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Criminal Law: State of Affairs, Prospects
and Mandates’

TRANSITIONAL JUSTICE: REFRAMING INTERNATIONAL LAW IN TIMES OF VIOLENT CONFLICT*

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ABBREVIATIONS

BPG	UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
TRC	Truth and Reconciliation Commission

1. INTRODUCTION

The last three decades have witnessed the emergence of many new institutions at the national and international level to explicitly deal with serious human rights violations and international crimes committed in the past, i.e. under a previous regime. Since the 1980s, and particularly after the fall of the Berlin wall in 1989, the world has witnessed many examples of such conflicts and the ensuing challenges to address the horrors of the past, including the restoration of democracy in Latin America, the post-communist period in Central Europe, post-Apartheid South Africa and post-genocide Rwanda, several Asian countries after armed conflict, and the Arab Spring. As a result, international courts and tribunals were set up to try individual perpetrators, such as the ad hoc ex-Yugoslavia and Rwanda tribunals in the 1990s, and the more recent and permanent International Criminal Court accompanied by its Trust Fund for Victims. But many national courts have also 'discovered' the category of international crimes and have undertaken criminal prosecutions and trials. Moreover, dozens of truth commissions have been established in order to provide a general overview of past human rights violations and create common ground for the future. Furthermore, many victim reparations programmes have emerged to redress the harm inflicted upon direct and indirect victims of serious human rights violations and international crimes.

These institutions, and their underlying rationales, are commonly grouped together under the new concept of 'transitional justice' that saw the light of day in the mid-1990s and has become a booming field of study since then. No current-day treatise on international law would be complete without at least a succinct overview and debate about transitional justice, and the broader context of research and policy-making within which this legal and political regime has originated and is operating. Hence the importance of focusing on some central questions. What exactly is transitional justice, where did it come from and how did it develop? What is the role of law, particularly international law, in the establishment and operation of the many new national and international institutions and procedures? And how does this section of international law operate in its wider political and social context?

The structure of this contribution largely follows these central questions. We first explain the origins and content of the concept of transitional justice, before going into its four main components: criminal prosecutions, truth commissions, victim reparations and institutional reforms. Along the way, we mention specific types of mechanisms and illustrate them through concrete examples. And we conclude with some critiques of and challenges for transitional justice.

In presenting this overview of transitional justice, we do not take the perspective of classical international lawyers, who are versed in all sources and technicalities of their discipline, but rather that of socio-legal scholars who apply their knowledge and expertise to the area of international law in a contextual and critical

manner.¹ This implies that our attention will not be limited to ‘positive’ law and its operation, but will also cover some aspects relating to the genesis of international law on the one hand, and the effects of international law on the other, all situated within their general social and political context.

2. ORIGINS AND DEVELOPMENTS OF TRANSITIONAL JUSTICE

According to the International Centre for Transitional Justice, one of the world’s leading think-tanks in this field, transitional justice can be defined as ‘the 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. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms’.²

This definition, and many similar ones, draw the attention to several key issues: what legacies of massive human rights violations are being targeted, how are the judicial and non-judicial measures decided and designed, and what features do these four types of measures display? The following sections in this report will address these issues in more detail.

2.1 Conceptual developments

First of all, it is important to highlight the evolutionary character of the concept and the practice of transitional justice in the past quarter century. The specific term ‘transitional justice’ arose in the early 1990s, on the occasion of several international conferences that addressed the theoretical and policy implications of the legacy of authoritarian regimes in Latin America, Central Europe and South Africa.³ In those years, several concepts floated around, including ‘justice in transition’, ‘dealing with the past’,⁴ and ‘Vergangenheitsbewältigung’,⁵ but it was ‘transitional justice’ that finally carried weight in the years to come.

While various authors claimed its conception and parenthood, the first real reference appeared in the three-volume book of 1995 composed by Neil Kritz of the United States Institute of Peace and collecting a large number of studies of

¹ J.M. Beneyto & D. Kennedy (eds.), *New Approaches to International Law. The European and the American Experiences*, The Hague, Asser Press 2012. V. Gessner and D. Nelken (eds.), *European Ways of Law. Towards a European Sociology of Law*, Oxford, Hart Publishing 2007.

² www.ictj.org (accessed on 15 August 2019).

³ P. Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, 31(2) *Human Rights Quarterly* (2009) pp. 321-367.

⁴ L. Huyse, ‘Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past’, in A.J. Jongman, (ed.), *Contemporary Genocides: Causes, Cases, Consequences*, Leiden, PIOOM 1996, pp. 187-214.

⁵ U. Neumann, C. Prittowitz, P. Abrão, L. J. Swensson Jr and M. D. Torelly (Hrsg), *Transitional Justice. Das Problem gerechter strafrechtlicher Vergangenheitsbewältigung*, Frankfurter kriminalwissenschaftliche Studien, Frankfurt a. M., Peter Lang 2013.

countries that had passed from war and dictatorship back to peace and democracy and were facing the challenge of dealing with past crimes.⁶ A second major point of reference was Richard Siegel's review essay of 1998, summarising the first decade of transitional justice research. He referred to transitional justice as 'the study of the choices made and the quality of justice rendered when states are replacing authoritarian regimes by democratic state institutions', and thus highlighted the political transitions from authoritarian regimes to democratic ones.⁷ This conception was to be situated against the background of earlier political science research, first by Philip Schmitter, Guillermo O'Donnell and Laurence Whitehead (1986),⁸ who identified a worldwide trend away from authoritarianisms and towards democratisation, and later by Samuel Huntington (1991), about the 'third wave of democratization'.⁹ In the view of the latter, the trend had started with the carnation revolution in Portugal in 1974 and included the transitions in Latin America, Asia, and Central and Eastern Europe that took place since then.

As noted elsewhere,¹⁰ the conceptual framework of transitional justice was fundamentally altered in 2004, through a ground-breaking report on the rule of law and transitional justice presented by United Nations Secretary-General Kofi Annan to the United Nations Security Council. In this report, transitional justice was defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'. Thus, two major conceptual changes had taken place. Firstly, the definition added a number of clear objectives for transitional justice actions and interventions, namely, to ensure accountability, serve justice, and achieve reconciliation.¹¹ And secondly, it substituted the idea of political transitions and regime changes by the notion of large-scale abuses in whatever context, also within democratic countries. This definition was confirmed in the Secretary-General's follow-up report to the Security Council of 2011, and has since obtained the status of 'acquis' in the field of international law and practice.¹² Furthermore, the same concept has also taken root in official documents of several regional organisations, including the European Union Policy

⁶ N. Kritz (ed.), *Transitional Justice*, Washington, US Institute of Peace Press 1995.

⁷ R.L. Siegel, 'Transitional Justice: A Decade of Debate and Experience', 20(2) *Human Rights Quarterly* (1998) pp. 431-454.

⁸ Ph. Schmitter, G. O'Donnell and L. Whitehead (eds.), *Transitions from Authoritarian Rule. Prospects for Democracy*, Baltimore, Johns Hopkins University Press 1986.

⁹ S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. Oklahoma City, University of Oklahoma Press 1991.

¹⁰ S. Parmentier, 'Transitional Justice', in W.A. Schabas (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge, Cambridge University Press 2016 pp. 52-72.

¹¹ The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2004/616, para. 8.

¹² The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2011/634.

Framework on Transitional Justice,¹³ and the African Union Transitional Justice Policy Framework.¹⁴

Parallel to these developments in the policy world, the concept of transitional justice has given rise to an actual field of study, consisting of specialised journals, specialised book series, mailing lists, conferences, university courses and degrees.

To conclude this section, it is worth referring to some grand periods in the development of transitional justice, both as a concept and a practice. In her seminal article on the ‘genealogy’ of transitional justice, Ruti Teitel, one of the parents of the concept, has specified that three broad categories of situations can be identified that have given rise to discussions, policies and practices of transitional justice:¹⁵

- Phase I, post-Second World War, which started in 1945 with the Nuremberg and Tokyo criminal trials and ended just a couple of years later when the Cold War began;
- Phase II, post-Cold War, which displays the gradual disintegration and ultimate implosion of the Soviet Union and the parallel periods of ‘accelerated democratisation’ in Central and Eastern Europe, and around the world (including Latin America and Africa); and
- Phase III, that of the ‘steady-state’, which is characterised by the rapid development of transitional justice phenomena associated with globalisation, and also refers to political instability and violence in many parts of the world.

While phases II and III in her work clearly coincide with the emergence of the concept of transitional justice since the mid-1990s, this is not the case for phase I, which occurred well before the concept took root. The same historical critique of ‘anachronism’,¹⁶ also came up through the work of Jon Elster, who traced transitional justice issues back to classical Greece, and to the English and French restorations,¹⁷ and of Jozef Monballyu who focused on the changes in the Belgian criminal justice system in the post-First World War period (1918-1928) under the

¹³ Council of the European Union, Policy Framework on Support to Transitional Justice, Brussels, 16 November 2015.

¹⁴ G. Wachira, The African Union Transitional Justice Policy Framework and How it Fits into the African Governance Architecture (AGA), Cambridge Core, May 2018; available at <<https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/african-union-transitional-justice-policy-framework-and-how-it-fits-into-the-african-governance-architecture-aga/AEF88EB3F10C747188D74B23CA99F858/core-reader>> (accessed on 25 September 2019).

¹⁵ R.G Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* (2003) pp. 69-94. And see M. Zunino, *Justice Framed, a Genealogy of Transitional Justice*, Cambridge, Cambridge University Press 2019.

¹⁶ Arthur, *supra* n. 3.

