In July 2003, he repealed the presidential decrees which forbade them, empowering the judiciary to determine those requests on a case by case basis. What is more, Kirchner's pro-Transitional Justice approach resulted both in additional support for human rights organizations which worked specifically in the fight against impunity, such as Mothers and Grandmothers of Plaza de Mayo, and in new reparations, this time for the children of those disappeared[57].

Lastly, of particular symbolic importance and predominantly ignored in the literature reviewing Argentina's transitional history, is the controversy that surrounded the prologue of the Nunca Más' report. The original prologue, written by Sábato, was frequently accused of alluding to the "theory of the two demons". This rhetorical device, used in political

[55] Kirchner, 'Creación del Museo de la Memoria, Néstor Kirchner en la ESMA en 2004 (Creation of the Museum of Memory, Néstor Kirchner at the ESMA in 2004)', Cristina Fernández de Kirchner 2004. [online] Available at: http://www.cfkargentina.com/museo-de-la-memoria-nestor-kirchner-en-la-esma/, last accessed 07 November 2018.

[56] Kirchner, 'Nestor Kirchner ordena bajar el cuadro del dictador Videla del Colegio Militar de la Nacion (Nestor Kirchner orders to lower the picture of the dictator Videla from the Military College of the Nation)', Cristina Fernández de Kirchner 2004. [online] Available at: http://www.cfkargentina.com/nestor-kirchner-ordena-bajar-el-cuadro-del-dictador-videla-del-colegio-militar-de-la-nacion/, last accessed 07 November 2018.

[57] Kirchner, 'Proyecto de Ley de indemnización y reparación a los hijos de desaparecidos (Draft Law of compensation and reparation to the children of disappeared persons)', Cristina Fernández de Kirchner 2004. [online] Available at: http://www.cfkargentina.com/proyecto-de-ley-de-indemnizacion-y-reparacion-a-los-hijos-de-desaparecidos/, last accessed 07 November 2018.

discourses, describes the Argentine case as one which consisted of two warring factions (the subversives and the military) with equal force. The opening line of Sábato's prologue is mainly quoted as justification for this accusation:

> *"During the 1970s, Argentina was torn by terror from both the extreme right and the far left"*[58]

This prologue was something that human rights organizations were not satisfied with, as it was seen to somehow justify the horrors committed by the military. The controversy arose in 2016, when Kirchner's administration decided to rewrite the prologue. His position can be distinctly seen in the book's new opening page:

> *"[…] it is unacceptable to attempt to justify State terrorism as a sort of game of counteracting violence, as if it were possible to look for a justifying symmetry…"*[59]

Former president Alfonsín lamented the dangerous tendency that Kirchner's government had towards rewriting history and denied that Nunca Más' original report referred to the theory of the two demons.

3.4 The great incognito: Mauricio Macri

The fact that the current[60] government of Mauricio Macri, who took office in December 2015, is still struggling with reconciliation after thirty years of the return to democracy, exhibits how politicized the whole process has been. Right from the start, Macri has had a friendly approach towards the military, something not welcomed by human rights organizations. Stemming from his leniency, he increased their power while giving many jailed repressors the benefit of house arrest. It all culminated in a widespread discontent when, on May 3rd 2017 the Supreme Court applied the bene-

58 Comisión Nacional sobre la Desaparición de Personas (note 16), 7.

59 Clarín, 'Editan el "Nunca más" sin los agregados del kirchnerismo: hay polémica (The "Never Again" is edited without the additions of Kirchner: there is controversy)', Clarín 2016. [online] Available at: https://www.clarin.com/cultura/editan-agregados-kirchnerismo-polemica_0_EJRDRYRN-.html, last accessed 07 November 2018.

60 Macri office's term finished on December 9th 2019.

fits of Law 24390 to the case of Luis Muña, an ex-repressor, effectively reducing the number of years in his sentence.

Law 24390[61], commonly known as 2x1 law, was originally enacted to reduce the population in prisons, which were composed mainly of people in pretrial detention without a final conviction. The law stated that preventive prison could not exceed two years and that any excess time spent on detention after that was to be computed twice and reduced from the final sentence. Though the law was derogated in 2001, the reasoning behind the Supreme Court's decision was the so-called principle of the most benign law, which states that "if the law in force at the time of committing the offense was different from the one that exists when pronouncing the ruling, the most benign one will always be applied"[62]. This case was worrisome for many, as it could become a precedent to all of the other military cases who had already been convicted or whose trials were still in process.

While the first reaction from Macri's party members revolved around respecting the independence of the Court, the boundless rejection from the Argentine public made many of them distance themselves from its decision. Macri's initial silence only helped to increase the belief of his support towards impunity. In an overt move to decrease the negative impact on his government, a new law (27362) was quickly approved which specified that the benefit of the 2x1 law did not apply to crimes against humanity, something that Macri celebrated because "he had always been against any tool that favoured impunity"[63].

61 'Ley nº 24390', Información Legislativa y Documental 1994. [online] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/776/norma.htm, last accessed 07 November 2018.

62 BBC Mundo, 'Qué es el 2×1, el polémico fallo de la Corte Suprema que favorece a exrepresores y que pone de acuerdo a gobierno y oposición en Argentina (What is the 2×1, the controversial ruling of the Supreme Court that favours former repressors and that makes the government and opposition in Argentina agree)', BBC 2017. [online] Available at: http://www.bbc.com/mundo/noticias-america-latina-39876510, last accessed 07 November 2018.

63 Todo Noticias, 'Macri, 2x1: criticó el fallo de la Corte, pero más al kirchnerismo (Macri, 2×1: he criticized the ruling of the Court, but the Kirchnerismo more so)', Todo Noticias 2017. [online] Available at: https://tn.com.ar/politica/en-mendoza-macri-da-una-conferencia-de-prensa-antes-de-que-el-senado-voltee-el-2x1-represores_791980, last accessed 07 November 2018.

4. Final Thoughts

The centralization of the political aspect within Transitional Justice leads to the conclusion that there are not "good or bad" methods to judge the past. Every decision is the direct result of a power play between actors pursuing their own benefits. At this point, it is relevant to mention that a limited understanding of this approach can impact negatively on those seeking justice, as they are usually at the bottom of the power pyramid. They should not be discouraged. As a matter of fact, I argue the contrary. When working together, civil societies, human rights activists, victims, families, and the community at large can turn the odds to their favour. Democracy can be successfully cemented in a fragmented society as long as the right interests are taken into account. When they are not, the struggle will continue many years after the transition, as the Argentine case demonstrates.

Finally, the suitability of this theory to other situations of transition needs to be addressed. As mentioned at the beginning of this paper, I consider politicization as present in every occasion, whether nationally, internationally, or mixed. Though it should be the focus of other research papers to do an in-depth analysis of other events, a few examples can be briefly acknowledged. Take Uruguay, for instance, a country that spent twelve years under a civil-military dictatorship and chose amnesty and impunity as a solution to achieve reconciliation and settle democracy. However, starting from the mid-1990s and due to the pressure of civil societies accompanied by public support, impunity began to be challenged, which ended up in reparations policies and the derogation of the amnesty laws.

Shifting the attention to Cambodia, the trials prosecuting the crimes of the Khmer Rouge have been defined as a "shocking failure"[64] due to their politicized aspect. When the trials were set up, a compromise between the government of Cambodia and the United Nations resulted in a combined court, composed by both international and local judges. Right from the beginning, government interference was denounced as an obstruction to progress. By 2017, and after more than ten years of work, the trial had only delivered three convictions[65]. This should not be surprising given that

[64] Campbell, 'Cambodia's Khmer Rouge Trials Are a Shocking Failure', Time 2014. [online] Available at: http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/, last accessed 07 November 2018.

[65] Mydans, '11 Years, $300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?', The New York Times 2017. [online] Available at: https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html, last accessed 07 November 2018.

Cambodia's prime minister, arguably the most powerful political figure in the country, is former Khmer Rouge commander Hun Sen. In a meeting at Amnesty International in which the author participated, Dame Silvia Cartwright, former governor-general of New Zealand and one of the international judges who took part in The Extraordinary Chambers in the Courts of Cambodia, illustrated how, among other things, political pressure on national judges hindered the achievement of the trial's goals.

The degree to which the relationship between justice and the political can be easily perceived will vary. In some cases, the link will be explicit. Most of the times, however, it takes in-depth analysis and critical thinking to be able to identify and disclose its influences and effects. Either way, it is imperative that every transitional justice exploration is able to bring this relationship to the fore of the discussion, understating its role as a decision-making puppeteer. Any omission will undoubtedly lead to a limited understanding of reality, which will, in turn, hinder the fundamental goal of transitional justice: reconciliation.

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Transforming Transitional Justice to Address Colonial Crime

The Nama's and Herero's Claim for Justice for Germany's Colonial Genocide in Namibia

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Abstract While the concept of transitional justice and its range of measures have gained importance on an international level to come to terms with major crimes of the past, colonial crimes and mass violence committed by Western actors have not been addressed by transitional justice so far. In this chapter, the Herero's and Nama's struggle for justice for the genocide on their ancestors by Germany from 1904–1908 and the arising challenges are set in relation to conceptual debates in the field of transitional justice. Building on current debates in the field, suggesting more structural and transformative conceptualizations of transitional justice and an approach 'from below', it is argued that decolonial activism of formerly colonized communities and transitional justice debates can inform each other in a dialogic and fruitful form to formulate suggestions for a process towards post-colonial justice.

1. Introduction

While the concept of transitional justice and its range of measure have gained importance in the endeavor to come to terms with major crimes of the past on an international level, colonial crimes and mass violence committed by Western actors have not been given as much attention in transitional justice so far.[1] In recent years, however, a greater interest has emerged in connecting transitional justice mechanisms and the historical

[1] Balint/Evans/McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) Vol.8 IJTJ 194.

experience of formerly colonized communities. The struggle for justice for the colonial genocide on the Nama and Herero in present-day Namibia by Germany from 1904 to 1908 shows parallels to transitional justice concepts and mechanisms and at the same time—as will be outlined in this chapter in more detail—it challenges its boundaries beyond traditional ideas of transitional justice. Thus an analysis of these processes may allow for the development of forms of transitional justice adequate to account for colonial crimes.

Building on current debates in the field, specifically the suggestion of more structural and transformative conceptualizations of transitional justice and an approach to justice 'from below', this chapter will therefore explore in more detail *how the case of the Nama's and Herero's push for justice for the colonial genocide may provide insights into a transformative approach to transitional justice, particularly with regards to colonial crimes and their continuities.*

The chapter starts by tracing the happenings in the years of 1904 to 1908 in German South West Africa (GSWA) within the context of the German colonial endeavor. Secondly, the Herero's and Nama's demands and struggle for justice for these colonial crimes will be portrayed, including the course of action which has been taken so far and what arguments they base their demands on. In the third part, the connection to transitional justice will be drawn and the applicability of international law and transitional justice discussed, presenting major challenges therein. The fourth section will set the previous analysis in relation to debates in the field of transitional justice and discuss parallels and possible synergies as a contribution to debates surrounding the issue of justice for colonial crimes.

2. German colonization and the genocidal war from 1904–1908

The Herero society formed in the central region of todays' Namibia in the 19th century in relation to the so-called cattle-complex. Local communities professionalized in cattle farming resulting in a social stratification setting the ground for the emergence of the Herero as a society.[2] They kept intensive trade relations to the cap region, were involved in conflicts with

[2] Gewald, 'Kolonisierung, Völkermord und Wiederkehr: die Herero von Namibia 1890–1923' in Zimmerer/Zeller (eds.), *Völkermord in Deutsch-Südwestafrika: Der Kolonialkrieg (1904–1908) in Namibia und seine Folgen* (Ch. Links 2003), 105.

neighboring communities and despite going through a process of political centralization, were rather fragmented and loosely connected.[3] These divisions were capitalized on by German colonizers to pressure the Herero to sign concessions and protectorate contracts later on.[4]

German influence in the region started with the presence of the Rhenish Missionary Society from 1842 onwards, which established missionary stations around the region.[5] In 1883, the German tradesman Lüderitz bought land from the Nama for his company and asked the German empire for protection, which was finally granted by the Chancellor of the German Empire Bismarck in order to limit further expansion of the British Empire. Further expansion of German territory followed under the newly founded *Deutsche Kolonialgesellschaft für Südwestafrika* (DKGfSWA, German Colonial Society for Southwest Africa) and the German Empire decided to formally put the region under its rule and administration in 1885. Additionally, the German empire sought to meet the conditions for territorial claims set in Art. 35 of the General Act of the Berlin conference from 1884/85.[6] Germany and indigenous communities signed various treaties until the 1890s. These contracts put indigenous communities under German protectorate rule, prohibited their leaders to close treaties with other colonial state powers or give them land without Germany's consent, obliged them to protect the lives and property of German citizens and allowed Germans unlimited trade. A treaty with the Herero society was signed under Mahaherero in 1885.[7] German military troops were sent to GSWA, first, to be in contact with the indigenous communities, although their mandate and autonomy was soon extended to serving as police and to intervene in case of agitation against German rule.[8]

Through the process of colonization and a heavy cattle plague in 1897 the Herero society became existentially dependent on the good-will of the colonial state, including land ownership, access to reservations and

3 Krüger, 'Das Goldene Zeitalter der Viehzüchter. Namibia im 19. Jahrhundert' in Zimmerer/Zeller (note 2), 18.
4 Gewald (note 2), 105
5 Krüger (note 3), 21.
6 Fabricius, *Aufarbeitung von in Kolonialkriegen begangenem Unrecht. Anwendbarkeit und Anwendung internationaler Regeln des bewaffneten Konflikts und nationalen Militärrechts auf Geschehnisse in europäischen Kolonialgebieten in Afrika* (Duncker & Humblot 2017), 163–165.
7 Ibid., 166.
8 Ibid., 166–169.

to loans, and work opportunities. Herero chiefs were pressed to sell land. Large parts of land were thus ripped from Herero territory and occupied by German settlers, companies and troops.[9] Whereas missionaries of the Rhenish Missionary Society attempted to found protected reservations for indigenous communities on inalienable land, a significant number of German settlers, soldiers and administrative officers expressed discontent about reservation policies and demanded permission to occupy land without restriction.[10]

The deteriorating social and economic situation of the Herero, the proliferation of German settlement, arising conflicts between Herero and Germans and the unacceptable reservation policy of the colonial administration resulted in an insurrection against colonial rule.[11] On January 12th 1904, 5–10,000 Ovaherero attacked the military station Okahanja, as well as German settlements and farms, and killed 120 Germans.[12]

The German state reacted by creating propaganda that promoted revenge and punishment of the Africans.[13] Influenced by the racist ideologisation of German settlers, who insisted on a final decision in the *'Rassenkampf'* and a 'radical solution to the indigenous question', and fueled by propagandistic speeches of the colonial administration, an atmosphere of hatred and aggression developed among Germans.[14] Also, a war was a welcome opportunity to change the question of land and property according to the German interest.[15]

On January 13th, a state of war was proclaimed by Germany, first only in one region, then in whole GSWA and the command of the German troops was transferred to the General Staff in Berlin. In May 1904, Lothar von Trotha was assigned commander-in-chief, replacing former commander Leuthwein's approach of repression and negotiation with a strategy of military intervention and the use of force.[16] When von Trotha arrived in the region, around 35,000 Herero, including women and chil-

9 Gewald (note 2), 110 f.
10 Ibid., 112.
11 Zimmerer. 'Krieg, KZ und Völkermord in Südwestafrika. Der erste deutsche Genozid' in Zimmerer/Zeller (note 2), 46.
12 Drechsler, *Südwestafrika unter deutscher Kolonialherrschaft: Der Kampf der Herero und Nama gegen den deutschen Imperialismus* (Akademie Verlag 1966), 150.
13 Fischer/Čupić, *Die Kontinuität des Genozids: Die Europäische Moderne und der Völkermord an den Herero und Nama in Deutsch-Südwestafrika* (AphorismA 2015), 48.
14 Ibid., 49.
15 Ibid., 48.
16 Fabricius (note 6), 170 f.

dren were assembled in expectation of peace talks at the Waterberg. To the contrary, they were encircled by German soldiers and attacked. The Waterberg became the epicenter of the most crucial and devastating battle of the war.

The many Herero who could break through and flee were driven into the desert of Omaheke at gunpoint. Most of them died in the desert of dehydration, but still the battle was "to be continued as long as there was any possibility of a revival of the Herero's power of resistance."[17] On October 2nd 1904 the notorious extermination order by von Trotha was proclaimed, ordering all Herero to leave GSWA and German troops to kill: "Any Herero found within the German borders with or without a gun, with or without cattle, will be shot at. I no longer shelter women and children. They must either return to their people or will be shot at. This is my message to the Herero nation."[18] Soon after, the Nama, who had sided with the Germans until then, joined the resistance against colonial rule under the command of Hendrik Witbooi and faced the same fate as the Herero.[19]

As advised by the German Chancellor Bülow, who was concerned about Christian and humanistic principles, the proclamation was revoked on November 29th 1904 by Wilhelm II, after the genocidal phase had already ended.[20] The services of the Rhenish Missionary Society were made use of and concentration camps were built to host the 'rest of the Herero' in order to make them surrender.[21] The state of war was officially renounced on March 31st 1907, but fighting with Nama Chiefs[22] and war captivity only ended in 1908.[23]

Based on estimations, some 65,000 Herero and 10,000 Nama—about 80% and 50% of their populations respectively—had perished.[24] Amongst other tactics, the genocide was carried out through starvation and by the poisoning of Herero wells. About one-third died on the jour-

17 Ibid., 172.
18 See Bundesarchiv Berlin Lichterfelde, R 1001, Nr. 2089, Bl. 100 ff. cited in: Behnen (ed.), *Quellen zur deutschen Außenpolitik im Zeitalter der Imperialismus 1890–1911* (Wissenschaftliche Buchgesellschaft 1977), 291 ff.
19 Hillebrecht, 'Die Nama und der Krieg im Süden' in Zimmerer/Zeller (note 2), 121.
20 Zimmerer, *Krieg KZ und Völkermord* (note 11), 50, 53.
21 Fabricius (note 6), 173.
22 Kaulich, *Die Geschichte der ehemaligen Kolonie Deutsch-Südwestafrika (1884–1914) Eine Gesamtdarstellung* (Peter Lang 2001), 258, 263.
23 Zimmerer, *Krieg KZ und Völkermord* (note 11), 58.
24 Fabricius (note 6), 174.

ney to concentration camps and many died due to typhus, smallpox, and other diseases in the camps. They were subjected to forced labor, beaten and whipped by their captors. Women were raped or made concubines and many men were hung.[25]

With the closure of concentration camps, all surviving Herero were subjected to tight measures of control and surveillance to prevent any form of autonomous political organization and they were distributed as "labourers without rights"[26] to meet the need for work force in the colony in railway construction, farming and mining.[27] A decree adopted in 1905 paved the way for the expropriation of all property and assets, even reservations and cattle and a subsequent distribution thereof among German settlers and businesses. Consequently, the Herero were not only deprived of their material livelihood, but also a base to practice their traditions and customs, which were closely tied to cattle farming.[28] About 25% of the indigenous population were also deported to other regions of GSWA or other protectorates, such as Cameroon.[29]

German colonial rule ended with Germany's defeat in World War I and the entry of the South African army in 1915.[30]

3. The Herero's and Nama's struggle for justice

The genocidal war against the indigenous population of Namibia by the German Empire was decisive in putting direct domination in the central and southern region of present-day Namibia into practice.[31] The long-term effects of the genocide, to which Herero[32] representatives refer,

25 The Combat Genocide Association/Zimmerer/Neuberger, *Herero and Nama Genocide* <http://combatgenocide.org/?page_id=153> accessed July 27th 2018.

26 Gewald (note 2), 117.

27 Eicker, *Der Deutsch-Herero-Krieg und das Völkerrecht: Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904und ihre Durchsetzung vor einem nationalen Gericht* (Peter Lang 2009), 77.

28 Ibid., 77 f.

29 Schildknecht, *Bismarck, Südwestafrika und die Kongokonferenz: Die völkerrechtlichen Grundlagen der effektiven Okkupation und ihre Nebenpflichten am Beispiel des Erwerbs der ersten deutschen Kolonie* (LIT 2000), 267.

30 Gewald (note 2), 118.

31 Zimmerer, *Deutsche Herrschaft über Afrikaner. Staatlicher Machtanspruch und Wirklichkeit im kolonialen Namibia* (LIT Münster 2001), 13.

32 Representatives of the Herero community were the first ones to demand redress for the genocide and other colonial crimes by Germany. The Nama joined their de-

concern the social, political and economic structure, due to wholesale expropriation of indigenous communities from their land. This created not only the conditions for settlement of European farmers in nearly the entire region, but also affected the way history was constructed in the area, particularly with regards to the collective identity of many Herero and Nama groups.[33] The struggle for justice by the communities of victims' descendants have focused on the acknowledgement and an apology for the German genocide from 1904–1908, reparations for the loss and harm it created and the implementation of a commemoration culture to prevent similar atrocities in the future.

In 1923, the funeral of former Paramount Chief Samuel Maharero marked the effective creation of a unified Herero society that was tied to the history of war with Germany. Additionally, it sparked the creation of an annual commemoration important for re-telling Otjitiro Otjindjandja (meaning 'many people died in one place') among the communities.[34] The idea of seeking reparations from Germany was reportedly raised the first time by some Herero political elites soon after World War II, but since they were engaged in the struggle for Namibia's independence from South Africa, the endeavor lacked resources and interest at that time.[35] The first attempts to officially press for reparations were made shortly after independence in 1990, when the important Herero figure Riruako asked the Namibian president to deliver a letter to Germany demanding compensation for the eradication of 80% of the Herero—without success.[36]

At a state visit of German chancellor Helmut Kohl in 1995, a demonstration was held in Windhuk, in which more than 200 descendants of the victims participated and a petition was handed over.[37] Three years later, further petitions were delivered to German president Roman Herzog, one

mands, as well as the San and Damara more recently. Due to limited clarity and literature, a detailed account of the genealogy of involved communities cannot be given.

33 Kößler/Melber, 'Völkermord und Gedenken: Der Genozid an den Herero und Nama in Deusch-Südwestafrika 1904–1908' in Fritz Bauer Institut/Wojak/Meinl (eds.), *Völkermord und Kriegsverbrechen in der ersten Hälfte des 20. Jahrhunderts: Jahrbuch 2004 zur Geschichte und Wirkung des Holocaust* (Campus 2004), 236.

34 Morgan, 'Remembering Against the Nation-State: Herero's Pursuit of Restorative Justice' (2012) 21(1) Time & Society 21, 22, 24. Most Namibians simply refer to the happenings by the years of its duration: 1904–1907.

35 Ibid., 24.

36 Eicker (note 27), 82.

37 Delius, *100 Jahre Völkermord an Herero und Nama. Menschenrechtsreport Nr. 32 der Gesellschaft für bedrohte Völker'* (GfbV 2004), 17.

demanding financial compensation, another demanding a formal apology and the acknowledgement of the principle of reparation.[38]

The German president responded by expressing acknowledgement of the wrongdoing of German troops and Germany's moral responsibility. At the same time, he excluded a formal apology and compensation and avoided the term 'genocide'. Since the relevant international law created in 1948 was not applicable at that time, and Germany was already paying development aid to Namibia, the Herero's request was to be considered void.[39] This notion was contested publicly at a visit of Riruako. He raised the argument that the Herero did not benefit from Germany's development aid and highlighted the unequal distribution of land in Namibia. Also, a comparison between the fate of the Herero and the Shoa was drawn, demanding an equal handling of victims.[40] Namibian foreign minister Theo-Ben Gurirab supported that argument in 2001 when he denounced Germany's unwillingness to apologize for the genocide in Namibia as being motivated by racism.[41]

In 1998, the Herero filed a first legal complaint for the payment of compensation at the International Court of Justice (ICJ) in the Hague. It was refused based on Art. 34 of the ICJ statute, which limits access to the court to states.[42] Further legal actions followed. In September 2001 the Herero People's Reparation Corporation (HPRC) submitted a legal claim at the High Court of the District of Columbia in the USA, suing the companies *Deutsche Bank eG,* Terex corporation and *Deutsche Afrika-Linien* for 2 billion US Dollars of compensation. In a separate trial, Germany was sued for the same amount of compensation at the US Federal Court in Washington. Both of the accused were incriminated of genocide, crimes against humanity, expropriation, forced labor, slavery, destruction of culture and sexual abuse during colonial rule.[43] While mostly ignored, it should be highlighted that the statement of claim was not limited to

38 Eicker (note 27), 82 f.
39 Ibid., 83.
40 Ibid., 84.
41 Ibid., 84.
42 Ibid., 83 f.
43 Böhlke-Itzen, *Kolonialschuld und Entschädigung: Der Deutsche Völkermordan den Herero 1904–1907* (Perspektiven Südliches Afrika 2, Brandes & Apsel 2004), 26 f. Both legal actions were based on the *Alien Tort Claims Act,* a law introduced in 1789 enabling the prosecution of foreign companies, institutions and persons in case of damage or harm through the violation of international law or a treaty signed by the USA.

the crimes of 1904, but also included corporal abuse by German settlers and authorities after the war had ended, pointing to the broader context of violence and crime under colonialism.[44] In January 2017, another legal complaint was filed with the United States District Court for the Southern District of New York under the Alien Tort Statute. The case[45] was dismissed in March 2019.[46]

At the UN World Racism Conference in Durban in September 2001, the Herero raised their claims and were supported by a German human rights organization, the *Gesellschaft für bedrohte Völker,* for the first time.[47] Cooperations with German and international activist and NGOs were expanded over the years to come, culminating in recent transnational conferences in Berlin in 2016 and Hamburg in 2018.[48]

Nevertheless, the line of argument of Germany did not change until 2004. A turning point was the visit of a commemoration event on the occasion of the centennary of the battle of Waterberg by the German minister of development Heidemarie Wieczorek-Zeul. In her speech, she asked for forgiveness and spoke of a German war of annihilation against the Herero, which would nowadays be called genocide. Reparations were still ruled out, but help regarding the land reform planned by the Namibian government was announced.[49]

The German Ministry for Foreign Affairs asserts that about 1 billion euro have been invested in bilateral development cooperation with Namibia since 1990, the highest payment per capita in Africa.[50] A parliamentary resolution from 1989 set the foundation for this distinguished and historically motivated form of cooperation.[51] From 2007 until 2015

44 Ibid., 29.

45 https://www.dw.com/en/pressure-grows-on-germany-in-legal-battle-over-colonial-era-genocide/a-42267279, accessed July 20th 2018.

