
ESTABLISHING A NORMATIVE FRAMEWORK FOR EVALUATING DIVERSE CASES OF TRANSITIONAL JUSTICE

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ased on an assessment of contemporary practices of dealing juridically with large-scale human rights violations, this paper argues that there is a need for updating important aspects of transitional justice theory. The field of transitional justice emerged around the so-called third wave of democratization, most notably the transitions from military rule in Latin America in the 1980s and the transitions in Central and Eastern Europe following the fall of communist governments. However, though institutionalized responses to mass violence and state-sponsored repression now take place in highly diverse cases, transitional justice theory remains dominated by the claim that law

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and justice should primarily promote liberal democratic values. This paper argues that it is useful to operate with a differentiated normative framework, thereby endorsing a more nuanced understanding of the interests that transitional justice in fact serves as well as the legitimacy of these. In doing so, this paper distinguishes between transitional justice in cases of liberal transitions, non-liberal transitions, deeply conflicted societies that have not seen a fundamental regime change, and consolidated democracies. Though rejecting one consistent normative framework, which prioritizes liberalization and democratization as the end product of transitional justice, the present paper concludes that it is possible to establish some overall positive goals of transitional justice, namely attending to the needs of victims, preventing the recurrence of large-scale violence and, finally, creating a more just society

1. THINKING ABOUT THE PRACTICES OF TRANSITIONAL JUSTICE

Transitional justice is usually said to refer to the kinds of justice which occur in the *aftermath* of gross human rights violations, and – in one way or another – attempts to *address* these violations. As will follow from discussions in section 2.3., the ‘transitional’ in transitional justice can have various meanings. Most theory, however, takes it as referring to conditions of fundamental political change, rather than referring to the nature of justice itself.¹ These fundamental political changes are usually understood as making reference to *liberal change*, thus entailing a clear normative dimension. This clarification could lead to the presumption that the institutions and practices of transitional justice are identical to those in other contexts. That,

however, is not necessarily the case.

The origin of transitional justice as a field of scholarly inquiry is closely linked to the Latin American transitions from military rule to democracy and the democratization processes in Central and Eastern Europe following the Soviet collapse.² ‘Transitional justice’ as a notion was constructed in the late 1980s or early 1990s, when some lawyers suggested an idiosyncratic conception of justice in periods of fundamental (and liberalizing) political change. According to Ruti Teitel, she coined the expression in 1991.³ However, as some commentators have pointed out, the first involvement with issues of transitional justice can be traced to the 1988 Aspen Institute conference, ‘State Crimes: Punishment or Pardon?’⁴ Since then, the field has developed and expanded significantly. However, a generally accepted definition of transitional justice is yet to emerge, and different definitions put forward in the literature are often at odds with the nature and scope of transitional justice discourses.⁵

Several scholars have defined transitional justice by making reference to those *practices* that can be put in place to address past wrongdoing. Jon Elster, for example, observes that transitional justice can be understood as “the processes of trials, purges, and reparations that take place after the transition from one political regime to another”.⁶ Most observers add to Elster’s list a widely utilized institution: the truth commission.⁷ In other words: transitional justice discourses have tended to approach its practices primarily as a matter of criminal trials, vetting processes, reparations to victims, and truth commissions.⁸ In a sense, this understanding of what measures make up transitional justice reflects that these institutions and processes were, from time to time, employed in transitions in Latin American, Central and Eastern Europe, Southern Europe, and the post-World

War II context. The question whether amnesties should be perceived as a mechanism of transitional justice is more controversial. Some observers see the granting of amnesties as the anti-thesis to transitional justice, but others suggest that amnesties may also represent a form of accountability and should be considered within a transitional justice framework.⁹ Moreover, some commentators have suggested that forward-looking processes, such as legal and institutional reform, ought to be considered within a transitional justice framework.¹⁰ This perception, however, remains marginalized in the scholarship. Transitional justice has most commonly been associated with a *specific set of institutions or processes that deal with the past*. As Mark Freeman and Jaspreet Saini note: “transitional justice tends to be implemented by means of four main mechanisms: criminal prosecutions, truth commissions, victim reparation programs, and vetting procedures”.¹¹

In the following, I dwell on these four mechanisms of transitional justice. Section 2 examines transitional criminal trials; section 3 examines vetting processes; section 4 examines reparations; and in section 5 truth commissions are examined. Section 6 concludes these deliberations on the mechanisms of transitional justice by briefly discussing amnesties and the ‘doing nothing’ option.¹²

2. TRANSITIONAL CRIMINAL TRIALS

Criminal trials are at the forefront of understandings of the mechanisms of transitional justice. As Ruti Teitel notes, “in the public imagination, transitional justice is commonly linked with punishment and the trials of ancient regimes”.¹³ Transitional criminal trials can take place at different levels, including the local, the national, the

international, and the supranational. The scholarship of transitional justice has paid extensive attention to criminal justice at all of these levels. Sometimes criminal accountability is pursued in a combination of two or more levels. For example are perpetrators of the Rwandan genocide prosecuted at the supranational level (ICTR), the international level (primarily European courts exercising universal jurisdiction), the national level (domestic courts), and at the local level (Gacaca Courts).¹⁴ In other recent instances, a merger of accountability levels forms new institutions. Acknowledging the limited resources available in post-civil war Sierra Leone, its president's request for UN assistance led to the creation of a so-called 'hybrid tribunal'. The 'Special Court for Sierra Leone' is a treaty-based tribunal located in Freetown, Sierra Leone. It holds jurisdiction over international crimes as well as domestic crimes, and it relies on international personnel as well as the assistance of Sierra Leonean authorities.¹⁵

Criminal justice following gross human rights violations may in some aspects resemble and in other aspects differ from criminal justice in other contexts. A different, or unique, nature of transitional criminal trials has been said to follow from the creation of special tribunals, a move towards collective guilt, presumption of guilt rather than innocence, lack of adversarial procedures, lack of appeal provisions, extension of statutes of limitations, and the use of retroactive legislation.¹⁶ When due process guarantees, such as the right to legal defence, are restricted, critique tends to be based on the premise that human rights standards should be fully applicable to processes of transitional justice.¹⁷ On the other hand, some point to the impossibility of respecting all international standards in these contexts and therefore suggest a more nuanced approach to human rights in

processes of transitional justice.¹⁸

A central debate in the field concerns the political nature of transitional criminal justice. Politics is said to contravene with notions of judicial impartiality and, more broadly, the rule of law when political leaders put pressure on judges or intervene in the functioning of tribunals,¹⁹ when only a certain group of perpetrators are put on trial,²⁰ or when the crimes prosecuted are punishable only according to rules established by the new regime.²¹ While warning against a “remarkably thin line between the fulfilment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice”, observers such as Ruti Teitel suggest that the political nature of criminal trials in these contexts is not necessarily an obstacle to liberal political transformation.²² Others maintain that also in periods of fundamental transition must law be sharply separated from politics. Commenting on the Eichmann trial, Hannah Arendt concludes that “the question of individual guilt or innocence, the act of meting out justice to both the defendant and the victim, are the only things at stake in a criminal court”.²³

Some of the more well-known cases of transitional criminal trials at the supranational and international level include the Allies’ trials of top Nazi leaders in Nuremberg (IMT); its Asian counterpart (IMTFE); subsequent prosecutions of German war criminals under Control Council Law No. 10; prosecutions of war crimes, crimes against humanity, and genocide before the two ad hoc UN tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR); and more recently, prosecutions before the permanent International Criminal Court (ICC). Prosecutions in countries not directly affected by violence (universal jurisdiction) are also considered in the transitional justice scholarship. The (attempted) prosecution of Augusto Pinochet in European courts,

for example, has been debated in a number of studies.²⁴

The importance of supranational and international transitional criminal trials lies more with the political importance of the persons prosecuted than in the sheer numbers. By October 2009, the ICTR – after 15 years of existence, around 1,000 staff members, and a total budget of more than one billion US Dollars – has completed 37 cases while 38 cases await trial, are still pending, or are awaiting appeal.²⁵ Likewise, the emergence of a permanent body to hold accountable the masterminds of crimes against humanity, after seven years of existence (October 2009), has only led to one case reaching its trial hearings (*prosecutor vs. Thomas Lubanga Dyilo*).²⁶ Such circumstances, along with the claimed inability of international tribunals to address root causes of human rights abuses and international tribunals' remoteness from victims, make some commentators question the legitimacy of international justice and its institutions.²⁷ On the other hand, some credit these bodies for advancing a move “from a culture of impunity to a culture of accountability”,²⁸ and some international lawyers have celebrated the tribunals' contribution to the development of international human rights law.²⁹

At the national level, most will recall the trials of collaborators in post-World War II European countries, such as France, the Netherlands, and Denmark; the trials of the colonels in Greece following the fall of the military regime; the trials of former junta leaders in Argentina; the Ethiopian 'Red Terror Trials' following the 1991 overthrow of the Mengistu regime; the 'Border Guards Trials' ensuing the German reunification; and more recently, the trial of Saddam Hussein in US occupied Iraq.