¹⁷ J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge, Cambridge University Press 2004.

heading of transitional justice.¹⁸ While the dangers of ‘Hineininterpretierung’, and thus incorrect comparisons, are always lurking in the background, it can be argued that this type of studies also create the added value of applying the ‘transitional justice lens’ to historical events and thus contribute to novel understandings.

Teitel has also argued that in the field of transitional justice, various models of justice coincide and display specific characteristics:¹⁹

- Criminal justice, evidently embodied in the design and functioning of criminal courts and tribunals, at the national and international level, to prosecute perpetrators of international crimes;
- Historical justice, as illustrated through those mechanisms, both trials and truth-seeking institutions, that promote a broader understanding of past human rights violations and create new narratives;
- Reparatory justice, which is strongly represented in the area of reparations for victims of serious human rights violations and international crimes, both as part of judicial and non-judicial mechanisms;
- Administrative justice, which refers mostly to other types of mechanisms, such as lustration and vetting (the screening of persons for their involvement in human rights violations in the past), as well as other institutional reforms; and
- Constitutional justice, as illustrated by various processes and institutions to reformulate the fundamental relationships between individuals and the state, and thus to create new foundations for post-conflict societies.

2.2 Legal aspects of transitional justice

The above sections make abundantly clear that transitional justice options are heavily influenced by the political, social, economic, and cultural context from which they emerge. At the same time, transitional justice mechanisms often use existing legal instruments, standards and institutions, or develop them anew, to shape society. In the words of Teitel, the relationship between politics and law should be seen as mutual: “[...] law is shaped by the political circumstances, but, [...] law here is not mere product but itself structures the transition”.²⁰ And to put it more concisely: law “is alternately constituted by, and constitutive of, the transition”.²¹ In this respect, several sources of law, general and specific, should be mentioned.

¹⁸ J. Monballyu, ‘La justice transitionnelle en Belgique dans les affaires pénales après la Première Guerre mondiale (1918–1928)’, 80 *Tijdschrift voor Rechtsgeschiedenis / Revue d’Histoire du Droit / The Legal History Review* (2012) pp. 443-479.

¹⁹ R.G. Teitel, *Transitional Justice*, New York, Oxford University Press 2000.

²⁰ *Ibid.* at p. 6.

²¹ *Ibid.*

First of all, transitional justice was born out of the concern with human rights violations committed under previous authoritarian regimes, during situations of armed conflict and war, and even during periods of democracy. Therefore, both international human rights law and constitutional law at the domestic level have constituted, and will continue to constitute, a major source of inspiration for the development of transitional justice.²² Furthermore, the establishment of the international criminal tribunals since the 1990s has clearly found inspiration in international humanitarian law (the law of war) on the one hand, and, on the other hand, also international criminal law. Finally, several aspects of transitional justice also go back to general principles of international law, such as the concept of *ius cogens*, the principle of state immunity and the duty to repair harm.

Next to these general sources of law, specific sources of law also have been very inspirational. It should be emphasised that, from the very start, transitional justice has been associated with the fight against impunity for serious human rights violations. This connection was clearly established through the reports of the two special experts requested by the then United Nations Commission on Human Rights to systematise and improve the principles against impunity. Both Louis Joinet and Diane Orentlicher in their reports of 1997 and 2005, respectively, listed the three main pillars of the fight against impunity: (a) the right to know about the facts of the past, both for individuals and for society at large; (b) the right to justice, i.e. perpetrators should be prosecuted and tried before a court of law, and (c) the right to reparation for victims for the harm inflicted upon them.²³ These three pillars to combat impunity continue to constitute the hard core of transitional justice mechanisms around the world.²⁴ One subsection, on victim reparations, has given rise to separate United Nations Basic Principles for Redress and Reparations, which will be discussed below.

In sum, the confluence of several sections of international law has led David Scheffer, ambassador for war crimes under the Clinton administration, to propose the new concept of ‘atrocities crimes’, or crimes that are so serious that they should be the focus of individual states and the international community.²⁵ In his view, the following four bodies of international law are core to the identification and

²² S. Parmentier, M. Aciru, H. Saeed and M. Rauschenbach, ‘Human Rights in Situations of Transitional Justice’, in L. Weber, E. Fishwick and M. Marmo (eds.), *The Routledge International Handbook of Criminology and Human Rights*, Milton Park, Abingdon, Routledge 2017, pp. 235-246.

²³ Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88.

²⁴ F. Haldemann and Th. Unger (eds.) *The United Nations Principles to Combat Impunity: a Commentary*, Oxford, Oxford University Press 2018.

²⁵ D. Scheffer, ‘Genocide and Atrocities Crimes’, 1(3) *Genocide Studies and Prevention: An International Journal* (2006) pp. 229-250.

dealing with such atrocity crimes: international human rights law, international humanitarian law, international criminal law, and general international law.

To conclude this section on a wider note, it merits attention that many international crimes committed during authoritarian rule and periods of armed conflict tend to be fundamentally different from ‘ordinary’ crimes in ‘normal’ situations, however serious the latter may be.²⁶ First of all, serious crimes in conflict situations are frequently committed for political reasons or within a political context, either to challenge positions of power, or to defend them.²⁷ They are often called ‘political crimes’, as they either ‘defy’ or ‘defend’ the holders and sources of political power.²⁸ As a result, they are frequently committed by smaller or larger groups, and thus require a high degree of organisation, command structure, financial and logistical resources. Secondly, international crimes often produce massive numbers of direct and indirect victims, and generate a lot of damage. In some cases, and particularly during armed conflict, there can be a ‘role reversal’ whereby victims become offenders and offenders become victims.²⁹ Each of these characteristics adds to the highly ‘politicized’ character of transitional justice, and thus poses particular challenges to the design and the operation of transitional justice mechanisms.

3. MAIN PILLARS OF TRANSITIONAL JUSTICE

In this section, we will give a short overview of the main ‘pillars’ of transitional justice, as they are commonly denoted. While there is no universal consensus on the exact number and nature of these pillars, four of them are very widely accepted to stand out: criminal prosecutions, truth commissions, victim reparation programmes, and institutional reforms. For each of these pillars, some judicial and others non-judicial, we will briefly sketch the main characteristics and types, and also highlight some topical debates. Sometimes, other mechanisms that play an important role in post-conflict contexts, like amnesty provisions, civil justice procedures, and local justice institutions, are also subsumed under the heading of transitional justice.³⁰ Given the constraints of this report, however, we will not deal with the latter. In line with the general perspective of this report, we take a socio-

²⁶ S. Parmentier and E. Weitekamp, ‘Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes’, in S. Parmentier and E. Weitekamp (eds.), *Crime and Human Rights*, Amsterdam/Oxford, Elsevier/JAI Press, 2007 pp. 109-144.

²⁷ Ch. Van Den Wyngaert, *Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order*, The Hague, Kluwer 1980.

²⁸ J.I. Ross, *The Dynamics of Political Crime*, Thousand Oaks, Cal., Sage 2003.

²⁹ M. Mamdani, *When Victims Become Killers. Colonialism, Nativism, and the Genocide in Rwanda*, Princeton, Princeton University Press 2001.

³⁰ Advisory Council on International Affairs, *Transitional Justice. Justice and Peace in Situations of Transition*, The Hague, Advisory Council on International Affairs, Opinion on Transitional Justice, 2009.

legal approach to international law, applying an emphasis on law but also including aspects from other social science disciplines, like political science, criminology, and psychology. This is based on the assumption that transitional justice is a field par excellence where many aspects, particularly law and politics, are closely intertwined and therefore merit being studied in a broader context.

3.1 Criminal prosecutions

In virtually all treatises on transitional justice criminal prosecutions are listed as the prime mechanism for dealing with the human rights violations and international crimes of the past, and in some cases transitional justice is even reduced to criminal justice.

3.1.1 *Main characteristics of criminal prosecutions*

This first pillar is firmly rooted in the retributive model of criminal justice systems, whereby international crimes are considered to constitute an infringement of the public order and need to be investigated, prosecuted, and tried through the interplay of the law enforcement agencies, in casu the police, the prosecutorial services and the criminal courts. If found guilty, offenders should serve prison sentences, possibly in combination with other sanctions, like the loss of political rights and monetary compensation to the victims. Hence, the prison system and other measures for the execution of criminal sanctions complete the criminal justice pyramid. By imposing harsh sanctions, the reasoning goes, the criminal justice system is believed to bring an end to impunity and deter criminal acts of the same persons and the general public, and thus to contribute to the prevention of similar crimes and violations in the future.³¹ Overall, one can argue that the last half century has witnessed a gradual evolution from impunity to accountability for serious human rights violations and international crimes, although these developments have not been linear nor systematic, and continue to display many anomalies and lacunae.

As mentioned above, many international crimes committed during periods of dictatorial rule and armed conflict tend to display fundamentally different features from ‘ordinary’ crimes in ‘normal’ situations. As a result, the nature of these crimes, and of their perpetrators and victims, make the investigation, prosecution and trials by criminal justice agents fundamentally different and much more difficult to deal with. They also pose particular difficulties for the punishment of the offenders and the reparations for victims, not to mention creating general deterrence and strengthening the rule of law in the post-conflict society. These many challenges explain the complexity of criminal prosecutions for international crimes in today’s world.

³¹ M. Bergsmo and E. Buis (eds.), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Brussels, Torkel Opsahl Academic EPublisher 2018.