46 https://www.reuters.com/article/us-namibia-genocide-germany/lawsuit-against-germany-over-namibian-genocide-is-dismissed-in-new-york-idUSKCN1QN2SQ, accessed July 20th 2018.

47 Eicker (note 27), 84.

48 PR http://genocide-namibia.net/wp-content/uploads/2016/10/161011_Presse-release.pdf; https://colonial-amnesia-quovadishh.eu/, accessed July 20th 2018.

49 Morgan (note 34) 29 ff.

50 Ministry of Foreign Affairs [Auswärtiges Amt] 'Beziehungen zu Deutschland' (June 2018) <https://www.auswaertiges-amt.de/de/aussenpolitik/laender/namibia-node/-/208320>, accessed July 24th 2018.

51 Deutscher Bundestag, *Beschlußempfehlung und Bericht Drucksache 11/3934 Die besondere Verantwortung der Bundesrepublik Deutschland für Namibia und alle seine Bürger* <http://www.namibia-botschaft.de/images/stories/Namibia/bilateral/Bundestag/11_4205.pdf>, accessed July 20th 2018.

Germany also offered another 36 Million euro within a 'special initiative of reconciliation' intended to fund measures of communal development in the living areas of Herero, Nama, Damara and San, the communities which suffered most under colonial rule. An evaluation of the program is still outstanding.[52] The Herero surrounding Riruako refused the offer and insisted on reparation payments instead.[53]

The state of Namibia seemingly tried to soften Herero demands in the interest of national reconciliation.[54] When Namibia gained independence in 1990 the new state promoted nation-building and declared a national policy of reconciliation. Thus, the emphasis on a particular group's past did not accord with the government's priorities. "Reconciliation effectively meant adopting a Namibian identity and 'moving forward' rather than debating the historical responsibility of various groups"[55], what Sabine Höhn calls "collective amnesia".[56] Also, many Herero perceived that the SWAPO (South West African People's Organization) government directed land redistribution, development projects and service provision improvements almost exclusively to the Nothern region of the ruling party's constituency. "Where the Namibian government saw Herero claims as a challenge to the nation-state, some Herero saw their marginalization by their own government to benefit the German state."[57]

In October 2006, however, the Namibian parliament unanimously adopted a resolution requested by Riruako guaranteeing the Herero Namibian support in their pursuit of reparations from Germany. Since 2014, negotiations about an appropriate name for Otjitiro Otjindjandja,

52 Bundesregierung [Federal government of Germany], *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Niema Movassat, Wolfgang Gehrcke, Christine Buchholz, weiterer Abgeordneter und der Fraktion DIE LINKE.—Drucksache 18/8859*—Sachstand der Verhandlungen *zum Versöhnungsprozess mit Namibia und zur Aufarbeitung des Völkermordes an den Herero und Nama* (Berlin July 6th 2016) http://dip21.bundestag.de/dip21/btd/18/091/1809152.pdf, accessed July 20th 2018.

53 Eicker (note 27), 86 f.

54 Sarkin, *Colonial genocide and reparations claims in the 21st century: the socio-legal context of claims under international law by the Herero against Germany for genocide in Namibia, 1904–1908,* (Praeger Security International 2008), 55 f.

55 Morgan (note 34), 25.

56 Höhn 'International Justice and Reconciliation in Namibia: The ICC Submission and Public Memory' (2010) 109: 436 African Affairs, 471, 484–487.

57 Morgan (note 34), 28.

an apology, and a process of reconciliation are ongoing between representatives of Namibia and Germany.[58] There have been no results to date.[59]

Nonetheless, celebrations and commemoration events, such as Herero day in Okahandja and Heroes' Day in Gibeon, have been established. The events carry a message of reconciliation, both between various groups in Namibia and between the descendants of the survivors of genocide and the German state—but also demand a clear recognition of the happenings and the sincere determination to seek whatever redress is possible for past atrocities and injustice.[60]

Efforts by the Herero to raise awareness and build up political pressure have attracted national and international press and resonated broadly over the last decade, for example in a number of museums and exhibitions including information about the war of annihilation. The political pressure created is considered to have urged the German government representative Wieczorek-Zeul to formally apologize in 2004.[61] Motifs iteratively invoked by Herero are systematic racism and colonization, which formed the base for their impoverishment, and serve as a basis for their demands for land, reparations, truth and reconciliation.[62] The declaration of the first transnational congress on the Ovaherero and Nama genocides in October 2016 in Berlin adds the demand that "the Ovaherero and Nama communities [are] to be directly involved in negotiating a comprehensive solution, including recognition of the genocide, a sincere and appropriate

58 Bundesregierung, *Sachstand der Verhandlungen* (note 51); Christiane Habermalz and Jan-Philipp Schlüter, 'Deutschland verhandelt über Entschädigung der Herero' *Deutschlandfunk* (February 16th 2018) <https://bit.ly/2LB9W31> accessed July 27th 2018.

59 Krüger, 'Delegation aus Namibia macht Druck auf Bundesregierung' Spiegel (June 5th 2018) <http://www.spiegel.de/politik/ausland/namibia-deutschland-soll-verantwortung-fuer-herero-voelkermord-uebernehmen-a-1201421.html> accessed July 20th 2018.

60 Kößler, '"A Luta Continua": Strategische Orientierung und Erinnerungspolitik am Beispiel des "Heroes Day" der Witbooi in Gibeon' in Zimmerer/Zeller (note 2), 180–191.

61 Anderson, 'Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany' (2005) 93(4) California Law Review, 1155, 1185 f.

62 Gross. 'Why The Herero Of Namibia Are Suing Germany For Reparations' (National Public Radio May 6th 2018) <https://www.npr.org/sections/goatsandsoda/2018/05/06/606379299/why-the-herero-of-namibia-are-suing-germany-for-reparations?t=1532012650598> accessed July 20th 2018.

apology, as well as just reparations to the Ovaherero and Nama communities who continue to suffer the adverse effects of the genocide."[63]

4. Major challenges to the pursuit of (transitional) justice

Transitional justice has not yet been discussed in connection with the colonial genocide on the Nama and Herero in academic and political discourse. In the context of Namibia, it rather is an issue of debate as an option concerning the more recent events during the struggle for independence. After independence, SWAPO, the leading party in the struggle, introduced an unconditional general amnesty, avoiding accountability for past human rights violations. South Africa's acclaimed transitional justice body, the Truth and Reconciliation Commission, even asked for hearings in Namibia. The offer was rejected,[64] but South Africa's courage to address its brutal past impressed and inspired Herero activists to adapt the concept. Mbakumua Hengari of the Ovaherero Genocide Foundation explains: 'South Africa took a very bold step by creating a Truth Commission where people would come vent out and point fingers and, through that process, find a mechanism of trying to level out things.' In Namibia, this effort must come from within the Herero community.

The fact that transitional justice is being considered regarding Namibia's more recent history as well as the experience of its neighboring country could be built up upon. However, the Herero and Nama have also encountered a number of challenges, which are relevant for the applicability of transitional justice. Three major obstacles will be illustrated in more detail: the lack of acknowledgement of the events as a genocide and

63 1. Transnational Non-governmental Congress on the Ovaherero and Nama Genocide 'RESTORATIVE JUSTICE AFTER GENOCIDE Joint Resolution of the Delegates to the I. Transnational Congress on the Ovaherero and Nama Genocides Berlin, October 14–16, 2016' http://genocide-namibia.net/wp-content/uploads/2016/12/2016-12-01_CongressResolution.pdf, accessed July 20th 2018.

64 For a detailed account of the debate concerning justice for human rights violations by SWAPO in the course of the struggle for Namibia's independence see Conway, 'Truth and Reconciliation: The Road Not Taken in Namibia' 5(1) The Online Journal of Peace and Conflict Resolution <http://www.trinstitute.org/ojpcr/5_1conway.htm>, accessed July 20th 2018 or Hunter '"Wenn zu viel Wahrheit entzweit, wie viel Wahrheit ist wohl genug?" Umgang mit der jüngsten Vergangenheit in Namibia' in Schmidt/Pickel/Pickel (eds.), *Amnesie, Amnestie oder Aufarbeitung? Zum Umgang mit autoritären Vergangenheiten und Menschenrechtsverletzungen* (VS Verlag für Sozialwissenschaften 2009).

Germany's reluctance to participate in a justice process, the inapplicability of international law and the exclusivity of genocide in international memory politics.

4.1 Germany's trouble recognizing colonial genocide

While the collective memory and trauma among descendants of the victims lives on and has become an issue of concern for the majority of Namibian society, a century after the genocide, there is widespread amnesia or indifference in Germany, with little effort to address the injustice.[65] Still, there is no consensus concerning the question of wheter the atrocities committed by German troops on indigenous people in Namibia at the beginning of the 20th century are to be considered a genocide or not. Representatives of the communities assert that it was indeed a genocide, in reference to article 11 of the UN Security Council Resolution 1325 (2000).[66]

The first evidence in favor of the argument was published by German scientists in the late 1960s. The claim was then supported by various academic monographs in the 1990s, so that '[o]n the basis of these contributions as well as widely established contemporary definitions, we can describe the historical events that took place at the beginning of the twentieth century in eastern, central and southern parts of the German colonial territory called South-West Africa with confidence, as being tantamount to genocide.'[67] The UN-commissioned Whitaker Report further substantiated this conclusion by describing events in GSWA between 1904 and 1908 as the first genocide of the 21st century.[68]

Germany's position regarding the classification as a genocide remains unclear. On one hand, the German diplomat Martin Schäfer emphasized the government's position in 2015 as "The war of annihilation in Namibia

65 Melber, 'The Genocide in "German South-West Africa" and the Politics of Commemoration. How (Not) to Come to Terms with the Past' in Perraudin/Zimmerer (eds.), *German Colonialism and National Identity* (Routledge 2011), 252.

66 Congress on the Ovaherero and Nama Genocide (note 62), 2.

67 Melber (note 65), 252.

68 Drafted by the special rapporteur Ben Whitaker for the United Nations Subcommission on Prevention of Discriminiation and Protection of Minorities the document was adopted as *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (Document E/CN.4/Sub.2/1985/6, 2 July 1985).

from 1904 to 1908 was a war crime and a genocide."[69] Further, then-President of the *Bundestag* Norbert Lammert confirmed in a newspaper: "Measured by current standards, the abatement of the Herero uprising was genocide."[70] In September 2015, at the first reading of the parliamentary motion by the party *Die Linke* (leftist party) 'Reconciliation with Namibia—Remembrance and apology for the genocide in the former colony German-Southwest Africa' speakers of all parties in the German parliament applied the term 'genocide'.

On the other hand, no resolution has been passed by the Bundestag which acknowledges the genocide as such officially and the German government appears to continue to avoid the phrase.[71] Instead, German government representatives invoke the "special historical and moral responsibility" due to their entangled colonial past, which finds expression in the scope of development aid being paid to Namibia.[72]

Reparations, and a form of apology which could legitimate an entitlement, are excluded based on the arguments that development aid to Namibia makes reparations obsolete, that too much time had passed and that international law did not protect the civilian population at that time of the war.[73] Most especially the latter argument has been highlighted repeatedly and explained in detail in an elaboration by the German parliament's scientific service.[74]

In 2014, a political process of dialogue was initiated, aiming at formulating a common declaration about the atrocities, finding a dignified form of commemoration and remembrance, as well as to overcome the

69 Schäfer, 'Regierungspressekonferenz vom 10. Juli' (July 10th 2015) <www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2015/07/2015-07-10-regpk.html> accessed July 20th 2018.

70 Lammert in 'Bundestagspräsident Lammert nennt Massaker an Herero Völkermord' *Die Zeit* (July 8th 2015) <https://www.zeit.de/politik/deutschland/2015-07/herero-nama-voelkermord-deutschland-norbert-lammert-joachim-gauck-kolonialzeit> accessed July 18th 2018.

71 Bundesregierung (note 52).

72 Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (Federal Ministry of Economic Cooperation and Development) <http://www.bmz.de/de/laender_regionen/subsahara/namibia/index.jsp> accessed July 18th 2018.

73 Anderson (note 61), 1185.

74 Wissenschaftlicher Dienst Deutscher Bundestag, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908). Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen,* (September 27th 2016) <https://www.bundestag.de/blob/478060/28786b58a9c7ae7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf> accessed July 18th 2018.

noticeable effects of colonial rule in Namibia.[75] The German government announced the plan to conclude the talks by the end of 2016, then postponed the completion to the last federal parliamentary elections in September 2017 and until today, no official conclusion has been published.[76] In an agreement by representatives of both governments, Nama and Herero victims organizations should not be involved in the negotiations directly. Namibia, thereby, also acts against the Namibian parliamentary resolution which granted them the right to participate in such talks. Germany considers a judgment concerning their involvement an illegitimate interference with internal affairs of Namibia.[77]

As a recent survey by the Windhoek-based think tank Institute for Public Policy Research shows, however, Namibia's attitude is currently shifting. The Namibian public and population is getting anxious to see results and the Namibian government is losing patience. Two thirds of Namibians support the demand for reparations and slightly more than half want traditional representatives of the Herero and Nama to be involved in the negotiation. A major point of critique, not only by Herero and Nama leaders but also by German oppositional politicians and NGOs, is that the negotiations are taking place behind closed doors and are not transparent. The Namibian government also appears to take a closer position to the Herero's and Nama's claims, such as when the attorney general unexpectedly announced he was investigating a compensation claim against Germany.[78]

It should be noted that the German government invested in cultural and academic exchange to foster reconciliation, and that the development and testing of educational methods about the genocide on the Nama and Herero was funded in 2016 and 2017 after academics and activists had raised serious concerns.[79] Additionally, the German government confirmed—after having been pressured by civil society organizations for many years—that they are in dialogue with the Namibian embassy and

75 Bundesregierung (note 52), 1.

76 Kynast, 'Völkermord an Herero—In Namibia wächst die Wut auf Deutschland' *ZDF* (January 14th 2018) <https://www.zdf.de/nachrichten/heute/voelkermord-an-herero-wut-auf-deutschland-waechst-100.html> accessed July 27th 2018.

77 Bundesregierung (note 52), 5 f.

78 Deutsche Welle (May 9th 2018) 'Namibians losing patience over German slowness to act on genocide claims' https://www.dw.com/en/namibians-losing-patience-over-german-slowness-to-act-on-genocide-claims/a-43715135 accessed July 27th 2018.

79 Bundesregierung (note 52), 13.

German museums and collections in order to organize further repatriation of human remains to Namibia.[80]

Reckoning with its colonial past proves to be a long-term process of small steps for Germany, which is shaped by political structures and power relations in and between both countries. In March 2018, the party Die Linke issued a parliamentary motion including the acknowledgement of the genocide according to the respective UN convention and an official apology by Germany. The motion called for the inclusion of Herero representatives in the reconciliation dialogue, a plan to tackle the structural consequences of colonial rule and violence and a need to address the issue of public remembrance culture and education in Germany.[81] It remains to be seen if Germany will finally acknowledge the genocide and thereby take a pivotal step which can pave the way for future activities to handle its colonial past.[82]

4.2 Applicability of international law

It is without question that, from today's perspective, the atrocities and actions of annihilation which took place in colonial military conflicts constitute injustices. In international law they would be classified as war crimes, specifically genocide and crimes against humanity.[83]

Germany, among other European states, opposes this notion recalling the legal principle excluding retroactive effects and arguing that the crimes committed during colonial times can only be considered based on contemporaneous international legislation.[84] Indeed, the legal principle *tempus regit actum* regulating intertemporality in law assures exactly this, laid down for instance in Art. 28 of the Vienna Convention on the Law of

80 Ibid., 14.

81 Deutscher Bundestag, *Antrag Versöhnung mit Namibia—Entschuldigung und Verantwortung für den Völkermord in der ehemaligen Kolonie Deutsch-Südwestafrika* (Berlin March 16th 2018) http://dipbt.bundestag.de/dip21/btd/19/012/1901256.pdf accessed July 16th 2018.

82 Dokumentations- und Informationssystem für Parlamentarische Vorgänge (DIP), 'Basisinformationen über den Vorgang' <http://dipbt.bundestag.de/extrakt/ba/WP19/2333/233389.html> accessed July 22nd 2018. A continuously updated overview of all parliamentary actions concerning the relation to Namibia including English translations is offered by the Namibian embassy: http://www.namibia-botschaft.de/parlamentarische-initiativen.html accessed July 22nd 2018.

83 Fabricius (note 6), 35, 37.

84 Ibid., 35.

Treaties from 1969. The *Institut de drois international* reaffirmed in 1975 "[…] the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of the law that are contemporaneous with it."[85] Therefore, for a legal evaluation of the actions by German troops in GSWA, solely the law at that time is relevant and decisive.[86]

At the beginning of the 20th century, genocide was not yet codified in law. Only in 1948 did the Convention on the Prevention and Punishment of the Crime of Genocide enable criminal prosecution. Even if the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity from November 1968 excludes the temporal limitation of war crimes such as genocide[87], the problem of intertemporality explained above remains.

Another obstacle to the application of international law is the lack of an individual or community-based entitlement to reparations. A theoretical claim for reparations according to Art. 3 of the Hague Convention of 1907 only takes states, as subjects of international law, into account.[88] Anthony Anghie, professor of international law and proponent of the Third World Approach to International Law (TWAIL) criticizes this exclusivity. International law was systematically formed by a "complicity of positivism and colonialism" with a focus on sovereign territorial states according to the colonial interests of European colonial powers, in order to enable conquest and "oppression of the non-European world."[89] Even if this notion is debatable, it is a fact that in the 19th century, the definition of subjects of international law was eurocentric and limited. States outside of Europe had to apply and justify their willingness and capability to become part of the alliance of 'civilized states'.[90] International humanitarian conventions, both the Geneva and the Hague laws, were thus not applicable in colonial wars between European states and indigenous communities, because they were no parties to any treaties. Indigenous communities were not considered (potential) subjects of international law.

85 Institut de droit international 'The Intertemporal Problem in Public International Law' (Eleventh Commission, Rapporteur Max Sorensen 1975), at point 1.
86 Fabricius (note 6), 39.
87 Böhlke-Itzen (note 43), 15 f.
88 Ibid., 20.
89 Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 15.
90 Fabricius (note 6), 334.

Consequently, colonial wars were not considered international conflicts either[91] and international rules regulating military conflict and war were not applied to colonial wars, neither treaty-based nor customary law.[92] After the establishment of formal colonial rule in 1885, German national law was to be applied in GSWA. German law included some protection from arbitrary violence by European soldiers in the colony, but regulations did not apply to times of conflict.[93]

As Fabricius concludes her thorough legal analysis of the happenings in GSWA from 1904–1908, the conditions for the crimes of genocide and crimes against humanity are theoretically fulfilled, but at that time they were crimes of moral nature only, not from a legal perspective.[94] In his evaluation of the chances of success of the legal appeal by the Herero in 2001, Eicker reaches the same conclusion. Besides the immunity clause and the political question doctrine, which excludes political questions from being treated by federal courts, taking effect in the USA, the violations of international law, which were presented in the statement of case by the Herero, do not meet the legal prerequisites for a legal claim.[95] The legal actions by the Herero might have been and may continue to be unsuccessful on a material level, but it should be noted that they did in fact have an enormous political effect.[96]

Even if most scholars appear to agree on the perspective presented above, opposing views deserve mentioning. Rachel Anderson argues that the actions committed by the German colonial administration violated customary and treaty law and that the Berlin West Africa Convention and the Anti-Slavery Convention conferred third-party beneficiary rights of protection to the Herero Nation and its people, because Germany referred to them as a nation in documents.[97]

91 Ibid., 335

92 Fabricius (note 6), 336. It was only in the mid 20th century that humanitarian law was also recognized to be applied in domestic conflicts and that customary humanitarian legal standards would have to be considered in colonial wars also.

93 Ibid., 339.

94 Ibid., 343.

95 Eicker (note 27), 478.

96 Ibid., 503.

97 Anderson bases her argument on the notion that that the third-party beneficiary doctrine recognized in international law in the 1969 Vienna Convention on the Law of Treaties (Art. 34) and that the Herero community did fulfill the requirements of population, territory and government to be defined as a state at the end of the nineteenth century and Germany addressed them as such in treaties and other documents. Poisoning wells, killing women and children, and killing and wounding prisoners of war would have been illegal under the laws of war at that time. The

Implementing an approach of transitional justice, which is based on international law, seems to be impossible from a legal perspective. Additionally, introducing a base for seeking redress for colonial crimes does not appear to be a priority by the international community. In 2000, the United Nations Subcommission on the Advancement and Protection of Human Rights adopted a resolution named 'Mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery' which concludes that these crimes "should no longer benefit from impunity".[98] However, the final statement of the following World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, while acknowledging the suffering caused by genocide, no longer mentioned colonial wars or colonialism and their effects were referred to in a general terms only.[99] In that regard, Eicker argues that regarding the legal restriction as the sole basis for Germany to deny reparations would be naive.[100]

4.3 Exclusivity of victimhood on international level

The German genocide against the Herero has gained considerable academic and public prominence in the last two decades. At the same time, other atrocities such as the equally brutal suppression of the Mau-Mau movement in Kenya in 1952–7 or the so-called Maji-Maji War in current Tanzania, where the German policy resulted in the death of hundreds of thousands Africans, do not receive the same amount of attention.[101] As

war thus also violated treaty law prohibiting the annihilation of African peoples in reference to clauses in the Berlin West African Convention and the 1890 Anti-Slavery Convention that obliged colonial powers to protect indigenous Africans. See Anderson (note 60), 1178–1188.

98 UN Doc. E/CN.4/SUB.2/DEC/2000/114, Sub-Commission on Human rights decision 2000/114 'Mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery', August 18th 2000.

99 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration, September (2001) <http://www.un.org/WCAR/durban.pdf> accessed July 27th 2018.

100 Eicker (note 27), 496.

101 Schaller, 'The Struggle for Genocidal Exclusivity. The Perception of the Murder of the Namibian Herero (1904–8) in the Age of a New International Morality' in Perraudin/Zimmerer (eds.), *German Colonialism and National Identity* (Routledge 2011), 267.

Schaller analyzes, this fact is due to the selectiveness of an 'international morality', which developed after the Cold War and sought to recognize, apologize and possibly pay restitution for past injustice[102] resonating in the emergence of the field of transitional justice.

The selectiveness expresses itself through a competition between different victim groups, struggling for international recognition and inclusion into global collective memory.[103] The success of the Holocaust restitution movement in this endeavor has inspired other victim groups.[104] The Herero's remarkable achievement to attract so much attention as a victim group of a 'pre-modern' genocide can be, at least partly, attributed to having applied a strategy of comparison to the victims of National Socialism, especially Jews and forced laborers and highlighting the relevance of the genocide in Namibia as a precursor for the Holocaust.[105]

Numerous scholars have analyzed how the Namibian genocide has contributed to the establishment of a new pattern of extermination. The inherent racism of settler colonialism and change of discourse in publications, military practice and doctrines increased the acceptance of mass violence and killings and linked the ideas of 'decisive battles' and a 'final solution'.[106] Polemic and simplistic constructions of causality should, however, be dealt with care from an academic perspective.[107]

Many victims of the Nazi regime have been compensated by Germany by measures of '*Wiedergutmachung*' (lit. 'making good again'). In reference, the victims of colonial genocide would morally also deserve to be compensated on the ground of equal treatment. Taking into account that Nuremberg laws which were applied in the trials following the Nazi

102 Ibid., 267.

103 Ibid., 267 f.

104 Despite the ongoing Turkish government's denial, the mass murder of Anatolian Armenians has been successfully recognized by a number of international bodies, including the German Bundestag. Pro-Armeinan activists have applied a strategy of highlighting similarities to the Holocaust, a strategy which was highly successful.

105 Schaller (note 101) 270 f.

106 Melber (note 65), 258. See also Kößler/Melber, 'Völkermord und Gedenken: Der Genozid an den Herero und Nama in Deusch-Südwestafrika 1904–1908' in Fritz Bauer Institut/Wojak/Meinl (eds.), *Völkermord und Kreigsverbrechen in der ersten Hälfte des 20. Jahrhunderts: Jahrbuch 2004 zur Geschichte und Wirkung des Holocaust* (Campus 2004) 37–75. Zimmerer, 'Rassenkrieg und Völkermord: Der Kolonialkrieg in Deutsch-Südwestafrika und die Globalgeschichte des Genozids' in Melber (ed.), *Genozid und Gedenken* (Brandes & Apsel Verlag 2005), 23–48 or Fischer (note 13), 93–103.