Sometimes criminal trials at the national level have focused on

bringing to account only the *leaders* of prior repressive regimes. In Argentina, for example, Raúl Alfonsín's administration designed prosecution strategies that left behind many actual perpetrators and instead focused on bringing to account the main architects of the military regime. In 1985, after the parliament had nullified a 'self-amnesty law', nine commanders in chief of the armed forces who had all been members of the junta were brought to trial. In a tense climate (but generally deemed fair), five received long prison sentences while four were acquitted. Prosecutions of other perpetrators did in fact commence, but were eventually – after intense pressure from fractions within the armed forces – cut short with the passing of a 'due obedience law' and other legislative measures.³⁰ While the attempt to expand prosecutions, with mid-level army personnel facing court proceedings, has been attributed to the dynamics of an independent judiciary, the executive's strategy of curtailing the judicial activity is usually observed as a trade-off with the Argentine army,³¹ or (more positively) as a necessary measure to ensure stability and the consolidation of democracy.³² Also beyond the Argentine case, tensions between 'peace and justice' are profound for discussions of transitional criminal trials.³³ The Argentine judiciary's attempt to circumvent political strategies also raises questions that relate to a more theoretical debate on the role of legal professionals in transitions.³⁴ Moreover, the nullification of the Argentine self-amnesty law and the challenge of due obedience defences highlight rule of law concerns that have unfolded in many other contexts.³⁵

In other instances of selective prosecutions, the focus has been on former *leaders as well as low-key perpetrators*. Following the German reunification, more than 22,000 investigations of crimes in the former GDR commenced. However, only about 500 of these led to court

hearings – and of these, only 20 resulted in prison sentence.³⁶ Although prominent officials, such as the former head of state, Erich Honecker, were prosecuted, only few GDR leaders were actually sentenced to imprisonment.³⁷ Most of the low-key perpetrators who were convicted, including the border guards who had implemented the shoot-to-kill policy, received lenient or suspended sentences.³⁸ Some argue that this limited scope of criminal accountability was (partly) the result of lacking public and political interest in the trials in unified Germany.³⁹ The question of which factors in society drive the pursuit of transitional criminal trials and which factors can be obstacles to that has been subjected to rigorous analysis in the field.⁴⁰ In the German case, one cause of the limited outcome of pursuing criminal accountability for GDR crimes relates to difficulties in proving individual responsibility. Firstly, a strict application of the principle of non-retroactivity – so that the act must be criminalized under both GDR and FRG law – precluded prosecution for a wide range of human rights abuses.⁴¹ Secondly, a general fear of politicizing the process – reflected in Chancellor Helmut Kohl’s infamous “we do not hold political trials” announcement⁴² – may have led judges to be extra cautious of not letting trial become an “end in itself”.⁴³ Moreover, concerns over individual accountability for GDR oppression reflect a theoretical debate of whether responsibility should be individualized when the crimes in question were sponsored or ordered by the state.⁴⁴ In the GDR case, it has been suggested that many of the “moral wrongs” did not constitute unlawful acts, and “how is it possible to come to terms with these ‘faceless’ arrangements in terms of personal guilt and culpability?”⁴⁵

Examples of widespread criminal accountability are fewer. In Ethiopia, however, criminal accountability was based on an approach

where decision-makers, officials who passed on orders, as well as those responsible for carrying out the orders were all liable to prosecution. More than five thousand individuals have been indicted, and as of 2007, more than one thousand have been convicted, including (in absentia) former head of state Haile Mengistu.⁴⁶ Yet, Mengistu has avoided accountability and lives comfortably in Zimbabwe.⁴⁷ Obtaining custody over high-profile defendants is a common challenge to transitional criminal trials. Despite the ICC's arrest warrant, for example, it is unlikely that Sudanese President Bashir will face trial in The Hague in the near future.⁴⁸ Prosecuting a large number of individuals involved in past repression also raises difficult questions of how far criminal accountability can, and should, be stretched.⁴⁹

Discussions of advantages and disadvantages of conducting transitional trials at the national level vis-à-vis the supranational level are central to transitional justice discourses. Many observers suggest that in those instances where national authorities are capable of conducting fair trials, criminal justice at the national level poses “a significant potential advantage over international tribunals” because the judicial process is “more deeply connected with the society” in which the crimes took place.⁵⁰

The pursuit of criminal accountability at the local-level is of more recent nature than the above models. Perpetrators of the Rwandan genocide have been prosecuted in so-called ‘Gacaca Courts’, which purportedly combine a traditional reconciliatory community process with formal justice and criminal accountability. Genocide criminals are sentenced in accordance with provisions in written law, but the process relies on extensive community participation and thousands of Gacaca Courts have been set up countrywide.⁵¹ The field is divided on

the merits of local-level prosecutions. Advocates for such forums have noted their potential for engaging ordinary citizens in the conduct of justice, thus reinstating “a collective social and judicial voice in communities deeply divided and traumatized by the atrocities of the past”.⁵² Critics, on the other hand, argue that such forums provide inadequate human rights protection for the defendant and raise a number of other concerns relating to the fairness of the process.⁵³

In other instances, community processes of transitional justice have functioned in *conjunction* with criminal justice institutions. In East Timor, the Commission for Reception, Truth and Reconciliation has sought to mediate between victims and low-key perpetrators at the community level, while the gravest crimes are prosecuted in the UN sponsored ‘Special Panels for Serious Crimes’.⁵⁴

As such, transitional criminal trials are usually said to build “upon the complex legacies of the Nuremberg and Tokyo trials conducted after World War II”.⁵⁵ The post-World War II trials’ contribution to the establishment of rules in international law (‘The Nuremberg Legacy’) has often been celebrated.⁵⁶ However, we must recall that even if criminal justice provides “the dominant language of successor justice”,⁵⁷ the majority of war criminals around the world do not end up facing criminal trial. Moreover, the preference for criminal justice in international law is not followed by consensus on the *appropriateness* of trial and punishment. The question of whether and why societies emerging from repressive rule and violent conflict should pursue criminal accountability has received considerable attention in the field.

In part, justifications for criminal trials rely on arguments resembling those put forward in general penal theory.

The IMT, it has been noted, “in the first instance [...] aimed at

punishment and retribution”,⁵⁸ and Mark Drumbl, in looking into the sentencing practice of the ad hoc international tribunals, observes “a preference for retributive motivations”.⁵⁹ More generally, Drumbl concludes that “retribution remains a consistent goal, although national and local punishing institutions experience considerable difficulty in operationalizing enhanced retribution to accord atrocity perpetrators their comeuppance”.⁶⁰ Rather than formulated as ‘the perpetrator should be punished because he deserves it’, retributive arguments for transitional criminal justice often use a ‘softer’ language where “crimes [...] deserve punishment as a matter of morality and fundamental considerations of justice”;⁶¹ crimes should be met with punishment as a matter of expressing “condemnation and outrage of the international community”;⁶² or, reversed (and victim-centric), “impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflict to whom we owe a duty of justice”.⁶³

Perhaps even more enthusiastically, advocates for individual criminal accountability following large-scale abuses dwell on trials’ ability to deter other individuals from instigating or carrying out atrocities. The Nuremberg trials, as Robert Jackson noted, were desired “to make war less attractive to those who have the governments and the destinies of people in their power”.⁶⁴ Similarly, the existence of the ICC, “it is hoped [...] will end forever the culture of impunity, thereby deterring the commission of gross human rights violations in the future”.⁶⁵ When societies commence prosecution at the national level, Diane Orentlicher asserts that “by laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future

temptation to be complicit in state-sponsored violence”.⁶⁶ However, the deterrent argument often takes a reversed form in transitional justice theory. Orentlicher argues: “above all, however, the case for prosecutions turns on the consequences of *failing* to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lessons can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct”.⁶⁷

Only to a more limited extent have advocates for transitional criminal trials attended to other justifications familiar from general penal theory.⁶⁸

It is important to note that a number of influential studies have questioned the applicability of retributive and deterrent theory to the sphere of transitional justice. These studies tend to argue that the nature of mass violence differs so radically from ‘ordinary crime’ that the premises of general penal theory are unfitted for such contexts; that justice in societies emerging from large-scale violence is a world apart from justice in stable democracies.

Critics of a retributive justification for transitional criminal trials sometimes dwell on the retributivist’s premise of proportionality between crime and punishment. Carlos Nino argues: “our vocabulary for moral blame soon runs out when we want to condemn the genocide of six million persons or the torture of children. To say that these acts were wrong sounds like a kind of irony. Our level of emotion may be raised, but our terms for describing moral heinousness have a limit”.⁶⁹ Martha Minow, in a similar vein, suggests that mass violence calls “for more severe responses than would any ordinary criminal conduct, even the murder of an individual. And yet,

there is no punishment that could express the proper scale of outrage”.⁷⁰ From a practice perspective, Mark Drumbl points to inconsistencies between the severity of crimes and the sentencing practice of international and national tribunals.⁷¹

Retributivism’s precondition of blameworthiness, which is thought to rest on an evaluation of characters, is also questioned. Hannah Arendt’s observation that organizers of the Holocaust, such as Eichmann, were opportunists who acted to benefit their career makes Nino question whether we are “prepared to blame a character which we evaluate as banal rather than full of burning hatred, sadistic inclinations, and cruelty?”.⁷² Other critics have as well questioned whether individual culpability is the right paradigm for collective or state-sponsored violence. Drumbl concludes: “whereas for the most part individual participation in ordinary crime deviates from generally accepted social norms in the place and time where the crime is committed, extraordinary crime has an organic and group component that makes individual participation therein not so self-evidently deviant. Participation is often a matter of obeying official authority, not transgressing it”.⁷³ Though more sympathetic to retributive theory, Jon Elster also notes that its premises face greater obstacles in transitional justice than otherwise. Counterfactuals, such as committing crimes to prevent worse crimes being committed, can complicate blame; perpetrators of gross human rights violations may have different motives (political, opportunistic, or pleasure), and it is difficult to determine which is the most blameworthy; and the time span between the point where a crime is committed and the point where trial takes place may challenge the assumption that the perpetrator (still) deserves to be punished.⁷⁴