3.1.2 *Three types of criminal prosecutions*

Criminal prosecutions as a mechanism of transitional justice can aptly be portrayed to constitute a ‘triptych’,³² a metaphor that refers to the paintings decorating many churches and other religious institutions across the globe. In this image, the central piece of this triptych consists of criminal prosecutions taking place at the domestic level, that is by the law enforcement agencies of the state on whose territory the international crimes were committed. In this model, the criminal justice institutions that normally deal with ‘ordinary’ crimes – police, public prosecutor, criminal court and prison system – are mobilised to address international crimes. The legal base for these actions lays within the national legal order, either attached to ordinary categories of crime (like murder, abduction), or after the incorporation of international crimes in the domestic legal order, through monistic or dualistic systems.³³ It can be argued that the domestic level is and remains the ‘regular’ system in criminal law and constitutes the prime locus for many prosecutions worldwide.

The wide diversity of domestic criminal prosecutions can be illustrated by some examples, without any claim to completeness:

- Right after the Second World War domestic criminal justice institutions in many occupied countries, like Belgium, the Netherlands and France, investigated and tried war crimes committed on their respective territories.³⁴ Also in Germany in the 1950s, in the aftermath of the large Nuremberg trial, national criminal prosecutions and trials have taken place.
- In the 1970s and 1980s respectively, domestic trials against high-level military were held in Greece and Argentina after the military juntas had been ousted.³⁵ In Argentina, additional trials against lower ranking officials continue to be held until today.
- In Rwanda, the crimes of the genocide against the Tutsi of 1994 have been tried by regular national criminal courts since the early days. Because of their limited capacity, the new government later designed specialized tribunals, called ‘Gacaca’, which implied a re-activation of old systems of conflict management at the local level.³⁶

³² E. Weitekamp and S. Parmentier, ‘Restorative Justice and State Crime’, in D. Weisburd and G. Bruinsma (eds.), *Encyclopedia of Criminology and Criminal Justice*, New York, Springer Verlag 2014, pp. 4430-4446.

³³ E. Kristjansdottir, A. Nollkaemper and C. Ryngaert (eds.), *International Law in Domestic Courts. Rule of Law Reform in Post-Conflict States*, volume 9, Series on Transitional Justice, Cambridge/Antwerp/Portland, Intersentia Publishers 2012.

³⁴ D. Pendas, ‘Seeking Justice, Finding Law: Nazi Trials in Postwar Europe’, 81(2) *The Journal of Modern History* (2009) pp. 347-368.

³⁵ D. Orentlicher, ‘“Settling Accounts” Revisited: Reconciling Global Norms with Local Agency’, (1) *International Journal of Transitional Justice* (2007) pp. 10-22.

³⁶ Ph. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda. Justice without Lawyers*, Cambridge, Cambridge University Press 2010; P. Sullo, *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda. The Search for Truth, Justice and Reconciliation*, Asser Press, Berlin 2018.

- In the Democratic Republic of the Congo, crimes of sexual violence are increasingly being investigated by national courts, not only in the Ituri region whose situation was referred to the International Criminal Court, but also in other parts of the country.³⁷

Despite the centrality of domestic criminal prosecutions, the triptych holds two more panels that merit closer attention. One is composed of the criminal justice mechanisms that have emerged at the international level.³⁸ International criminal justice has attracted a lot of attention in international law and is nowadays seen as the hallmark of criminal accountability and a strong weapon against impunity for international crimes. Yet, the legal bases of international tribunals and courts strongly differ from one institution to the other, illustrating the rapid developments in this field. As a result, their legal competences (in terms of substantive crimes, targeted offenders, place and time) also differ substantially. Furthermore, the principles of national criminal justice systems apply only partially. International criminal justice institutions only consist of two layers, namely prosecutorial offices and trial chambers.³⁹ Because they lack the preceding layer, an independent police force, as well as the final layer, a prison system for the execution of sentences, their operations heavily depend on the cooperation by individual states and by the international community as a whole.⁴⁰

Here the list of examples is much shorter, but also clearer:

- The archetype of this model lies with the two military tribunals established after the Second World War to deal with war crimes: the military tribunal of Nuremberg and the military tribunal for the Far East (or the Tokyo tribunal). Set up by the allied powers who won the Second World War and judging only a limited number of military and political representatives of the defeated nations, both tribunals have been categorised as forms of ‘victors’ justice’.
- After four decades of inaction, the early 1990s witnessed the establishment of the two ad hoc criminal tribunals, for ex-Yugoslavia (1993) and for Rwanda (1994) respectively. They were set up by the Security Council of the United Nations under Article VII of the UN Charter, with a limited territorial jurisdiction, and in the case of the ICTR also for a limited period of time. Both tribunals had primacy over national criminal prosecutions, which

³⁷ M. Lake, ‘Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo’, 4(1) *African Conflict and Peacebuilding Review* (2014) pp. 1-32.

³⁸ See the report by G. Sluiter for the Royal Netherlands Society of International Law (Koninklijke Nederlandse Vereniging voor Internationaal Recht (*KNVIR*)) (2019) for more details about international criminal justice.

³⁹ L. Reydams, J. Wouters and C. Ryngaert (eds.), *International Prosecutors*, Oxford, Oxford University Press 2012.

⁴⁰ V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge, Cambridge University Press 2008.

- at the time constituted a strong innovation in international criminal law.
- In the following years, intense negotiations among many countries led to the adoption of the Rome Statute in 1998 to establish a permanent International Criminal Court, entering into operation in 2002, in combination with the Trust Fund for Victims.⁴¹ For the first time the main categories of international crimes were clearly defined: genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute introduced a novel system of ‘complementarity’, only allowing the Court to step in if States Parties are ‘unwilling or unable’ to undertake criminal prosecutions at the national level.
- It was followed by a number of mixed or hybrid international-national tribunals, including for the crimes committed in East Timor, Kosovo and Cambodia.⁴² The mixed nature pertains both to the legal basis (applying national and international law) and the composition of the tribunals (consisting of national and international members).

Next to criminal prosecutions at the domestic and the international level, the ‘third-country’ model should be highlighted. This also relates to criminal prosecutions at the national level, but focuses on international crimes committed outside of the territory of the state concerned. In this model as well, the criminal justice institutions that normally deal with ‘ordinary’ crimes – police, public prosecutor, criminal court, and prison system – are mobilised to address international crimes. However, the legal basis to this effect is very different as it requires the national legal order to extend its reach to a ‘universal jurisdiction’.⁴³ The main argument for this model lies in the heinous character of international crimes that are considered not only to affect the victims and society of the states concerned, but humanity as a whole, for which reason third states are willing to invest some of their resources in the prosecutions and trials of these offenders. Over the past decades, only a limited number of countries have adopted universal jurisdiction legislation.⁴⁴ Moreover, various models exist, ranging from ‘pure’ universal jurisdiction (no links with the place of the crime, the nationality of the offender or the victim) to more qualified versions that require some kind of link.

Some examples of universal jurisdiction laws include the following:

⁴¹ W. Schabas, *The International Criminal Court. A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2nd edition, 2016.

⁴² C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, Oxford, Oxford University Press 2004.

⁴³ Anne-Marie Slaughter, ‘Defining the Limits: Universal Jurisdiction and the National Courts’, in S. Ratner (ed.), *Universal Jurisdiction. National Courts and the Prosecution of Serious Crimes under International Law*, Philadelphia, University of Pennsylvania Press 2006, pp. 168-192.

⁴⁴ L. Reydams, *The Application of Universal Jurisdiction in the Fight against Impunity*, In-Depth Analysis Reports, European Parliament, March 2016; available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929013> (accessed on 25 September 2019).

- One of the oldest examples relates to the Eichmann case, whereby the suspect was criminally tried in Israel for crimes against the Jews committed in Germany and other territories under German occupation during WWII. To stand trial in Jerusalem, Eichmann was secretly kidnapped in Buenos Aires, which raised serious issues about the legality of the ensuing proceedings.⁴⁵
- Spain and Belgium belong to the small group of European countries that in the course of the 1990s developed extensive universal jurisdiction over many international crimes, notably war crimes, crimes against humanity and genocide.⁴⁶ In Belgium, e.g., the last two decades have witnessed several jury trials before the Court of Assizes in Brussels against perpetrators involved in the genocide against the Tutsi in Rwanda. The system also attracted many claims from around the world for further investigation by national judges, thus quickly flooding the criminal justice system. After claims against Israeli officials for their alleged role in the massacres in Palestinian refugee camps in Lebanon, the Belgian government came under strong political pressure from various sides and in later years decided to radically curtail the universal jurisdiction legislation.⁴⁷ In the case of Spain, the national judicial authorities continued to accept and investigate cases from around the world, most notably from Latin American countries.
- In 1998-1999, the United Kingdom was host to the famous case of Pinochet, former head of state of Chile, who was kept under house arrest in London after several other European countries had asked for his extradition for his role as commander of the armed forces in the killing, torture and disappearance of many Chileans after his military coup in 1973. While the general was ultimately allowed to travel back to Chile on humanitarian grounds, the ‘Pinochet effect’ of increased criminal accountability resonated very strongly around the world in the following years.⁴⁸
- Other countries in Europe, like Switzerland, Germany, France and the Netherlands, also continue to operate universal jurisdiction laws, all based on the same principles but of a very different nature. In 2018, there was evidence of 149 suspects in fifteen countries and seventeen accused on trial for a range of international crimes.⁴⁹

This concise overview of three types of criminal prosecutions for international crimes displays some salient characteristics. First of all, none of these types appears as static but rather as ‘contingent’, i.e. under constant evolution and influenced by other developments in (international) law and in society in general. E.g., the first

⁴⁵ Ch. Paulussen, *Male Captus Bene Detentus?*, Antwerp/Oxford, Intersentia Publishers 2010.

⁴⁶ J. Wouters and H. Panken, *De Genocidewet in Internationaal Perspectief*, Gent, Larcier 2002.