107 Schaller (note 101), 273.

regime seem to have created genuine law, as well as the diverse forms of *Wiedergutmachung,* the relevance of the difference of applicability of international law fades from a moral standpoint. The accusation of a racist differentiation appears difficult to be refuted on that ground.[108] Upholding the unique status of the Holocaust the German government explained, that the term *Wiedergutmachung* specifically designated compensation for victims of the Holocaust and other injustice of the NS regime. Reparations, on the other hand, described the settlement between states, typically after acts of combat, based on international law.[109]

In Namibia, the Herero's claim for reparation for genocide has lead to political controversies and dispute among different ethnic groups. The SWAPO lead government, dominated by representatives of the Ovambo, refused to support their demands in the first place in order to not neglect other groups which were also affected by German colonial rule.[110] Herero groups have long ignored expressions of concern about their monopolization of victim status and the resulting promotion of tribalism.[111] Melber explains that "[t]he exclusivity of genocide results in the danger that through the acknowledgement of the Herero genocide, other colonial atrocities might be neglected or forgotten."[112] The Nama and the San were also subject to genocidal acts under German colonial rule in Namibia. After the Herero's defeat in 1904 German troops resorted to mass killings, deportations, incarceration in concentration camps and enslavement of Nama civilians in order to suppress their resistance. The nomadic San were regularly hunted by German troops and coerced into settling down in permanent villages until the end of Germany's rule in 1915, a clear case of cultural genocide.[113] Herero associations, however, have sought to unite with other communities affected by the German genocide in recent years, which may have contributed to the growing importance of justice and reparations for the majority of the Namibian population.

Germany's acknowledgement of the Turkish genocide against Armenians sparked another debate in public concerning the differentiated

108 Eicker (note 27), 495 f.
109 Bundesregierung (note 51), 10.
110 Schaller (note 101), 273 f.
111 The phenomenon of 'competition among victims' resulting in the claim of a monopoly victim status is certainly not limited to this case. The dominant association of the Holocaust with an exclusively Jewish victimization process, for instance, have lead to a long denied recognition of other victim groups such as Rom*nja and Sint*ezza or homosexuals. Melber (note 65), 257, 260.
112 Schaller (note 101), 275.
113 Ibid., 274. Melber (note 65), 252.

treatment of victims of genocide and fueled accusations of racism.[114] The selectiveness of granting the status of victimhood of genocide enacted on a national and international level, thus, does not only severely impede the pursuit of justice and reconciliation, but also appears to be the result of political processes and struggles.

5. Transformative transitional justice as a framework

As has been elaborated, Nama and Herero groups and activists have appealed to transitional justice concepts and mechanisms, such as (international) courts to seek redress in the form of reparations, demanding acknowledgement and an official apology. Further, they have also referred to other instances of transitional justice such as the Nuremberg trials and specific transitional justice instruments like truth commissions. However, the particular context of colonial injustice as illustrated in this case, its complex local and global causes and long-term effects, the inapplicability of international law due to the principle of intertemporality and its focus on states, and the seeming reluctance of involved states and the international community to seriously deal with the issue reveal some obstacles to implementing transitional justice in its 'original' form. Taking a perspective of more transformative transitional justice informed by a movement from below could offer a base for overcoming such limitations.

Transitional justice is a 'global project' and constitutes a dominant international framework for conceptualizing and seeking redress for systematic violations of human rights, such as genocide, other mass atrocities and widespread oppression.[115] It emerged as a field in the late 1980s as a reaction to the practical challenges human rights activists were facing in Latin American countries following authoritarian rule in 'transition to democracy'. The idea of accountability for past abuse was adopted on an international level and translated into legal-institutional reforms and responses, such as prosecution, truth-telling, restitution and reform of

[114] Muinjangue, Vorsitzende der Ovaherero Genocide Foundation, gegenüber der Zeitung "Die Welt" vom 8. Juni 2016 ("Der Völkermord an den Armeniern fand nur sieben Jahre nach dem an den Herero statt, hier sprechen die Deutschen plötzlich wie selbstverständlich von Völkermord […] Was ist der Unterschied? Die Herero sind schwarz, die Deutschen glauben, dass sie Schwarze nicht ernst nehmen müssen. Das ist für mich die einzige Schlussfolgerung.", www.welt.de/156078534).

[115] Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) Third World Quarterly, 275.

abusive institutions.[116] The field of transitional justice is, however, also a contested one and subject to continuous debate and development. Critique on the concept includes its legalistic approach neglecting political dimensions,[117] treating symptoms rather than the causes and its lack of achievements and impact.[118]

As an answer, transitional justice practitioners and scholars propose a radical reform of the politics, locus and priorities of transitional justice towards a more transformative nature. Transformative justice, as defined by Gready and Robins, thereby describes a "transformative change that emphasizes local agency and resources, the prioritization of process rather than pre-conceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both local and global levels".[119] It entails a shift in focus from the legal to the social and political, from the state and institutions to communities and everyday realities, based on a bottom-up understanding of analysis and needs. Lambourne outlines a transformative approach to transitional justice which entails four key elements: accountability or legal justice; truth and healing (psychological justice); socioeconomic justice; and political justice.[120] As a result, the tools of transformations could comprise a broad range of policies and activities that can impact the social, political and economic situation of several stakeholders, and are not restricted to, but may include, courts and truth commissions.[121]

Within a transformative framework, and informed by research findings, transition is not viewed as an interim process from linking one regime to another, but as a long-term, sustainable process of transformation embedded in society.[122] Also, Girelli proposes to open the definition of transition for the application of transitional justice "as (political) processes, and long-term ones, which not only seek justice but also acknowledge and plant the seeds for addressing root causes of conflicts and abuses,

116 Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) Human Rights Quarterly 31(2), 321.
117 McCargo, 'Transitional Justice and its Discontents' (2015) 26(2) Journal of Democracy, 5.
118 Gready/Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8:3 IJTJ 339, 340.
119 Ibid., 340.
120 Lambourne, 'Transformative Justice, Reconciliation and Peace Building' in Buckley-Zistel/Koloma Beck/Braun/Mieth (eds.), *Transitional Justice Theories* (Routledge 2017), 24.
121 Gready/Robins (note 118), 340.
122 Lambourne (note 120), 19.

and where spaces are carved for traditionally marginalised subjects to express their grievances. Transitions should consequently be approached as a forum for debate, critique, redefinition."[123] Goals of transitional justice are therefore not limited to establishing democratic state structures anymore. Scholars have highlighted the benefits of using the conceptual tools of transitional justice to describe and shape redress politics in established democracies, especially regarding settler colonial states.[124]

In recent times, an increased activism of indigenous groups has been witnessed in transitional justice scenarios, with the effect of pushing classical boundaries of the discipline.[125] Even if the Nama and Herero have not referred to transitional justice explicitly they nevertheless have integrated and appealed to key elements of transitional justice, such as reconciliation, overcoming impunity, truth-finding and how to come to terms with the past in general, as well as to measures typical of transitional justice such as apologies, reparations and appealing to international law at judiciary bodies. Similarly to the origins of transitional justice, activists are challenging the boundaries of the understanding of justice and how justice can be achieved through strategies that suit postcolonial analysis of colonial genocide and challenges they encounter in their pursuit of justice. Thereby they appear to address similar issues as have been pointed out by the conceptualization of transformative transitional justice from below.

5.1 Justice from below

Debates about 'transitional justice from below' have sought to set the focus on transitional justice 'on the ground' in the communities or organizations which have been affected by violent conflict directly. Experience shows that, as soon as 'the wheels of institutionalized international justice begin to turn' the voices of those most affected are not always heard or given adequate weight.[126] Examples of communities in Northern Ireland, Sri Lanka and Colombia demonstrate that the absence of viable international justice mechanisms has resulted in the creative energy for transition com-

123 Girelli, *Understanding Transitional Justice. A Struggle for Peace, Reconciliation, and Rebuilding* (Philosophy, Public Policy, and Transnational Law, Palgrave 2017), 299.

124 Winter, 'Towards a Unified Theory of Transitional Justice' *IJTJ 7(2)* (2013), 224.

125 Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 IJTJ 214; Girelli (note 123) ch 3.

126 McEvoy/McGregor, *Transitional Justice from Below: Grassroots Activism and Struggle for Change* (Hart 2008), 3.

ing from below. In such settings, it is often victim groups, community and civil society actors, including NGOs, that act as "engines for change".[127]

In his critique on the imperialist tendencies in international law and human rights discourse Rajagopal advocates the need for movements 'from below' to be 'written back into' struggles for human rights and social justice.[128] The development of effective methods of dealing with the past have been and still are not only marked by the deliberation of legal institutions or landmark cases but by the individuals and groups involved in social and political struggles. As Nyamu-Musembi illustrates "rights are shaped through actual struggles informed by people's own understandings of what they are justly entitled to" and therefore promotes an "actor-oriented perspective"[129] on justice. Such an approach acknowledges the reality of power differences and therefore points to the need to look beyond formal legal principles. Rather, an otherwise legalistic discourse of rights is used in a transformative manner challenging power inequalities in society.[130]

Herero and Nama communities' and activists' actions and demands clearly resonate with that framework and understanding of rights. Similarly to cases in other countries in transition, no adequate international or national bodies have been created which could be appealed to and addressing other institutional bodies like national courts in the USA has not been successful from a legal perspective. Nevertheless, the communities continue to organize themselves in creative ways, such as by building up networks between communities and civil society actors in Namibia, Germany and beyond, and formulating a common understanding of the events and context in Namibia in 1904–1908, as well as common demands.[131] Taking into account the specific context that many Herero and Nama were deported or had to flee at that time and that, as a result, a lot of community members are living in diaspora, they demand self-representation within talks towards reconciliation with the German government. Namibia cannot represent their community members without Namibian nationality.[132] Thereby they also challenge the dichotomy inherent to

127 Ibid., 3.
128 Rajgopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).
129 Nyamu-Musembi, 'Towards an Actor Informed Perspective on Human Rights', IDS Working Paper 169 (Institute of Development Studies 2002), 1.
130 Ibid., 2.
131 Congress on the Ovaherero and Nama Genocide (note 62).
132 Ibid., 3.

common understandings and practice of (transitional) justice between victims and perpetrators by introducing the community of descendants as an actor. Girelli suggests a corresponding broadening of the concept of subjects to transitional justice, to include "also those—individuals or groups—who underwent economic, historical and cultural violence (such as indigenous communities) […] in the context of or consequently to wars."[133]

In this way, justice from below and direct participation is used both as a practical strategy by Nama and Herero communities and as a demand directed at the involved states and the international community. In accordance with An-Na'im, they thereby also imply a demand to decolonize the understanding of the meaning of justice, as to be informed by the community, that "if it does not make sense to […] the community, it is not justice".[134] Documenting such forms of resistance can be viewed as a new task of transitional justice. Resistance can serve as a very promising basis for political reconciliation, because it shows possibilities for agency, solidarity and innovation.[135] Fostering participation and making resistance visible also acknowledges agency and can transform victimhood in an emancipatory way.[136]

5.2 Combining restorative and retributive approaches

Throughout the latest statements by Nama and Ovaherero is the request for a 'trialog' between community representatives, Namibia and Germany, within a process of restorative justice.[137] At the same time, various legal actions have been taken by Herero associations, the latest in 2017, suing Germany for reparations for its colonial crimes. Activist and community organizations thereby appeal to both, retributive and restorative conceptions of justice. Lambourne's theory of transformative transitional

133 Girelli (note 123), 295.

134 An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice' (2013) 7 IJTJ 199.

135 Gready/Robins, *From Transitional to Transformative Justice: A new agenda for practice Briefing Note TF-J* (University of York 2014) <http://www.simonrobins.com/Transformative%20Justice%20Briefing%20Paper.pdf> accessed July 27th 2018, 4.

136 Ibid., 4 f.

137 Cf. Cunneen, 'Restorative justice and the politics of decolonization' in Weitekamp E G M/Kerner H (eds.), *Restorative Justice: Theoretical Foundations* (Willan 2003), 32–49.

justice, likewise, proposes a syncretic approach integrating retributive and restorative justice.[138] Such an approach seeks to avoid compromise whilst also acknowledging that the process is inevitably messy and aims to enable a transformation of social, economic and political structures in addition to legal justice mechanisms to deal with the enormity of pain and destruction caused by violence and conflict.[139] It appears that the integrated strategy applied in the search for justice for the Herero and Nama genocides is an expression of precisely these needs. Additionally, integrating restorative justice to the transitional justice practice can create opportunities to pursue justice despite the non-applicability of international law. As has been illustrated, most scholars agree that a claim for reparations for colonial crimes by Germany cannot be substantiated on the basis of international law. Negotiations in a restorative justice setting, however are an option.

It should also be considered that establishing a right to redress through reparations for the Herero and Nama would set a precedent for dealing with colonial genocide, likely more so if taking place in a retributive setting which is generally more accepted in the international sphere of justice. The proposed trialog as a restorative justice setting could decrease the pressure and risk for Germany in that regard, but at the same time pave the way for case specific negotiations in other cases of colonial injustice.

5.3 The entanglement of the legal and political

Judicial procedures suing states for reparations do, as this case shows, not only serve the purpose of a financial claim. Most of all, communities hope for a document of official recognition of the injustice they were subjected to and an acknowledgment of their loss and trauma as well as an official apology as an expression of respect for the victims. Suing for that recognition is rather a desperate act vis-á-vis the political failure to open the way to make amends.[140] The legal action against companies and Germany by the HPRC in New York in 2001 did not only have a legal purpose. It was also aimed at gaining international attention and creating awareness about the issue, in order to build up political pressure.[141]

138 Lambourne (note 120), 20–39.
139 Ibid., 19–20.
140 Böhlke-Itzen (note 43), 24 f.
141 Eicker (note 27), 492.

As has been explained, the international law which can be applied in the case of the genocide was created in and is informed by the historic setting of that time. Racism and a politically motivated conception of subjects of international law, that served the colonial and imperial interests of European states led to the fact that humanitarian and war law was not applied at that time. The German government even asserted the racist conception of international law at the time of the genocide as a legitimation to exclude reparations.[142] Legal actions by Herero representatives thus also point to the fact that international law and law in general is always a result of a political process and setting, even if or rather because they fail.

This also becomes evident by the comparison between how the Herero and Nama genocide and the Holocaust were dealt with. Considering that new laws were created so that perpetrators of the Nazi regime could be prosecuted in a legal form in the Nuremberg trials while the German state repeatedly refers to the inapplicability of international law to disclaim demands for reparations by Herero and Nama, the political nature and flexibility of law and its application become clear. This fact also explains why Herero representatives continue accusing the German government of racism.[143]

The argument that "law, emerging from political processes of negotiation and deliberation, is itself always political" is also supported by Girelli who points to the risk of not dealing with this fact openly in the practice of transitional justice.[144] The legal and the political should rather be handled in their entanglement.

5.4 Addressing structural effects

With regards to addressing indigenous harm, Balint, Evans and McMillan advocate that including structural justice will enhance the ability of transitional justice to recognize and address colonial injustice and its structural continuities or effects.[145] Transitional justice mechanisms usually deal with periods of exceptional violence and institutionalized crime with state forces being the main perpetrator. They thus usually follow a conception of violence as violation of physical integrity. Systemic violence, as

142 Wissenschaftlicher Dienst Deutscher Bundestag (note 74), 16.
143 Eicker (note 27), 496.
144 Girelli (note 123), 296 f.
145 Balint/Evans/McMillan (note 1) 194.

a less visible form of violence inherent in the social, political and economic system, and often root causes of conflicts, have not received the attention in the field that they deserve.[146] Indigenous communities often experience these different kinds of violence, and the relations between them, which continue in the form of a politico-economic context of historic and ongoing dispossession and of contemporary deprivation and poverty.[147] A meaningful transition might thus be conceived as a primarily economic endeavor, entailing redistributive policies, socio-economic rights and structural reforms of the political and administrative to achieve social and economic justice. As Girelli finds "the dominant paradigm of transitional justice often appears to fall short of offering meaningful avenues for rectifying ongoing injustices centered on land dispossession and self-determination that impact some 350 million indigenous peoples residing in 70 states around the world."[148]

Not only reparations, but also the current distribution of land marked by a concentration of farming land in the hands of businesses owned by *white* descendants of European settlers has been an issue repeatedly raised by Herero and Nama communities. While the Namibian government has initiated some land reform, for which Germany has announced its support, the Herero and Nama are not satisfied by the results.[149] The Herero and Nama see their economic situation as a direct result of the genocide in 1904–1908 and German colonial rule, which marked the starting point of total forceful expropriation. They have never been compensated for their "forced labour or for the complete loss of their land, livestock and properties".[150] Reconciliation for colonial genocide is regarded as intrinsically intertwined with economic aspects, even more so due to the context of colonialism. As has been explained, activities of tradesmen and economic interests played a vital role in the German colonization of Namibia and were interwoven with political interests.[151] In the current negotiations, however, Germany refuses to recognize land distribution as a means of compensation for the consequences of the genocide.[152]

146 Girelli (note 123), 257.
147 Ibid., 258.
148 Girelli (note 123), 261.
149 Melber, 'No land in sight' *Development and Cooperation* (June 9th 2017) <https://www.dandc.eu/en/article/despite-independence-1990-land-ownership-remains-unfairly-distributed-namibia> accessed July 28th 2018.
150 2016 Declaration, 2. Also Melber (note 149).
151 Fischer, 37–45.
152 Melber (note 149).

The notion that transitional justice should also offer redress for long-standing socio-economic violations, or to outline developmental and economic policies, is also contested in academic debates. Exceeding the 'natural mandate' of transitional justice would risk creating unrealistic expectations and these concerns should rather be left to other disciplines such as development.[153] Such an argumentation is contested by the Herero's and Nama's refusal of development aid. Germany's argument that the extraordinarily large amount of development aid paid to Namibia would serve the purpose of undoing the economic harm resulting from colonialism (and thereby equal reparations)[154], does not meet the demands of the communities of Nama and Herero. They demand economic restitution as reparations, not development aid, since reparations also provide an official recognition of the past and the connection of the past to the present.[155]

Additionally, this argument points to another structural continuity of the relation between Germany and its former colony. The vision of Namibia and its people, as well as Africa in general, in Germany is still mostly shaped by a patronizing attitude, informed by racist colonial imaginations of the other as 'uncivilized' and needy of help.[156] Racism as a legitimizing structure of colonization and genocide, as well as a continuous societal power structure is also addressed by Herero and Nama. Racism is explicitly evoked as a problem regarding the differentiated treatment of victims of genocide who are and are not of African descent, emphasizing the need of political education about racism in German society. It is a central theme in the communities' networking activities. Nama and Herero associations mostly cooperate with local German organizations addressing issues of racism, especially against people of African descent, such as the Initiative of Black People in Germany (Initiative Schwarze Menschen in Deutschland Bund e.V.).

A limited legalistic focus on civil and political rights, and on individuals, can be particularly problematic for indigenous people when it detracts attention from broader structures of discrimination that led to and resulted from the conflict.[157]

Further, the power relations and dependencies which also resulted from colonialism are an issue of discussion. Namibia, for quite a long time, has refused to support the Nama and Herero's claim for reparations,

153 Girelli (note 123), 273.
154 Eicker (note 27), 498; Böhlke-Itzen (note 43), 99 f.
155 Sarkin (note 53), 429 f.
156 Böhlke-Itzen (note 43), 125.
157 Girelli (note 123), 259.

presumably also due to a fear of losing Germany's financial support in the form of development cooperation on which they are, to some extent, dependent. In contrast to reparations, development aid from Germany is mostly tied to conditions such as a liberal market policy and 'good governance'.[158] Also within Namibia, political power relations have to be considered. Herero have repeatedly expressed the feeling of being politically marginalized in Namibia. Having lost 80% of their population in the genocide might have influenced their current political status. Morgan also argues that this feeling of being sidelined, heightened the interest of some Herero of addressing their experience with early colonialism.[159]

Elements of transformative justice can be helpful to consider and address all of these interwoven structures of power and economic relations through its critical evaluation of "intersecting power relationships and structures of exclusion at both local and global levels."[160] The struggle of the Nama and Herero thereby not only points to economic effects of colonial crime, but also to the role of structural racism in the way colonial injustice is (not) dealt with and of political structures on a local and global level.

6. Conclusion

This chapter has started out by raising the issue of connecting the struggle for justice by Nama and Herero communities for the colonial genocide by Germany in 1904–1908 to the concept of transitional justice. An analysis of the the context of the genocide shows that atrocities cannot be dealt with in an isolated manner, but root causes such as economic interests and racist ideologization as well as structural effects like economic hardship and land deprivation have to be accounted for as well. Seeking justice in respect of these interwoven aspects must be a long-term process.

Transitional justice as a field can offer a fruitful ground for such a process, if adapted to the needs of post-colonial justice. The analysis has revealed the limitations of legalistic approaches, as well as those of international law in general regarding colonial injustice. "[A] neocolonial approach to justice that evaluates the experiences of former colonies in terms

158 Böhlke-Itzelt (note 43), 100.
159 Morgan (note 34), 25.
160 Gready, Robins (note 135), 1.

of the path set for them by colonial administrations"[161] calls for a broader debate about decolonization and the acknowledgement of the need to address colonial injustice on an international level.

Considering elements of transformative justice models and transitional justice from below can open ways to account for power relations on a national and international level, offer space for marginalized groups to voice their perspective and shift the focus to social, political and economic issues. Other actors beyond states and institutions, such as companies and civil societies, can also be addressed and involved. In combination with the inclusive use of restorative and retributive justice these steps can help to overcome the limitation of legalistic approaches and broaden the perspective of transitional justice to include social justice as a goal.

As in the case for the German genocide on indigenous people in Namibia, transformative models of transitional justice may offer an adequate frame for the involved actors to consider. Restricting the debate and measures to legalistic aspects and limiting the involvement to states without participation of the victims' descendants, will probably not lead to successful reconciliation. As the victims' associations have announced, they will continue to organize transnationally and from below. Their voices for justice cannot be ignored any longer.

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[161] An-Na'im (note 134).

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Structural and Socioeconomic Approaches to Justice: Transformative Justice in Nicaragua's 'Dual Transition'

Sean Conner

Abstract Transitional justice is conventionally theorized as how a society deals with past injustices after regime change and alongside democratization. Nonetheless, scholars have not reached a consensus on what is to be included or excluded. Recent ideas of transformative justice seek to expand the understanding of transitional justice to include systemic restructuring and socioeconomic considerations. In the context of Nicaragua—where two transitions occurred within an 11-year span—very little transitional justice took place, in terms of the conventional concept of top-down legalistic mechanisms; however, distinct structural changes and socioeconomic policies can be found with each regime change. By analyzing the transformative justice elements of Nicaragua's dual transition, this chapter seeks to expand the understanding of transitional justice to include how these factors influence goals of transitions such as sustainable peace and reconciliation for past injustices. The results argue for increased attention to transformative justice theories and a more nuanced conception of justice.

1. Introduction

Until recently, most academic literature on transitional justice has focused on legal-political and top-down mechanisms, such as truth commissions, judicial prosecutions, reparations, lustration, and amnesty.[1] Nonetheless, the conceptual boundaries of the field have often been pushed by both scholars and practitioners. The result is that the definition and framework of transitional justice lacks a strict consensus, and instead has become con-

[1] Arthur, 'How "Transitions" Reshaped Human Rights: a Conceptual History of Transitional Justice', 31(2) Human Rights Quarterly 2009, 321–367.

text- and goal-dependent.[2] Among the recurring themes, however, are the ideas of transition from violent conflict to peace, democratization, and addressing past injustices.

Nicaragua, one of the lesser studied cases of transitional justice—following the Sandinista Revolution in the 1970s and again after the Contra War of the 1980s—is a notable example of how both conventional and unconventional conceptions of transitional justice overlap. In what can be referred to as a dual transition, Nicaragua underwent two dramatic and distinct attempts to transition from violent conflict to divergent perceptions of peace, democracy, and justice. Analyzing these transitions from a conventional perspective, however, reveals that there was minimal use of prescribed transitional justice tools; of the aforementioned approaches, only amnesty was actively and faithfully pursued.[3] While there is clear value to the analysis of Nicaragua's dual transition in this context, the approach overlooks some of the central issues that dominated national and local debate during this timeframe.

Several scholars have explored a theoretical shift from transitional to transformative justice, with the latter focusing on socioeconomic and grassroots approaches to justice following a transition. As Paul Gready and Simon Robins explain in their article, *From Transitional to Transformative Justice: a New Agenda for Practice,* transformative justice aims to create "conditions for sustainable peace" by "addressing root causes and adopting holistic responses…", borrowing from the conflict transformation model.[4] The central issue of the sustainability of peace is often referred to indirectly in transitional justice texts; for example, Terence Roehrig frames the realization of judicial prosecutions in Argentina as a balance between justice and maintaining peace between different factions in the country.[5] However, there are other conditions beyond the legal-political to consider in the generation of sustainable peace—namely, the social, structural, and economic conditions in a society.

Given the nature of Nicaragua's transitions—which unmistakably involve disparate models of political, social, and economic relations—it is

2 Fletcher/Weinstein/Rowen, 'Context, Timing and the Dynamics of Transitional Justice: a Historical Perspective', 31(1) Human Rights Quarterly 2009, 163–220.

3 Bothmann, *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past,* Springer, 2015, 157–176.

4 Gready/Robins, 'From Transitional to Transformative Justice: a New Agenda for Practice', 8(3) International Journal of Transitional Justice 2014, 352.

5 Roehrig, 'Executive Leadership and the Continuing Quest for Justice in Argentina' 31(3) Human Rights Quarterly 2009, 730.

necessary to analyze which unconventional approaches to transitional or transformative justice accompanied the general amnesty. By synthesizing ideas from different scholars, this chapter will use the categories of structural and socioeconomic justice as a basis for analysis. The goal of this method is to expand the current understanding of how transitional justice has been perceived and conducted in the past; in other words, it is vital to consider which unconventional methods of transitional or transformative justice have played an important role before, during, and after historical transitions. The interplay of causes, justifications, and results in Nicaragua's dual transition will provide insights on how these factors may influence other transitions.

In the following sections, this chapter will discuss: 1) an explanation and delineation of transitional and transformative justice approaches to be considered; 2) the history surrounding Nicaragua's dual transition and empirical data regarding conditions and outcomes; 3) the structural changes to institutions and participation for each transition 4) the socioeconomic policies developed and reformed in each transition; and 5) the insights these transformative justice mechanisms give into the character of Nicaragua's dual transition. This chapter will limit the historical analysis to the context of the dual transition and the administration of Violeta Chamorro in the 1990s. While it is important to note that some aspects of transitional justice, both socioeconomic and civil-political, occurred after this timeframe, this chapter will not address those matters.