Moreover, scholars such as Miriam Aukerman assert that the

selective nature of prosecution in transitional settings poses an unsolvable challenge to the requirement of just desert for every criminal, as endorsed by retributive theory.⁷⁵

Deterrence theory has not fared better with these critics. Scholars who are sceptical to deterrence theory point out that given massive participation in atrocities, perpetrators stand little chance of being indicted – and face an even smaller risk of being sentenced. Therefore, it is argued, the threat of punishment is unlikely to influence decisions in these contexts.⁷⁶ For some observers, the counter-argument – that deterrence would be strengthened if more judicial institutions are created – is based on a failed premise. Jamie Malamud-Goti, in looking into the Argentine case, suggests that deterrence is implausible in situations where military personnel are responsible for human rights abuses. Malamud-Goti argues that the “immediate and certain approval from comrades overrides any reason for complying with legal standards or any fear of the consequences of engaging in criminal behaviour”.⁷⁷ Because many perpetrators believe they are serving a greater cause, and therefore “want to belong to violent groups”, and because belonging to such groups is perceived as “the only viable survival strategy”, Drumbl concludes that “deterrence’s assumption of a certain degree of perpetrator rationality, which is grounded on liberalism’s treatment of the ordinary common criminal, seems particularly ill fitting for those who perpetrate atrocity”.⁷⁸ Such considerations allow Aukerman to conclude: “if deterrence is our goal, our underlying concern will be the prevention of future crimes. It is by no means clear that prosecution is the most effective mechanism for preventing atrocities”.⁷⁹

Some commentators reverse the deterrence argument. Rather than deterring others, adopting a prosecutorial strategy in one county may

lead authoritarian regimes in other countries to insist on maintaining their grip on power because they fear the consequences of democratization. Samuel Huntington notes how in the short-term, Alfonsín's decision to prosecute junta leaders in Argentina "stimulated some Uruguayan military to back away from their commitment to relinquish power".⁸⁰ Malamud-Goti makes the same argument, but with the perspective of special deterrence. Should the ousted leaders regain power, lessons from the court room, he argues, will "discourage them from surrendering their power to a democratic successor".⁸¹

Because of these, and a number of other theoretical problems of general penal theory,⁸² critics argue that transitional criminal trials must either find support in other justifications or be abandoned as an appropriate response to atrocities.

Alternative justifications for transitional criminal trials have tended to dwell on consequentialist goals of establishing a liberal democracy that is respectful to the rule of law. In drawing on Judith Shklar's work, Nino argues that trying perpetrators of the past repressive regime will "counter those cultural patterns and the social trends that provide fertile ground for radical evil". This potential, Nino suggests, is a consequence of trials' ability to 1) highlight "the scope and nature of the atrocities", thereby causing that the general public acknowledges the brutal nature of authoritarian regimes; 2) reinforce the rule of law by juxtaposing "the lawless conduct of the defendants" with the new regime's commitment to due process; 3) reinforce the rule of law by lessening the "impulse toward private vengeance"; 4) enable victims to regain "self-respect as holders of legal rights" by providing them with a forum for acknowledgement of suffering and official sanction of the perpetrators; and 5) counter authoritarian

tendencies by enhancing public deliberation, resulting in “collective appreciation of the rule of law”.⁸³ Similarly, Juan Méndez notes how “the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person”.⁸⁴ The presumption that transitional criminal trials will further democracy and the rule of law remains among the most frequently articulated justifications for adopting a prosecutorial strategy in dealing with repression and mass violence.⁸⁵

Beyond these utilitarian goals of punishment, specific justifications for transitional criminal trials have focused extensively on victims’ rights. The victim-centric approach suggests that “punishment ought to be directed at redressing the valued sentiments of those who were wronged”, thereby making up with “the victim’s loss of purpose and sense of worth”.⁸⁶ The argument that transitional criminal trials can be justified with reference to victims’ needs has not only gained support in the scholarship, but now also finds expression in the language of law.⁸⁷ Early advocates of a legal duty to prosecute human rights perpetrators mainly made reference to obligations in treaty law to prevent violations of the rights laid down – and therefore focused on deterrence theory.⁸⁸ More recent accounts of international law articulate that victims’ right to a remedy entails a right to equal and effective access to justice. If the state in question does not ensure that human rights violations are investigated, prosecuted, and punished, the victim’s right to access to justice is said to be violated.⁸⁹ Nonetheless, developments in international law on victims’ rights to prosecution are not followed by consensus in the scholarship that prosecution and punishment are in fact what victims are looking for.⁹⁰

3. VETTING

Vetting – also known as ‘purges’, ‘lustration’, and a number of other names – has received considerably less attention in the scholarship than transitional criminal trials.⁹¹ Vetting has been defined as “processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment”.⁹² Integrity, in this connection, is said to refer “to a person’s adherence to relevant standards of human rights and professional conduct, including her or his financial propriety”.⁹³ Vetting is thought to distinguish itself from mass removal through its focus on *individual assessment*.⁹⁴ Although vetting processes may relate to various forms of past misconduct, from a transitional justice perspective, human rights abuses are said to be most central.⁹⁵ According to these definitions, vetting only disqualifies public officials, and the concept does therefore not concern the removal from private or semi-private institutions.⁹⁶ Even if definitions of vetting only concern the screening process itself, the subsequent process of removing responsible agents from office is inherent to the usual understanding (and practice) of vetting.⁹⁷ Vetting may be relevant to persons already employed in the public sector as well as prospective employees, thus adding to the notion a positive dimension (ensuring that human rights abusers are removed from office) and a negative dimension (ensuring that human rights abusers are not being employed).⁹⁸ Besides this distinction, vetting is often divided into processes of review where the state official remains in office unless the (individual) review concludes that he should not, and, on the other hand, processes of reappointment where all employees in a certain state institution are removed from office, and can then reapply for their positions.⁹⁹

Vetting processes have been utilized in a variety of post-conflict

and post-authoritarian contexts. The most widely discussed instances of screening and removal of human rights offenders include the purges of Nazi collaborators in the former occupied European countries;¹⁰⁰ the de-nazification programmes initiated by the Allies in post-World War II occupied Germany;¹⁰¹ lustration laws in Central and Eastern Europe after the fall of communist rule, including the Czech Republic, Poland, Hungary, and others;¹⁰² and, more recently, US attempts to rid the Iraqi administration of human rights offenders (or Saddam Hussein loyalists?) through a de-Ba'athification programme.¹⁰³

Although there are significant differences between these cases, they share the feature that screening and removing public officials associated with a past regime take place according to a legal mandate. However, it is worth noting that the insistence on individual assessment in theory is not necessarily reflective of how such practices are in fact carried out. Besides some historical examples of collective dismissals,¹⁰⁴ some have argued that the post-World War II purges in occupied Germany concerned groups rather than individuals.¹⁰⁵ As a security measure, individuals belonging to Gestapo, SD, SA, and SS were automatically arrested and interned without trial by the Allied forces.¹⁰⁶ Moreover, more than 100,000 Germans were removed from public office after the introduction of the so-called 'Fragebogen' system.¹⁰⁷ Finally, some argue that the trials of persons belonging to those organizations deemed criminal by the IMT (and subsequently by Control Council Law No. 10) had "in actuality lost any practical significance as an independent category of criminality and was simply subsumed within the general purge of denazification that would have, in any event, taken the significance of such membership into account".¹⁰⁸ More generally, some suggest that the distinction between criminal and administrative justice tends to

blur in transitional settings.¹⁰⁹

Of the many vetting processes carried out in post-communist Central and Eastern Europe, the Czech practice of ‘lustration’ is probably the one surrounded by most controversy in the scholarship. In Czechoslovakia, the lustration law concerned political organs – such as parliament and the cabinet – as well as administrative organs, and a range of other institutions, including media posts, academic posts, and the judiciary. According to a draft law, only officials involved in human rights violations that could be proved by the state were to be removed. The law finally adopted, however, simply banned individuals according to their membership in institutions and agencies associated with the prior regime’s repression. Moreover, the law only provided for limited access to judicial review.¹¹⁰ While the stated purposes of the Czech lustration was to exclude persons from the administration who were thought to endanger the process of democratization and to restore trust in government,¹¹¹ some observers imply that such arguments simply functioned as a smokescreen for retribution.¹¹² The law has also been severely criticized for failing to respect due process guarantees.¹¹³ On the other hand, some have argued that access to judicial review reduced the effect of lustration – combined with other factors – rendering it without “any considerable effect on the end result of the Czech [...] transition”.¹¹⁴ The question of whether vetting processes should comply with those due process guarantees that are typically recognized criminal justice has received considerable attention in the scholarship, also beyond the Czech case.¹¹⁵

Although the international community has been involved in a number of national vetting processes, such involvement is far less institutionalized compared to processes of criminal justice – and it is

perceived far less controversial in the scholarship.¹¹⁶ External involvement also occurs when occupation forces impose transitional justice. In Iraq, the US launched a ‘de-Ba’athification programme’, where top Ba’ath party officials were removed and banned from future employment in the administration, and all other Ba’ath party members were prohibited from holding key positions in government institutions. In total, around 30,000 individuals were removed from public office.¹¹⁷ Some commentators question the legitimacy of this process because it is argued that the Iraqis were not sufficiently consulted and because support for this move is lacking in the Iraqi population.¹¹⁸ Since the vetting process in Iraq ended up excluding large parts of the educated elite from public office, some conclude that “the process of de-Ba’athification had become a model of how not to do it”.¹¹⁹