⁴⁷ Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases*, 2019, available at: <https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf> (accessed on 25 September 2019).

⁴⁸ N. Roht-Arriaza, *The Pinochet Effect. Transnational Justice in the Age of Human Rights*, Philadelphia, University of Pennsylvania Press 2005.

⁴⁹ Trial International, *supra* n. 47.

wave of anti-junta trials in Argentina immediately after the return to democracy (President Alfonsín) by the 1990s was followed by presidential pardons and amnesty laws (President Menem) that stalled any further domestic prosecutions for more than a decade, until new criminal policies started to be instituted (President Kirchner) and the criminal trials resumed that continue until today.⁵⁰ International criminal justice has been under constant evolution in the last three decades, as demonstrated by the changing provisions on, inter alia, immunities, victim standing, and evidence and procedures. And universal jurisdiction laws that were in full swing at the end of the 20th century have since then been curtailed and lost a lot of their power, but they continue to form the basis of many prosecutions worldwide.

Secondly, the three types of criminal prosecutions do not operate in complete isolation, but on the contrary display a very dynamic relationship. The various levels and systems influence one another, in their set-up, operations and outreach. E.g., the post-WWII domestic trials in Germany might not have taken place without the preceding international trial in Nuremberg. Also, the case law of many international tribunals is serving as a source of inspiration for other international tribunals and courts, and also for national courts. Furthermore, the visible limitations of the Pinochet case in London spurred a greater interest in prosecutions at the international level in ensuing years. And a country like Rwanda has adopted a comprehensive policy of full accountability for the genocide against the Tutsi by pushing for criminal prosecutions at all levels, domestic, international and in third countries.

To conclude, criminal prosecutions provide a crucial aspect of transitional justice. Their development and interaction over the last decades, particularly since the end of the Cold War, can be seen to constitute a major innovation in international law. At the same time, because they deal with international crimes, which are in essence political, the various legal designs of criminal prosecutions remain strongly embedded in politics, certainly at the international level but also related to the domestic realm. This relates to the mandates and competences of criminal tribunals and courts, their rules of evidence and procedure, their internal working methods and their external communication with the world.

3.1.3 *Debates about criminal prosecutions*

After this general description of criminal prosecutions as one transitional justice mechanism, it is also crucial to dig deeper and raise some more fundamental issues about the place of criminal prosecutions in the totality of transitional justice. Such meta-legal perspective provides a richer understanding of the reasons why criminal prosecutions are used, or not used, in certain cases, their operations and their effects on law and society. Hence a short overview of some strengths and weaknesses of

⁵⁰ D. Zysman Quirós, 'Punishment, Democracy and Transitional Justice in Argentina (1983-2015)', 6(1) *International Journal for Crime, Justice and Social Democracy* (2017) pp. 88-102.

criminal prosecutions, sometimes in general and sometimes related to one specific type.⁵¹

First of all, a wide body of literature covers the strong points of criminal prosecutions for international crimes, and many of these arguments are adopted and reiterated in legal and political circles around the globe:

- Primo, the legal aspect. In her seminal article of 1991, Diane Orentlicher convincingly argued that there exists a general ‘duty to prosecute in international human rights law’ for serious human rights violations, grounding her thesis in the several human rights treaties that contain passages to this very effect and the ensuing case law of international supervisory bodies. In the updated version of her article of 2007, while reiterating this fundamental principle, she also accepted the distinction between a ‘global norm’ (criminal prosecution for the most responsible perpetrators) and the ‘local agency’ to enforce and interpret this norm (including the non-prosecution for many low-level offenders).⁵² In essence, it means that not all perpetrators of all international crimes must inevitably be criminally prosecuted, but that a large degree of discretion exists, for a variety of reasons to be determined by local (read: domestic) authorities. Both aspects go to the other legal argument that criminal prosecutions, national and international, put an end to total impunity for the worst crimes, or at least reduce the levels of impunity in post-conflict societies.
- Secondo, there is a political aspect. Many have argued that after the return to democracy of authoritarian states, criminal prosecutions can strengthen this fragile democracy by confirming and consolidating the principles of the ‘rule of law’.⁵³ By doing so, prosecutions can even provide a firm foundation on which to construct more awareness for human rights and a stronger human rights culture in the country. Kathryn Sikkink has argued that criminal prosecutions have fundamentally transformed world politics and are a necessary prerequisite for the long-term development of human rights.⁵⁴
- Finally, there is a moral argument. It is argued that criminal prosecutions, even if limited to some international crimes committed by some perpetrators, do assist in reconstructing the moral order of a society in a Durkheimian manner. By confirming the moral values of right and wrongful behaviour, they contribute to the desire that ‘justice be done’, which is held by society as a whole and by specific groups in particular (mostly victims).

⁵¹ Huyse, *supra* n. 4.

⁵² Orentlicher, *supra* n. 35 at p. 10.

⁵³ R. Zając Sannerholm, *Rule of Law after War and Crisis. Ideologies, Norms and Methods*, volume 7, Series on Transitional Justice, Cambridge/Antwerp/Portland, Intersentia Publishers 2012.

⁵⁴ K. Sikkink, *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics*, New York, Norton Company 2011.

However, criminal prosecutions are not regarded to operate without problems or risks, and have therefore also attracted a lot of critiques:

- A first series of critiques also concerns legal matters.
 - (a) Contradictory as it may sound, criminal prosecutions of perpetrators can also undermine the ‘rule of law’ of the new state or the new regime. If certain acts were not punishable under the former regime or government, or if certain crimes are prescribed, criminal prosecutions may no longer find a legal basis. Several Central European countries, upon ratifying the European Convention of Human Rights in the early 1990s, found themselves confronted with the principle of non-retroactivity of domestic criminal law for serious human rights violations committed before and during the 1960s.
 - (b) Another legal challenge to domestic criminal justice systems relates to their level of independence and impartiality. Even if the legal hardware of a country or regime has been adapted to modern standards, the mentality and culture of the police, prosecutors, judges and other law enforcement personnel may not have changed so quickly. This poses particular problems when law enforcers appointed by the previous regime are called to investigate and judge the crimes of their former colleagues. Problems of this nature are of course very minimal in the case of criminal prosecutions at the international level or in third countries.
 - (c) Furthermore, all criminal justice systems confronted with mass violence face major logistical problems that also entail legal consequences. The sheer number of perpetrators makes it unavoidable to be highly selective and to only prosecute some perpetrators. Who then is to be prosecuted: the heads and the planners of the crimes, the ones who executed the orders and those who assisted them, the so-called ‘bystanders’ who witnessed and sometimes benefited from the consequences? Logistical constraints involve hard choices to make, and inevitably also impact on principles of fair trial, equality of arms, etcetera.
 - (d) Finally, criminal prosecutions and trials by their very nature mostly focus on the offenders and their rights, and tend to reserve little space for victims of international crimes whose role is often limited to being witnesses. While the regimes of victims’ rights, both in domestic and international criminal justice, are gradually developing (the ICC being the most recent example), victimological researchers argue that these developments are not systematic and that there is a long way to go before victims will have the same standing as perpetrators.⁵⁵

⁵⁵ S. Walklate (ed.), *Handbook of Victims and Victimology*, Abingdon, Routledge, 2nd edition, 2017.

- Secondly, the political context may also contain important risks.
 - (a) Many new democracies or new governments remain very fragile if former political and military elites continue to resist the new order, passively or actively. Criminal prosecutions against high-level perpetrators of the previous regime, and even the threat thereof, can provoke the old elites to opposition and even to resuming power, as the examples of Chile and Argentina illustrate. Although this risk is larger in the case of domestic prosecutions, the first case of Uganda and the Lord’s Resistance Army before the ICC clearly demonstrates that the threat of international prosecutions may also lead some key actors involved in peace negotiations into renewed violence.
 - (b) Politics also play a determining role in another way. For every international tribunal or court established, one can find examples of similar crimes or cases for which no tribunal or court was or will ever be established. Vast numbers of international crimes in Guatemala, the Democratic Republic of the Congo and Indonesia, to name just a few countries, will never be prosecuted because of the lack of political consensus about setting up new tribunals, while the domestic and third-country systems are unlikely to take over their role and remain very inactive and/or inefficient. This is not even to mention powerful nations, like China, India, Russia and the United States, that adhere to a strict ‘statist logic’⁵⁶ and consistently refuse any international interference in their domestic affairs, particularly when they relate to serious human rights violations and international crimes of the past. These and other reflections of geostrategic *Realpolitik* in international affairs cast many sobering, even chilling, effects on the operations of criminal prosecutions worldwide.

3.2 Truth commissions

Next to criminal prosecutions, truth commissions are commonly considered a second major mechanism of transitional justice. The basic idea is not to prosecute and try individual perpetrators of international crimes, but it is fundamentally different, namely, to provide a detailed overview of facts and figures about the violent past, and of the causes that gave rise to them. In the sense of the Principles to Combat Impunity, they contribute primarily to ‘the right to know’ for victims and society at large.⁵⁷ The ultimate goal of truth commissions is to construct a collec-

⁵⁶ R. Falk, ‘The Quest for Human Rights in an Era of Globalization’, in M. Schechter (ed.), *Future Multilateralism. The Political and Social Framework*, London, Palgrave Macmillan 1999, pp. 153-178.