2. Expanding on Conventional Transitional Justice Analysis

Transitional Justice as an academic concept began to take form with the end of World War II, as the Allied Powers attempted to deal with the atrocities and war crimes committed by the Axis Powers. The term has evolved significantly since then and has more recently been used to analyze cases of transition from one regime or situation of violence to a peaceful and often democratic regime—such cases include Argentina after the 'Dirty War,' Rwanda after the Genocide in the 1990s, and the Balkans region following the breakup of Yugoslavia.[6] Despite a level of standardization to the field (for both academic and practical purposes),

[6] Teitel, 'Transitional Justice Genealogy', 13 Harvard Human Rights Journal 2003, 89–92.

there remains no agreement on which mechanisms are to be included in the field, nor on how to effectively implement these tools in a transition.[7]

Nonetheless, the most prominent concepts of transitional justice include the use of truth commissions, prosecutions, reparations, lustration, and amnesty—all of which are implemented through a top-down, institutional approach.[8] Truth commissions deal with the collection of information regarding atrocities committed prior to a transition through the collection of primary documents and victim testimonies, with the goal of sharing the final reports publicly and clarifying otherwise ambiguous accounts of events. Prosecutions, on the other hand, seek to punish those responsible for human rights abuses and other misdeeds prior to the conflict. Reparations imply monetary payments to victims or the families of victims. Lustration punishes those who were associated with human rights violations by disqualifying them from certain roles in politics. Finally, amnesty refers to the pardoning of human rights violators in an attempt to limit punishments, emphasize forgiveness, and preserve a level of peace and order. Amnesties can be granted selectively or universally ('blanket amnesties'). Each case of transitional justice has been unique in its choices and implementation of these methods, something that often occurs over an extended period of time and may or may not involve the international community.[9]

While analyzing transitions through these mechanisms produces meaningful analysis on how transitions take place and the goals of the leaders of the transition, some scholars have sought to expand what may be considered as tools of transitional justice. Here, it is important to note a distinction between academic research regarding past transitions and practical discussion or involvement in current or future transitions. Some scholars approach new transitional justice concepts not as a theoretical analysis of past transitions, but rather as a practical approach to apply.[10] Nonetheless, the expansion of transitional justice terms and mechanisms for analyzing past transitions may provide new insights that have previously been ignored. There are numerous arguments for including or excluding certain concepts of transitional justice; below, the most relevant to the case of Nicaragua are presented and justified.

7 Arthur, 357–364.
8 Bothmann, 33–47; Arthur, 347.
9 McCargo, 'Transitional Justice and Its Discontents', 26(2) Journal of Democracy 2015, 5–20.
10 Arthur, 357–360.

Thomas Obel Hansen emphasizes the need to reimagine the theory of transitional justice as a differentiated theory, with various iterations and circumstances dependent on the characteristics of a society, rather than creating one generalized theory.[11] A distinction must be made between liberal and non-liberal states during a transition; in other words, the characteristics of the regime that replaces an old regime in a transition is not necessarily democratic or may limit civil and political rights. These transitions, Hansen contends, must be analyzed differently than liberal transitions; this does not, however, mean that the transition or justice is necessarily illegitimate. Rather, one must consider the strength of pre-existing institutions (or lack thereof) to serve the needs of society, the context of the transition, and the handling of past injustices.[12]

Hansen also develops three interconnected goals of transitional justice: preventing the recurrence of abuses, creating a more just society, and attending to the needs of victims.[13] While all three may be addressed in part by conventional transitional justice mechanisms, Hansen argues for a wider interpretation of these goals. Preventing the recurrence of abuses includes, for example, "demobilization of paramilitaries, a political settlement and reforms that allow for the restructuring of abusive institutions, and increased transparency and accountability…"[14] Attending to the needs of victims extends beyond top-down measures to active inclusion of all types of victims, whether from direct or structural violence. This is particularly important in the context of women and ethnic minorities. Lastly, the goal of creating a more just society connects directly to the other two goals:

> *If access to political, economic, and social resources is not made more equal, chances are that those victimized in the past will continue to feel victimized, or that new groups will be marginalized. If so, risks are high for a return to violent conflict.*[15]

This final concept directly relates to Gready and Robins' notion of transformative justice, which is defined as "transformative change that emphasizes local agency and resources, the prioritization of process rather than

11 Hansen, 'Transitional Justice: Toward a Differentiated Theory', 13(1) Oregon Review of International Law 2011, 1–54.
12 Hansen, 41–46.
13 Ibid., 41–46.
14 Ibid., 42.
15 Hansen, 43.

preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level."[16] Rather than seeking to replace legalistic or top-down approaches, transformative justice is seen as a multi-disciplinary approach that encompasses the political, economic, and social elements of transition at all levels from institutions to communities and subcommunities. The process includes grassroots decision-making and extends the definition of violence from direct or immediate violence to structural and cultural violence as well.[17] Relating to Hansen's goals of transitional justice, Gready and Robins highlight a need to balance transitional justice mechanisms and the establishment of a sustainable peace. Additionally, the analysis of power relations and inclusion and exclusion of factions of society are essential within the context of transitions.[18]

Regarding socioeconomic rights, Lisa J. Laplante argues that often the root causes of pre-transition violence are structural violence—underprivileged segments of society experience poverty, exclusion, and inequality without recourse or government assistance.[19] On one hand, these concerns can be addressed through democratic mechanisms post-transition, allowing all citizens a voice; on the other hand, transformative justice must take into account factors like access to education, healthcare, infrastructure, and food and job security. By addressing these issues, Laplante argues, the risk for a return to conflict is greatly reduced, since the fundamental causes of the original conflict have been addressed.[20] Such issues are addressed in International Covenant on Economic, Social, and Cultural Rights (ICESCR), which may serve as a guideline for socioeconomic justice.[21] Laplante also suggests a hybridization of approaches, such as granting space and attention to socioeconomic rights within a truth commission and using the results to make recommendations for new social and economic policies.[22]

Equally important in the transformative justice approach is the quality of being *process-oriented,* rather than outcome-oriented. Gready and

16 Gready/Robins, 340.
17 See Galtung, 'Cultural Violence', 27(3) Journal of Peace Research 1990, 291–305.
18 Gready/Robins, 350, 357.
19 Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework', 2 The International Journal of Transitional Justice 2008, 332–334.
20 Ibid., 346–354.
21 UN General Assembly, 'International Covenant on Economic, Social, and Cultural Rights', 993 United Nations Treaty Series 16 December 1966, 3–106.
22 Laplante, 333.

Robins emphasize that causes of violence that prevent sustainable peace do not only occur prior to a transition, but also *during* a transition.[23] There is a possibility for resistance to approaches that are top-down or that ignore the needs of certain segments of society. Thus, the participation of a wide range of communities and minority groups in all phases of the transition is essential to addressing root issues of a conflict in a sustainable and effective manner. Outcomes remain important, but dependent on the process.

While the concept of transformative justice is very new and continues to be developed and refined, its application in analyzing past instances of transitions may provide new insights. There are limited examples of research into unconventional transitional justice mechanisms, although Gready and Robins mention Rwanda's *gacaca* courts and Timor-Leste's Community Reconciliation Process as local, grassroots approaches to justice.[24] Likewise, some scholars have noted the socioeconomic efforts made by countries like South Africa, where the participation and inclusion of black communities was a central element of the transition, and Nicaragua, where the socialist ideology of the Sandinistas influenced transitional policies.[25] However, these studies tend to focus on specific elements of transformative justice, such as participation or representation.

This chapter seeks to address a wider range of characteristics associated with transformative justice and analyze them in the context of Hansen's differentiated approach to transitional justice. The first area of concern will be the structural nature of the transition, including the characteristics of institutions in the new regime, their inclusivity or exclusivity, and grassroots engagement. Second, a focus on the socioeconomic tools implemented during transitions is necessary, particularly with regards to poverty and inequality. Third, the relation of these mechanisms to the underlying causes of violence and to the creation of sustainable peace must be analyzed. The selected categories do not address all of the criteria related to transitional justice, but rather are used to expand the use of the concept in academic studies and draw conclusions on how the concept may further be applied in future research. While the third point seeks to relate the use of transformative justice mechanisms to the overarching

[23] Gready/Robinson, 340.
[24] Ibid., 349–350.
[25] Fletcher/Weinstein/Rowen, 184–186; Reed/Foran, 'Political Cultures of Opposition: Exploring Idioms, Ideologies, and Revolutionary Agency in the Case of Nicaragua', 28(3) Critical Sociology 2002, 354–356.

goals of transitional justice, this should not be perceived as an evaluation on effectiveness nor as assuming causal relationships. Rather, the analysis and findings regarding this question are meant to relate to the claims of transformative justice theorists regarding their reasonings for applying this new model.

Using Nicaragua's dual transition as a case, this chapter will outline these differentiated approaches to transitional justice and analyze how this expansion may extend our understanding of transitional justice in both academic literature and practical usage. The dual transition provides unique insights due to the divergent and ideologically-charged approaches of both the FSLN in the 1980s and the government of Violeta Chamorro in the 1990s.

3. Nicaragua's Dual Transition: Priorities and Conflicts Post-Somoza

Nicaragua has a long history of conflict and regime change dating back to its independence. Similar issues of governance, foreign influence, economic inequality, and social inequities dominate much of Nicaraguan history.[26] Nonetheless, the Sandinista Revolution and fall of the Somoza regime represented a unique ideological and economic shift as the *Frente Sandinista de Liberación Nacional* (Sandinista National Liberation Front, or FSLN) strove to address the ills they recognized in society. The Somoza regime, which held power from 1936 to 1979, was an illiberal and repressive government that kept wealth concentrated in the hands of a few elites and suppressed various movements for democratic reforms.

The FSLN began in the 1960s as an oppositional movement and evolved into a guerilla force until eventually forming a political party and playing a central role in Nicaragua's first transition. Their ideology centered not only on the expansion of civil and political rights (CPR), but also economic, social, and cultural rights (ESCR), integrating socialist and liberation theories.[27] Regarding the former, the FSLN's primary goal was to overthrow the Somoza regime, and establish a revolutionary government. Further CPR goals included the independence from intervention or influence from outside countries (most notably the United States), the

[26] See Kinzer, *Blood of Brothers: Life and War in Nicaragua,* Harvard University Press, 2007.

[27] Bothmann, 72.

establishment of a participatory democratic system, an end to corruption, and the extension of human rights—including freedom of expression and the right to assemble—to all members of society. Social and economic demands of the FSLN included redistribution of land to address social inequality and reform of the welfare system to improve the standard of living for the large lower class.[28] It is important to note, however, that the FSLN was neither homogeneous nor the only voice of opposition to the status quo. Elizabeth Dore and John Weeks argue that:

> *The movement that overthrew Somoza was led by a polyglot group of men and women with little clear plan for what would occur once the dictatorship had been defeated. In so far as there was a unifying ideology it involved the fervent conviction that the New Nicaragua would be free from the domination of the United States, and the economy of the country would be reorganised to provide more benefit to the lower classes.*[29]

In the years leading up to the first transition, massive human rights abuses were rampant throughout the country, of which the majority were committed by the Somoza regime. Torture, arbitrary detention, and state terror were government responses to civil resistance. Further, corruption, press censorship, and election manipulation were common practice and limited Nicaraguan citizens' rights to express themselves and participate in political, social, and economic decision-making.[30] The result was a consolidation of both power and wealth among a small community of elites and a lack of attention to the needs of the Nicaraguan people, especially those suffering from poverty and inequality. Great inequalities existed in relation to gender rights, health services, and education, which have all been studied as causes for the rise of the FSLN and similar groups against Somoza.[31] What is clear from analyzing the growth of the anti-Somoza

[28] Ibid., 71–76; Williams, 'Dual Transitions From Authoritarian Rule: Popular and Electoral Democracy in Nicaragua', 26(2) Comparative Politics 1994, 169–185.

[29] Dore/Weeks, *The Red and the Black: the Sandinistas and the Nicaraguan Revolution,* University of London Institute of Latin American Studies, 1992, 22.

[30] Kinzer, 19.

[31] See Arnove/Dewees, 'Education and Revolutionary Transformation in Nicaragua, 1979–1990', 35(1) Comparative Education Review 1991, 92–109; Garfield/Taboada, 'Health Services Reforms in Revolutionary Nicaragua', 74(10) American Journal of Public Health 1984, 1138–1144; and Molyneux, 'Mobilization Without Emancipation? Women's Interests, the State, and Revolution in Nicaragua', 11(2) Feminist Studies 1985, 227–254.

movement is that a deprivation of both civil-political and socioeconomic rights were direct causes for the uprising of the FSLN and other rebel factions.

The first transition came with the fall of the Somoza regime in 1979 and the formation of the *Junta de Gobierno de Reconstrucción Nacional,* consisting of members of the FSLN, smaller political movements like the Movimiento Democrático Nicaragüense (Nicaraguan Democratic Movement, or MDN), and other interested parties, like labor unions and business groups. As in most transitions, the decision-makers and their approaches changed and adapted over the following years. Initial actions to address civil and political injustice were the abolition of the constitution, dissolution of the National Congress and other state institutions, and the banning of images and symbols related to the Somoza regime.[32] Special expedited trials were set up against those involved in the dictatorial regime, and basic human rights—including the right to participate in political, social, and economic matters, the right to assembly, the prohibition of torture and legal rights to a trial and counsel—were guaranteed to all Nicaraguan citizens through the Statute on the Rights and Guarantees of Nicaraguans.[33] Regarding socioeconomic transitions, the Junta began campaigns for literacy and vaccinations, created a free education and healthcare system, redistributed plots of land including the seizure of land owned by Somoza supporters and wealthy landholders, and women were given a formal equality to men in politics and the economy.[34] In the years following the fall of the Somoza regime, the FSLN also consolidated power in the government and ruled in a unilateral manner, despite elections in 1984.[35]

Simultaneously, the start of a counterrevolution (or Contra War) prevented the formation of a stable peace in the country and undermined the transitional authorities. Notably, the support and organization of the United States for those discontent with Sandinista rule fueled the violence throughout the 1980s. Nonetheless, the concerns of certain groups in Nicaraguan society formed the basis for participation in the resistance to the FSLN: landowners and elites voiced concerns of property loss and

32 Bothmann, 76–81, 115–121.

33 Envío Team, ' Human Rights: Nicaragua's Record', 76 Envío Digital, retrieved from: http://www.envio.org.ni/articulo/3174, accessed September 30th 2018.

34 See Austin/Fox/Kruger, 'The Role of the Revolutionary State in the Nicaraguan Food System', 13(1) World Development 1985, 15–40; Bothmann, 76–80; Molyneux, 238–251.

35 Williams, 178.

economic restructuring; indigenous tribes felt imposition on their autonomy; those who benefitted from the Somoza regime's time in power felt unfairly persecuted; and many simply disagreed with the ideology and direction in which the FSLN wanted to lead the country.[36] Further, the form of democratic participation and representation was questioned by many groups in society, which was amplified by the consolidation of power by the FSLN in all four branches of government (executive, legislative, judicial, and electoral) and the adoption of several laws that limited civil and political rights.[37]

The FSLN was made to change its policies as a result of the resistance and violence that accompanied the backlash. Its form of representative, or 'Popular Revolutionary Democracy' shifted toward a more traditionally conceived liberal democracy; while at the same time, many of the rights promised by the Statute on the Rights and Guarantees of Nicaraguans were restricted. Nonetheless, many of the socioeconomic policies adopted by the regime carried on despite the conflict.

Violence and human rights abuses, including kidnapping, torture, and arbitrary detention, were perpetrated by both Sandinista and Contra forces throughout the 1980s, leading to a second transition in 1990. With the involvement of the international community—primarily other Latin American countries such as the Lima Group, Costa Rica, Mexico, Colombia, and Venezuela—the peace process began in the early 1980s.[38] However, it was not until the 1990 elections and transfer of power to Violeta Chamorro, a non-Sandinista politician, that the second transition took hold and the conflict began to settle. Various earlier peace accords focused on democratization, amnesty, national reconciliation, and a sustainable peace, and for the most part these were implemented after the second transition.[39] The *Protocolo de Procedimiento de Transferencia del Mando Presidencial de la República de Nicaragua* (Protocol for the Procedure of Transfer of the Presidential Mandate of the Republic of Nicaragua, or Transitional Protocol) was designed during negotiations on

[36] Brown, *The Real Contra War: Highlander Peasant Resistance in Nicaragua,* University of Oklahoma Press, 2001; Foran/Goodwin, 'Revolutionary Outcomes in Iran and Nicaragua: Coalition Fragmentation, War, and the Limits of Social Transformation', 22(2) Theory and Society 1993, 222–227; Henriksen/Kindblad, 'Neoliberalism, patriarchal rule, and culture change at the turn of the twentieth century: the case of Tasbapauni', in Baracco (ed.), National Integration and Contested Autonomy: The Caribbean Coast of Nicaragua (2011), 201.

[37] Bothmann, 76–79, 135–138.

[38] Bothmann, 91–92.

[39] Ibid., 96–98.

the transition and further outlined the specific conditions of the transfer; namely, a continuation of the structure of the armed forces (though with a reduction of the overall size), protection for labor unions and mass organizations, job guarantees for state officials, civil authority over police forces, and compensation for landowners who had their properties seized after the first transition. Further promises were made to provide assistance and pensions to those harmed in the war and to disarm both the army and Contra forces.

The changes brought on by the Chamorro government were significant but limited and the FSLN continued to hold significant control over the army and many government institutions, despite a reduction in the size of the former.[40] Instead, the following years were characterized by volatility and a focus on maintaining peace. The 1987 constitution drafted by the FSLN remained in place (constitutional reform would take place several years after the second transition), blanket amnesties were introduced, and there is very little evidence that displaced former landowners received any compensation for lost land.[41] However, one of the larger changes during the Chamorro administration was the retreat from mixed economic policies that supported cooperative production and distribution toward a more free market or neoliberal capitalist economic model.[42]

With regard to conventional transitional justice mechanisms, neither the regime of the 1980s nor that of the 1990s chose to implement strategies to deal with past injustices. The Junta and FSLN had just one method of dealing with the human rights violations of the Somoza regime: associates of the regime were to be put on trial and punished for crimes. Trials, however, centered around the idea of 'victor's justice' and were conducted arbitrarily through special tribunals and appeals courts. These courts have been criticized for convicting defendants with a vague definition of 'human rights violations'—namely, anyone associated with the Somoza regime—insufficient evidence, and in expedited timeframes.[43] Far from a liberal definition of justice, it is clear that the FSLN's approach to addressing past injustices consisted of eliminating all traces of the previous regime; still, the approach did little to aid the transition of society. The mid-1980s through the election of Violeta Chamorro were

40 Dore/Weeks, 32–34.
41 Bothmann, 100.
42 Utting, Amalia Chamorro, and Christopher Bacon, *Post-conflict Reconciliation and Development in Nicaragua: the Role of Cooperatives and Collective Action,* United nations Research Institute for Social Development Working Paper 2014-22, 2014.
43 Bothmann, 118.

dominated by the use of amnesties, and finally the adoption of the *borrón y cuenta nueva* policy, centered around forgetting past conflicts and moving forward.

While reasons for each regime's choice in respective approaches to transitional justice have been advanced, it remains uncertain whether these policies truly addressed the underlying conditions that led to violence and human rights abuses. Following Hansen's goals of transitional justice, it can be argued that underlying conditions were not addressed by amnesties or trials; however, other actions may have attempted to address these issues, such as through structural adjustments or social and economic policies. Nonetheless, it is clear that each regime had distinct perceptions of which underlying causes were most important and how to address them given the context in which the transitions took place. Therefore, it is essential to analyze how these unconventional methods of transitional justice were implemented and what consequences may have arisen as a result.

4. Systemic Changes: Development of Institutions and Systems of Inclusion

4.1 First Transition: The FSLN's Popular Revolutionary Democracy and the Evolution of Liberal Democracy

Oppressive regimes tend to rule within structural and institutional conditions that allow for human rights abuses and exclusion of sections of society, such as women or indigenous peoples, from participation or decision-making. Transitional justice has often been imagined in the context of a transition from such a regime to a liberal democracy; however Hansen contends that there is a spectrum of liberal-illiberal transitions and that the particular institutional and structural setting that is created by the transition is in fact part of the attempts to deal with past injustices. Gready and Robins expand this argument to include active participation and decision-making roles for members of underrepresented communities to ensure that new policies and other transitional justice approaches accurately meet the needs of these groups.[44] Such inclusive processes seek to address underlying causes of violence and conflict within a country.

[44] Gready/Robins, 357–358.

The fall of the Somoza regime and formation of the Junta in 1979 brought an end to the illiberal rule of the past 43 years as well as the structures—like the constitution, National Congress, National Guard, judiciary, and other state institutions—that supported it.[45] Thus, brand new institutions were to be formed, initially by the Junta and later by the Council of State and Cabinet. Among the first actions of the Junta was to enact the Statute on the Rights and Guarantees of Nicaraguans, a positive step toward liberalization and democratization in the country. Similarly, the adoption of the Law for Political Parties in 1983 and a new constitution in 1987 enshrined equal rights for men and women, rights to health, education, social security, housing, and environment, freedom of assembly and to form political parties, and created a separation of powers through four branches of government—the executive, legislative, judicial, and electoral. Conversely, the Sandinista regime imposed limits to rights throughout the 1980s, due in a large part to the continued violence of the Contra War. A State of Emergency was imposed immediately after the fall of Somoza and was followed by various iterations up through 1988. The result was the suspension of many of the rights included in the previously mentioned documents, including the right not to be arbitrarily detained, the right to strike and freedom of expression, movement, and association.[46] Further, the judicial system set up to prosecute human rights abuses under the Somoza regime was widely seen as 'victor's justice,' with little to no regard for civil and political rights.[47]

The FSLN's domination over the creation of new institutions further shaped the regime's liberalization, but in a very particular manner; rather than a liberal, Western-style democracy, centered around elections as democratic participation, the FSLN strove to develop a 'Popular Revolutionary Democracy,' characterized by the mobilization of grassroots organizations in both rural and urban spaces having the ability to participate in politics.[48] Beyond these bodies, the development of traditional, liberal democratic institutions were not given priority in the early 1980s. These mass organizations were given formal representation in the Council of State and had legitimate influence over decisions made by the FSLN. However, relations between the state and grassroots organizations were not always amicable, and were "tied closely to the government's percep-

45 Bothmann, 76.
46 Ibid., 122–132.
47 Bothmann, 118.
48 Foran/Goodman, 224; Williams, 172–176.

tion of the external threat."[49] Elections in 1984 presented an opportunity for the inclusion of liberal democratic values within the evolving structure of new Nicaraguan institutions. While international election observers characterized the elections as free and fair, the abstinence of a large coalition of business groups and labor unions undermined its legitimacy.[50]

It may be easy to dismiss the FSLN regime of the 1980s as nondemocratic or illiberal, however an analysis of the context of the transition provides some deeper insights. Primarily, the continuation of violence during the transition by a variety of factions, led the FSLN to make difficult choices about what political freedoms and institutions could be developed and over what timeframe this could be done. Initial promises of civil, political, economic, and social freedoms were partially reversed in an effort to push security and peace; nonetheless, there is some evidence that these protective measures actually increased participation in rebel groups.[51] Other contextual factors, such as post-revolution economic devastation and outside influence from the US also affected the FSLN's ability to adopt new and effective institutions from the beginning of the transition. Countries in economic turmoil need more time to form new and strong institutions and often prioritize the reconstruction of society over the formation of a liberal democracy.[52] Nonetheless, the pressure to stabilize the country following the transition may have pushed the FSLN leadership to adapt their institutions and systems. This imbalance of interests and needs could explain the FSLN's mixed approach and eventual shift toward more liberal democratic structures in the late 1980s.

The participation of concerned parties through unions and grassroots movements also formed a major part of the FSLN's approach to transitional justice throughout the 1980s. Their attempts to create a 'Popular Revolutionary Democracy' involved many underrepresented actors—rural cooperatives, poor workers, women among them—in the decision-making process through mass organizations. The *Unión Nacional de Agricultores y Ganaderos* (National Union of Farmers and Ranchers of Nicaragua, or UNAG) was able to modify a government resettlement program as well as reforms to agrarian law.[53] Still, not all segments of society were represented equally or granted equal influence. The *Asociación de Mujeres Nicaragüenses Luisa "Amanda Espinoza"* (Luisa Amanda Espinoza Asso-

[49] Williams, 177.
[50] Bothmann, 129; Williams, 178.
[51] Foran/Goodwin, 228.
[52] Hansen, 14.
[53] Williams, 173.

ciation of Nicaraguan Women, or AMNLAE), for instance, has addressed some practical problems that women face, yet their program "remains one conceived in terms of how functional it is for achieving the wider goals of the state."[54] Further, the influence of such organizations was drastically reduced following the 1984 elections.[55] The inability of some groups to express themselves within the new system also contributed to the rise of violent resistance. The case of indigenous populations on the Caribbean coast of Nicaragua illustrates this most clearly—the attempts of the FSLN to integrate the strongly autonomous communities into their regime led to feelings of alienation and to the mobilization of indigenous masses into resistance forces through MISURATA and MISURA.[56] While given representation in the Council of State, relationships remained hostile.