The general importance of vetting has been stressed by Jens Meierhenrich: “although lustration is just one of the many institutions of *jus post bellum*, it is arguably one of the most important. The pursuit of administrative justice affects the reconstitution of the public sphere – literally and figuratively – in more fundamental ways, and thus more far-reaching ways, than most other institutions of transitional justice”.¹²⁰ However, Pablo de Greiff warns: “the idea of ridding institutions of abusers and collaborators in the aftermath of conflict or authoritarianism, as is well known, has a long (but not necessarily distinguished) history. At the most general level this is an expression of the desire for a new beginning, or at least a renewal, which is perfectly understandable under such circumstances. However, there is no such thing as a ‘new beginning’ and the idea of renewal is nothing more than shorthand for something that requires articulation”.¹²¹

There are several justifications for vetting public officials responsible for past human rights abuses. Some claim that vetting can serve as a measure to prevent the recurrence of abuses because such processes remove individuals who are likely to become abusers once again from the public sphere.¹²² Others contend that vetting leads to institutional reform, thus (re)establishing public confidence in state institutions – which, in turn, may help to “safeguard the democratic transition”.¹²³ Some link vetting specifically to the rule of law. Former UN Secretary-General, Kofi Annan notes: “vetting processes help to facilitate a stable rule of law in post-conflict countries”.¹²⁴ Others again imply that vetting can serve retributive or deterrence purposes. They argue that vetting may provide accountability where trials are not feasible. The OHCHR, for example, notes how “under circumstances of limited or delayed criminal prosecutions, the exclusion from public service of human rights abusers may help to fill the impunity gap by providing a partial measure of non-criminal accountability”.¹²⁵

Although human rights bodies have indicated that the state has a duty to remove human rights perpetrators of a prior regime,¹²⁶ the legal advocacy for ‘state duties’ that underpins transitional criminal trials is hardly visible in vetting discourses.¹²⁷ Legal standards and legal discourse in the context of vetting predominantly concern due process questions.¹²⁸ It is noteworthy that although international law *might* facilitate a claim that victims of gross human rights violations are entitled to see their perpetrator removed from office, the debate on vetting has – unlike transitional criminal trials – not (yet) been framed in a victim-centric manner.¹²⁹

4. REPARATIONS

Reparatory justice has received a great deal of attention in transitional justice scholarship. The *prevalence* of reparations as a measure of transitional justice, however, remains disputed. Naomi Roht-Arriaza asks: “if reparations are so universally accepted as part of a state’s human rights obligations, why have so few states emerging from periods of armed conflict or mass violence put viable programs into place?”¹³⁰ Ruti Teitel, on the other hand, observes that “in contemporary times, most transitional regimes – whether following war, military dictatorship, or communism – have undertaken some form of reparatory justice”.¹³¹ This disagreement may follow from different understanding of ‘reparations’. Although financial compensation – as discussed by Roht-Arriaza¹³² – is central to transitional justice discourses, other forms of reparations have played out, in practice as well as in theory. Some of these are restitution of land or assets;¹³³ symbolic reparation, such as apologies or the building of memorials;¹³⁴ and collective reparations, such as community development or affirmative action programmes.¹³⁵ The notion of ‘reparation’, however, has also been used to cover a range of other practices. In contemporary UN terminology measures of “medical and psychological care”; “public disclosure of the truth”; “assistance in the recovery, identification and reburial of victims”; “effective civilian control of military and security forces”; “strengthening the independence of the judiciary”; providing “human rights and international humanitarian law education to all sectors of society”; and many more initiatives and processes are dealt with as matters of reparatory justice.¹³⁶

Despite these variations, Teitel observes some common features of reparatory measures in transitions. Reparations, she suggests,

transgresses distinctions between criminal and civil justice because they “express responsibility of past wrongdoing” and “challenge the understanding that the distinguishing feature of criminal justice (as opposed to civil justice) is the dominant role of the state”.¹³⁷

Examples of reparations include financial compensation from the German state (and companies) to victims of the Holocaust; (limited) financial compensation, official acknowledgement, and creation of public memorials in Argentina and Chile following the military dictatorships; financial compensation and restitution of confiscated property in some Central and Eastern European countries following communist rule; restitution of land and property in Bosnia and Herzegovina in accordance with the Dayton Peace Agreement; various reparation programmes in post-Apartheid South Africa, including restitution of land and (limited) compensation; and compensation by a UN trust fund for (certain) victims of the Iraqi invasion of Kuwait.¹³⁸ Studies of transitional justice have also looked into reparations in a more distant past. Jon Elster, for example, discusses compensation for loss of property and loss of career opportunities offered to supporters of the restored French monarchy (1814) in a transitional justice framework,¹³⁹ and Teitel debates the imposed reparations on the German state after World War I.¹⁴⁰

The field has also (but more marginally) dealt with reparations for past wrongs in Western democracies. Martha Minow, for example, pays attention to US reparations for injustices committed against Japanese Americans during World War II.¹⁴¹ Already during the War, (unsuccessful) attempts were made to challenge the legality of convictions when Japanese Americans were interned for violating curfews. Following decades of silence, in 1978 the ‘Japanese American Citizens’ League’ requested the US Congress to facilitate

an apology and financial compensation for internments during the War. The 1983 congressional commission report ‘Personal Justice Denied’ recognized the humiliating conditions of internment and explained the policy behind as a consequence of racism, war hysteria, and failed political leadership. The commission was forthcoming to the claims for financial compensation. Finally, in 1988 – after heated debates in the Senate – a ‘Civil Liberties Act’ was passed, granting each surviving victim a sum of 20,000 US Dollars and an official apology for the internment. Moreover, a 1983 lawsuit (once again) challenged the legality of convictions for surpassing curfews. This time, a district court judge, following a detailed examination of wartime evidence, ruled in favour of the plaintiffs and removed their labelling as criminals.¹⁴² According to Minow, both of these reparatory measures created increased recognition of the suffering of Japanese Americans, and may have motivated Afro-Americans and others to file cases against the US government for past wrongdoing.¹⁴³ The argument that “the struggle for reparations represented the search for public acknowledgement of the wrongs done” raises more general questions of what ends financial compensation in fact serves as well as the importance of symbolic reparation.¹⁴⁴ Reparations to Japanese Americans concern events that took place four decades earlier. Deliberations on ‘how far back should we go’ – and whether descendants of victims should be compensated – have also received attention beyond this case.¹⁴⁵

In other cases, reparations concern more recent events. During the decade-long civil war in Guatemala, “systematic reallocation of property became a tactic to prevent the return of the displaced”.¹⁴⁶ The peace accords entail provisions for land restitution, but the remedies are unclear and were “only partially implemented”.¹⁴⁷ Rhodri Williams

explains that the government showed little interest in effecting land restitution, and that land disputes continue to have a destabilizing effect in Guatemala.¹⁴⁸ In Guatemala, measures of transitional justice also include a UN sponsored ‘Commission for Historical Clarification’. This commission recommended measures of reparations. Although much delayed, in 2004, a ‘National Reparations Programme’, with a 10-year mandate and a budget of almost 40 million US Dollars, was launched.¹⁴⁹ As the compensation programme entitles victims of summary executions, disappearances, and torture a right to compensation as well as it lays down a collective right for victims to seek compensation for forced displacement and massacres, the programme is more inclusive than counterparts in for example Chile, Argentina, and South Africa, at least on paper.¹⁵⁰ Yet, the Guatemalan case reveals how tensions between groups can arise when distribution of compensations takes place.¹⁵¹ Transitional justice theory, also beyond the Guatemalan case, has dealt with questions of how to define ‘victims’ and who to compensate.¹⁵²

Several justifications for reparations have been put forward in transitional justice theory.

According to UN guidelines, “adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law”.¹⁵³ Statements like this, however, leave us with little clarification on whose justice should be promoted, what kind of justice should be promoted, what is meant by ‘promote’, and how reparations are thought to promote the kinds of justice in question.