⁵⁷ Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; Independent Study on Best Practices, Including

tive understanding of the past and thus create common ground for co-existence between the diverse groups and factions in the post-conflict society. While they use certain instruments that resemble court procedures, their working methods are fundamentally non-judicial. In contrast to criminal prosecutions that are basically offender-focused, truth commissions adopt a strong focus on victims and their victimisation. Therefore, and contrary to the retributive approach of criminal prosecutions, truth commissions are said to adopt a ‘restorative approach’, both in their main objectives and their working methods.⁵⁸ In the terms of Teitel, they contribute primarily to ‘historical justice’.⁵⁹

We first highlight some general features of truth commissions, before analysing specific types and highlighting some debates around truth commissions.

3.2.1 *General features of truth commissions*

Although truth commissions constitute a relatively recent phenomenon, the first one only dating back to the 1970s, their numbers have quickly risen in the last couple of years. Moreover, they tend to be very flexible institutions that are being moulded according to the constraints and needs of the political and social circumstances in post-authoritarian and post-war societies. Truth commissions are not permanent bodies, but ad hoc institutions that always exist for a limited period of time. Sometimes they are the only transitional justice mechanism in place, at times they are combined with other transitional justice mechanisms, such as criminal prosecutions, either in a consecutive order or even operating at the same time.

Because truth commissions are not courts or tribunals, there is no formal judicial (or legal) definition of what a truth commission is. Despite the large variety among truth commissions, however, it is possible to identify some common features. Priscilla Hayner established herself as one of the prime truth commission scholars and her qualification is among the most widely accepted. In her view, for an institution to be called a truth commission it needs to comply with five major features:⁶⁰

- (1) it is not concerned with present events, but only with past ones;
- (2) it is not investigating individual events, but focuses on larger patterns of events, over a longer period of time;
- (3) it collects information from people that are directly affected, and therefore engages in a direct and broad manner with them and their perceptions and needs;
- (4) it is always a temporary body, not a permanent one, and supposed to produce a final report; and

Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88.

⁵⁸ I. Aertsen, J. Arsovska, H. Rohne, M. Valiñas, and K. Vanspauwen (eds.), *Restoring Justice after Large-Scale Violent Conflicts*, Cullompton, Willan Publishing 2008.

⁵⁹ Teitel, *supra* n. 19.

⁶⁰ P. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., New York, Routledge 2011, at pp. 11-12; also, S. Parmentier and M. Aciru, *supra* n. 5.

- (5) it is not a private initiative, but from the very start enjoys the support and/or the powers provided by the state within which the investigations take place.

This five-point list is in fact an update from the earlier definition given by the same author in 2001, but with two additions (points 3 and 5) after quite fierce critiques from Mark Freeman, another truth commission expert.⁶¹ In his view, the earlier definition paid too little attention to two issues: firstly, the victim-centred nature of truth commissions, which allows victims to tell their stories and express their expectations; and secondly, the fact that truth commissions focus on crimes that were committed in the same State that entrusted them with the powers and the support to investigate.

More than criminal prosecutions and trials, truth commissions adopt a strong focus on victims and their families, first of all to collect individual stories that together constitute the major patterns of human rights violations and international crimes, and secondly also to pay tribute to the victims and survivors of these horrendous acts. For these purposes, they can adopt various special procedures for e.g. statement taking, public hearings, confrontations with perpetrators. Throughout such procedures, the support of the state remains crucial. Although truth commissions may work in an independent manner, they still operate within a state context for their composition, legal competences and organisational resources. In many cases, their resources are too limited to adequately address the vast numbers of serious human rights violations of the past, thus making this a daunting, if not impossible exercise. Moreover, after their (short) terms expire, truth commissions heavily depend on the state for the implementation of their recommendations, which poses specific challenges.

3.2.2 *Different types of truth commissions*

Unlike criminal prosecutions, which were typified above on the basis of their national or international reach, truth commissions are much more difficult to typify. The main reason is that they always operate at the national level, and although some display some international features, no truth commission has ever existed at the international level in the same way as the International Criminal Court is currently dealing with criminal cases from across the globe. More than two decades ago, Michael Scharf staunchly defended the creation a permanent international truth commission, and even elaborated a draft statute, as a way to provide the international community with more expertise and more continuity to give effect to the right to truth.⁶² Thus far, however, no such institution has come into existence.

⁶¹ M. Freeman, *Truth Commissions and Procedural Fairness*, Cambridge, Cambridge University Press, 2006 at pp. 14-18.

⁶² M. Scharf, 'The Case for a Permanent International Truth Commission', 7(2) *Duke Journal of Comparative & International Law* (1997) pp. 375-410.

In virtually all cases, the reasons for their establishment, their mandates and their resources heavily depend on the political and economic considerations within a given country and at the international level. Overall, it could be argued that over the last decades at least three types of truth commissions have seen the light of day, partly based on their chronology and partly on their focus. The first type displays a strong emphasis on documenting the patterns of human rights violations committed under the previous regime, including facts and figures about the victims, what happened to them and how these violations can be prevented in the future. It is the oldest type of truth commission, and less in vogue in the 21st century.

Some examples include the following:⁶³

- Uganda was host to the first commission of this type, called the ‘Commission of Inquiry into the Disappearances of People in Uganda since 25 January, 1971’. Set up in 1974 by presidential decree, then-President Amin allowed the commission to look into cases of disappearances during the first three years of its mandate. Over 300 such cases were reported, but the commission report was never officially published, thus lacking an important feature to formally be called a truth commission.
- The first well-established truth commission came about in Argentina in late 1983, by decree of the first newly-elected President Alfonsín after the seven-year military dictatorship. The CONADEP commission’s mandate was limited to disappearances only, and it reported nearly 9,000 such cases and recommended many reforms in the country. The famous ‘Nunca Mas’ report of 1984 became a hallmark for Argentina and the rest of the world of thorough (and speedy) human rights documentation and awareness.
- Similar commissions were set up by the new President Aylwin in Chile in 1990 to investigate human rights abuses resulting in death or disappearance during the preceding military rule of general Pinochet (1973-1990), thereby excluding the violations of torture and other abuses not resulting in death.
- In Guatemala, the United Nations-brokered peace agreement between the government and the major guerrilla force established in 1996 a truth commission (‘Commission for Historical Clarification in Guatemala’) to look into the many human rights violations during the 36-year long armed conflict. It concluded that many forms of repression took place by the armed forces and also the judiciary, and that in some regions state agents had committed genocide against the Mayan people.

The second type of truth commission is not only concerned with documenting the human rights violations of the past, but also with promoting some form of reconciliation between individuals, groups and society at large in the post-conflict situation. Therefore, these commissions also include ‘reconciliation’ in their title,

⁶³ An extensive digital collection of truth commissions can be found on the website of the United States Institute for Peace (USIP): <<https://www.usip.org/publications/2011/03/truth-commission-digital-collection>> (accessed on 15 August 2019).

frequently provide public forums for victims to share their stories and expectations, and sometimes also include practices of reconciliation.

Some examples of this type of truth and reconciliation commission also merit mention:

- The most classical example is certainly the ‘Truth and Reconciliation Commission’ in South Africa, established through a legislative act in 1995. Its mandate comprised a limited type of serious human rights violations committed by state forces and liberation movements (including abductions, killings and torture, but excluding forced removals) during the Apartheid period between 1960 and 1994. The Act also entrusted the TRC with the power to grant amnesty to individual applicants under strict conditions, a thus far quite exceptional and also controversial power for truth commissions. The TRC’s public hearings, coupled with a strong dissemination strategy, have resonated all over the world and turned the South African commission into an iconic model.⁶⁴
- In the following years, other commissions in Africa have followed this example to a larger or lesser extent, including the Truth and Reconciliation Commission in Sierra Leone and the Equity and Reconciliation Commission in Morocco. Also the Commission for Reception, Truth and Reconciliation in Timor Leste bears many resemblances to the South African model.⁶⁵
- In Peru, a Truth and Reconciliation Commission was set up by presidential decree in 2001 to address many human rights violations (killings, torture, disappearances, displacement, and terrorist methods) committed by state and non-state actors between 1980 and 2000. Next to the usual recommendations on truth, reparations and reconciliation, the Peruvian commission also recommended the criminal prosecutions of the main perpetrators in 43 cases handed over to the Ombudsman’s Office and the Public Prosecutor’s Office.

It can be argued that a third type of truth commissions has also been developed, particularly in more recent years. One of their main features is that they are not set up in the Global South, but relate to human rights violations in other contexts, which are investigated by following the models and experiences of other commissions.

Some recent examples illustrate the potential of truth commissions for other contexts of large-scale abuses:

⁶⁴ Ch. Villa-Vicencio and W. Verwoerd, *Looking Back, Reaching Forward. Reflections on the Truth and Reconciliation Commission of South Africa*, Cape Town/London, UCT Press/Zed Books 2000.

⁶⁵ O. Bakiner, *Truth Commissions: Memory, Power, and Legitimacy*, University of Pennsylvania Press, Philadelphia 2016; P. Hayner, *supra* n. 60, at pp. 11-12. In Hayner’s view, these five commissions have been the strongest thus far: South Africa, Guatemala, Peru, Timor Leste and Morocco.

- The Greensboro Truth and Reconciliation Commission was established in 2004 in the same city (in North Carolina, USA) to investigate the events of the so-called ‘Greensboro Massacre’ in November 1979, whereby five people were killed and ten injured during a march for social and racial justice. It received the support of the city and county government and released its report documenting the events and recommending several actions to overcome the social cleavages in the city, without much success.
- Between 2008 and 2015, the Truth and Reconciliation Commission of Canada investigated the official policy of residential schools for First Nations children in operation until 1996, and the ensuing sexual abuse taking place in them.⁶⁶ Established under the ‘Indian Residential Schools Settlement Agreement’ between the government of Canada and a representation of First Nations, it delivered various in-depth reports that led to a conclusion of ‘cultural genocide’ against the First Nations and issued nearly 100 recommendations to redress the past and construct a new future. It was coupled with a reparations tribunal open to direct and indirect victims of the residential school policy.