By the mid-1980s, the FSLN was already enacting a number of reforms to deal with the conflicts in the country. A liberalization of the political and electoral systems, peace talks with rebel groups, and amnesties replacing trials were all key elements of this shift. Given that the systems and institutions were created anew, and within the context of continued violence and poor economic performance, it is reasonable that the institutions would need to adapt and develop. The illiberal state of emergency laws and trials of ex-Somoza supporters could be justified as necessary to develop and protect institutions; nonetheless, their implementation was reminiscent of similar laws in place during the Somoza regime. The involvement of underprivileged groups in creating a new and more fair system also held the potential to create a truly inclusive and socially conscious transition. Limits placed on extent of participation—including an imbalance of decision-making power between different groups, the hierarchical structure of organizations (taking power away from smaller, more local organizations), and eventually the reduction of structural influence on the government—hindered the FSLN's ability to execute truly transformative justice measures. Nonetheless, the FSLN's concessions to their vision of justice were necessary for bridging the gap between the regime and the Contras and for a prompt end to violence.

54 Molyneux, 251.
55 Dore/Weeks, 32–34.
56 Bourgois, 'Nicaragua's Ethnic Minorities in the Revolution', 36(8) Monthly Review 1985, 38–40.

4.2 Second Transition: Balancing Liberalization and Sustainable Peace

The elections of 1990 represent a major turning point in the structure of institutions in Nicaragua, although the legacy of the FSLN's years in power remained to a degree. The various peace accords signed, and in particular the Sapoá Accord of 1988, served as a "negotiated transition" and set forth many of the structural reforms carried out by the Chamorro government.[57] Structural conditions included a return to guaranteeing freedom of expression, political participation for all through elections, and the establishment of a western-style liberal democracy.[58] Further structural changes and concessions to FSLN institutions came immediately following the election of 1990 and the creation of the Transitional Protocol—specifically, respect for the integrity of the armed forces amidst a reduction in numbers (a Sandinista-dominated institution), constitutional protection for mass organizations and labor unions, job guarantees for state officials (which were also FSLN-dominated), subordination of the national police to civil authority, and, perhaps most importantly, retention of the 1987 constitution.

Notably, this second transition did not eliminate the institutions established by the FSLN, but rather modified them. Many of the fundamentals of a liberal, electoral democracy had been established in the years leading up to 1990, although plenty of areas of contention still existed. In one case, the Chamorro government ordered the police to close the National Assembly and seize its assets, after the supreme court annulled the assembly election.[59] Further, by conceding to allow many FSLN-dominated institutions to remain in place—with the goal of pursuing peace and reconciliation between the different governing factions—the transition did not address some of the central structural issues that led to the conflicts of the 1980s. While civil and political liberties were gradually restored, institutions remained only partially liberal with endemic instability, internal contradictions, and the potential for exploitation.[60] For

[57] Bothmann, 105.
[58] Kinzer, 374.
[59] Williams, 181–182.
[60] See Martï i Puig, 'Nicaragua: Chapiolla Democracy', in Levine/Molina (eds.), The Quality of Democracy in Latin America (Lynne Rienner Publishers, 2011), 173–200; Martí i Puig (Claire Wright, Trans.), 'The Adaption of the FSLN: Daniel Ortega's Leadership and Democracy in Nicaragua', 52(4) Latin American Politics and Society 2010, 79–106.

example, the FSLN maintained a significant level of influence and power, engaging in "behind-the-scenes lobbying" to persuade Chamorro's government to change economic policies and acted as a mediator between the government and mass organizations like those of the sugar and banking industries.[61] The goal of ending violence and creating stability was a major factor in the agreement on the Transitional Protocol and may explain in part the degree of structural changes that the second transition brought. One attempt to reform the constitution in 1995 brought the Chamorro government to "the verge of ungovernability."[62] Economic conditions began to improve, although struggles continued and may have contributed to the lack of reformation of institutions during the early 1990s.

The modified liberal, electoral democracy that took form in the late 1980s and early 1990s significantly changed the access and participation of different segments of society. No longer possessing direct access to government institutions or decision-making privileges, the preexisting mass organizations had to rely on government representatives being receptive to their needs and demands. While these changes began during the FSLN regime in the 1980s, the groups still had significant connections to the Sandinistas and thus more opportunities for participation; in the years following the second transition, mass organizations' relation to official institutions deteriorated and the organizations became frustrated.[63] Several groups that felt underrepresented turned to other means of expression, including strikes and violence in the years that followed. While overall civic involvement continued to increase during the 1990s, the struggle of many groups to have their concerns addressed illustrates the retreat from participatory, grassroots mechanisms of transformative justice. Moreover, elites and the business community gained more influence in formal government structures than during the FSLN's regime.[64]

The use of blanket amnesties as a conventional transitional justice tool is also noteworthy. The balancing of political, economic, and social factions within Nicaragua was essential to curbing violence in the early 1990s.[65] While the use of amnesties avoids the illiberal practices of the trials against Somoza affiliates in the 1980s, it is characteristic of the volatile situation that the Chamorro government had to mediate during its time in power. The use of amnesties may have reinforced the FSLN's hold

61 Williams, 182.
62 Bothmann, 158.
63 Williams, 180–181.
64 Foran/Goodwin, 234; Williams, 180.
65 Bothmann, 162–166.

on power in the military, police force, and various government institutions and certainly did not change the structure of institutions. At the same time, a blanket amnesty portrayed the new government as impartial in a very divided society.

It must be repeated that transitional and transformative justice occur over extended periods of time. Systems, institutions, and the involvement of mass organizations have continued to develop after the end of Violeta Chamorro's presidency in 1996.[66] While these later changes may have had an effect on the sustainable peace in Nicaragua, it is valuable to compare the periods of transition of the FSLN and the Chamorro government to understand how initial approaches between the two differed and what policies were changed immediately following the second transition, as these institutional changes addressed discontents with FSLN structures. Further, these structures directly relate to economic and social policies put forward by each of the transitional governments. The ideologies and approaches to dealing with the economic and social discontents influence structural choices and in turn these structural choices influence how the governments respond to the needs of different groups within society. Thus, the analysis will now turn to the socioeconomic factors addressed by each transition.

5. Socioeconomic Justice: Limited but Potent Changes for the Underprivileged

5.1 First Transition: Economic Restructuring, Expanded Access to Resources, and Discontents

Prior to the Sandinista Revolution, inequality in Nicaragua was widespread and multifaceted. A small percentage of the population owned the majority of land in the country, most Nicaraguans lived in extreme poverty, and minority groups felt the effects of poverty particularly strongly.[67] Economic and political power were concentrated in the hands of a few elites while most Nicaraguans saw little or no improvements in their socioeconomic conditions. This disparity created further inequalities in health, education, and access to food or employment opportunities. Edward Muller and Mitchell Seligson make a particularly strong case

[66] Puig, 94–96.
[67] Bothmann, 70; Kinzer, 268.

for how these socioeconomic deficiencies influenced citizens' decisions to pick up arms and join the movement against the Somoza regime alongside political repression, overall economic development and political violence.[68] Agrarian inequality, alongside a semi-repressive regime, low economic development, and governmental acts of coercion, are among the most important determining factors for political violence.

These inequalities were a major part of the FSLN and other rebel groups' platforms for change prior to and during the first transition. Among the Junta's first actions in power was a complete overhaul of the socioeconomic policies of the past five decades. The largest programs included a literacy or alphabetization campaign, a vaccination campaign, and a massive redistribution of property.[69] These adjustments created nearly instantaneous improvements to the living conditions of poorer Nicaraguans in the early 1980s: vaccinations for Malaria, Measles, DPT, and Polio increased drastically, causing a 50% decrease in malaria cases and a virtual end to Polio and Measles; illiteracy was reduced to 13% from 50%; and agricultural cooperatives increased their share of land.[70] On a larger scale, the FSLN designed a mixed-economy system with a range of public and private enterprises and corporations, including *Corporaciones Nacionales del Sector Público* (National Corporations of the Public Sector, or CORNAP).[71]

Nonetheless, socioeconomic policies were not without their setbacks. Nicaragua's economic underdevelopment prevented the FSLN's socioeconomic campaigns from moving at a faster pace and limited resources were spread thin between social programs and the Contra War.[72] The violence of the war itself further limited the development of social and economic policies because of the risk to the volunteers carrying out the campaigns, who on several occasions were kidnapped or intimidated.[73] Further, some

68 Muller/Seligson, 'Inequality and Insurgency', 81(2) The American Political Science Review 1987, 425–452. See Figure 4. Observed Causal Paths in the Multivariate Causal Model, 442.

69 Bothmann, 126.

70 Austin/Fox/Kruger, 'The Role of the Revolutionary State in the Nicaraguan Food System', 13(1) World Development 1985, 21–24; Bothmann, 126; Garfield/Taboada, 'Health Services Reforms in Revolutionary Nicaragua', 74(10) American Journal of Public Health 1984, 1143.

71 Bothmann, 126; Rodríguez/Rivas, 'Inequality and Welfare Changes: Evidence From Nicaragua', in Nellis/Birdsall (eds.), Reality Check: The Distributional Impact of Privatization in Developing Countries (2005), 118–120.

72 Austin/Fox/Kruger, 32; Dore/Weeks, 19.

73 Bothmann, 149.

policies were responsible for fostering the anxiety, discontent, and mobilization of opposition to the FSLN, most notably those regarding land reform and private property.[74] Consequences included a severe labor shortage in the agroexport sector and hyperinflation. In the second half of the 1980s, the FSLN modified policies and attempted to include the upper and middle classes within its economic policies.[75]

Social policies focusing on marginalized groups also brought mixed results. While many women's issues were addressed, such as the Provision Law that sought to create gender equality in the household, improvements to women's health and safety provisions at work, and entitlement to their own wages rather than to the male head of household.[76] Further, structural equality of women and more general economic policies like those previously mentioned benefitted women more than men—traditionally more men were educated and earned money for the family. Nonetheless, women's rights remained in this context of economic reform as the primary goal of the FSLN.[77] Similarly, the FSLN attempted to address the discontents of the indigenous communities on the Caribbean coast. Philippe Bourgois notes that the Caribbean coastal economy and culture had very little connection to Managua or western Nicaragua.[78] Further, the economy of eastern Nicaragua did not experience the same drastic economic inequality that was present in the west of the country. FSLN attempts to integrate the coast into a more centralized state and economic structure lead to feelings of alienation and resentment in indigenous communities; despite significant contributions from the FSLN in the form of government services and investments, many indigenous communities were displaced by violence and imposition between anti-government forces and the FSLN.[79]

Similar to structural and systemic transitions, socioeconomic policies changed and evolved over the course of the FSLN's rule in the 1980s. The pressure of the Contra War and poor economic conditions influenced the implementation and effectiveness of projects and forced reconsiderations from leaders in the later years. While many economic policies directly addressed root causes of the Sandinista Revolution, they were not con-

74 Foran/Goodwin, 228.
75 Ibid, 225–226.
76 Molyneux, 247–248.
77 Boesten/Wilding, 'Transformative Gender Justice: Setting an Agenda', 51 Women's Studies International Forum 2015, 78.
78 Bourgois, 31.
79 Bothmann, 143–148.

ducted with consideration to all segments of society. Short-term policies like the vaccination and literacy campaigns proved effective, but larger reforms like land reform as well as the overall restructuring of the economy were met with skepticism and backlash. Further, social policies targeting minorities and the most vulnerable communities were not prioritized to the same degree as the economic reforms and did not fully take differences into account.

5.2 Second Transition: Capitalism, Privatization, and a Shift of Attention

The transition to the Chamorro government of the 1990s again changed the direction of socioeconomic policy in Nicaragua. Many in the Chamorro government's coalition were former elites that had opposed the FSLN's approach to a mixed economy and favored a Western-style capitalist economy. Literacy programs and healthcare initiatives diminished, in particular the access for lower socioeconomic classes, and state-owned enterprises and CORNAP began the process of privatization, placing large corporations back in the hands of the elites.[80] These changes had real and stark effects on most citizens of Nicaragua, above all the poorest and led to inequality levels comparable to those during the end of the Somoza regime. Nonetheless, the overall economic condition of Nicaragua improved under Chamorro with hyperinflation coming under control in 1992, followed by reductions in the budget deficit and an increase in international investment.[81]

Some elements of Sandinista reforms remained in place, such as the socioeconomic rights guaranteed in the constitution to education, healthcare, and some reforms to the national economic system.[82] While education and healthcare accessibility fell under Chamorro, they remained more available to the economically underprivileged than during the Somoza regime. Further, the influence and power of unions and trade groups may have diminished, but was not altogether eliminated.[83] Promises of land and pension compensation—for former landowners who lost land during the FSLN's rule and former combatants, respectively—guaranteed in the

80 Rodrígues/Rivas, 85–121.
81 Williams, 182.
82 Constitute Project, *Nicaragua's Constitution of 1987 with Amendments through 2005,* Oxford University Press, 2014.
83 Williams, 181.

Transitional Protocol were not met, however. In the case of land, 83% of rural properties that were under review in 1990 had not been settled by 2001.[84] These issues led to some continued violence from both Contras and FSLN soldiers in the early 1990s; however, this violence was not as widespread or long-lasting as the prior conflicts.

For minority groups in the country, the second transition did not address many issues. While compensation for former combatants was provided, those who experienced the worst human rights abuses during the Contra War—specifically women and indigenous peoples—received no compensation.[85] Moreover, the return of elites to power in Nicaragua shifted focus farther away from minority rights to a traditional civil-political approach, where all citizens have formal rights to participate in liberal democratic institutions.

6. Lessons from the Dual Transition: Confronting Transformative Justice, Goals, Timeframes, and External Factors

As evident in the preceding analysis, Nicaragua's dual transition brought distinct structural changes to institutions and socioeconomic policies, although it would be a mistake not to recognize the context in which the transitions occurred as well as the compromises that each transitional regime made. Looking at these structures as a component of transitional or transformative justice, there are several key takeaways.

The first finding is that while neither transitional regime employed any significant mechanisms of conventional transitional justice beyond amnesty, each reformed systems to reflect their vision of a more just society. In the case of the FSLN, the socialist ideology sought to bring economic and social justice to those who had suffered under severe inequality and poverty during the Somoza regime. Providing resources for education, healthcare, and employment opportunities gave these communities new opportunities that had not existed under Somoza and which many who participated in the revolution had fought for. The FSLN also created completely new institutions, removing those which had been abused by the Somoza regime in the prior decades. These new structures, however,

[84] Broegaard, 'Land Tenure Insecurity and Inequality in Nicaragua', 36(5) Development and Change 2005, 852.

[85] Bothmann, 100.

did not completely remove the potential for abuse, as evidenced by the enactment of various states of emergency. Further, while the 'Popular Revolutionary Democracy' involved a wide range of actors in the form of grassroots organizations, the extent to which these groups were able to influence decisions varied and uneven power structures favoring the FSLN prevented the mechanism from allowing for full and active participation.

The transition to a liberal democracy with the ascension of Violeta Chamorro to the presidency saw the implementation of vastly different methods of transformative justice. Eleven years after the fall of Somoza, the Chamorro government focused on bringing stability to the country through institutional and economic reforms. While the second transition did not address socioeconomic concerns of the underprivileged, the reforms nonetheless affected social and economic outcomes. The institutional and economic mechanisms of justice did not have a strong attachment to grassroots movements and thus the transition was led with more of a top-down approach than the first transition; nonetheless, the retaining of some institutions from the FSLN regime shows that the second transition was not an attempt to create a completely new system, but rather to make adjustments to what the Chamorro regime found unjust in previous structures.

The second finding regards each regime's decisions in implementing their methods of transformative justice. Some common goals were shared by both regimes: a shared desire for the establishment of a democratic system—although their definitions differed—to replace the illiberal system of the Somoza dictatorship, an end to violence and human rights abuses, and creating a stable and independent economy. The FSLN adjusted their transformative justice approaches throughout the 1980s in order to address these goals; the continuation of violence through the Contra War brought about changes to the established 'Popular Revolutionary Democracy' and led to peace talks and elections, while changes to the structure of economic policies and unions attempted to address hyper-inflation. Similarly, the Chamorro government's compromise on the transition of power—keeping Sandinistas in positions of power in institutions—and drastic economic reforms had the goals of ending violence and improving economic conditions.

However, the FSLN and Chamorro governments had disparate goals and ideas as to the root causes of the conflict. The first transition represented a replacement of elites in power with representatives of the lower class who had suffered under the socioeconomic conditions of the Somoza regime and sought to form an inclusive system; the second transition wit-

nessed a return of elites to positions of power where the focus was on forming a modern capitalist liberal democracy that includes space for political pluralism and elections to decide leadership. This finding best represents the large divides within Nicaraguan society that date back to even before the Somoza regime—namely, stark differences of political opinion regarding the direction of the country.

It is clear that even prior to the first transition the revolution in the 1970s did not have a consensus as to the reasons for overthrowing the Somoza regime. This divide may indeed be one root cause of the violence prior to each transition (as well as the more sporadic violence following 1990), although more research would need to be done on this topic.[86] What is certain is that neither the FSLN or the Chamorro government could address all root causes with their approaches to transitional and transformative justice.

A third finding is the importance of the timeline of mechanisms of transformative justice. Many studies have noted the importance of timing or sequencing with regard to conventional transitional justice mechanisms.[87] This is evidently true for transformative justice approaches like systemic and socioeconomic changes; however, it seems that the timeframe may be more sensitive in these cases, as shown by the gradual change of strategy that the FSLN underwent in the 1980s. Reaction to policies may be stronger with regard to these changes and could lead to a breakout of violence or perhaps even the need for a second transition. Further research is recommended regarding the relation between transformative justice implementation and the potential for violent responses.

Finally, the relation between external actors and transformative justice must be further developed. Astrid Bothmann, in her dissertation on transitional justice in Nicaragua, has analyzed how the US involvement in the Contra War and the economic isolation of Nicaragua had a large impact on conventional transitional justice mechanisms during the transitions. Such research should be expanded to look as well at the influence of these factors with regard to systemic and socioeconomic justice mechanisms.

86 See de Volo, 'Dynamics of Emotion and Activism: Grief, Gender, and Collective Identity in Revolutionary Nicaragua', 11(4) Mobilization: An International Quarterly 2006), 461–474.

87 See Fletcher/Weinstein/Rowen, 2009; Roehrig, 2009.

7. Conclusion

While Nicaragua's transition occurred before the idea of transitional justice had been popularized and expanded, it is clear that nonetheless both the FSLN and Chamorro government made strides toward resolving past injustices and preventing a return to conflict. Whether or not their efforts produced a truly stable and sustainable peace cannot be determined in this analysis; however, the focus on systemic changes and socioeconomic policies illustrates the relevance of these factors to the greater analysis of justice in times of transitions. The contrasting approaches of the FSLN and Chamorro governments is evidence of the range of different actions that are possible in these areas and gives us perspective on the *how* and *why* behind the violence and discontent during the dual transition in Nicaragua. While there is still much work to be done toward the integration of transformative justice theories into the field of transitional justice, this chapter endeavours to contribute to this development.

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Transitional Justice and Nonviolent Resistance

Mutually Reinforcing Frameworks for the Consolidation of Democracies?

Lucas Maaser

Abstract At different times and places, civic engagement in nonviolent resistance (NVR) has repeatedly shown to be an effective tool in times of conflict to initiate societal change from below. History teaches us that there have been successes (Mahatma Gandhi in India) and failures (the Tiananmen Square protests in China).

Along with the recognition of the duality between transformative potential and stark consequences, the historical development of NVR was accompanied by the emergence of scholarly debate, fractured along disputes around purpose, character and effectivity of nonviolent actions taken by civil society stakeholders engaged in making their voices heard. One of the field's current points of interest is the examination of the long-term effects of NVR movements resulting in societal transformation on the stability and adequacy of a subsequently altered or emerging democracy, suggesting that NVR contributes positively to the sustainable and representative design of an egalitarian governing system.

The conclusion of the Nepalese civil war in 2006 should pose as an unambiguous example for the illustration of this phenomenon, but simultaneously raises the question why there was no successful implementation of a transitional process focusing on the needs of the victims.

Introduction

From India's non-cooperation movements in the 1920s[1] to Armenia's "velvet revolution" in 2018,[2] civic engagement in nonviolent resistance (NVR) has repeatedly shown to be an effective tool in times of conflict to initiate societal change from below. While prominent movement figures like Mahatma Gandhi and Nikol Pashinyan have had a significant impact in shaping social and political conduct within their respective contexts through the application of NVR strategies, cases like the Tiananmen Square protests of 1989—leaving several hundreds dead at the hands of the Chinese army[3]—illustrate the severity of possible risks and the questionability of NVR's success.

Along with the recognition of the duality between transformative potential and stark consequences, the historical development of NVR was accompanied by the emergence of scholarly debate, fractured along disputes around purpose, character and effectivity of nonviolent actions taken by civil society stakeholders engaged in making their voices heard.[4] One of the field's current points of interest is the examination of the long-term effects of NVR movements resulting in societal transformation on the stability and adequacy of a subsequently altered or emerging democracy, suggesting that NVR contributes positively to the sustainable and representative design of an egalitarian governing system.[5] Commonly mentioned as an NVR campaign successfully leading from authoritarianism to democratic governance, the conclusion of the Nepalese civil war in 2006 should pose as an unambiguous example for the illustration of this phenomenon. As the adequate conceptualization and conduct of post-conflict measures can be seen as an integral component in the solidification of a

1 Low, 'The Government of India and the First Non-Cooperation Movement—1920–1922', 25 (2) The Journal of Asian Studies 1966, 241–259.

2 Demytrie, 'Why Armenia 'Velvet Revolution' won without a bullet fired' (2018), in URL: https://www.bbc.com/news/world-europe-43948181; last accessed 31 July 2018.

3 Stieren, 'Facing down the guns: When has nonviolence failed?' (2001), in URL: http://carl-ink.com/wp-content/uploads/2011/03/When-nonviolence-failed.pdf, last accessed 31 July 2018. Additional cases: East Timorese peaceful procession at the Dilian Santa Cruz Cemetery in 1991, in which 270 peaceful protesters were killed by the Indonesian Army.

4 Cp. Dudouet, *Nonviolent Resistance and Conflict Transformation in Power Asymmetries,* Berghof Research Center for Constructive Conflict Management, 2011.

5 Cp. e.g. Bayer et al. (2016): 'The democratic dividend of nonviolent resistance', 53 Journal of Peace Research 2016, 758–771.

functioning sustainable democracy, the hypothesis arises that the NVR-induced Nepalese transition would be followed by the implementation of transitional processes commonly accepted as representatively reflecting the needs of those affected most by conflict, in order to allow the development of a cohesive society built on a mutually agreed-upon set of core values. Yet, the Transitional Justice measures entrusted with this task cannot be characterized as such, with responsible commissions having investigated none of the approximately 63,000 cases brought before them until December 2017, over ten years after the conflict's resolution.[6] In order to explore this purportedly paradoxical dynamic in more detail, this chapter seeks to answer the following lead question:

Which factors of the nonviolent mobilization and engagement of civil society actors leading to the abolishment of the Nepalese authoritarian rule in 2006 contributed in the inadequacy of Transitional Justice mechanisms implemented by the subsequently emerging democratic government despite the supposedly successful initiation of a peaceful, bottom-up transition through the application of NVR strategies?

To do so, the following subchapters first introduce basic concepts behind NVR theory, to then discuss them in light of the Nepalese transition and their potential relevance for the subsequent Transitional Justice process. Notably, the ongoing research of Véronique Dudouet has proven particularly valuable in considering a multitude of perspectives within the scholarly debate around NVR and thus crucially contributed to building a theoretical framework through which the critical analysis of core issues has been made possible.[7]

[6] Cp. Peace Insight, 'Nepal: Conflict Profile' (2017), in URL: https://www.peaceinsight.org/conflicts/nepal/, last accessed 5 March 2018; Adhikari, 'Revealing Disappeared Numbers' (2014); in URL: http://opennepal.net/blog/revealing-disappeared-numbers, last accessed 5 March 2018.

[7] Especially Dudouet (note 4); Dudouet, 'Powering to peace: Integrated Civil Resistance and Peacebuilding Strategies'; 1 ICNC Special Report Series, 2017, 1–44.

1. Theoretical Framework

1.1 The Concept of Nonviolent Resistance

While the above-mentioned Gandhi-led non-cooperation movements popularized the concept of NVR through the leader's development and application of the principle-focused resistance form of *satyagraha* against the British rule, traces of NVR can be found as early as the mid-19th century. Denounced as an essentially counter-revolutionary practice of the bourgeoisie aimed at the maintenance of social class benefits and strengthening of the elites, Marx first coined the term "passive resistance" *(passiver Widerstand)* in 1848. Whereas Gandhi's ideas would inspire the actions of figures like Martin Luther King Jr. during the US-American civil rights movement of the 1950s and '60s, Marxist scholars like Fanon and Sartre recurrently stressed the transformative relevance of tactical violence; "[f]or violence, like Achilles' lance, can heal the wounds that it has inflicted."[8] While these opposing perspectives may be seen as contradictory extremes of a more nuanced spectrum portraying resistance strategies in general, they emphasize the necessity of a definition of how violence and nonviolence are considered preceptually in the context of this chapter as well as the terms' relation to the concept of NVR. Violence as a strategic tool for societal transformation as conceptualized by Fanon and Sartre builds on the application of physical force against those who apply structural violence, e.g. through governance and class privileges.[9] Commonly serving as a reference point in NVR theory, Doug Bond similarly defines it as "the use of physical force against another's body, against that person's will, and that is expected to inflict physical injury or death upon that person".[10] It is notable that other forms like psychological and cultural violence[11] are not included here, reinstating the Neo-Marxist perspective on "violent resistance" as a direct, physical action. The definition of nonviolence, on the other hand, is often directly derived from the Sanskrit

8 Fanon, *Wretched of the Earth, Grove Press, 1961.;* as quoted in: Hardiman, 'Towards a History of Non-violent Resistance', 48 (23) Economic & Political Weekly 2013, 41–48, 42.

9 Cp. ibid.

10 Bond, 'Nonviolent Direct Action and the Diffusion of Power', in Wehr, Burgess and Burgess (eds.), Justice without Violence (1994), 59–79, 62.; as quoted in: Dudouet (note 4), 4.