Many transitional justice scholars argue that it is problematic to assume that ‘standard legal justification’ for reparation, such as ‘making the victim whole again’, can be exported to the transitional

context.¹⁵⁴ Erik Doxtader, for example, notes: “reparations are never enough. The past cannot be undone, lost potential can never be fully recovered and the reparative gesture is inevitably partial”.¹⁵⁵ Roht-Arriaza also emphasizes that reparations are “intended to return victims to the state they would have been in had the violations not occurred – something that is impossible to do” after mass violence.¹⁵⁶ Roht-Arriaza continues: “what could replace lost health and serenity, the loss of a loved one or of a whole extended family, a generation of friends, the destruction of culture or an entire community?”¹⁵⁷ Other general justifications for reparations, such as “the correction of unjust enrichment”, for observers such as Aviezer Tucker, are subject to the objection that perpetrators of mass violence do not necessarily benefit economically from their crimes. Tucker therefore concludes that “we deal here with a negative-sum game”.¹⁵⁸ What is more, according to Minow, “putting value on losses from mass atrocity” can be an inappropriate way of attending to victims’ needs.¹⁵⁹ Minow exemplifies: of the 500 so-called comfort women survivors, only 6 accepted the Japanese government’s offer of monetary compensation. Accordingly, Minow questions the concept of translating human losses into material goods. She points to the general inadequacy of compensation after mass violence when noting that “no market measures exist for the value of living an ordinary life, without nightmares or survivor guilt”.¹⁶⁰

Despite these reservations, for most observers, the primary justification for reparations after repression and atrocity remains victim-centric. Laura Arriaza and Naomi Roht-Arriaza, for example, note that “reparations can provide one of the most tangible manifestations of a government’s recognition of victims’ dignity and rights, and of its commitment not to repeat past wrongs”.¹⁶¹ However,

like criminal trials and vetting processes, reparation as a mechanism of transitional justice also finds justification in the idea of liberal democratic change. Teitel notes how “the paradigm of transitional reparatory justice is a complex conception, as it does work advancing multiple purposes mediating and constructing the transition”.¹⁶² Teitel finds reason to distinguish reparations in political transitions from other instances of reparations because “moral reparations transcend redress to the affected individuals and their survivors for injury, reaching the public eye”, thereby serving “the societal interest in the political transition”.¹⁶³ Teitel illustrates by arguing that in post-communist Central and Eastern Europe, reparations were framed in “juridical terms, as legal entitlements and ‘rights’” only to the extent that they were “compatible with the goals of the economic transition”.¹⁶⁴ Consequently, Teitel argues that “transitional reparatory justice is not justified primarily by conventional corrective concerns, but, rather by external political values related to the political exigencies of the time”, where “redress constitutes a primary symbol of discontinuity with the past, exercising the new regime’s critical transformative potential”.¹⁶⁵

Another dimension of reparatory justice’s transformative potential concerns a suggested link between reparations and restorative justice. With this nexus, a profound question concerns “how material and symbolic compensation can work to acknowledge the wounds of the past, restore human dignity and create platforms for collective (re)integration and nation-building”, and a key objective of reparations becomes the transformation of “a divided society into one that has a sense of common good and collective unity”.¹⁶⁶ Reparations, therefore, may be observed as part of a broader project of reconciliation.¹⁶⁷

Finally, reparatory justice in transitions – unlike reparations in other contexts, it is argued – connects to punishment. Elster concludes: “in modern legal systems [...] reparation for victims is uncoupled from punishment of the wrongdoer”, but in transitional settings, “the process of compensation may nevertheless be wholly or partly shaped by punitive intentions”.¹⁶⁸ However, as some observers imply, corrective purposes of reparatory justice frequently end up targeting the wrong entities. This can lead to dilemmas, including the paradoxical situation where a new democratic regime (whose leaders may have been subjected to repression) ends up ‘being punished’ for the ancient regime’s crimes.¹⁶⁹

Examining these justifications gives rise to the question of “whether past *suffering* or present and future *need* is the most relevant ground for compensation”.¹⁷⁰ Most observers agree that reparation is in fact both backward-looking and forward-looking. While reparations inherently relate to the past, its consequences may provide “a basis for building a future”,¹⁷¹ or “reintegrate the marginalized and isolated into society so they can contribute to the future rebuilding of the country”.¹⁷² Some scholars distinguish between restitution, which they see as backward-looking, and compensation, which they see as “forward looking and utilitarian”.¹⁷³

Developments in international law have proved crucial for the scholarship’s understandings of when and why victims should be redressed. International humanitarian law has for long required that states which breach the rules of war pay compensation to the violated state.¹⁷⁴ Moreover, as early as in 1928, the Permanent Court of International Justice (the predecessor to the International Court of Justice) held that reparations are integral to international law.¹⁷⁵ However, it was only with the coming of international human rights

law (and further developments of humanitarian law) that individual victims of abuses obtained rights to monetary compensation.¹⁷⁶ Contemporary debates on reparatory justice as a measure of transitional justice tend to draw significantly on these legal standards (and may have contributed to their development).¹⁷⁷ Not all celebrate these developments in international law. Doxtader, for example, argues that “international law tends only to recognize the need for reparative measures in response to specific gross violations of human rights. This focus leaves to the side the question of how to understand and redress the wounds inflicted by structural forms of violence such as South African Apartheid – a system that subjugated and exploited millions in a manner that does not always translate into actionable legal claims that can be adjudicated in courts”.¹⁷⁸ What is more, Doxtader suggests that the formal courts’ inaccessibility can be an obstacle to approaching the question of reparations primarily as a matter of legal rights that are assumed enforceable.¹⁷⁹

5. TRUTH COMMISSIONS

Besides transitional criminal trials, purges, and reparations, the truth commission is usually considered “one of the standard options on the palette of transitional justice alternatives”.¹⁸⁰

Priscilla Hayner, a leading expert on these commissions, defines the “generic name of truth commissions” as bodies that 1) focus on the past; 2) investigate a pattern of abuses over a period of time (rather than a specific event); 3) are of temporary nature (typically between 6 months and 2 years), and complete their work with the submission of a report; and 4) are officially sanctioned, authorized, or empowered by the state.¹⁸¹

Truth commissions have gained importance as a mode of dealing with past abuses. In 2001, Hayner (according to the above definition) identified “at least twenty-one official truth commissions established around the world since 1974”.¹⁸² Among the most well-known of these are the Argentine ‘National Commission on the Disappeared’, established in 1983 when Raúl Alfonsín took office after the military junta had consented to democratic elections;¹⁸³ the Chilean ‘National Commission on Truth and Reconciliation’, established by President Patricio Aylwin immediately after his taking office in 1990;¹⁸⁴ and the South African ‘Truth and Reconciliation Commission’, established in connection with the negotiated transition from Apartheid to democratic rule in 1994.¹⁸⁵ But truth commissions have played important roles elsewhere.¹⁸⁶ The prevalence of truth commissions is followed by increased academic interest as well as extensive practical involvement by international organizations, the donor community, and civil society organizations.¹⁸⁷

There may be several reasons for the prevalence of truth commissions. As Hayner notes, the most straightforward of these concerns the needs “to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history”.¹⁸⁸ These needs are said to materialize because authoritarian regimes commonly carry out (the worst acts of) repression and human rights violations in secret. An officially sanctioned version of past repression, therefore, has been said to eliminate continued denial among parts of the population.¹⁸⁹ Aryeh Neier notes: “where deception is so central to the abuses, then truth takes on a greatly added significance”.¹⁹⁰ Compared to criminal trials, some scholars argue that the truth revealed by these commissions is more nuanced, more comprehensive, and easier to

assess.¹⁹¹ For others, truth commissions “will be a second-best solution because the public inquiry into the truth is much more precise and much more dramatic when done through a trial, with the accused contributing to the development of the story”.¹⁹² Another merit of truth commissions is said to involve victims’ redress because they receive acknowledgement of their suffering and increased recognition of their needs.¹⁹³ What is more, because victims are treated “as persons to be believed, rather than troublemakers or even people with a burden to prove their story”, many scholars insist that the procedures under a truth commission are more victim-friendly than criminal proceedings.¹⁹⁴ Although truth commissions are backward-looking by nature, they may also contribute to forward-looking objectives such as prevention. The commissions, Ruti Teitel suggests, sometimes by their very names (‘Nunca Más’),¹⁹⁵ “offer the promise of deterrence of future criminal wrongdoing”.¹⁹⁶ The commissions are also merited for outlining institutional responsibility and forwarding recommendations for reform.¹⁹⁷ In addition, truth commissions are often associated with reconciliation. This may not be surprising since commissions such as the Chilean and the South African made explicit reference to this concept already qua their names. However, the question of how these commissions actually contribute to reconciliation remains a controversial issue in the literature.¹⁹⁸ Finally, truth commissions can be linked to the pursuit of accountability. Some see the procedures before truth commissions as entailing a form of accountability in their own right.¹⁹⁹ However, the work of truth commissions, it has been noted, can also increase the probability of criminal accountability by making recommendations for criminal investigations, or by forwarding files to the prosecutor’s office.²⁰⁰

Despite these merits, decision-makers’ opt for a truth commission

is not necessarily the result of an ideal choice. Truth commissions have often been perceived as a ‘second-best option’ when prosecutions are not feasible. Benjamin Schiff, in comparing truth commissions with trials, notes that “pardons, amnesties, and truth commissions depart from important standards of accountability and thus fail clearly to counter impunity”, and therefore recommends that truth commissions are only established when trials cannot take place.²⁰¹ In practice, truth commissions have sometimes (but in different ways) been connected to amnesty provisions. According to many observers, the creation of the Chilean commission should be viewed as a feasible alternative to prosecutions – an option made difficult with Augusto Pinochet’s passing of a general amnesty law before his leaving office and the military’s continued influence under the new democracy.²⁰²

In one case – that of the South African Truth and Reconciliation Commission – did the commission itself hold the powers to grant amnesties for human rights violations committed in context of past political repression and struggle. The granting of amnesty was, however, conditional. Amnesties were granted only on an individual basis after application; the applicant was to make a full disclosure of the human rights violations committed; and only abuses committed between 1960 and 1994, with a *political objective* (and proportional to that objective), were eligible to amnesty.²⁰³ Many have argued that the South African model of ‘trading truth for amnesty, and amnesty for truth’ was a prerequisite for the Apartheid regime to agree to the holding of democratic elections, and thus a necessary compromise for ensuring a peaceful transition. Former South African President Thabo Mbeki has put it simple: “within the ANC the cry was to ‘catch the bastards and hang them’ – but we realised you could not

simultaneously prepare for a peaceful transition while saying we want to catch and hang people, so we paid a price for the peaceful transition. If we had not taken this route I don't know where the country would be today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment, we would never have undergone peaceful change".²⁰⁴