While the above examples are by no means exhaustive, they lead to a number of interesting conclusions. First of all, they make clear that the model of a truth commission is quite innovative in national and international relations in dealing with the legacy of periods of authoritarianism and war. The experience of the last decades indicates that truth commissions tend to be very flexible bodies, that can strongly diverge in terms of background, legal basis, process of establishment, composition, legal powers, operational methods, resources, visibility, outreach, implementation, and their overall legacy.⁶⁷ The differences among commissions tend to be strongly congruent with the political and economic context in which they originate.

Secondly, the relationship between truth commissions and criminal justice organs tends to be very diverse. In the early years, truth commissions were often conceived of as an alternative, a so-called ‘third way’, in between criminal prosecutions for offenders on the one hand, and complete amnesty for the violations of the past on the other hand. Moreover, the commissions’ task to produce facts and figures about the past was seen as a valuable endeavour to construct a common ground for the future. In later years, truth commissions have increasingly come to be seen as complementary mechanisms, operating in conjunction with criminal justice. They serve their own function to produce a much broader picture of patterns and causes of violations and crimes, and thus allow for concrete recommendations for structural change. In some situations, truth commissions have preceded criminal prosecutions, in others they were set up after criminal prosecutions had taken place. In

⁶⁶ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015.

⁶⁷ J. Sarkin (ed.), *The Global Impact and Legacy of Truth Commissions*, volume 24, Series on Transitional Justice, Cambridge/Antwerp, Intersentia Publishers 2019.

some exceptional cases, like Sierra Leone, the truth commission and the Special Criminal Court existed alongside one another, which generated substantial confusion and controversy about the respective roles of both types of institutions.

To conclude this part, it should be noted that – next to truth commissions – additional forms of truth-seeking have been developed over the years, which also form part of the catalogue of transitional justice mechanisms. Without the possibility to elaborate upon them in the context of this report, two particular types merit mentioning.⁶⁸ On the one hand, ‘commissions of inquiry’ that also intend to produce facts and figures about the past (e.g. fact-finding commissions by non-governmental organisations, professional and religious institutions).⁶⁹ Their activities also lead to reports with high moral and political value, but often without (and sometimes against) the support of the state, thus lacking efficacy for concrete changes. A second type of truth-seeking came about in the aftermath of the famous Russell Tribunals of the 1960s that focused on the war in Vietnam. Investigation commissions, in the form of quasi-tribunals with persons of high moral and political character and frequently adopting quasi-judicial procedures, have occasionally been set up to cover specific types of violations (e.g. regarding indigenous rights, water rights, aggression and war crimes). Their ‘judgments’ also embody very thorough investigations but seldom lead to concrete changes.

3.2.3 *Debates about truth commissions*

Truth commissions are very flexible institutions that are adaptable and apply to a variety of contexts. In the perspective of Hayner, they can be set up for various reasons and may have various objectives.⁷⁰ In their ‘fact-finding function’, they may ‘discover, clarify and formally acknowledge past abuses’ and thus generate more information about the facts, their origins and their qualifications; this is essential in distinguishing hard facts from vague rumours and ultimately reduces the space for denial about the past by political opponents and certain sectors of society. As mentioned before, truth commissions also tend to pay ample attention to the stories of victims and their need to be heard and recognised. Even more, by bringing facts to the fore, they also promote the accountability of perpetrators and thus ‘counter impunity’. They continue to be non-judicial bodies without prosecutorial powers, but nevertheless they sometimes can ‘name names’ of responsible persons, and may sometimes refer specific cases to prosecutorial services. Truth commissions can also make recommendations for reforms of all kinds in order to prevent similar or new violations and crimes from occurring in the future. Such recom-

⁶⁸ L. Bickford, ‘Unofficial Truth Projects’, 29(4) *Human Rights Quarterly* (2007) pp. 994-1035.

⁶⁹ An overview of such ‘commissions of inquiry’ is produced on the same website of the United Institute of Peace, although the list is far from complete and the distinction with truth commissions is not always clearly made. Other examples include the fact-finding commission of the archbishop of Guatemala (ODHAG), which in 1998 produced a very valuable report that clearly served the official truth commission that started its work the year after.

⁷⁰ Hayner, *supra* n. 60.

mendations may relate to a variety of legal, political, economic, social, cultural, and institutional matters and policies. Last but not least, truth commissions that also carry the name ‘reconciliation commission’ can contribute to reconciling individuals and groups, and society at large. No doubt this is the most difficult and delicate function of truth commissions, if one considers that reconciliation means different things to different people and oscillates between process and result.⁷¹

Given the variety of aims and ambitions, the question arises about the concrete effects of truth commissions in post-conflict settings. In the short run, they tend to have some very visible and tangible effects on individuals, communities and society at large, as they produce facts and interpretations that were previously unknown to many persons and institutions. However, the record is less impressive in the longer run, as argued by Monica Aciru.⁷² Her comparative study about the follow-up and implementation of truth commission recommendations clearly indicated that the major success factor relates to the political will of the ruling elites. If they are prepared to bring change, like in Ghana where victims received financial compensation, something tangible can happen; if this is less likely the case (Sierra Leone), then little effect for victims is generated. It can therefore be concluded that truth commissions, even more than criminal tribunals and courts, are highly contingent upon the political context for their establishment, operations and legacy.

3.3 Victim reparation programmes

It is commonly accepted that victim reparations constitute the third major pillar of transitional justice, geared as they are towards providing reparations to victims for the harm inflicted upon them.

To provide reparations to victims of serious human rights violations and international crimes is in line with ‘the right to reparation’ expressed in the Joinet and Orentlicher reports as the third aspect of combating impunity. It also fits the frameworks of ‘reparatory justice’, according to Teitel, and ‘reparative justice’, as proposed by Rama Mani.⁷³ Overall, it can be argued that the intellectual and legal position of victims of serious human rights violations and international crimes has strongly increased since the 1980s, albeit that these developments are by no means systematic nor complete. As a result, victims still occupy a much weaker position in transitional justice matters than offenders.

⁷¹ D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, Stockholm, International Idea 2003; E. Daly and J. Sarkin, *Reconciliation in Divided Societies. Finding Common Ground*, Philadelphia, University of Pennsylvania Press 2006.

⁷² M. Aciru, *Transitional Justice in Practice. Truth Commissions and Policies of Victim Reparations*, Ph.D. in Criminology, Leuven, KU Leuven 2017.

⁷³ R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge, Mass., Polity Press 2002.

3.3.1 *General features of victim reparations*

Conceiving of victim reparations as an individual and subjective right is a relatively recent development in various bodies of international law. To start with general international law, roughly until the Second World War, it was deemed the ‘duty of the State’ to repair the damage done to persons and goods under its jurisdiction. This concept was clearly expressed in the 1928 Chorzów Factory judgment of the Permanent Court of International Justice, which convicted Poland to pay compensation to Germany for the nationalization of a German company after the borders between the two countries had changed in the aftermath of the first World War.⁷⁴ It found further application in the 2004 Advisory Opinion of the International Court of Justice related to the Palestinian Wall, in which Israel was considered obliged “to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem”.⁷⁵

The right of individual victims to receive reparations gained ground in international human rights law, particularly in a wide number of human rights treaties like the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Rights of the Child. Regional human rights treaties in Europe and the Americas also include victim reparations in different forms and degrees. Particular attention can be given to the extensive case law of the Inter-American Court of Human Rights to give effect to the right to reparation in the Inter-American Convention on Human Rights. The Court has developed new schemes to determine the amount of money to be paid by the state to the victims. It has also accepted that reparations may include conducting legal investigations by the concerned state, establishing memorial sites in honour of the victims,⁷⁶ and initiating forms of collective reparations.⁷⁷ The European Court has for a long time adopted a very cautious position, in which the declaration that a violation of the Convention had taken place in itself counted as satisfaction for the applicant. It has gradually moved to more specific case law, e.g., by ordering the release of a person in unlawful detention.

In the last two decades, the field of international criminal law has been in full expansion in relation to victim reparations. Before 1998, none of the special tribunals (Nuremberg/Tokyo, and the United Nations ad hoc tribunals) held any provisions on victim reparations. However, the Rome Statute contained a huge legal innovation by instituting a double system of victim reparations, firstly by incorpo-

⁷⁴ Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits), [1928] PCIJ Reports, Ser. A, No. 17.

⁷⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *I.C.J. Reports* 2004, p. 136.

⁷⁶ I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, paras. 246-286.

⁷⁷ I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname. Reparations and Costs*. Judgment of September 10, 1993. Series C No. 15.

rating the right of victims to reparation in the case of the offender(s) being held criminally liable by the Court (Article 75), and secondly by establishing a Trust Fund for Victims to provide assistance and services to victims of a situation before the Court (Article 79).

This brief sketch should not lead to the conclusion that victims of serious human rights violations and international crimes can only receive reparations by resorting to the procedures before international tribunals and courts. Many domestic legal systems have also established principles and procedures for victim reparations of the said violations and crimes. Moreover, victims may also receive reparations through non-judicial forums and programmes that are set up, at the national or international level, with the explicit purpose of providing reparations for specific human rights violations (e.g. loss of property or torture), and/or for specific groups of victims.