11 Violence Prevention Initiative of the Government of Newfoundland and Labrador, 'Defining Violence and Abuse' (undated), in URL: https://www.gov.nl.ca/VPI/types/index.html, last accessed 31 July 2018.

word *"ahimsa"*,[12] which is commonly translated to encompass the "respect for all living things and avoidance of violence towards others."[13] While this avoidance of violence implies the ability to passively apply *ahimsa* by not engaging or participating in violent agitation, nonviolent resistance is to be seen "as a direct substitute for violent behavior: it implies deliberate restraint from expected violence, in a context of contention between two or more adversaries."[14] Hence, claiming a space of opposition or resistance through a directed action while adhering to the principles set forth by the term of *ahimsa* will be considered nonviolent resistance within the scope of this chapter's analysis. Thus, while NVR strategies could be employed with the sole intention of a demonstrative countermovement against the use of physical force, they are often utilized as direct supplements for more hazardous types of resistance to address structural violence like discriminative legislation, misuse of authority or institutionalized disadvantage of societal minorities and/or interest groups. Gene Sharp distinguishes between three types of methodologies commonly employed in NVR, differentiated by the intent they follow:

- **Nonviolent Protest and Persuasion**—Aimed at the peaceful communication of demands and convictions as well as the display of opposition within a societal discourse through the use of "symbolic gestures and actions […] [in order] to persuade others."[15] Concrete examples include "formal statements", "symbolic public acts" as well as "public assemblies and protests."[16]
- **Non-cooperation**—Aimed at the alteration of societally relevant relationships through the directed non-participation or acts of denial within the social, economic and political sphere. They include "student and labour strikes", the "withdrawal from social institutions" and "political boycott."[17]
- **Nonviolent Intervention**—Aimed at accomplishing change through "direct physical obstructions",[18] altering social relations by dissolving existing or forging new ones. These obstructions entail "psychological

12 Dudouet (note 4), 3.
13 Oxford Dictionary, 'ahimsa' (undated), in URL: https://en.oxforddictionaries.com/definition/ahimsam last accessed 23 November 2018.
14 Dudouet (note 4), 4.
15 Ibid., 5.
16 After ibid.
17 After ibid., 5–6.
18 After ibid., 6.

> intervention[s]" such as "self-inflicted pain", "physical intervention[s]" like "sit-ins" and "nonviolent invasions" as well as the establishment of alternate institutions and societal conventions, such as "parallel governments" and alternate education systems.[19]

As the main focus of this chapter lies on the implications of NVR on institutionalized post-conflict mechanisms for the insurance of a sustainable and peaceful societal order, it will only be considered as a grassroots tool of resistance within the boundaries of a state or region undergoing a structural societal transition. Widening the focus from applied methods and intents to underlying ideals, four main characteristics are commonly employed within the scope of the divergent scholarly debate surrounding NVR theory, often treated dichotomously by vocal proponents and opponents on each side of the discourse:[20]

- **Pragmatic vs. Principled**—While principled leaders like Gandhi and Martin Luther King Jr. referred to a higher purpose or entity to engage civil society members in their movements and achieve their goals, studies indicate that NVR movements in recent history commonly choose nonviolent approaches not out of systemic conviction, but out of mere strategic calculation. In contrast to principled approaches, this pragmatism does therefore ordinarily not aim to transform societal dependencies beyond the scope of predetermined objectives, as it is commonly founded in the assessment of available means to reach above-mentioned targets. While there is no clear particular stock of distinguishable characteristics uniting initiators of pragmatic movements, proponents of principled approaches are commonly affiliated with a spiritual or religious school of thought. In addition to activities of the public figures mentioned above, one prominent example of principled NVR campaigns is the involvement of Desmond Tutu in South Africa's transition from the Apartheid regime to a non-discriminatory constitutional democracy, which heavily relied on his role in the Christian church as a resource for societal change.[21]

[19] After Sharp, *The Politics of Nonviolent Action. Boston: Porter Sargent, 1973.;* as mentioned in Dudouet (note 4), 5–6.
[20] Cp. e.g. ibid., 6.
[21] After ibid., 6–10.

- **Revolutionary vs. Resolutionary**—As pragmatism and principle are to a large extent concerned with the ideology behind the scope of NVR activities, discourse around revolutionary and resolutionary strategies attributes a stronger focus to the relationship between parties involved in the transformation process within the context of a particular conflict at hand. While resolutionary actions build on the maxim of societal reconciliation, revolutionary approaches essentially invoke the necessity of change through supersedence. Through the acknowledgement of the cruciality of societal cohesion, proponents of resolutionary ideologies hence commonly stress the vital importance of existing governmental structures and therefore employ negotiating and diplomatic strategies among all actors of a certain conflict scenario to reach their objectives. This is in stark contrast to revolutionary practices, which emphasize strategies to counteract, undermine and replace pre-existing governance structures due to their oppressive and asymmetrical use of power.[22]

Contrary to scholarly convention,[23] these purportedly opposing categories are not considered as mutually exclusive, but limiting values of an ideological spectrum in the scope of this chapter's analysis. With this approach, an attempt is made to acknowledge the complexity and multiplicity of transformations on a societal scale, with ideological influences constantly shifting through the variety of groups and individual key actors involved in shaping the main characteristics of the transitory process as well as the continuously evolving conflict stages with varying degrees of challenges and opportunities available to actors within the particular nonviolent movement in question. Coincidentally, the recognition of this complexity commonly serves as a basis for the definition of the preconditions that are to be met to substantially increase the probability of an NVR undertaking to be successful in achieving self-determined objectives. Namely, these include:

- "the level of mobilization,
- social cohesion and unity of the movement,
- the degree of legitimacy and popular support which it receives,

[22] Cp. ibid.

[23] As suggested by e.g. Bharadwaj, 'Principled versus pragmatic nonviolence', 10 Peace Review 1998, 79–81; Martin, 'Dilemmas in Promoting Nonviolence', 31 (3) Gandhi Marg 2009, 429–453.

- the range of tactics and types of methods selected,
- the presence of effective leadership, and
- the degree of nonviolent discipline."[24]

As the intent of this chapter is not to examine the success of the Nepalese NVR movement of 2006 per se—but rather to evaluate the relevance certain factors represented within the scope of the above-mentioned categories might have had in the establishment of measures aimed to sustainably stabilize and organize an emerging parliamentary democratic state—the consideration of these categories will be limited to serving as reference points for the differentiation of certain aspects of applied NVR strategies and the identification of possible obstacles and resources for the adequate design and implementation of transitory mechanisms. Therefore, the measurability of stated preconditions will not be considered further in the scope of this chapter's analysis.

1.2 NVR and Transitional Justice—Synergies and Dysergies in the Establishment of a Sustainable Democratic Post-Conflict Environment

With this general knowledge of fundamental NVR concepts in mind, a focus will now be laid on their relevance in shaping processes beyond the boundaries of conflict transformation. In the case of Nepal, Transitional Justice mechanisms were entrusted with the continued support of a sustainable societal reconfiguration. A brief introduction of basic ideas behind Transitional Justice theory will be provided, to then analyze them against the backdrop of scholarly assessments of NVR strategies' potential impact on the successful implementation of post-conflict measures. This will allow for the identification of a more nuanced frame of reference for the subsequent analysis of concrete components relevant in the Nepalese transition from constitutional monarchy to parliamentary democracy.

[24] Dudouet (note 4), 8.

1.2.1 The Concept of Transitional Justice as a Scholarly Field

While principal mechanisms of the model are often traced back to the German Nuremberg Trials from 1945–46,[25] the emergence of Transitional Justice as a concept can essentially be observed during the "third wave of democratization", a period Samuel P. Huntington delimits as the interval between the Portuguese Carnation Revolution in 1974 and the collapse of the Soviet Union in 1989.[26] With a notable number of states transitioning from authoritarian rule to systems adhering to democratic core principles as well as a scholarly debate reemphasizing the cruciality of democracy as the only governance structure allowing a sustainable, agency-driven societal organization in line with Western thought,[27] a "turn away from 'naming and shaming' and toward accountability for past abuse among human rights activists was taken up at the international level."[28]

As the concept of accountability implies an intention to determine and punish those responsible for this "past abuse", the diplomatic evolution from denunciation to collaboration was accompanied by the development of a framework of practices which prioritized "legal-institutional reforms and responses—such as punishing leaders, vetting abusive security forces, and replacing state secrecy with truth and transparency—over other[s] […] that were oriented toward social justice and redistribution."[29]

The agglomeration of cases which required a response to the individual challenges regimes faced in their respective states of transition condensed in an academic discourse to bring forward a theoretical basis for thus far often action-driven approaches, culminating in the emergence of Transitional Justice as a discipline of academic interest. As this scholarly debate can be considered a mere reflection of dynamics observable on the ground, a majority of scholars mirrored the tendency of favoring legalism over consequentialism.[30] Yet, the deliberation of additional cases in which

[25] Weller, 'What Are The Nuremberg Trials And Why Do They Still Matter Today?' (2016), in URL: https://rightsinfo.org/nuremberg-trials-still-matter/, last accessed 31 July 2018.

[26] Cp. Huntington, *The Third Wave: Democratization in the Late Twentieth Century, University of Oklahoma Press, 1991.*

[27] Prominent examples include: Rawls, *Political Liberalism, Columbia University Press, 1993.* and Fukuyama, *The End of History and the Last Man, Penguin, 1992.*

[28] Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', 31 Human Rights Quarterly 2009, 321–367, 321.

[29] Ibid.

[30] E.g. Kritz (ed.), *Transitional Justice—How Emerging Democracies Reckon with Former Regimes—Volume I: General Considerations,* USIP Press Books, 1995.

non-legalist approaches[31] led to favorable results stresses the relevance of methodologies beyond jurisprudence. Through the enhanced evolution of this alternative perspective on Transitional Justice mechanisms, theoretical frameworks emerged which amended the principle of accountability with maxims surrounding truth, reconciliation, memory and justice, the proportions between which heavily rely on specific needs in respective contexts.[32] Following these core ideals that contrast with previous conventions, Nir Eisikovits identifies four main objectives of non-legalist transitional concepts:

1. the "[c]reat[ion of] a reliable record of past human rights abuses",
2. the establishment of "a functional, professional bureaucracy and civil service",
3. the support of "victims [to] restructure and repair their lives" and
4. the discontinuation of "violence and [the] consolidati[on] of stability."[33]

It is notable, however, that—while these objectives commonly serve for the legitimization of Transitional Justice measures—the examination of participatory opportunities for civil society stakeholders in times of transition by scholars like Simon Robins suggests that

> *institutional approaches to transitional justice that emerge from the standard global framework, despite making […] extravagant claims for victim engagement, can be seen to be almost exclusively nominal or instrumental in how victims participate, delivering little to victims but often being necessary for a process to occur.*[34]

[31] Most prominently South Africa in their establishment of the Truth and Reconciliation Commission in 1996. For a more in-depth analysis cp. e.g. Magistad, 'South Africa's imperfect progress, 20 years after the Truth & Reconciliation Commission' (2017), in URL: https://www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission, last accessed 31 July 2018.

[32] Eisikovits, 'Transitional Justice' (2014), in URL: https://plato.stanford.edu/entries/justice-transitional/, last accessed 31 July 2018.

[33] Ibid.

[34] Robins, 'Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal', 5 (1) The International Journal of Transitional Justice 2011, 75–98, 55.

1.2.2 Nonviolent Resistance and its Relevance in Transitional Justice Adequacy

While this limited portrayal of Transitional Justice history and theory already indicates the concept's much contested nature, its main purpose of stabilizing and guiding transitional development through processes built on democratic core values can be seen as the underlying unifying factor within applied and scholarly debate. As the assessment of the necessary steps to successfully facilitate this guiding process is directly determined by the nature of the struggle which initiated societal transformation prior to the establishment of Transitional Justice mechanisms, the application of NVR strategies for reaching self-determined objectives within this very struggle should hypothetically support the transitional guiding process by default. Indeed—among others, Robert Burrowes[35] and Diana Francis[36] stress the capability of NVR to transform asymmetrical power structures into more dialogue-centered relations in conflict settings, providing the capacity for constructive collaboration and enhanced societal cohesion within post-conflict processes. The foundation of this line of argumentation lies in the assumed impact of NVR on individuals accomplished simply by their participation in nonviolent movements, as their contribution implies an active claim of power over their circumstances under often exacerbating external conditions.[37] Dudouet has observed this act of self-empowerment as occurring in two stages:

- **Education**—Since declaring and defending space within contexts questioning established societal relations and collectively legitimized order requires the identification of deficiencies and definition of positions, the awareness of political dependencies and generation of relevant knowledge is necessary to build a sustainable foundation for meaningful change.
- **Mobilization**—With these acquired resources available, actions are required to illustrate the relevance of identified positions within the respective conflict context, continuously generating supporters of the wider general public acknowledging represented positions as

[35] Burrowes, *The Strategy of Nonviolent Defense: A Gandhian Approach,* State University of New York Press, 1996.

[36] Francis, *People, Peace and Power: Conflict Transformation in Action,* Pluto Press, 2002, 44.

[37] Cp. Dudouet (note 4), 15.

viable and necessary in order to sustainably improve the livelihoods of the collective.[38]

With a movement harnessing enough traction to create significant counter-pressure against oppressive forces, the potential for the initiation of a transformative societal process from conflict to post-conflict is amplified. Simultaneously, this grassroots engagement in NVR encourages political participation and hence contributes to an agency-driven transitional environment. This is, however, only true when the amplified potential for the initiation of change successfully translates into an actual transformation. As a successful NVR campaign and hence a supposedly promising environment for the implementation of Transitional Justice measures, regardless of whether the intentions are resolutionary or revolutionary, inherently requires an agreement of the conflict party in power to trade authority against legitimacy, the nature in which this trade occurs is fundamental to the implications on post-conflict processes. Due to this central role of the strategic positioning of those equipped with power during the advancement of societal transition, a differentiation between positioning forms appears necessary to assess their possible impact on Transitional Justice measures. In his work "The Politics of Nonviolent Action", Gene Sharp does so by distinguishing between three "mechanisms of change":[39]

- **Nonviolent conversion**—A process in which oppressors actively recognize the validity of the positions proposed by the NVR movement, resulting in a power trade based on the conviction that the incorporation of the movement's demands in a common stock of values crucially contributes to the greater good of society. This outcome is ordinarily strived for by proponents of a principled approach towards NVR, as it suggests a strong potential for sustainable change through a common belief system.
- **Nonviolent coercion**—On the opposite end of the spectrum, nonviolent coercion describes the willingness to surrender power due to an inability to maintain it. Hence, those equipped with authority do not acknowledge the value of proposed demands, but are forced to surrender prior advantages through a movement's pressure. This out-

[38] Cp. ibid., 13–14.
[39] Cp. Sharp (note 19).

come suggests a strong potential of continued societal fragmentation in post-conflict settings.

- **Nonviolent accommodation**—Definable as an intermediate form between the two mechanisms described above, nonviolent accommodation is the outcome most commonly observable in practice. While oppressors do not agree or agree to a very limited extent with an NVR movement's demands, they choose to forfeit (a certain part of) their authority as a strategic action based on an assessment of the dynamics governing the shifting political and societal environment as well as resources available to maintain the prior power configuration.[40]
- **Nonviolent disintegration**—Posing an amendment to his original evaluative framework, Sharp introduces the concept of "disintegration" in his revised edition of "La Lucha Politíca Noviolenta: Criterios y Técnicas" in 1997.[41] Popovic et al. define it as "[a] mechanism of change in nonviolent action in which the opponent is not simply coerced, but rather its system or government is disintegrated and falls apart as a result of massive non-cooperation and defiance. The sources of power are restricted or severed by the noncooperation so completely that the opponents' system or government simply collapses."[42]

As a total sustainable, adequate and cohesive transformation from one societal order to the other through the sole application of NVR strategies—as imagined probable in a nonviolent conversion setting—is deemed highly unlikely in practice, the literature suggests that while the outcome of an NVR undertaking and the subsequent mechanism of change highly impact the post-conflict environment, follow-up processes adhering to similar core values as NVR are required to productively initiate change.[43] These processes' success is, following the logic of the portrayed methods of change as indicators of probable societal cohesion and therefore collaborative potential in post-conflict settings, highly dependent on the degree of "nonviolent conversion" dynamics within "nonvio-

40 Cp. Dudouet (note 4), 15.
41 Cp. Sharp, *How Nonviolent Struggle Works, The Albert Einstein Foundation,* 2013, xi.
42 Popovic et al., CANVAS Core Curriculum (2007), in URL: http://canvasopedia.org/wp-content/uploads/2015/08/CANVAS-Core-Curriculum_EN.pdf, last accessed 22nd of November 2018, 61; 273.
43 Cp. Dudouet (note 4), 21.

lent accommodation" practices likely to be observed in a conflict setting of interest. Therefore, while overarching maxims of Transitional Justice theory and societal effects of NVR seem highly compatible as subsequent steps for the establishment of an agency-driven, dialogue-centered society founded on core democratic values, particular attention is to be paid to NVR's impact on power asymmetries for the adequate design of Transitional Justice measures.

2. The Case of Nepal

Based on this theoretical framework, the current subchapter will now introduce the particular case of the Nepalese transition from conflict to post-conflict and make an attempt to identify factors contributing to the inadequacy of the Transitional Justice process following the conflict's conclusion in 2006. To do so, key occurrences of the Nepalese conflict history will be portrayed, to then serve as a foundation for the investigation of NVR's role in the process.

2.1 Resistance and Transformation— A Historical Contextualization

2.1.1 From Tribhuvan to Birendra—Nepal's Pre-Insurgency History of Democratic Struggle

The struggle for democracy has been a recurring theme of central relevance throughout Nepalese history. While authoritarian rule has long been able to persist as the legitimate form of governance, this legitimacy has periodically been questioned by civil society groups and political actors alike. As such, the first establishment of a constitutional multi-party system dates back as far as 1959, finding its roots in an unlikely alliance between king Tribhuvan and civil society actors for the reconfiguration of power distribution within systems of governance—syphoning authority away from the hereditary prime ministers (or *Ranas*) back to the royal family. Nonviolent political organization, strikes and student movements[44] resulted in

[44] Cp. University of Central Arkansas, 'Nepal (1946–present)' (undated), in URL: http://uca.edu/politicalscience/dadm-project/asiapacific-region/nepal-1946-present/, last accessed 31 July 2018.

the establishment of the Nepali Congress party (NCP) in 1946, followed by the promulgation of the first Nepalese constitution in 1948.[45] His open support of *Rana*-critic mobilizations urged the king to seek asylum in India, which consequently led to the establishment of the Congress Mukti Sena, a military arm of the Nepali Congress party. Adding public pressure to the nonviolent organizers' work through military operations, the *Ranas* allowed for negotiations, out of which a triparty agreement was reached between the prime ministers, king Tribhuvan and the NCP, resulting in the redistribution of ultimate power to the king while allowing the unrestricted formation of political organizations. The most central component of the so-called Delhi Accord, however, was the commitment to developing and adopting a democratic constitution within two years. Four years after king Tribhuvan had died and passed the throne on to his son, Mahendra, the constitution was finally promulgated in 1959, allowing the country's first democratic elections with the NCP confidently winning absolute majority. This first bloom of Nepalese democracy was, however, highly impersistent, as king Mahendra forbade all political parties and seized absolute power through a coup d'état in 1960.[46] This state was maintained beyond the rule of Mahendra, who was superseded by king Birendra in 1972, and first fundamentally challenged again in 1985, when the still-forbidden NCP launched a nonviolent civil disobedience campaign against the authoritarian regime. While the joint undertaking in cooperation with communist factions was determined to initiate a second democratic awakening by mobilizing the civil society, the endeavor in line with NVR strategies was undermined by several bombings in Kathmandu, leaving seven dead and more than 20 injured purportedly at the hands of more radical communist faction affiliates,[47] ultimately leading to the dissolution of the NVR campaign as a consequence. While unsuccessful, the 1985 movement laid the foundation for the Jana Andolan, the first People's Movement in 1990. Similar in its nonviolent design and composition of initiating actors, members of the NCP and the Maoist coalition United Left Front (ULF) launched a civil disobedience campaign on

45 Reuters, 'TIMELINE—Milestones in political history of Nepal' (2008), in URL: https://www.reuters.com/article/us-nepal-chronology/timeline-milestones-in-political-history-of-nepal-idUSL281216020080528, last accessed 31 July 2018.

46 Cp. University of Central Arkansas (note 44).

47 Cp. e.g. Branigin: 'Nepal's Shangri-La Image Shattered by Bombings' (1985), in URL: https://www.washingtonpost.com/archive/politics/1985/07/07/nepals-shangri-la-image-shattered-by-bombings/0d3fda38-e3ce-48fe-ab2d-68394731d092/?noredirect=on&utm_term=.082356d00f53, last accessed 31 July 2018.

the 18 February, the Nepalese Day of Democracy. With the movement gaining traction and calling for general strikes (bandhs) with increasing success, royal forces repeatedly resorted to the use of force to answer the peaceful protests, leaving twelve dead at a demonstration in Bhaktapur later that month. After another incident in Patan with several civilian casualties caused by the military, the movement's strength peaked in April at an estimated 200,000 protesters, surrounding governmental buildings and calling for the reinstatement of a multiparty system based on the Tribhuvan model of the 1950s. On the 8 April, king Birendra lifted the ban on political parties, allowing the reestablishment of a democratic congress. A constitutional monarchy emerged, granting congress substantial power for the co-determination in key political decisions. Most essential authorities like the command over the army and the power to dissolve congress, however, remained with the royal family.[48] As the purpose of the campaign was achieved, a number of groups participating in the ULF left the coalition to become independent parties to then reorganize as the United People's Front of Nepal (UPFN) in congress, which was mostly dominated by NCP and UPFN affiliates after its restoration in May 1991.[49] While a considerable number of political and civil society actors perceived the emerging system as bearing great potential for the establishment of a more participative and equal collective order, leftist factions were torn in their vision of a new Nepal, leading to a prompt refragmentation of the UPFN. When party affiliates formerly collaborating under the Maoist coalition umbrella clashed in the socially-disadvantaged Eastern regions of Rolpa and Rukum in 1994, police forcefully dissolved the confrontation. The so-called "Operation Romeo", backed by the two major political parties in congress and critiqued for its inadequate degree of application of force and questionable legal basis by the international community, pressured the following of Maoist leader Pushpal Kamal Dahal underground, leading to the founding of the Communist Party of Nepal—Maoists (CPN-M) in 1995. With the firm conviction of an entirely parliamentary democratic system and core demands surrounding gender and caste equality as well as the amplification of Nepalese indigenous populations' rights, the splinter

48 Cp. University of Central Arkansas (note 44).

49 Cp. Global Nonviolent Action Database, 'Nepalese force king to accept democratic reform, 'Jana Andolan' (People's Movement), 1990' (undated), in URL: https://nvdatabase.swarthmore.edu/content/nepalese-force-king-accept-democratic-reform-jana-andolan-peoples-movement-1990, last accessed 31 July 2018.

group declared the "people's war" in February 1996 through the assault of a bank and three police stations in Nepal's western regions.[50]

2.1.2 Of Maoist Agitators and Forceful Response—The Nepalese Civil War

While initially being limited to a comparably low number of armed encounters between the CPN-M's People's Liberation Army (PLA) and the Royal Armed Police (RAP), events in 2001 provided the insurgency with more traction. On the 1 June, crown prince Dipendra killed king Birendra and nine members of the royal family under the influence of substances in occurrences commonly denoted as the "royal massacre", ultimately leaving the former king's brother Gyanendra as the only heir to the throne.[51] Based on the claim of congress's unfitness to resolve the Maoist insurgency effectively, Gyanendra first seized executive power in October 2002, claiming direct authority in January 2005 after peace talks repeatedly not translating into projected resolutionary outcomes. With the king's increased emphasis on the use of military force in responding to the PLA's agitations, the number of disappearances, casualties and other human rights violations committed on both sides grew considerably. Especially targeting the general population in rural areas, civilians were often forced to voice their support for either side of the conflict, contributing to an amplified societal divide. Simultaneously, the then forbidden former congressional parties formed the Seven Party Alliance (SPA) as an entity of resistance against the illegitimately perceived regression to an absolute monarchy. Through the establishment of Gyanendra as a common enemy, negotiations between the PLA and the SPA accompanied the increasingly violent civil war, leading to the joint invocation of bandhs from 5–9 April 2006 in protest of the king's hostile conflict resolution strategy, questioning the legitimacy of his authority over the country.[52] Accompanied by a ceasefire

[50] Cp. e.g. OCHA, 'Nepal—Chronology of decade-long conflict' (2006), in URL: https://reliefweb.int/report/nepal/nepal-chronology-decade-long-conflict, last accessed 31 July 2018.

[51] Staff and Agencies, 'Nepal inquiry blames crown prince for royal massacre' (2001), in URL: https://www.theguardian.com/world/2001/jun/14/nepal, last accessed 31 July 2018.