Following the establishment of the South African Truth and Reconciliation Commission, some scholars started to argue that truth commissions should generally (or in most instances) be preferred to criminal trials.²⁰⁵ Others maintain that the use of truth commissions (at the cost of criminal trials) fails to conform to international law standards and insist that retribution is necessary to achieve "just reconciliation".²⁰⁶

Advocacy for truth-seeking efforts has frequently made reference to 'state duties' to utilize such measures. Already at the 1988 Aspen Institute conference, 'State Crimes: Punishment or Pardon?' there "was common agreement that the successor government has an obligation to investigate and establish the facts so that the truth be known and be made part of the nation's history. Even in situations where pardon or clemency might be appropriate there should be no compromising of the obligation to discover and acknowledge the truth".²⁰⁷

6. CLOSING THE BOOKS

In instances of 'negotiated transitions' – such as those in Chile and South Africa – amnesties are said to make up "an important bargaining chip" in ensuring a peaceful transition.²⁰⁸ Both Chile and South Africa opted for combining amnesties with other measures of

transitional justice, but this is not always the case. As if reflecting a decision to ‘close the books’ and not look back, blanket amnesties are sometimes granted and no other measure of transitional justice is put in place.²⁰⁹

With the passing of a general amnesty law in October 1977, the Spanish Parliament endorsed the new democratic administration’s plea to halt prosecutions of any member of the outgoing regime (or for any other political crime). The amnesty was part of “a broader transitional pact”, according to which political prisoners were released, the archives of the secret police were sealed, most civil servants could maintain their jobs and pensions, the communist party was legalized, and a new constitution was adopted with consensus.²¹⁰ Some commentators have emphasized how the ‘Spanish model’ lays the foundation for a successful transition and democratic consolidation. Samuel Huntington notes that “to reject amnesty in these cases is to exclude the most prevalent form of democratization”.²¹¹ Scholars such as Paloma Aguilar, however, argue that the ‘doing nothing path’ should not necessarily be understood as a broad consensus decision where the actors had preferences for ‘looking forward’. Aguilar argues that “it is fear of conflict that allows one to understand the attitude of the main actors involved in the transition process and the institutional framework established during the [transition] period”.²¹²

There are other examples of consensus (at the level of the political leadership) to refrain from adopting any mechanisms of transitional justice. When in Mozambique, the long-lasting civil war between the leftish Frelimo government and the South African sponsored insurgents, Renamo, was negotiated to an end in the early 1990s, it was agreed that “no one should be prosecuted for what had been done

during the war”.²¹³ The rationale was seemingly that “we needed to forget those things” in order to advance peace and reconstruction.²¹⁴ The subsequent democratic elections rested on a peace agreement, in which a blanket amnesty was laid down. No other officially sanctioned processes of truth seeking, reparations, or vetting were initiated. Nonetheless, a UN sponsored process of disarmament, demobilization, and reintegration was implemented. Moreover, the lack of state sponsored (or internationally enforced) mechanisms of transitional justice does not mean that Mozambicans have ‘done nothing’. Processes of community-based healing have been used in villages, reintegrating (and perhaps reconciling) perpetrators and victims.²¹⁵

But if the Mozambican case is said to highlight a transition where actors *refrain* from adopting measures of transitional justice, how then can these community-based processes be approached? Parts of the scholarship have answered this question by utilizing a broader understanding of the mechanisms of transitional justice.²¹⁶ Likewise, there are problems related to perceiving the Spanish case as an example of ‘closing the books’; as an example of doing nothing. More recently, legislation has been passed which addresses repression during the Franco years as well as the preceding civil war through a variety of measures, including financial compensation, reversal of ‘political convictions’, preferential access to public services, and the granting of citizenship to persons who have been exiled in this period.²¹⁷ In part, these challenges to the field seem to derive from the understanding that transitional justice is something that is embarked on in the interval between two regimes.

NOTES:

1. It has therefore been observed that “the term itself is misleading, as it more commonly refers to ‘justice during transitions’ than to any form of modified or altered justice”. See Bickford, “Transitional Justice”, 2004, p. 1045.

2. See for example the essays in Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, 1995.

3. Teitel, “Editorial Note – Transitional Justice Globalized”, 2008, pp. 1-4.

4. Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice”, 2009, pp. 321-367. See also Hesse and Post, “Introduction”, 1999, p. 15 with note 16.

5. I return to some of these definitions and the problems that surround them later in this chapter.

6. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 1.

7. See for example Freeman, *Truth Commissions and Procedural Fairness*, 2006, pp. 5-6; Villa-Vicencio, “Truth Commissions”, 2004, pp. 89-95; Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001; Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998; and Teitel, *Transitional Justice*, 2000.

8. See for example Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations*, 1995; and Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies*, 1995.

9. On this debate, see Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, 2008. See also further below in section 2.2.6.

10. See for example Bell et al., “Justice Discourses in Transition”, 2004, pp. 305-328.

11. Freeman and Saini, "Transitional Justice and Civil Society", 2007, p. 64.

12. The fact that this chapter refrains from discussing legal and institutional reform in detail should by no means be seen as reflecting a perception that such processes are not crucial for doing justice in contexts of repression and mass violence. On the contrary, the marginalization of such measures in debates on transitional justice remains one of my key concerns with the field. See further Chapter V.

13. Teitel, *Transitional Justice*, 2000, p. 27.

14. Des Forges and Longman, "Legal Responses to Genocide in Rwanda", 2004, pp. 49-68.

15. Horowitz, "Transitional Criminal Justice in Sierra Leone", 2006, pp. 43-69.

16. Elster, "Introduction", 2006, p. 8.

17. The Rwandan genocide trials, for example, have been severely criticized for failing to respect due process guarantees such as the right to legal defence. See for example Amnesty International, *Gacaca: A Question of Justice*, 2002.

18. Most clearly William Schabas has argued that there can be tensions between international standards, in some instances making the full respect for all rights impossible. See Schabas, "Balancing the Rights of the Accused with the Imperatives of Accountability", 2004, pp. 154-168; and Schabas, "The Rwanda Case: Sometimes It's Impossible", 2002, pp. 499-520.

19. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 30-31. Political interference can take place at all levels. In his account of the ICTY, former Chief Prosecutor Richard Goldstone provides interesting perspectives on how politicians and diplomats, including former UN Secretary-General Boutros-Ghali, attempted to interfere in his work. See Goldstone, *For Humanity: Reflections of a War Crimes Investigator*, 2000, in particular pp. 100-104.

20. Such selectivity can take two forms. Firstly, the political nature of prosecutions can be evident when only a small proportion of alleged perpetrators are put on trials ('scapegoats'). Secondly, concerns over selectivity arise when only one side to a conflict is held accountable (victors' justice). On the 'scapegoat' challenge, see for example Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 40-45. On the 'victors' justice' challenge,

see for example Shklar, *Legalism: Law, Morals, and Political Trials*, 1986, pp. 161-164.

21. For a thoughtful analysis of the political purposes served by retroactive legislation in transitions, see Nino, *Radical Evil on Trial*, 1996, in particular pp. 127-135.

22. Teitel, *Transitional Justice*, 2000, p. 30.

23. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 1963, p. 298.

24. See for example Sriram, "Exercising Universal Jurisdiction: Contemporary Disparate Practice", 2002, pp. 51-57.

25. ICTR website at <http://69.94.11.53/default.htm> (accessed October 7, 2009); Hirondele News Agency, *Cost of the ICTR to Reach \$ 1 Billion by the End of 2007*, May 12, 2006; and Møse, "The ICTR's Completion Strategy – Challenges and Possible Solutions", 2008, pp. 667-679.

26. In other cases, however, arrest warrants have been issued, or cases are in their pre-trial stage. Investigations against the Lord's Resistance Army in Uganda have resulted in the ICC issuing altogether five arrest warrants (but proceedings against one have been terminated due to his decease); besides the case against Dyilo, two cases (involving three persons) related to crimes committed in the DRC have reached their pre-trial stage; one case concerning a citizen of the Central African Republic is at its pre-trial stage; and finally due to a UN Security Council referral, arrest warrants have been issued against three Sudanese citizens (including President Bashir) who are all still at large, and an additional case is pending against a Sudanese rebel leader who has appeared voluntarily before the Court. See ICC website at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/> (accessed October 4, 2009).

27. See for example Drumbl, *Atrocity, Punishment, and International Law*, 2007.

28. Lauren, "From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context", 2004, pp. 15-41.

29. Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2001, p. 204. See also Christine Chinkin's discussion of how international tribunals have contributed to the

development of standards on gender-related crimes in Chinkin, “Gender-related Crimes: A Feminist Perspective”, 2004, pp. 116-134.

30. On the junta trial, see Nino, *Radical Evil on Trial*, 1996, pp. 60-104. In 2005, the Argentine Supreme Court declared the ‘due obedience law’ unconstitutional, and prosecutions have re-emerged in recent years. See Sikkink and Walling, “Argentina’s Contribution to Global Trends in Transitional Justice”, 2006, pp. 301-324.

31. Acuña and Smulovitz, “Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts”, 1997, pp. 93-122.

32. Nino, *Radical Evil on Trial*, 1996, pp. 100-101.

33. See for example Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints”, 1995, pp. 3-31.

34. See for example McEvoy and Rebouche, “Mobilizing the Professions: Lawyers, Politics, and the Collective Legal Conscience”, 2007, pp. 275-314.

35. Nino, *Radical Evil on Trial*, 1996, pp. 62-72 and 149-185; and Teitel, *Transitional Justice*, 2000, pp. 27-67.

36. Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, p. 265.