3.3.2 *The scope of victim reparations*

Next to the legal sources of ‘hard law’ mentioned above, in the last fifteen years a very important source of ‘soft law’ has emerged in the international regime of victim reparations. In December 2005, after a long period of expert discussions and political negotiations,⁷⁸ the United Nations General Assembly adopted the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (BPG).⁷⁹ They are commonly referred to as the ‘Van Boven/Bassiouni Principles’ after their two intellectual fathers. Although clearly designed as non-binding principles and guidelines, their moral and political influence cannot be overestimated, as they are gradually finding their way into binding legal instruments, like court judgments.

The BPG list five categories of victim reparations (Principles 18-23), thus introducing more conceptual clarity and also substantially expanding the scope in comparison to the existing provisions. Given their innovative nature, it is worth looking at them more closely.

- The first category mentioned is ‘restitution’, based on the idea that it is preferable to bring victims back into the position *ex ante*, that is before their rights were violated. The best known examples of restitution refer for example to immovable property, like houses or land, and cattle, (e.g. through the work of the Property Claims Commission in Bosnia and Herzegovina

⁷⁸ D. Shelton, ‘The United Nations Principles and Guidelines on Reparations: Context and Contents’, in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp/Oxford, Intersentia Publishers 2005, pp. 11-33.

⁷⁹ United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147.

to restitute houses to persons displaced during the war),⁸⁰ as well as movable property, like pieces of art and personal belongings (e.g. in the case of the survivors of the Holocaust). But the restitution of rights is possible also as a form of reparation (e.g. in the case of refugees who have lost their jobs or their citizenship; or in the case of establishing biological family ties between children and their (grand)parents, as illustrated in Argentina where grandmothers and grandfathers campaigned for the ‘right to identity’ of their grandchildren who were ‘stolen’ by the military and grew up in other families than their own).⁸¹

- Next is ‘monetary compensation’, the so-called second-best option to address the harm inflicted on victims. In practice, it is the most widely used one, because in many human rights violations and international crimes goods and/or rights are so badly damaged or completely destroyed (e.g. after killings or serious torture) that restitution is not possible. For example, the claims for monetary compensation by Kenyan torture victims during the Mau Mau uprising against British colonial rule were concluded with an out-of-court settlement with the British authorities, leaving each of the more than 5,000 Kenyan client victims with roughly £4,000.⁸²
- There exist a wide variety of methods to ‘calculate’ the exact value of the damage and the amounts of financial compensation.⁸³ Some are inspired by the practice of regular insurance companies that have vast expertise in assessing the physical and material damage to their clients; others are more innovative, as illustrated by the ‘life project’ (*proyecto de vida*) doctrine of the Inter-American Court of Human Rights, which refers to the likely life trajectories that individuals would have followed in the absence of any human rights violations. Monetary compensation can be paid after judicial and non-judicial proceedings, at the national and the international level, by private persons (e.g. after criminal convictions) or entities, or by public agencies (in the case of state responsibility). Overall, it can be said that monetary compensation is mostly paid for specific forms of physical and material harm, while emotional harm is rarely taken into account.
- The third category of reparation is called ‘rehabilitation’, which basically encompasses services to victims in order to address immediate needs and become full-fledged members of society again in the longer run. Traditionally, the scope of these services is very wide and tends to include medical assistance (e.g. surgery or wheelchairs), psychological assistance (e.g. trauma counselling), social assistance (e.g. social reception or filling out the right

⁸⁰ H. Van Houtte, ‘Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina’, 48(3) *International and Comparative Law Quarterly* (1999) pp. 625-638.

⁸¹ R. Arditti and M. Brinton Lykes, ‘“Recovering identity”: The Work of the Grandmothers of Plaza de Mayo’, 15(4) *Women’s Studies International Forum* (1992) pp. 461-471.

⁸² More information on: <<https://legalbrief.co.za/diary/legalbrief-africa-new/story/historic-settlement-of-mau-mau-claims-agreed/print>> (accessed on 25 September 2019).

⁸³ P. De Greiff, *Handbook of Reparations*, Oxford, Oxford University Press 2006.

forms), and legal assistance (e.g. advice and representation in judicial or administrative procedures). The procedures to obtain rehabilitation services are hugely varied. As an example, the South African Truth and Reconciliation Commission awarded ‘urgent’ material and medical services to certain victims who had participated in statement taking and oral testimonies.⁸⁴

- The fourth category of reparations is ‘satisfaction’ and possesses by far the widest scope. It is divided into a number of subcategories, that refer to very different interests and actions, and also connect to other pillars of transitional justice, namely criminal prosecutions and truth commissions:
 - (a) disclosing the truth about human rights violations, with the proviso that such revelation will not cause any more harm to or jeopardize the safety of victims, surviving relatives, or others involved; this aspect also extends to the production of an accurate account of the human rights violations in educational materials and settings, in order to create a better understanding of the background of conflicts and violations and the suffering of victims;
 - (b) looking for victims’ remains and facilitating a dignified funeral or other ceremony in close consultation with the wishes of the surviving relatives; this aspect also extends to memorial services or tributes to victims, which are seen as hallmarks of ‘symbolic reparations’; it also closely touches on ‘memory work’ in many post-conflict societies, which has rapidly developed in the last decades and is often seen as a separate pillar of transitional justice;⁸⁵
 - (c) issuing public apologies, including an acknowledgment of the facts and an acceptance of responsibility; the public character relates mostly to the forum where it is expressed, but also refers to the importance that public authorities assume responsibility for the actions of their agents, by way of a powerful symbol (e.g. American President Clinton for the role of the United States during the armed conflict in Guatemala; Belgian prime minister Verhofstadt for the role of Belgium during the Rwandan genocide against the Tutsi);
 - (d) imposing legal and administrative sanctions for those responsible for the violations; this aspect is strongly related to criminal prosecutions (or other procedures) for the violations and crimes of the past, and is considered another form of symbolic reparation to victims.
- Finally, the fifth category of reparations relates to ‘guarantees of non-repetition’. The underlying idea is that the avoidance or prevention of similar violent conflicts, human rights violations and international crimes in the future also contributes to repairing the harm of victims. In the words of Teitel, this

⁸⁴ Truth and Reconciliation Commission of South Africa, Report, 7 vols, Cape Town, Juta & Co. 1998 and 2003.

⁸⁵ S. Buckley-Zistel and S. Schäfer (eds.), *Memorials in Times of Transition*, volume 16, Series on Transitional Justice. Cambridge/Antwerp/Portland, Intersentia Publishers 2014.

is about providing ‘administrative justice’.⁸⁶ In essence, this category refers to a variety of actions that include the following:

- (a) initiating fundamental reforms of specific state institutions, particularly the ones involved in past human rights violations (the police, the military, intelligence services); because of the paramount importance of this aspect, guarantees of non-repetition are often identified with ‘institutional reforms’, although this is just one aspect;
- (b) strengthening judicial independence and impartiality to allow a more adequate system of checks and balances (e.g. giving more supervisory competences to the judicial power; screening or vetting new candidates for judicial office on their human rights record);⁸⁷
- (c) providing more training about human rights values and norms, both in broad sectors of society, as well as with specific law enforcement personnel, and follow-up of the changing attitudes and practices of all trainees; and
- (d) completing legislative reforms to incorporate international norms and standards in human rights, humanitarian law, criminal law, etcetera.

An additional word on the specific category of ‘guarantees of non-repetition’, which is presented here as an integral part of the Basic Principles and Guidelines. Other human rights documents, however, tend to view it as a more or less separate aspect. In both the Joinet and Orentlicher reports the ‘guarantees of non-recurrence’ occupy a separate place next to reparation principles. They also explicitly mention the dissolution of paramilitary groups and the social reintegration of child soldiers as important aspects of non-recurrence in the future, and devote great attention to public consultation processes to allow both victims and other sectors of society to express their opinions and expectations about reparations.

As argued elsewhere,⁸⁸ the reparation measures of the BPG can also be organized in another manner, into three main categories:

- (a) legal actions of different types, including victim participation in criminal trials and reparation programmes, legal sanctions for perpetrators, legislative reforms and human rights training;
- (b) symbolic measures of different forms that may lead to the recognition of victimhood and the memory of victims, like the disclosure of facts, the establishment of memorial days/memorials and public apologies, and
- (c) financial and other tangible measures that focus on, for example, restitution

⁸⁶ Teitel, *supra* n. 19.

⁸⁷ A. Mayer-Rieckh and P. de Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies*, New York, Social Science Research Council 2007.

⁸⁸ R. Letschert and S. Parmentier, ‘Repairing the Impossible: Victimological Approaches to International Crimes’, in I. Vanfraechem, A. Pemberton and F.M. Ndahinda (eds.), *Justice for Victims. Perspectives on Rights, Transition and Reconciliation*, Abingdon, Routledge 2014, pp. 226-243.

of goods and rights, monetary compensation for the harm suffered and specific services.

In sum, the above overview clearly indicates that since 2005 victim reparations imply much more than just monetary compensation to victims. It sketches the wide diversity of reparation measures that can be initiated and implemented for a variety of human rights violations and international crimes, making use of a variety of institutions and procedures. The BPG primarily offer an extensive menu that allows for minimalist and maximalist approaches, the legal outcome of which heavily depends on the political power relations in post-conflict societies, on the public presence of victims and their associations, and on the availability of economic resources to transfer funds and services to victims.

3.3.3 *Debates about reparations*

Given the rapid development of victim reparations in the last decades, it is not surprising that the topic has given rise to some interesting debates.