[52] Cp. Global Nonviolent Action Database, 'Nepalese general strike to protest monarchic rule, 2006' (undated), in URL: https://nvdatabase.swarthmore.edu/content/nepalese-general-strike-protest-monarchic-rule-2006, last accessed 31 July 2018.

unilaterally declared by the Maoist rebels and demands requesting the full restoration of democratic bodies, a multi-party government and elections to a Constituent Assembly,[53] a nonviolent movement emerged, gaining additional traction through the support of two of the largest Nepalese trade union confederations.[54] With the increasing gain of legitimacy outside of the political realm, more and more civilians were inclined to join the general strike and participate in the collective call for the initiators' demands. On the 8 April, the SPA extended its strategic application of nonviolent strategies through the proclamation of a nationwide tax boycott, further contributing to the already significant limitation of the Nepalese economic capabilities. Meanwhile, the international community reacted to the events, with India and the USA issuing statements demanding Gyanendra to open negotiations with protest parties immediately. Despite the rising pressure, royal forces continued to counteract the movement by means of force, causing 13 casualties and over 1000 injuries in the course of the campaign. In a final mobilization effort, the SPA called for the continuation of the strike and the opening of negotiations on the 19 April. Despite the government's imposition of a daytime curfew to mitigate the protesters' efforts on the 20 April, several hundred thousand protesters filled the streets on the 21st, ultimately leading to the surrender of political authority to the people on the same day and the reestablishment of the Nepalese parliament on the 24 April. With the reinstatement of democratic authority, a truce agreement was reached between the SPA and the CPN-M—now representing a legitimate congressional party—on the 27 April, followed by the unanimous parliamentary vote to deprive the king of the vast majority of his powers on the 18 May, leaving the royal family as a mere public representative of the Nepalese state.[55]

With an estimated 17,000 casualties, more than 100,000 displaced and 1,400 disappeared,[56] the need for post-conflict processes to account for these transgressions of human rights committed by the conflict parties against the Nepalese civil society was reflected in the Comprehensive Peace Accord (CPA), the agreement between CPN-M and SPA

53 Cp. ibid.

54 Namely, the involved confederations were the General Federation of Nepalese Trade Unions (GEFONT), and the Nepal Trade Union Congress-Independent (NTUC-I), cp. ibid.

55 Ibid.

56 Cp. Peace Insight (note 6).

legitimately ending the civil war on the 22nd of November 2006.[57] While contained provisions imply a swift implementation of Transitional Justice measures modeled after the South African Truth and Reconciliation Commission (TRC),[58] the enactment of legal provisions allowing their establishment was continually delayed due to a substantial parliamentary divide, repeatedly leading to a political stalemate. This fragmentation inherent in the newly established democracy's main governing body did not only deny Nepalese citizens their right to deal with past offenses through an adequate and timely progression of Transitional Justice processes; it inhibited the advancement of the young republic towards the establishment of a common core value framework and hence the stabilization of the hard-won reconfiguration of societal order itself. As such, parliamentary discordance led to deferrals in…

- …the promulgation of an interim constitution and the dethronement of Gyanendra until 2008,
- …the implementation of the final draft constitution until 2015 and
- …the enactment of the above-mentioned legislative framework for the foundation of institutions entrusted with the Transitional Justice process, The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (TRC Act) until 2014.[59]

2.2 Nonviolence and Post-Conflict Parliamentary Fission—Contributing Factors to Nepal's Political Divide

While the lead question could be investigated further by analyzing specific propositions set forth by the TRC Act in consideration of the effect NVR strategies might have had on their design and execution, the depiction of the historical cornerstones of Nepal's struggle for democracy

57 Cp. Security Council Report, 'Chronology of Events—Nepal' (2015), in URL: http://www.securitycouncilreport.org/chronology/nepal.php, last accessed 31 July 2018. Lutz Getzschmann, 'Kein Zurück mehr | Der lange Weg der nepalesischen Maoisten vom Untergrund ins Parlament' (2008), in URL: https://www.iz3w.org/zeitschrift/ausgaben/308_tuerkische_literatur/faa, last accessed 5 March 2018.

58 Cp. e.g. Tutu, 'Truth and Reconciliation Commission, South Africa' (2010), in URL: https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa, last accessed 31 July 2018.

59 Cp. e.g. Human Rights Watch, 'Nepal: Fix Flawed Truth, Reconciliation Act' (2014), in URL: https://www.hrw.org/news/2014/07/08/nepal-fix-flawed-truth-reconciliation-act, last accessed 31 July 2018.

indicates the central cruciality of the distinctive divide between factions within the country's political environment not only regarding post-conflict processes, but the democratic order itself, despite the purportedly successful attainment of societal transformation through the application of NVR approaches. Therefore, this chapter attempts to answer the lead question through the examination of interdependencies between NVR procedures leading to Gyanendra's delegitimization and the subsequent fission between governing parties, potentially offering insights not only in NVR's relevance for Transitional Justice measures employed in the Nepalese context, but in the sustainability of the governing system at its core. Conceptually, contributing factors to the post-conflict environment can be divided into three interconnected categories relevant in NVR theory, which will be elaborated on further in the subsections below.

2.2.1 Heterogeneous Ideologies

While one might presume that the SPA and CPN-M's joint revolutionary nonviolent campaign against absolute hereditary rule in April 2006 could have led to a resolutionary effect on the relationship between the former political and ideological adversaries, the parliament's reoccurring inability to transcend the gap between the CPA's two signees in parliamentary discourse indicates that this effect has not been accomplished. One reason for this can be found in the mutually opposing, but respectively intrinsically cohesive and, to large extent, principled motivations of the factions. While each party follows its vision of a societal order benefitting the greater Nepalese population individually, the recognition of a collective effort across partisan and ideological lines as a requirement for gaining the institutional authority to realize this vision leads to the willingness to form a temporary, objective-based and therefore pragmatic alliance for the abolition of king Gyanendra as head of state and the reinstatement of a parliamentary democracy. This dynamic can be identified as a recurring theme in Nepalese resistance history, as a similar lack of ideological cohesion is observable in the dissolution of the ULF after the successful Jana Andolan campaign in 1990, highlighting the historic legitimization of pragmatic bonds for the elimination of structural obstacles without sustainable ambitions to contribute to a collective societal project collaboratively.

2.2.2 Shifting Dependencies and Multi-staged Conflict Scenarios

Additionally, the relations between actors involved in the conflict shifted considerably throughout its progress, most notably before and after the coronation of Gyanendra as Birendra's successor. While always directed against the preservation of the royal family's degree of authority, the Maoist insurgency was initiated by a group forced underground through measures heavily sanctioned by key members of what later became the SPA. Conceptualizing the NVR campaign of 2006 as a movement driven by initial demands of the CPN-M, one could argue that, while acknowledging that the Maoist rebels' violence-driven approach towards realizing their goals has to be accounted for, the SPA must be considered one of the oppressing forces in the evaluation of the conflict. Examining the establishment of congress through the transition from absolute to constitutional monarchy in 1991 as an achievement in favor of democracy, however, congressional parties—even when sanctioning forceful measures like Operation Romeo—can be conceived as actors strengthening democratic legitimacy not through NVR or conflict, but through their given institutional power, potentially mitigating authoritarian influence in the long term through available structural means. As such, the CPN-M may conflictingly be considered a key oppressing actor, ultimately causing a political environment which offered Gyanendra the opportunity to seize democratic accomplishments of the Jana Andolan. Analyzing these dependencies through Sharp's "models of change", this multiplicity of possible perspectives suggests the need for dismissing the supposed static bilateral relationship between oppressor and oppressed by differentiating between above-depicted cases within the actor triangle: royal family—SPA—CPN-M.

Since both the SPA and CPN-M's efforts motivating the bandhs of April 2006 were directed towards the royal family's conflict response and use of authority, their relationship with the Gyanendra-led regime may be considered as inherently founded on their experienced oppression. While the course of events depicted in subchapter 3.1.2 indicates the king's strong inclination towards a nonviolent coercion positioning, his post-conflict deprivation of authority and subsequent ousting as a politically relevant figure through a democratically legitimized process, however, makes the consideration of his influence on the Nepalese parliamentary divide obsolete. As the relationship between the two remaining actors is characterized by the mutually assigned attribute of the oppressor while claiming themselves as the oppressed, the conception of the respective

oppressor's response to the conflict's conclusion may be classified as nonviolent accommodation with considerable tendencies towards nonviolent coercion. As such, this dynamic is to be recognized as a decisive factor contributing to the fractured Nepalese political environment.[60]

2.2.3 The Effect of Violence on Nonviolence

Yet, the most influential contribution to this analysis of interdependencies between applied conflict strategies and post-conflict challenges may be the degree of nonviolent discipline adhered to in the course of the Nepalese transition from constitutional monarchy to parliamentary democracy. While the SPA and CPN-M's strategic advancement of demands through the application of NVR approaches to respond to violence committed by royal forces under Gyanendra's command can only be seen as a strong unifying resource contributing to the sustainability of blooming democratic conduct, the collectively defined adversary cannot be identified as the first or only party to the conflict attempting to achieve self-determined goals through the power of arms. Deemed factions enjoying full legitimacy as political actors within parliamentary discourse in Nepal's post-conflict setting, the CPN-M and several parties within the SPA are to be seen as major contributors to the perpetration of human rights violations against citizens they now represent through their governing duties. While these circumstances might have direct implications on design and conduct of Transitional Justice mechanisms in their own right, this chapter attempts to emphasize direct structural effects on the credibility and sustainability of the newly established democratic Nepalese system. The degree to which central leaders of 2006's general strike had form-

[60] Conservatively considering the political ouster of Gyanendra as a bilateral process between an oppressive authoritarian regime on one side and a disobedient civil society alliance on the other, it is arguable that the Nepalese general strike on the 21 April 2006 constitutes an act of non-cooperation leading to the failure of the then form of state and consequently to the dissolution of the existing government. While this would inevitably require the process to be classified as nonviolent disintegration in Sharp's extended evaluative framework, the king's promulgation of a reinstated parliamentary system implies the guided, if severely pressured, transition from one model of governance to the other. Along with the power dynamics inherent in the coalition between SPA and CPN-M requiring an individual assessment of their relationship towards one another, the localization of the three major actors involved in the campaign within the spectrum of the original "mechanisms of change" is therefore considered more adequate in the context of this chapter.

erly attempted to induce a community built on the common belief in equal values through coercion, forced societal fragmentation and violence directly undermines the legitimacy of proposed demands. Moreover, the perceived plausibility of the actors' reliability in adhering to democratic maxims and due conduct is substantially weakened through ideological inconsistencies, with the CPN-M openly promulgating principled visions of change while opportunistically agreeing to a political deal with the SPA in order to reach self-defined goals. Hence, it is not ideology that dictates the actor's strategic shift from violence to nonviolence; it is the pragmatically motivated outlook on the enjoyment of legitimacy within a potentially newly established government. The magnitude of this lack of fundamental integrity is amplified through its relevance in wider Nepalese conflict history, as actions of the Congress Mukti Sena are popularly thought to have contributed crucially to the opening of negotiations with the Ranas and hence the promulgation of Nepal's first democratic constitution in 1959, hazarding the consequences of force for the unsustainable establishment of democracy.

3. Conclusion

While NVR strategies may bear a high resource density for a productive and peaceful transition from conflict to post-conflict environments, this chapter has shown that even when successful, the nonviolent approaches applied to facilitate societal change are to be contextualized and evaluated in respect to particular historical and sociopolitical relevancies in order to assess their long-term impact on civic conduct. In the case of Nepal, it has been found that discrepancies in ideologies, shifting relationships between key actors and the inconsequent adherence to nonviolent conduct—while temporarily negligible in the examination of NVR's capabilities to initiate a transformative process itself—crucially thwart the development not only of an adequate Transitional Justice process, but the growth of a sustainable democracy itself. Honoring the complexity of any transitional process, however, it is of note that a myriad of issues related to the Nepalese societal transformation have yet to be taken into consideration in order to allow a holistic evaluation of its development, including…

- …an assessment of alternatives to the paths taken with an arguably higher (and lower) potential for inducing societal cohesion, allowing the development of a best-to-worst case scenario reference frame,

- …the severity of identified destabilizing factors for the long-term progression of democratic conduct in general and cases filed within Transitional Justice mechanisms established after the implementation of the TRC Act in particular and
- …the identification of additional crucial factors contributing to the destabilization of the political environment as well as the inadequate design and inefficient conduct of commissions following the passing of the TRC Act in parliament, such as political will, resources available for the implementation of Transitional Justice measures and an assessment of what would qualify as a representative design of Transitional Justice mechanisms, given the constraints at hand.

While accounting for these factors would have exceeded the scope of this chapter's analysis, it represents an invitation to explore limitations and opportunities of NVR strategies through their deconstruction, amplifying discourse around applicability and exploration of nonviolent approaches towards transition and thereby contributing to conduct honoring human rights and dignity.

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Transformative Justice in South Sudan

The Transformative Potential of a Contextualized Transitional Justice Process

Livia Röthlisberger

Abstract This chapter takes the ongoing conflict in South Sudan as a starting point for assessing the concept of transitional justice as such and its implementation in the country in particular. Following a brief description of the conflict and the peace processes, the author sheds light on the shortcomings of the established concept of transitional justice in the situation at hand. Then, the author outlines the alternate concept of transformational justice und takes a closer look at its implications on the situation in South Sudan. The author highlights existing initiatives of transformative justice and is very much in favour of their victim-centered approach.

1. Introduction

The current situation in South Sudan looks disastrous: the civil war, which started in 2013 has reached its fifth year and no peaceful end is in sight. Newly agreed ceasefires are constantly violated by government, opposition and rebel forces. While more than two million people had to flee to neighboring countries, another two million are internally displaced and face, apart from the constant insecurity and safety issues, the consequences of an increasingly severe famine.[1]

The African Union has delegated the mandate to support the establishment of peace in the newest nation of Africa to the Intergovernmental Authority on Development (IGAD), an East African organization with its headquarters in Addis Ababa. In 2015, the IGAD, supported by the

[1] Human Rights Watch, World Report 2018, South Sudan, retrieved on retrieved on 29/10/2018 available at: https://www.hrw.org/world-report/2018/country-chapters/south-sudan.

United Nations' troika for South Sudan, consisting of the United Kingdom, the United States and Norway, has managed to bring the current president, Salva Kirr, and the leader of the opposition and previous vice president, Riek Machar, to one table to negotiate a peace agreement, called the Agreement on the Resolution of Conflict in South Sudan (ARCISS). The externally negotiated agreement foresees a traditional transitional justice toolkit and standardized procedures in order to ensure peace and stability in South Sudan and create the sustainable infrastructure that the nation needs to develop its economic and social potential. Until today, none of the conveyed responsibilities have been assumed or implemented by any of the contracting parties.

Taking into account the criticism of the concept of transitional justice, the theoretical process that was established by IGAD for the reconstruction of South Sudan faces several challenges, two of which completely impede an advancement in the process: First of all, the conflict is still ongoing; civilians face constant insecurity and instability, with no functioning civil institutions or legal infrastructure that could protect them from abuses and provide them with a protection of their basic rights. Second, the main perpetrators of the mass atrocities are still in power. A fact that leads on the one hand to a lack of political will to implement any of the conditions for transitional justice to take place, and on the other hand to a lack of trust among the society towards the government and its institutions. The transitional justice process that was so thoroughly drafted by the IGAD and Western powers, is therefore condemned to fail.

Transformative justice is a new approach that attempts to respond to the criticism and challenges of transitional justice. It focuses on the process rather than the outcome and shifts from the legal aspect to the social and political, stressing the importance of the context and the participation of the local population in all aspects of the transformation.

Recent initiatives of the IGAD and the government of South Sudan to resolve the conflict seem to consider the arguments of transformative justice.

In which way these political initiatives move beyond the theoretical approach of ACRISS, but still fail to accurately address the criticism of transitional justice shall be elaborated in this chapter.

This chapter starts with an overview of the conflictual situation in South Sudan, including a historical detour in order to understand the roots of the current conflict. It then continues with a critical elaboration of the

traditional concept of transitional justice, followed by a presentation of a definition and the main features of transformative justice. In the last part, the chapter focuses again on the situation in South Sudan and argues that the currently employed tools for transitional justice lack the transformative power and that a bottom-up and contextualized approach is necessary to achieve the desired societal transformation and achieve sustainable peace and justice.

2. Conflictual situation in South Sudan

After a two decades long fight for secession from the North, South Sudan eventually reached independence on the 9th of July, 2011. With support from an international troika, consisting of the United States, the United Kingdom and Norway, the Comprehensive Peace Agreement (CPA) was signed six years before, paving the way for the referendum on self-determination, held in 2011, and the establishment of a constituency for South Sudan. Set in position of power through the CPA were those who had been fighting the independence war: members of Sudan People's Liberation Army/Movement (SPLA/M), led by Salva Kiir. At the expense of political and civil groups, the military assumed power in the constitution of the new state[2].

2.1 Establishment of SPLA/M

In order to understand the reasons for SPLA/M's powerful position in the newly independent state it is important to consider the historical development since the 1980s, when a group of Sudanese Nuer established a military base in Southwestern Ethiopia for the purpose of fighting for secession of the Southern part of Sudan. In 1983 they were joined by an armed group of Dinka rebels, led by John Garang[3].

In contrast to the idea of the Nuer separatist movement, Garang advocated for a unified, democratic and secular Sudan, where Muslim,

[2] Mamdani, 'Who is to blame in South Sudan?', Boston Review, 2016, retrieved on 23/07/2018, available at: http://bostonreview.net/world/mahmood-mamdani-south-sudan-failed-transition, p. 6.

[3] Although South Sudan is a multiethnic society and no tribe forms a majority, the Dinka and Nuer together constitute more than 57% of the population.

Christians and Animists have equal rights[4]. Through the support by the Ethiopian neighbor and Garang's autocratic nature, he managed to take over control of the rebel group and formed the SPLA. In line with his idea of inclusivity he invited other Sudanese elites, such as Riek Machar, a Nuer, as well as Lam Akol, a Shilluk, to join the movement. Nevertheless, his intolerance against criticism regarding his personal vision of an all-encompassing Sudan as well as his dictatorial leadership style resulted in a disagreement with Machar and other officials, who intended to fight for an independent South Sudan. The disagreement led to an internal split of the rebel group reaching its peak in 1991 when Machar commanded the killing of hundreds of Dinka in the area of Garang's home region, Bor[5]. The region was left devasted and during the famine that followed, thousands of civilians died[6]. Machar and Akol separated from the mainstream SPLA/M and formed their own rebel group[7]. After several years of separate struggles, rival alliances and bloody clashes, Machar and Garang remerged their movements in 2002 and fought together for independence from the North of Sudan[8]. In 2005, shortly after Garang died and Salva Kiir took over the leadership of SPLA/M, the North finally surrendered to the quest of the South and the Comprehensive Peace Agreement (CPA) was signed by representatives of the South and the North[9].

Mahmood Mamdani, an expert in political science and member of the investigation committee that was sent to South Sudan in 2013, argues that the agreement as well as the Interim Constitution that was drafted thereafter by the Western powers, constitute the roots of the current conflict. He believes that those documents legally transferred the power to the military groups while they left out the participation and consideration of other political groups. Instead of inaugurating a new area, the individuals

4 The following paragraph is based on information from: Steven Costello, 'A Second "split" for South Sudan', Carnegie Council for Ethics in International Affairs, 2017, retrieved 29/10/2018, available at: https://www.carnegiecouncil.org/publications/articles_papers_reports/0093.

5 Mamdani (note 2), p. 9.

6 Standley, 'Reclaiming the Past in Southern Sudan', BBC News, 2006, retrieved on 29 09 2018, available at: http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/5133324.stm.

7 Sudan Tribune, 'South Sudan VP Affirms Apology for Bor Massacre', Sudan Tribune, 2012, retrieved on 29/09/2018, available at: http://www.sudantribune.com/spip.php?article42124.

8 Tisdall, 'Riek Machar, the Former Rebel Fighter Ready for a New Battle', The Guardian, 2012, retrieved on 29/09/2018, available at: https://www.theguardian.com/world/2013/jul/04/riek-machar-south-sudan-ambitions.

9 Mamdani (note 2), p. 5.

that destabilized the country and its society were given the power to rule over their victims[10].

2.2 Creation of South Sudan

Between 2005 and 2011, the Interim Constitution of Southern Sudan (ICSS) served as the national constitution and paved the way for the referendum of self-determination of the people of South Sudan, the establishment of a new constitution and the creation of an administrative, legal and technical infrastructure. At the Conference of all Political Parties of South Sudan, which was held a year before independence, the decision was made to establish a transitional government of national unity, where all parties should be represented. Shortly after independence and with the unquestioned support of the troika, the SPLA/M ignored the request and resumed power, on a legal, self-acquired basis, giving itself the right to rule until 2015[11]. The Transitional Constitution that entered into force with the establishment of the new state of South Sudan in 2011, proclaimed a presidential government where the head of state is also the head of government and armed forces[12]. Salva Kiir, head of SPLA/M became president of South Sudan and appointed Riek Machar as his vice president[13].

After the referendum for self-determination, the transitional government that was set in place by the troika and the international community, was supposed to implement the foundations of the new state. Due to the fact that there was a lack of skilled human resources and a biased selection of candidates, the ministerial positions were occupied by generals of the SPLA/M and their relatives. As an opposition politician told Mamdani during the investigation in 2013, "the state became SPLM and SPLM became the state"[14]. The concentration of power in the hands of the SPLA/M was not only highly debated among the intellectuals but

10 Mamdani (note 2), p. 6.

11 Mamdani (note 2), p. 13.

12 Deng, 'Defining the Nature and Limits of Presidential Powers in the Transitional Constitution of South Sudan: A Politically Contentious Matter for the New Nation', Journal of African Law, 2017, p. 23–39 (25).

13 Human Rights Watch, 'The Impact of the Comprehensive Peace Agreement and the New Government of National Unity on Southern Sudan', 2016, p. 1–28 (20), retrieved on 29/10/2018, available at: https://www.hrw.org/report/2006/03/08/impact-comprehensive-peace-agreement-and-new-government-national-unity-southern.

14 Mamdani (note 2), p. 13.

the public also claimed that an inclusive participation was missing in the drafting process of the constitution[15].

Apart from the dissatisfaction of the society in regards to the missing inclusivity in the political sphere, the differences between Kiir and his vice president Machar became a debated issue. Compared to the idea that the international media defends, the friction between the two leaders is not merely based on ethnic differences, but much more on disagreement regarding the building of the new state and the extension of the term of Kiir's presidency, which was supposed to be renewed in 2015[16]. In 2013, the contest for power became more hostile and Kiir dismissed his vice president Machar and shortly after that, all the ministers. The party split into two groups. After the splitting, the SPLM in Opposition (SPLM-IO), the group led by Machar, was accused of having planned a coup d'état. Kiir used the supposed attempt as a pretext and commanded the killing of Nuer people in the capital, Juba[17]. It was Kiir's violent act and the bloody defense by the Nuer themselves that mark the beginning of the current civil war[18].

2.3 Civil war and peace processes

As the continental authority, the African Union (AU) assumed the role of the mediator in the conflict, appointed representatives and committees and mandated the IGAD to lead the peace negotiations[19]. In 2014, the AU appointed a commission to investigate into the human rights violations taking place in South Sudan. Although the final report describes the happenings in South Sudan as criminal acts that are not prosecuted because of the legal breakdown that the country faces, Mamdani submitted a separate opinion, arguing that the violence is political and that

15 Deng (note 12), p. 26.
16 Tsidall (note 8).
17 Mamdani (note 2), p. 3., as well as Human Rights Watch, World Report 2014, South Sudan, retrieved 29/10/18, available at: https://www.hrw.org/world-report/2014/country-chapters/south-sudan.
18 Mamdani (note 2), p. 9.
19 Lucey/Kumalo, 'How the AU can promote transitional justice in South Sudan', East Africa Report, Institute for Security Studies, 2017, retrieved on 29/10/18, available at: https://issafrica.org/research/east-africa-report/how-the-au-can-promote-transitional-justice-in-south-sudan, p. 1–20 (3–5).

a more complex response is needed to re-establish justice[20]. Due to the fact that the AU did not want to interrupt the peace negotiations that were going on in 2014 with the publication of the report and the very critical separate opinion, they were only published a year after submission. Fortunately, although only in 2015, the recommendations eventually influenced the drafting of the Agreement on the Resolution of the Conflict in South Sudan (ARCISS)[21]. ARCISS, signed in 2015 after a successful mediation by IGAD and external pressure from the troika[22], is an extremely well-structured document with a detailed procedure to follow for the establishment of a transitional government, the deployment of humanitarian assistance and the development of South Sudan's economic and financial potential[23]. In addition, chapter five of the agreement deals with the transitional justice process that is intended to respond to the mass violence and crimes against humanity that have been haunting the society since 2013[24].

While the agreement foresaw a start of those processes within a short time after its signing, it remained largely ignored by the warring parties and violence broke out again in 2016, forcing Machar and other members of the opposition to go into exile. The general deterioration of security, safety and the increased level of violence since 2016 led to efforts of the international community, represented through the African Union, the government itself and civil society to enhance peace and stability within the country[25]. While Kiir initiated a national dialogue by the end of 2017, the IGAD built up a revitalization committee to discuss a further advancement in the transitional justice process. What those initiatives concretely support and why their impact on the transitional justice process remains limited shall be discussed in the last part of this chapter.

20 Mamdani, 'A separate opinion: A Contribution to the AUCISS Report, AU Commission of Inquiry on South Sudan', 2014, retrieved on 29/09/2018, available at: http://www.peaceau.org/uploads/auciss.separate.opinion.pdf.

21 Lucey/Kumalo (note 19), p. 3.

22 Lucey/Kumalo (note 19), p. 4.

23 See Intergovernmental Authority on Development (IGAD), 'Agreement on the resolution of the conflict in the Republic of South Sudan', Addis Ababa, Ethiopia, 2015, retrieved on 29/10/18, available at: https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.

24 IGAD (note 23), chapter 5.

25 Vhumbunu, 'The National Dialogue Initiative in South Sudan', African Center for the Constructive Resolution of Disputes, 2018, retrieved on 29/09/2018, available at: http://www.accord.org.za/conflict-trends/the-national-dialogue-initiative-in-south-sudan.

3. Transitional justice and its limitations

In the next part, a definition of the concept of transitional justice is first presented and then followed by an elaboration of the practical limitations that have been revealed through the experience with this approach in past and current situations.