37. McAdams, “Communism on Trial: The East German Past and the German Future”, 1997, pp. 249-255.

38. Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, p. 265.

39. Ibid.

40. See for example Nino, *Radical Evil on Trial*, 1996, pp. 118-127; and Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, in particular pp. 79-135 and 188-271.

41. Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, pp. 255-256 and 262-263.

42. As quoted in McAdams, “Communism on Trial: The East German Past and the German Future”, 1997, p. 244.

43. A Judge in Honecker’s trial, as quoted in McAdams, “Communism on Trial: The East German Past and the German Future”, 1997, p. 252.

44. See just beneath on general justifications for transitional criminal trials.
45. Offe and Poppe, “Transitional Justice in the German Democratic Republic and in Unified Germany”, 2006, p. 246.
46. Tiba, “The Mengistu Genocide Trial in Ethiopia”, 2007, pp. 513-528.
47. BBC News, *Mengistu ‘To Remain in Zimbabwe’*, December 13, 2006.
48. See also Clark, “If Ocampo Indicts Bashir, Nothing May Happen”, 2008.
49. See for example Drumbl, “Sclerosis: Retributive Justice and the Rwandan Genocide”, 2000, pp. 287-307.
50. Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2001, pp. 182-183.
51. Clark, “Hybridity, Holism, and ‘Traditional’ Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda”, 2007, pp. 765-837.
52. Wells, “Gender, Violence and Prospects for Justice at the Gacaca Courts in Rwanda”, 2005, p. 177.
53. See for example Sarkin, “The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide”, 2001, pp. 143-172.
54. Reiger, “Hybrid attempts at accountability for serious crimes in Timor Leste”, 2006, pp. 143-170.
55. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 26-27.
56. On the UN General Assembly’s adoption of the ‘Nuremberg Principles’, see Teitel, *Transitional Justice*, 2000, pp. 34-36.
57. Ibid., p. 38.
58. Cohen, “Transitional Justice in Divided Germany after 1945”, 2006, p. 61.
59. Drumbl, *Atrocity, Punishment, and International Law*, 2007, p. 61.
60. Ibid., p. 121.
61. UN Secretary-General, *Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms in Cambodia*, March 16, 1999, para. 99.
62. ICTY Trial Chamber, *Prosecutor v. Momir Nikolic*, December 2, 2003, para. 86.
63. Bassiouni, “Accountability for Violations of International Humanitarian Law

and Other Serious Violations of Human Rights”, 2002, p. 54.

64. As quoted in Taylor, *The Autonomy of the Nuremberg Trials*, 1992, p. 55.

65. Flinterman, “The International Criminal Court: Obstacle or Contribution to an Effective System of Human Rights Protection”, 2004, p. 266.

66. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, 1991, p. 2542.

67. Ibid.

68. Justifications relating to rehabilitation, special deterrence, and incapacitation have only played a marginal role in justifications for transitional trials. See, however, Elster, “Retribution”, 2006, pp. 52-53.

69. Nino, *Radical Evil on Trial*, 1996, p. 141.

70. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, p. 121.

71. Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 154-163.

72. Nino, *Radical Evil on Trial*, 1996, p. 142.

73. Drumbl, *Atrocity, Punishment, and International Law*, 2007, p. 24.

74. Elster, “Retribution”, 2006, pp. 41-48.

75. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, 2002, p. 61.

76. Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 169-170.

77. Malamud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?”, 1990, p. 9.

78. Drumbl, *Atrocity, Punishment, and International Law*, 2007, pp. 171-173.

79. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice”, 2002, p. 70.

80. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 1991, p. 103.

81. Malamud-Goti, “Punishment and a Rights-Based Democracy”, 1991, p. 7.

82. This chapter’s outline does not claim to present a full account of the arguments put forward in debates on whether general penal theory is fitting for transitional justice.

83. Nino, *Radical Evil on Trial*, 1996, pp. 146-147.

84. Méndez, “In Defense of Transitional Justice”, 1997, p. 1.

85. Beside Nino's and Méndez' studies, this argument has been most central in for example Malamud-Goti, "Punishment and a Rights-Based Democracy", 1991, pp. 3-13; Osiel, "Human Rights as Social Ideals", 1999, pp. 217-262; and Teitel, *Transitional Justice*, 2000, pp. 27-68. For an interesting account of the arguments in the early scholarship for and against prosecution, see Huysse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", 1995, pp. 337-349.

86. Malamud-Goti, "Punishment and a Rights-Based Democracy", 1991, p. 9.

87. See the analysis of international law's protection of victims' rights in Aldana-Pindell, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", 2004, pp. 605-686.

88. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", 1991, pp. 2541-2544.

89. Bassiouni, "International Recognition of Victims' Rights", 2006, pp. 260-263.

90. See for example, Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes*, 2007, for example pp. 209 and 217.

91. Before the launch of a 2007 publication "no comprehensive, comparative, and thematic study" on vetting existed. See Duthie, "Introduction", 2007, p. 19. That being said, a considerable amount of case studies and general studies of transitional justice have looked into processes of vetting. See for example the collection of essays in Elster (ed.), *Retribution and Reparations in the Transition to Democracy*, 2006. See also the general discussions in Teitel, *Transitional Justice*, 2000, pp. 149-189; and Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, for example pp. 35-36, 68-69, 124-127 and 257-260.

92. Duthie, "Introduction", 2007, pp. 17-18.

93. International Center for Transitional Justice, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines", 2007, p. 548.

94. de Greiff, "Vetting and Transitional Justice", 2007, p. 524.

95. Duthie, "Introduction", 2007, p. 17.

96. However, the fact remains that private or semi-private entities, such as the media and learning institutions, on several occasions have been subjected to

screening. See for example Czarnota, “The Politics of the Lustration Law in Poland, 1989-2006”, 2007, pp. 222-258.

97. See for example UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 52.

98. Duthie, “Introduction”, 2007, p. 17.

99. *Ibid.*, pp. 25-27.

100. Rousso, “The Purge in France: An Incomplete Story”, 2006, pp. 89-123; Deak, “Political Justice in Austria and Hungary after World War II”, 2006, pp. 124-146; Dahl, “Dealing with the Past in Scandinavia”, 2006, pp. 147-163; and Huyse, “Belgian and Dutch Purges after World War II Compared”, 2006, pp. 164-178.

101. For a discussion of differences between American, British, French, and Soviet practices, see Cohen, “Transitional Justice in Divided Germany after 1945”, 2006, pp. 68-82.

102. Czarnota, “The Politics of the Lustration Law in Poland, 1989-2006”, 2007, pp. 222-258; Barret et al., “Lustration as Competition: Vetting in Hungary”, 2007, pp. 260-307; Wilke, “The Shield, the Sword, and the Party: Vetting the East German Public Sector”, 2007, pp. 348-400; and Priban, “Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law”, 2007, pp. 308-346.

103. Stover et al., “Bremer’s ‘Gordian Knot’: Transitional Justice and the US Occupation of Iraq”, 2006, pp. 229-254.

104. See for example Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004 (discussing French purges after 1848).

105. Cohen, “Transitional Justice in Divided Germany after 1945”, 2006, pp. 59-88.

106. *Ibid.*, pp. 68-71.

107. The idea behind the Fragebogen system was that all Germans should complete a questionnaire that could reveal how closely they were connected to the Nazi regime. The system met a number of obstacles, and the de-nazification process was eventually handed over to the Germans (who were much more lenient in their practice). See Cohen, “Transitional Justice in Divided Germany after 1945”, 2006, pp. 73-76.

108. *Ibid.*, p. 72.

109. Teitel, *Transitional Justice*, 2000, pp. 149-190.

110. Only judicial review of the decision to terminate employment (and not the content of the certificate determining whether the official in question belonged to any of the mentioned groups) was granted. See Boed, “An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice”, 1999, pp. 357-402.

111. Ibid.

112. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 126.

113. See Boed, “An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice”, 1999, pp. 385-398.

114. Tucker, “Paranooids may be Persecuted: Post-totalitarian Transitional Justice”, 2006, p. 202.

115. See for example Andreu-Guzmán, “Due Process and Vetting”, 2007, pp. 448-481.

116. The scholarly debate on international involvement in national vetting processes has been limited. Nonetheless, the UN has been involved in vetting processes on an ad hoc basis in Bosnia and Herzegovina, Kosovo, East Timor, Liberia and Haiti. See UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 17-18.

117. Stover et al., “Bremer’s ‘Gordian Knot’: Transitional Justice and the US Occupation of Iraq”, 2006, pp. 229-254.

118. Ibid.

119. Ibid., p. 243.

120. Meierhenrich, “The Ethics of Lustration”, 2006, p. 102.

121. de Greiff, “Vetting and Transitional Justice”, 2007, p. 524.

122. Elster, “Retribution”, 2006, pp. 52-53.

123. Duthie, “Introduction”, 2007, p. 30.

124. UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies...*, 2004, para. 52.

125. UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework*, 2006, p. 5. Many scholars, however, are opposed to retributive justifications. See for example Schwartz, “Lustration in Eastern Europe”, 1995, pp. 461-483.

126. See for example UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Brazil*, December 1, 2005, para. 18.

127. In Hansen, “Transitional Societies and International Law: An Obligation to Remove Human Rights Perpetrators from Office?”, 2008, I make the argument that under certain circumstances, the obligation to prevent violations as recognized in a number of international standards, including the ICCPR, cannot be fulfilled without removing known human rights abusers from public office. Perhaps surprisingly, the question of whether a state duty exists is otherwise only discussed sporadically.