The first issue is of a legal nature and consists of understanding to which extent there exists an individual and subjective right to reparation. In 2005, a joint research team from the universities of Antwerp and Leuven published a detailed report about the then current state of affairs in relation to victim reparations in international law.⁸⁹ It concluded that a number of binding human rights instruments and case law explicitly or implicitly mentioned the right to reparation and made efforts to give substance to it, so as to justify speaking of an ‘emerging right to reparation’. The team also concluded that the reality of victim reparations lacked any coherence, let alone uniformity, but basically resembled a complex patchwork of different rules and practices taking shape according to the specific context. Nearly fifteen years after this report, it can be argued that the rules and practices of victim reparations in post-conflict societies have substantially increased, but not at all to the level of coherence. It remains extremely difficult to draw wider conclusions from the myriad of different policies and practices.

Because of this legal diversity, it seems of paramount importance that victim reparations not only be studied from a normative legal perspective, but that their ‘social effects’ are also studied through social science methods, whereby the voices of the victims and other stakeholders are captured from a ‘bottom-up’ perspective. One such study was carried out in Bosnia and Herzegovina in 2006 by a team from the University of Leuven, in the form of a quantitative survey by means of a semi-structured questionnaire with a representative sample of respondents.⁹⁰

⁸⁹ K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp/Oxford, Intersentia Publishers 2005.

⁹⁰ S. Parmentier, M. Valiñas and E. Weitekamp, ‘How to Repair the Harm After Violent Conflict in Bosnia? Results of a Population-Based Survey’, 27(1) *Netherlands Quarterly of Human Rights* (2009) pp. 27-44.

It brought some very interesting information to the fore, e.g. that victims were above all interested in recognition of their victimhood and the harm done to them; that reparation schemes (and particularly monetary compensation and rehabilitation) paid a lot of attention to forms of physical and material harm, while emotional harm is rarely taken into account; that memories of the war and memorialisation of the victims can also have the downside of leaving the wounds of the past open and not allowing survivors to move on with their lives. Additional studies of this kind, in other post-conflict societies, can produce additional information to assist in fine-tuning, streamlining, or even modifying reparation schemes, and bringing them more in line with victims' needs.

In the case of serious human rights violations and international crimes, the nature of the harm tends to be very deep and the number of victims tends to be very high. It has led several authors, and most notably Brandon Hamber, to assert that all reparations are symbolic because it is simply impossible to repair the harm inflicted.⁹¹ He implies that it is impossible to bring victims back to the situation *ex ante*, i.e. before the violations and crimes took place. Instead, it has been argued that there is more merit in seeing the objective of reparations as 'searching for a new balance' between the former life of victims and their new living conditions, with a view to allowing them to move on with their lives in a more or less adequate manner without losing track of the many difficulties on this road.⁹²

4. BY WAY OF CONCLUSION

What happens in the present and future with large scale abuses, serious human rights violations and international crimes committed in the past? This fundamental question lies at the heart of the emerging field of transitional justice research and policy-making, which focuses both on the ideals and the realities of justice as utopia as well as the institutions of justice. The question is both empirical ('what is actually happening if anything at all') and normative ('what should happen according to moral and legal standards'). And it can be addressed through the input of various scientific disciplines, criminal law just being one of them next to many other disciplines.⁹³

The above quote in my contribution of 2016 tried to grasp the essential characteristics of transitional justice from the perspective of international criminal law. In the current contribution, transitional justice was investigated from the wider perspective of international law, through the lens of at least three bodies of law: in-

⁹¹ B. Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health*, Heidelberg, Springer 2009.

⁹² H. Rombouts and S. Parmentier, 'The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims', Special Issue on Victim Reparation and the International Criminal Court, edited by J.-A. Wemmers, 16(2) *International Review of Victimology* (2009) pp. 149-182.

⁹³ Parmentier, *supra* n. 10.

ternational human rights law, international criminal law and general international law. Three main issues were central to our investigations.

The first issue was of a conceptual nature and produced a widely accepted definition of transitional justice as the totality of mechanisms to address past serious human rights violations and international crimes, and consisted of four main pillars: criminal prosecutions, truth commissions, victim reparations and institutional reforms. In the last two decades, transitional justice has become a very broad concept to encompass judicial and non-judicial strategies for moving away from conflict and authoritarianism through political transitions, as well as judicial and non-judicial strategies for dealing with large scale abuses outside of any political transition.⁹⁴ It now refers to cases and situations both in the Global South and the Global North.

The second issue related to the role of international law in the establishment and operation of the many new national and international institutions and procedures. Throughout a more detailed analysis of the four pillars of transitional justice, it became clear that international law plays a very important role, both as an independent variable that constitutes the legal space within which societal practices operate, and as a dependent variable that results as the output of these societal processes. As a consequence, the field of transitional justice can be said to challenge and 'reframe' many aspects of international law. The latter, however, is not just malleable but also influences the design and operation of transitional justice mechanisms, mostly in the area of criminal justice.

The third major issue concerned the operation of international law in its wider political and social context. On various occasions, it became clear that transitional justice constitutes the field par excellence where law and politics intertwine, and international law and international politics do as well. The new power relations in post-conflict societies are crucial to understanding the direction in which legal arrangements are being developed, and the discretionary margin of appreciation at their disposal. The existing emphasis on 'top-down' approaches also requires more attention for 'bottom-up' perspectives on transitional justice,⁹⁵ to include the viewpoints of the affected populations at large, and of individual victims, perpetrators, bystanders, beneficiaries, in particular. The existing population-based studies in post-conflict countries can thus generate very valuable insights into the facilitating and obstructing factors for justice, peace and development.⁹⁶

⁹⁴ Contra: S. Lefranc, 'La justice transitionnelle n'est pas un concept', *Mouvements* n°53 mars-mai 2008, pp. 61-69.

⁹⁵ K. McEvoy and L. McGregor, 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis', in K. McEvoy and L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, London/Oxford, Hart Publishing 2008, pp. 1-14.

⁹⁶ S. Karstedt and S. Parmentier (eds.), 'Atrocity crimes and transitional justice', Special Issue, 9(5) *European Journal of Criminology* (2012) pp. 465-564; J. Sarkin, E. Zinsstag and S. Parmentier, Special Issue on Transitional Justice of 11(1) *Human Rights and International Legal Discourse* (2017) pp. 1-119.

5. PROPOSITIONS AND POINTS FOR DISCUSSION

1. While transitional justice is said to consist of four main pillars, it can be argued that the pillar of criminal justice is by far the most developed. Building on the existing infrastructure of national criminal law and justice, it has managed to expand into international and third-country criminal tribunals and courts, and has also established relatively clear arrangements of complementarity and cooperation. However, in doing so, it has also reproduced the limitations of national criminal law and justice systems, including a highly selective bias for certain types of crimes and perpetrators, and a very strong focus on offenders at the expense of victims.
2. Despite the limited place of victims in (inter)national criminal justice, and arguably because of this, transitional justice has introduced important innovations for victims of serious human rights violations and international crimes. The design and development of new mechanisms like truth commissions and victim reparation programmes, not to mention the preventive measures for not repeating similar violations and crimes, illustrate the novel inputs from transitional justice policies, as well as the malleability of international law. However, such innovative models in most cases fall short of adequate resources to serve the needs, rights and interests of victims in a convincing manner.
3. Moreover, it should be emphasised that the vast majority of transitional justice rules and practices focus on violations of civil and political rights (e.g. right to life, freedom from torture and enforced disappearances), and crimes against the physical and moral integrity of the person (e.g. murder and attempted murder, rape). But most often, the root causes of violent conflicts consist of violations of social and economic rights, such as economic and social inequalities, political exclusion, corruption and racism.⁹⁷ It is suggested that transitional justice in all its pillars, institutions and procedures, pays more attention to issues of social justice and social development.⁹⁸ The emerging concept of ‘transformative justice’,⁹⁹ focusing on conflict causes over symptoms and underlining the reformulation of power structures in conflict and post-conflict societies, may be very promising in this regard.
4. In their incisive conclusions to a special volume on transitional justice, Phil

⁹⁷ R. Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’, 2 *International Journal of Transitional Justice* (2008) pp. 310-330.

⁹⁸ R. Mani, ‘Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development’, 2(3) *International Journal of Transitional Justice* (2008) pp. 253-265,

⁹⁹ P. Gready and S. Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, 8 *International Journal of Transitional Justice* (2014) pp. 339-361; P. McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States*, Cheltenham, Edward Elgar 2017.

Clark and Nicola Palmer argue that the field is ‘under-theorised’.¹⁰⁰ They refer to the ill-defined and contested key concepts, like justice, peace and reconciliation. The same can be said to exist in the specific context of justice, where a variety of concepts abounds without a deep understanding of their meaning or operation, like retributive justice, restorative justice, reparative justice, transformative justice, distributive justice, deterrence, incapacitation, reintegration, and even the central concept of impunity. It is crucial for the field of transitional justice to see lawyers and social scientists starting to work hand in hand to clarify these concepts in a theoretical and empirical sense and sketch their relevance for all pillars and dimensions of transitional justice.¹⁰¹ Such a joint endeavour is likely to encourage ‘context-specific’ approaches and to avoid ‘ready-made’ and ‘toolbox’ models that seem pragmatic in the short term, but are impractical in the long term.

¹⁰⁰ Ph. Clark and N. Palmer, ‘Challenging Transitional Justice’, in N. Palmer, Ph. Clark and D. Granville (eds.), *Critical Perspectives in Transitional Justice*, Cambridge/Antwerp/Portland, Intersentia Publishers 2012, pp. 1-17.

¹⁰¹ S. Buckley-Zistel, T. Koloma Beck, Ch. Braun and F. Mieth, *Transitional Justice Theories*, London/New York, Routledge 2014; N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*, Cambridge, Cambridge University Press 2006; T. Olsen, L. Payne and A. Reiter, *Transitional Justice in Balance. Comparing Processes, Weighing Efficacy*, Washington, DC, United States Institute of Peace 2010.