3.1 Definition transitional justice

Transitional justice is a concept that finds its roots in the post-transition periods of authoritarian regimes that shifted to democracies and in reconstruction programs of post-conflict situations in the late 20th century in South America and Eastern Europe[26]. With legal mechanisms such as courts, truth commissions, compensation and reparation programs, war torn states and the international community try to respond to mass-atrocities of the past that have victimized entire societies and destroyed states' civil institutions[27]. The aim of transitional justice, as defined by the General Secretary of the United Nations, is to "come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and reconciliation"[28]. In practice, transitional justice remains debated and only proves a limited success. It has failed in many settings and seems to be unresponsive to current conflict and post-conflict situations in other regions of the world.

In the early 21st century, the academia and practitioners who have observed the limited success of transitional justice during the past decades, started advocating for a more holistic approach and a focus on the needs of the victims[29]. In particular, Louise Arbour's critique of the neglect of

[26] Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', Social and Legal Studies, 2012, p. 171–186 (173).

[27] Soueid et al., 'The Survivor-centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is a Necessary Component', George Washington International Law Review, 2017, p. 125–179 (134).

[28] Annan, 'The rule of law and transitional justice in conflict and post-conflict societies', United Nations Security Council, Reference Number S/2004/616, 2014, p. 1–21 (6), retrieved on 29/09/2018, available at: https://www.un.org/ruleoflaw/files/2004%20report.pdf.

[29] De Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', United Nations General Assembly, Reference Number A/HRC/30/42, 2016, p. 1–20, retrieved on 29/10/2018, available at: https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf.

economic and social rights in transitional justice processes and her call to target "human rights violations that pre-dated the conflict and caused or contributed to it"[30] led to a wave of contributions from scholars that question the traditional transitional justice measures and call for a transformation or expansion of the concept in order to address structural injustices rooted in historical inequalities.

3.2 Limitations of transitional justice

When the transitional justice approach was first applied, it was in the context of authoritarian military or communist regimes that transitioned to democracies[31]. There was a pre- and a post-context and transitional justice was supposed to deal with the latter. While, during that wave of transitions in the 1980s and 1990s, transitional justice was able to support the reconstructions of state infrastructure, the context has changed nowadays and states are often in gray zones in between authoritarian regimes and democracies and a clear cut of a conflict is not clearly existing[32]. This change of context and the underlying structural inequalities lead to the fact that a society considers survival and safety, together with the fulfilment of basic needs, such as food and shelter, as the most pressing issues. Compared to that, political and civil rights, which are primarily addressed by the traditional transitional justice mechanisms, are given less importance[33]. As Waldorf argues, this focus on political and civil rights at the expense of social and economic rights within transitional justice is connected to the concept of "liberal peace"[34]. This concept of liberal peace is based on the rule of law, democratic elections as well as neoliberal economic reforms. According to this conception of peace, democratic states are less likely to go to war and more prone to stability.

The fact that traditional transitional justice mechanisms, such as courts and amnesties but also truth commissions and compensation pro-

30 For more information, see Arbour's speech at https://news.un.org/en/story/2006/06/183712-poverty-most-serious-and-widespread-human-rights-abuse-un-official-says, as well as Arbour, 'Economic and Social Justice for Societies in Transition', International Law and Politics, 2013, p. 1–27 (3).

31 Balint et al., "Post-Conflict" Reconstruction, the Crimes of the Powerful and Transitional Justice', State Crime Journal, 2017, p. 4–12 (6).

32 Waldorf (note 26), p. 174.

33 Waldorf (note 26), p. 175.

34 Waldorf (note 26), p. 174.

grams, only superficially focus on the needs of the victims or only pretend to be victim-centered, was brought forward by several scholars, including Simon Robins. In his article on transformative justice, he claims that the traditional approaches are usually top-down, imposed by the elites and the international community, who are both far from the local context and far from the communities that are directly impacted by the violence of crimes[35].

Furthermore, by firmly distinguishing between periods of conflict and post-conflict, transitional justice fails to target continuities that have existed before and continue to foster socio-economic injustices after the end of a conflict. Structural violence, such as existing power inequalities, can hide behind expressions that take on different forms during a conflict, a transition or in a post-conflict situation and continue to shape the systemic domination of one group over the other even after the supposed resolution of a conflict[36]. In order to tackle those structural patterns of inequality that are historically rooted in a society or a given country, the transitional justice mechanisms such as amnesties and trials are not appropriate since they are only successful in well-functioning societies with established legal frameworks[37]. If the goal is to achieve deterrence, a transformation of the society and its institutions is necessary, which cannot be achieved with the traditional tools of transitional justice[38].

Other traditional mechanisms, such as reparations and compensations or truth commissions are partly more victim centered, or at least pretend to be, but fail to incorporate a long-term solution. They are established with the aim to achieve reconciliation or compensation for the loss after the conflict and exist for a certain time period but terminate without fully achieving those goals[39]. As observed in regards to the truth commission in South Africa, people claimed that even after the mandate of the truth commission came to an end, reconciliation was not yet achieved in the country[40].

35 Robins, 'Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal', The International Journal of Transitional Justice, 2011, p. 75–98 (76).

36 Balint (note 31), p. 6.

37 Daly, 'Transformative Justice: Charting a Path to Reconciliation', International Legal Perspectives, 2002, p. 73–183 (104).

38 Daly (note 37), p. 181.

39 Gready/Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', The International Journal for Transitional Justice, 2014, p. 339–361 (350).

40 For more on the South African Truth Commission, see Daly (note 37).

Due to the dependence on the international legitimacy of war-torn states or regions of post-conflict, the structure of the transitional justice process is usually highly influenced by external actors, which are more concerned with the justification of their own norms than with the needs of the local population in the country under consideration[41]. The external discourse that potentially also favors the elite at the expense of the victims can additionally lead to a harmful implementation of transitional justice mechanisms, which are commonly negotiated on the top among elite leaders and imposed on the society[42].

In addition, and also due to the external influence, the local context remains largely ignored. International standardized transitional justice mechanisms that have been used in other situations are applied, despite the fact that they are ill-suited to address the challenges and achieve reconciliation and justice in a specific context[43]. This, together with the ignorance of the needs of victims and local communities further leads to the fact that the entire procedure depends on the will of the social group holding the power. In cases where the government has not passed through a transition or the dictator of the previous regime or the perpetrator of the crimes is still in power, the process is hindered.

In sum, transitional justice faces political and pragmatic challenges that impede a successful processing of the past violence that hit a country and its society. The goal of ensuring accountability, serving justice and achieving reconciliation as set by the United Nations Security Council, is only rarely reached.

4. Transformative justice

Transformative justice, on the other hand, is an alternative concept to transitional justice responding to the aforementioned points of criticism. It offers a victim-oriented, participative and holistic approach to deal with mass atrocities of the past. How transformative justice is defined and what features the mechanisms consist of will be elaborated in this part.

41 Daly (note 37), p. 181 and Mutua, 'What is the Future of Transitional Justice', The International Journal for Transitional Justice, 2015, p. 1–9 (7).

42 Robins (note 35), p. 78.

43 Evans, 'Structural Violence, Socioeconomic Rights and Transformative Justice', Journal of Human Rights, 2016, p. 1–20 (5).

4.1 Definition transformative justice

Transformative justice is a concept that responds to the critics of transitional justice. It includes aspects that can unfold the transformative potential of transitional justice and lead to the achievement of the originally set goals: reconciliation and deterrence[44].

In very general terms, transformative justice demands a holistic, victim-oriented and long-term strategy to deal with the mass atrocities of the past. According to Robins, "transformative justice is defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level"[45]. Compared to the traditional concept of transitional justice, the focus is not laid on legal issues or on issues at state or institutional levels, but rather on social injustices, the needs of communities and inequalities that are historically rooted[46]. In Matthew Evans' words, another scholar of transitional justice, "transformative justice emerges in the context of the need to address structural violence and socio-economic rights issues that are produced and reproduced by conflict and authoritarianism"[47].

4.2 Characteristics of transformative justice

While scholars stress different tendencies that transformative justice or the expanded version of transitional justice should take on, they generally agree on features that the process and its institutions should consist of. Those characteristics and why they are decisive for transformation to take place, are presented in the following part.

Placing the victims in the center of the approach is an argument brought forward earlier by the United Nations Human Rights Council in a report of the Special Rapporteur on the promotion of truth, justice,

[44] It remains a debate among scholars if transformative justice is a completely new concept, or simply the extension or improvement of transitional justice. For more information on that debate, see Clara Sandoval, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition', International Center for Transitional Justice, New York, 2017, p. 166–201.

[45] Gready/Robins (note 39), p. 340.

[46] Gready/Robins (note 39), p. 340.

[47] Evans (note 43), p. 9.

reparation and guarantees of non-recurrence in 2004[48]. Based on previous experiences of the United Nations, the report highlights the importance of the participation of victims not only as testimonies in truth commissions and trials, but also during the drafting process of transitional justice measures, follow-up mechanisms and advocacy work[49].

Robins takes these arguments further and demands an ethnographic approach for transitional justice that analyzes the traditional institutions, such as families and communities, and exactly responds to their needs and the needs of the victims themselves[50]. He argues that the broad consultation and participation of victims has to be achieved at all levels of the drafting and implementing process of transitional justice in order to question the imposition of traditional measures by elites or external actors[51]. By doing so, Robin argues, a specific and culturally contextualized concept can be created that brings the victims the justice they need[52]. Culturally embedded, the process and its institutions also benefit from a higher degree of legitimacy[53].

Evans adds that the participation of victims not only increases the legitimacy of the mechanisms, but that it also gives marginalized people the possibility to become activists for their own rights[54]. This goes in line with Robins' argument that the victims, when participating in the development of transitional justice measures become empowered and are enabled to act on behalf of their own needs[55]. Evans further reminds us that those needs are also reflected in the agency of local civil society organizations as well as trade and labor unions and that a consultation of those movements has to be considered when planning and promoting the transformative justice mechanisms[56].

Moreover, transformative justice places its focus on socio-economic rights and needs, which are sometimes more pressing than the political and civil rights targeted through traditional transitional justice mecha-

48 De Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', United Nations General Assembly, Reference Number A/HRC/30/42, 2016, p. 1–20, retrieved on 29/10/2018, available at: https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf.
49 De Greiff (note 48), p. 9–11.
50 Robins (note 35), p. 76.
51 Robins (note 35), p. 77.
52 Robins (note 35), p. 78.
53 Soueid (note 27), p. 142.
54 Evans (note 43), p. 8.
55 Gready, Robins (note 39), p. 357.
56 Evans (note 43), p. 13.

nisms, such as trials and truth commissions. In his article, Waldorf argues that in situations where the basic needs such as survival and safety are not met, transitional justice mechanisms will not be considered a priority. The needs are a result of everyday injustices, which are usually rooted in structural inequalities that date back to periods before the conflict under consideration[57]. As Clara Sandoval argues, the justice mechanisms should therefore also target the conditions that made those inequalities possible and transform these structures in order to achieve sustainable justice[58]. Existing power structures are thereby challenged[59].

By considering the above-mentioned necessary characteristics for transformative justice to enhance a societal transformation with the aim to achieve reconciliation and deterrence it becomes obvious that the measures have to be contextualized. A standardized tool-kit that follows international norms and is imposed by external actors cannot be successful. Erin Daly correctly sums up that "each country's transitional path consists of a unique constellation of social, historical, political, economic, racial, religious, military, and other factors"[60]. He insists on the necessity of "yet-to-be-tried" mechanisms, established in accordance to the particular needs of a particular country[61].

Some of the authors and in particular Robins argue that transitional justice has to be applied in coordination with other fields, such as development, conflict transformation and/or peacebuilding[62]. Lambourne elaborates on the peacebuilding aspect, by including a political, economic, psychosocial and legal dimension to the traditional transitional justice tools in order to add a transformative power. In her opinion peacebuilding mechanisms of which an essential part is the termination of an armed conflict, have a transformative potential that can be used when applied in the context and with the participation of the civil society[63].

In regards to development strategies, Evans argues that a transitional justice approach has to apply similar mechanisms as poverty reduction

57 Waldorf (note 26), p. 175.
58 Sandoval, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition', International Center for Transitional Justice, New York, 2017, p. 166–201 (177).
59 Robins (note 35), p. 355.
60 Daly (note 37), p. 77.
61 Daly (note 37), p. 111.
62 Sandoval (note 58), p. 176.
63 Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence', The International Journal of Transitional Justice, 2009, p. 28–48 (35).

strategies. When targeting the root causes of structural poverty, the mechanism can contribute to a transformation of those conditions that allow the injustice[64].

5. Transformative justice in South Sudan

Looking at the particular situation in South Sudan, the points of criticism of the traditional concept of transitional justice are clearly present. This part of the chapter starts with an elaboration on why the currently planned process for transitional justice is deemed to fail. It then critically examines the other initiatives that have been brought forward by the government itself and the leaders of IGAD. Last, the chapter concludes with an overview of suggestions from civil society organizations and what measures they propose to achieve peace, reconciliation and long-term justice in South Sudan.

5.1 ARCISS—condemned to fail

Although ARCISS is in theory an extremely accurate and detailed agreement between the warring parties for the transitional justice process to take place in South Sudan, it also illustrates the practical challenges that the obsolete approach faces in real contexts. First of all, the fact that newly-agreed ceasefires are constantly violated and the war continues to ravage the country hinders any advancement in the process. There is no clear post-conflict situation, leading to an increased level of insecurity and a lack of stability that could enhance any reconstruction programs. In addition, the lack of security results in a higher perceived importance of basic survival needs and socio-economic rights by the local population, which are not addressed by the traditional transitional justice process.

Second, the political will to implement any of the measures of transitional justice is heavily questioned. The perpetrators of previous mass crimes and human rights abuses still hold the power in their hands. If the transitional justice process was to be started in an equitable way, in particular Kiir and Machar would face severe consequences[65].

64 Evans (note 43), p. 9.

65 The latter may have lost his position of power, but still holds a key role in peace negotiations.

Third, the way the conflict resolution agreement was drafted and then negotiated constitutes another limiting factor to a successful implementation of the mechanisms. Instead of taking into consideration the local context, the structural injustices within the society and the needs of the communities, the agreement appears to be highly standardized and academic, with references to international norms and the opinion of external actors. This is illustrated by the fact that the agreement was negotiated only with members of the South Sudanese elite and under the pressure of the international community[66]. This restricted participation during the negotiation process through the power-holding elite constitutes another obstacle. It is in particular this elite, consisting of former military officials, that has been fighting the struggle for independence from Northern Sudan and committing undocumented war crimes since the 1980s. Considered "criminals" by members of the South Sudanese society, this questioned group who is mandated by IGAD for the transitional justice process to take place in South Sudan impedes any establishment of trust towards governmental institutions. In particular, as for past human rights abuses, such as the Bor massacre, accountability has not been officially investigated for.

The influence of external actors and standardized international norms also becomes apparent in the ignorance of the fact that South Sudan does not possess the necessary infrastructure in order to start the transitional justice processes. The two decades long civil war and the outbreak of violence just after independence in 2013 have left the new nation without any administrative, technical and legal infrastructure. Although, as mentioned above, it was the Transitional Government's responsibility to create state infrastructure, the necessary human and financial resources were not available at that time, resulting in a delay and finally in an incomplete establishment of this infrastructure.

Taking into consideration that since the signing of the agreement none of the conditions for transitional justice to take place have been established and the agreed ceasefires are constantly violated, the weaknesses of this approach becomes evident.

66 Mamdani (note 2), p. 5.

5.2 Existing transformative initiatives

5.2.1 National Dialogue Initiative

After the renewed outbreak of violence in 2016, president Kiir reacted by initiating a national dialogue, composed of South Sudanese citizens, within and outside of the borders of South Sudan, members of the government, political parties and civil society organizations as well as academia and think-tanks and international non-governmental organizations[67]. The aim of the national dialogue was to discuss the outcome of local consultations in all regions of the country in intermediate regional and then in a final national conference in order to find a popularly supported resolution of the conflict starting to be implemented by mid-2018.

Regarding the critical examination of the conflict resolution roadmap for South Sudan, Kiir's initiative appears to respond to the critics of transitional justice. With his national dialogue, he targets a broad consultation of the local population, a contextualization of the mechanisms and a focus on the needs of the victims. By giving the communities the possibility to shape the peace negotiations, he increases the legitimacy of the process. As surveys find, the general initiative of the national dialogue has a wide acceptance within the South Sudanese society but also on an international level[68].

While in theory it is clearly more victim-oriented and contextualized than ARCISS, the national dialogue fails to live up to these standards on the ground. When digging deeper, the participation of key stakeholders remains limited and the main opposition leaders distanced themselves from the process, due to the lack of pre-consultations, transparency issues and the biased selection of committee members[69]. Despite the fact that the exclusion of the opposition in the national dialogue presents a controversy in regards to its actual methodology and aim, Kiir did not initiate a reorganization based on the critical arguments brought forward

67 Vhumbunu, 'The National Dialogue Initiative in South Sudan', African Center for the Constructive Resolution of Disputes, 2018, retrieved on 29/09/2018, available at: http://www.accord.org.za/conflict-trends/the-national-dialogue-initiative-in-south-sudan.

68 Vhumbunu (note 67).

69 Sudan Tribune, 'South Sudan sets conditions for "meaningful" dialogue', Sudan Tribune, 2017, retrieved on 29/09/2018, available at: http://www.sudantribune.com/spip.php?article62335.

but continued the process[70]. A contested national dialogue in a climate of war and insecurity further hinders the execution of the regional and local consultations, reflected in small numbers of people attending those consultations[71]. The restricted number of attendees also reflects the mistrust and loss of confidence of the population towards the government and its initiatives. The national dialogue, theoretically intended to enhance societal transformation, remains a debated and politicized instrument, limited to and in the hands of the power-holding elite.

5.2.2 Revitalization Forum

South Sudan's High Level Revitalization Forum (HLRF) is an initiative of the leaders of IGAD to advance the peace process and regenerate the vision to achieve the planned milestones enlisted in the ARCISS. It foresees several necessary steps to be taken in 2017, including the negotiations of a permanent ceasefire, the implementation of the mechanisms listed in ARCISS as well as the revision of its schedule and newly set elections for August 2018[72]. Eligible to participate in the forum organized by IGAD are the warring parties involved in the signing of the ARCISS.

The initiative to establish a forum and revise and re-discuss the implementation of the conditions of ARCISS bears the characteristics of transformative justice. The leaders of IGAD have realized the obvious obstacles that impede the peace process and react accordingly. According to the critics of transitional justice, it is necessary to coordinate those efforts with other fields, such as peacebuilding. As the initiators of the forum have become aware of the necessity of establishing peace and stability before starting any reconstruction process, one outcome of the forum was the decision to consider the establishment of respected ceasefires by all warring parties a first priority. Furthermore, and in particular considering the recommendations from Mamdani's separate note, the organization has understood the obsolescence of certain provisions of ARCISS and initiates a revision of those. The aim is to generally find a solution that is more contextualized and appropriate to the needs of the conflict in South

70 Vhumbunu (note 67).
71 Vhumbunu (note 67).
72 See Verjee, 'South Sudan's High Level Revitalization Forum, Identifying Conditions for Success', Policy Brief, United State's Institute of Peace, 2017, retrieved on 29/09/2018, available at: https://www.usip.org/sites/default/files/PB228-South-Sudan-s-High-Level-Revitalization-Forum.pdf.

Sudan and is based on primary peace building efforts. One of the main outcomes of the meetings of the forum is the so called "Bridging Proposal", which is supposed to be a middle ground roadmap regarding the implementation of the ARCISS. It was released in the second phase of the forum in May 2018 but got rejected by all the opposition factions because of the allegedly increased power it gives to Salva Kiir[73].

Despite the fact that the forum tries to alleviate the obstacles that hinder the implementation process of the mechanisms of ARCISS, several points of criticism concerning transitional justice are not taken into consideration. As the broad rejection of the "Bridging Proposal" shows, the outcomes lack broad support by the South Sudanese society. The forum completely disregards the consultation of the population or the needs of the victims but is merely based on negotiations reached among the top level and in particular between the government and the leaders of IGAD. Eligible to be part of the discussions in the forum are the ones who have signed the previously agreed ARCISS, hence the elite leaders of the government, the opposition and a few representatives from civil society organizations[74]. Newly established organizations or opposed parties remain excluded. In addition, the access to the forum for the South Sudanese population is further restricted through the forum's meeting place, which is located outside of South Sudan. A victim-oriented approach, based on a wide consultation of the population, is therefore out of reach, resulting in a limited success of the forum and its outcomes. Apart from the rejection of the "Bridging Proposal", other newly agreed ceasefires remain non-respected. The Khartoum Declaration, which constitutes the most recent attempt to impose a ceasefire on the warring factions at the end of June 2018, got violated just a few hours after entry in force[75].

[73] Sudan Tribune (note 69).

[74] See signatories of the ARCISS, which are also eligible to participate in the forum: Intergovernmental Authority on Development, 'Agreement on the resolution of the conflict in the Republic of South Sudan', Addis Ababa, Ethiopia, 2015, retrieved on 29/10/18, available at: https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.

[75] See the Khartoum Declaration: Intergovernmental Authority on Development, 'Khartoum Declaration of Agreement between Parties of the Conflict of South Sudan', Addis Ababa, Ethiopia, 2018, retrieved on 29/10/18, available at: https://igad.int/programs/115-south-sudan-office/1874-khartoum-declaration-of-agreement-between-parties-of-the-conflict-in-south-sudan.

5.3 Promising approaches for transformation

Looking at these initiatives that only respond to part of the critics of transitional justice but mainly ensure that the power is kept in the hands of the political elite, the situation seems hopeless for the people of South Sudan. But, while the government of South Sudan, Western powers and the leaders of IGAD still try to impose their resolutions of the conflict through top-down measures or economic sanctions, civil society organizations have advanced much further. Compared to the elitist approach of the initiatives of the government and the IGAD leaders, the proposals of civil society organizations from South Sudan and other African countries are much more in line with the aspects of transformative justice. Among those initiatives are in particular two projects that deserve special attention. They both academically address the needs of the conflicting parties and propose a contextualized and victim-centered resolution of the conflict. The report "Perceptions on Transitional Justice in South Sudan—Intersection of truth, justice and reconciliation", written by David K. Deng, the research director of the South Sudanese Law Society, presents the results of a survey regarding the perception of truth and justice of the South Sudanese population. The data collection was done by means of a survey in a few selected regions of the country and clearly reveals that at the community level, the discussions around transitional justice are still considered necessary. While the analysis sheds light on the needs of the victims of the conflict and on their perception of justice, the report ends with a list of recommendations for the transitional government, the signatories of ARCISS as well as civil society organizations. Deng's proposal is simple: He insists on developing a "South Sudanese-owned and driven transitional justice program"[76], as only then a societal transformation and long-term stability is achievable.

The second initiative is part of a broader project[77] called "Enhancing African responses to peacebuilding", proposed by three partner organi-

[76] Deng/Willems, 'Perception of Transitional Justice in South Sudan, University for Peace', UPEACE Center The Hague, 2016, retrieved on 29/09/2018, available at: http://www.upeace.nl/cp/uploads/hipe_content/Perceptions-of-Transitional-Justice-in-South-Sudan---Final-Report.pdf.

[77] For more information on the project, see: https://www.prio.org/Projects/Project/?x=1754 and consult Lucey/Kumalo (note 19) and Lucey/Kumalo, 'Democratise or Disintegrate, how the AU can help South Sudan', East Africa Report, Institute for Security Studies, 2017, retrieved on 29/10/18, available at: https://issafrica.org/research/east-africa-report/democratise-or-disintegrate-how-the-au-can-help-south-sudan.

zations: The Institute for Security Studies in South Africa, the Peace Research Institute in Oslo and New York University's Center on International Cooperation. It contains three articles that deal with the conflict in South Sudan and suggestions of how the African Union and the IGAD can move forward and support a transitional justice program in South Sudan. Again, the proposal is people-oriented, based on research with local institutions in South Sudan and it takes into consideration the aspects of transformative justice. Although both suggestions address the criticism of the original transitional justice process proposed for South Sudan, they lack the political and international support to receive the necessary attention to be realistically considered a solution.

6. Conclusion

Mass atrocities, ordered killings of civilians, internally displaced people, millions of refugees, consequences of a severe famine, violated ceasefires, unsuccessful peace negotiations, corrupt politicians and international interference—the headlines of news articles around the world on the conflict of South Sudan are changing day by day. They reveal the inhumane tragedy that is taking place in the newest nation in the world.

While international organizations are insisting on their standardized transitional justice process to establish peace and process the human rights violations that have been committed since 2013, the government and the power-holding elite agree to those roadmaps in theory, but provide zero support in practice. The unsuccessful approach has led to a review of the process and new initiatives. Although the National Dialogue from Kiir and the High Level Revitalization Forum proposed by IGAD address the criticism of the traditional transitional justice concept, they lack wider public support. Whereas those initiatives officially aim at establishing peace and justice, they guarantee that the power is kept in the same hands of the elite and ignore the needs of the communities and the structural inequalities.

Initiatives from civil society organizations in South Sudan and other African countries target exactly those preexisting injustices. By proposing a victim-centered approach, consultations of communities and the participation of the society in the establishment of a transitional justice process, they argue that a transformation of those structures, that form the underlying causes of the conflict, is possible. It remains therefore only a question of when the IGAD and other external actors that lead the peace negotia-

tion process by being able to exert enough pressure on the power-holding elite, recognize the pragmatic proposals of civil society organizations and implement those suggestions to achieve peace and justice in South Sudan.

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This publication deals with the topic of transitional justice. In six case studies, the authors link theoretical and practical implications in order to develop some innovative approaches. Their proposals might help to deal more effectively with the transition of societies, legal orders and political systems.

Young academics from various backgrounds provide fresh insights and demonstrate the relevance of the topic. The chapters analyse transitions and conflicts in Sierra Leone, Argentina, Nicaragua, Nepal, and South Sudan as well as Germany's colonial genocide in Namibia. Thus, the book provides the reader with new insights and contributes to the ongoing debate about transitional justice.

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