128. In a number of decisions, the European Court of Human Rights has considered questions relating to due process in vetting procedures. See for example European Court of Human Rights, *Turek v. Slovakia*, Judgment of February 14, 2006, para. 115; and European Court of Human Rights, *Matyjek v. Poland*, Judgment of April 24, 2007, para. 62. As for the scholarship, see for example Andreu-Guzmán, “Due Process and Vetting”, 2007, pp. 449-452.

129. Although international law provides victims with a right to ‘guarantees of non-repetition’ (as part of the broader right to reparation), in my view, the nature of vetting (a structured process that targets *institutions*) means that a possible ‘right to vetting’ rests with society as such, rather than with the individual victim. The argument is made in Hansen, “Transitional Societies and International Law: An Obligation to Remove Human Rights Perpetrators from Office?”, 2008.

130. Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 121-122.

131. Teitel, *Transitional Justice*, 2000, p. 119.

132. Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 121-161 (quote at 121).

133. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 107-112; and Teitel, *Transitional Justice*, 2000, pp. 129-131.

134. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 112-117 and 138-142.

135. Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, pp. 129-136.

136. UN General Assembly, *Basic Principles and Guidelines on the Right to a*

Remedy and Reparation..., 2006, principle 15-23.

137. Teitel, *Transitional Justice*, 2000, p. 128.

138. On all of these examples, see Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence", 2004, pp. 121-161.

139. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, pp. 36-46.

140. Teitel, *Transitional Justice*, 2000, pp. 121-122.

141. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 94-101.

142. *Ibid.*

143. *Ibid.*, pp. 101-102.

144. *Ibid.*, p. 99.

145. Tyler Cowen argues that we should be cautious in accommodating quests for cross-generation reparations. See Cowen, "How Far Back Should We Go? Why Restitution Should Be Small", 2006, pp. 17-32. Teitel examines a "dilemma of the passage of time" in Teitel, *Transitional Justice*, 2000, pp. 138-141.

146. Williams, "The Contemporary Right to Property Restitution in the Context of Transitional Justice", 2007, p. 42.

147. *Ibid.*, pp. 43-47.

148. *Ibid.*

149. Arriaza and Roht-Arriaza, "Social Repair at the Local Level: The Case of Guatemala", 2008, p. 155.

150. In Chile, only the families of those killed or disappeared were entitled to compensation. In addition, the process in Argentina provided compensation to political prisoners. In South Africa, victims of killing, torture, and abduction received monetary compensation. See Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence", 2004, pp. 124-126. On the details of the Guatemalan reparations programme, see Arriaza and Roht-Arriaza, "Social Repair at the Local Level: The Case of Guatemala", 2008, p. 155.

151. Arriaza and Roht-Arriaza point to tensions between Mayans and non-Mayans in the distribution of compensation. *Ibid.*

152. See for example Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, 2002, pp. 119-123.

153. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation...*, 2006, principle 15.

154. Cowen notes that “the original goal of restitution was to ‘make the victim whole again’”, while arguing that there are problems in utilizing such justifications in contexts of ‘past wrongs’. See Cowen, “How Far Back Should We Go? Why Restitution Should Be Small”, 2006, p. 29.

155. Doxtader, “Reparation”, 2004, p. 25.

156. Roht-Arriaza, “Reparations in the Aftermath of Repression and Mass Violence”, 2004, p. 122.

157. *Ibid.*

158. Tucker, “Rough Justice: Rectification in Post-authoritarian and Post-totalitarian Regimes”, 2006, p. 276.

159. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 104-105.

160. However, Minow also mentions that the reluctance to accept compensation was partly due to the fact that the compensation would be paid by private entities, rather than the government itself. ‘Comfort women’ refers to women from East Asian countries, captured and abused by Japanese soldiers during World War II. See Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 104-105.

161. Arriaza and Roht-Arriaza, “Social Repair at the Local Level: The Case of Guatemala”, 2008, p. 154. See also Bassiouni, “International Recognition of Victims’ Rights”, 2006, pp. 203-279.

162. Teitel, *Transitional Justice*, 2000, p. 146.

163. *Ibid.*, p. 127.

164. *Ibid.*, p. 131.

165. *Ibid.*, p. 147.

166. Doxtader, “Reparation”, 2004, p. 27.

167. See also Philpott, “Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?”, 2006, pp. 23-24.

168. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 166. See also Teitel, *Transitional Justice*, 2000, p. 121.

169. On these problems, see for example Teitel, *Transitional Justice*, 2000, pp.

138-140.

170. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 177.

171. Doxtader, "Reparation", 2004, p. 25.

172. Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence", 2004, p. 122.

173. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, p. 174.

174. See Article 3, the Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (the 1907 Hague Convention).

175. Permanent Court of International Justice, *Chorzow Factory Case*, September 13, 1928 (noting at 47 that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

176. See generally Teitel, *Transitional Justice*, 2000, pp. 122-124.

177. See Bassiouni's discussion of the UN principles (which he took part in developing) in Bassiouni, "International Recognition of Victims' Rights", 2006, pp. 203-279. See the wide range of victims' rights (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition) recognized in UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation...*, 2006.

178. Doxtader, "Reparation", 2004, p. 27.

179. *Ibid.*

180. Schabas, "The Sierra Leone Truth and Reconciliation Commission", 2006, p. 21.

181. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 14. For a slightly different definition, see Mattarollo, "Truth Commissions", 2002, pp. 295-324.

182. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15.

183. *Ibid.*, pp. 33-34.

184. *Ibid.*, pp. 35-38.

185. *Ibid.*, pp. 40-45.

186. For a comprehensive list of truth commissions following gross human rights violations, see Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15, Appendix 1, Chart 1, pp. 305-311.

187. The scholarship on truth commissions has become considerable. Besides a large number of case studies, notable studies of more general nature include: Freeman, *Truth Commissions and Procedural Fairness*, 2006; and Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15. On the practical side, the UN has (in different ways, and to different extents) been involved in the creation and running of several truth commissions, such as the El Salvadorian 'Comisión de la Verdad para El Salvador' (1992-1993); the Burundian 'International Commission of Inquiry' (1995-1996); the Guatemalan 'Comisión para el Esclarecimiento Histórico' (1997-1999); and, more recently, the Sierra Leonean 'Truth and Reconciliation Commission' (2000-2001). The 'donor community' and (international and local) civil society organizations are also involved in the set-up and funding of truth commissions. Not least, the emergence of international and regional 'transitional justice institutes', such as the New York-based 'International Center for Transitional Justice' and the Cape Town-based 'Institute for Justice and Reconciliation', has led to advocacy for, and practical involvement in, truth commissions.

188. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 14-15, pp. 24-25.

189. *Ibid.*

190. Aryeh Neier as quoted in Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 25 with note 6.

191. Abrams and Hayner, "Documenting, Acknowledging and Publicizing the Truth", 2002, p. 291.

192. Nino, *Radical Evil on Trial*, 1996, p. 146.

193. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 28.

194. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, p. 72.

195. The final report of the Argentine commission as well as the commission in

Uruguay were entitled “Nunca Más” (Never Again).

196. Teitel, *Transitional Justice*, 2000, p. 81.

197. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 29-30.

198. See for example Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, p. 30; Villa-Vicencio, “Reconciliation”, 2004, pp. 3-9; and Daly, “Truth Scepticism: An Inquiry into the Value of Truth in Times of Transition”, 2008, pp. 23-41.

199. See for example Bassiouni, “Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights”, 2002, p. 32.

200. In Argentina, the truth commission played an important role for the subsequent trials, and also in Uganda and Haiti, files were forwarded to the prosecutors’ office (but with less success in facilitating trials). See Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2001, pp. 29 and 90-102.

201. Schiff, “Do Truth Commissions Promote Accountability or Impunity? The Case of the South African Truth and Reconciliation Commission”, 2002, p. 327. See also Cassel, “International Truth Commissions and Justice”, 1995, pp. 326-333.

202. Acuña, “Transitional Justice in Argentina and Chile: A Never-Ending Story”, 2006, p. 225.

203. See for example Boraine, “Truth and Reconciliation Commission in South Africa”, 2006, pp. 305-307.

204. Thabo Mbeki as quoted in Villa-Vicencio, “Restorative Justice in Social Context: The South African Truth and Reconciliation Commission”, 2003, p. 236.

205. See for example Amstutz, “Restorative Justice, Political Forgiveness, and the Possibility of Political Reconciliation”, 2006, pp. 151-188; and Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998, pp. 118-147.

206. See Dugard, “Retrospective Justice: International Law and the South African Model”, 1997, p. 287.

207. Henkin, “State Crimes: Punishment or Pardon (Conference Report)”, 1995, pp. 184-188.

208. Teitel, *Transitional Justice*, 2000, p. 53.

209. Here simply understood as the mechanisms of transitional justice which have been discussed in preceding sections.

210. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004, pp. 61-62.

211. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 1991, p. 217.

212. Aguilar, "Justice, Politics, and Memory in the Spanish Transition", 2001, p. 94.

213. A Renamo delegate in interview with Helena Cobban. See Cobban, *Amnesty after Atrocity: Healing Nations after Genocide and War Crimes*, 2007, pp. 140-141.

214. Ibid.

215. Ibid., pp. 136-182.

216. See further section 2.4.

217. See the so-called 'Law of Historical Memory' (Act No. 52/2007), December 26, 2007. For an analysis of how the law came about, and its place in broader transitional justice discourse, see Golob, "Volver: The Return of/to Transitional Justice in Spain", 2008, pp. 127-141.