

(2022) Roddy Brett and Lina Malagón “Peacemaking, Peacebuilding and Transitional Justice: Dilemmas and Possibilities”, in *Contemporary Peacemaking*, (Eds. Roger Mac Ginty and Anthony Wanis-St. John). 475-507. Basingstoke: Palgrave MacMillan.

Peacemaking, Peacebuilding and Transitional Justice: Dilemmas and Possibilities

States and societies do not tend to follow a linear or sequential logic in the aftermath of conflict: poor quality peace, post-accord violence and conflict recidivism occur regularly in the wake of armed conflict and initially successful negotiations. This chapter traces the development of the transitional justice paradigm, with particular reference to its relevance for making and building peace in post-authoritarian and post-conflict societies. The chapter begins by documenting the emergence of the Transitional Justice paradigm in the 1980s, before turning to an analysis of its subsequent evolution towards becoming incorporated as an integral component of peace negotiations and post-conflict reconstruction processes. The chapter ends with a discussion of how, over the last decade, Transitional Justice (TJ) has undergone a further shift in emphasis, specifically with regard to the mentioned ‘victims’ turn’ – the direct inclusion of victims in the design and implementation of TJ mechanisms – what the implications of said transformation have been both for the paradigm itself and for peace-making and peacebuilding, and the inclusion of a transformative approach of TJ mechanisms in practice.

Introduction

States and societies do not tend to follow a linear or sequential logic in the aftermath of conflict: poor quality peace, post-accord violence and conflict recidivism occur regularly in the wake of armed conflict and initially successful negotiations.¹ According to a wide range of scholarship, between 40 and 60 per cent of conflicts relapse at least once after a settlement has been reached.² The critical timeframe for conflict relapse is between five to ten years; for example, an estimated 60 per cent of all armed conflicts settled during the early 2000s recurred within five years.³ Significantly, even in those cases where recidivism does not take place, the quality of peace achieved has often been low and the peace dividend meagre, leading to situations of so-called ‘no war, no peace’.⁴ Within this context, international actors, states and civil society have struggled to develop effective practices through which to

address the causes, consequences, and legacies of political violence; the transitional justice paradigm increasingly represents an example of such interventions.

From the mid-1980s, Transitional Justice (TJ) emerged as a developing set of practices, theories, mechanisms and concerns aimed at confronting and dealing with past human rights violations, specifically those that had been perpetrated principally during the authoritarian episodes that had characterised the Cold War regimes, in particular in Latin America and Eastern Europe.⁵ After the 1980s, the application of TJ interventions has expanded, and the paradigm has gradually shifted away from its original orientation towards authoritarian regimes and post-authoritarian societies.⁶ TJ mechanisms have since become increasingly employed in conflict and post-conflict settings, as well, more recently, as within established democracies.⁷ Consequently, the TJ paradigm has gradually become an integral component of the liberal peace repertoire, embedded within the dominant global peacemaking and peacebuilding architecture, and intrinsic in that regard to peace negotiations and to post-conflict state and nation-building.⁸ The framework of rights that has undergirded TJ interventions since the 1980s – victims’ rights to truth, justice, reparation and non-repetition – has thus itself become pivotal to mainstream peacemaking and peacebuilding initiatives, and critical to the global dissemination of those norms linked to liberalism and neoliberalism.⁹

After the 2000s, a growing interest in the perspective of victims of political violence has increased, evident in academic studies and other forms of practical application in the field. Broader processes, such as the creation of a victim’s trust fund at the International Criminal Court (ICC) established by the Statute and Rules of Procedure and Evidence, the increased focus on the rights of victims in UN mechanisms and practices and the worldwide establishment of distinct reparations programs also shaped this development.¹⁰ This so-called *victims’ turn* in transitional justice has provoked a broader discussion on the approach and scope of transitional justice and peacebuilding practices, in particular as regards the scope for the participatory and bottom-up construction of TJ measures and programmes that would incorporate victims’ demands.¹¹ In recent years, policymakers and scholars have furthermore discussed the need to implement a transformative approach for transitional justice and peacebuilding, in order to redress grievances of civil and political rights, in tandem with those rights that speak to the socio-economic and structural root causes and consequences of violent conflict. Scholarship has debated a more diverse concept of TJ that would be

contingent upon a notion of so-called transformative justice. Transformative justice has drawn upon a more complex understanding of human rights in relation to the framework typically employed in transitional justice and peacebuilding with the aim of remedying structural violations of economic, social and cultural violations.¹² This type of justice would require innovative, specifically focused tools which would be contemplated as having a longer term application than those mechanisms typically employed in conventional transitional justice programs.¹³

This chapter traces the development of the transitional justice paradigm, with particular reference to its relevance for making and building peace in post-authoritarian and post-conflict societies. The chapter begins by documenting the emergence of the TJ paradigm in the 1980s, before turning to an analysis of its subsequent evolution towards becoming incorporated as an integral component of peace negotiations and post-conflict reconstruction processes. The chapter ends with a discussion of how, over the last decade, TJ has undergone a further shift in emphasis, specifically with regard to the mentioned ‘victims’ turn’ – the direct inclusion of victims in the design and implementation of TJ mechanisms – what the implications of said transformation have been both for the paradigm itself and for peace-making and peacebuilding, and the inclusion of a transformative approach of TJ mechanisms in practice.

The Emergence and Consolidation of Transitional Justice

In the aftermath of the atrocities of the Second World War and of the Nuremburg and Tokyo courts that sought to respond to them, international treaties, such as the Genocide Convention (1945) and the Universal Declaration of Human Rights (1948), were formulated within the framework of the newly established United Nations System. The urgent drive to establish said treaties was linked to the emerging exceptional and international interest in the creation of a global rights framework. Subsequently, with the end of the Cold War in the late 1980s and the accompanying increase in political will at international level to support Peace Keeping Operations and to sustain the numerous transitions from authoritarian rule, in particular in Latin America and Eastern Europe, demands to establish effective conflict resolution strategies and mechanisms grew. The United Nations *Agenda for Peace*, launched in 1992, represented a first attempt through which to situate such practices in a normative framework to intervene in the new post-Cold War internal conflicts. Significantly, this

context also precipitated the beginning of the emergent push towards the ‘universalisation’ of international rights and justice norms, which would become crucial to the subsequent expansion of the transitional justice paradigm.¹⁴ Accordingly, for Teitel (2000: 217), in this environment, the recognition of massive and systematic wrongdoing as a common feature of state and non-state repression gave rise to the emergence of justice mechanisms that involved individual and collective processes of acknowledgment of responsibility and accountability.

A decade later, in 2002, the victim’s trust fund at the International Criminal Court (ICC) was established by the Statute and Rules of Procedure and Evidence, which possessed the option of granting individual or collective reparations. Said mechanism opened the door to the active participation of victims in the procedures of the ICC. For its part, in 2004, the United Nations Secretary-General issued the report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, with the view to protecting and promoting justice and the rule of law in conflict and post-conflict societies.¹⁵ On this occasion, the Secretary-General encouraged the explicit articulation between transitional justice with peacemaking and peacebuilding initiatives undertaken by the UN through concrete actions, such as ensuring participation of UN experts on these topics within peace processes and PKOs and promoting TJ, peacemaking and peacebuilding within the international normative framework of human rights. Over the following years, the UN consolidated a set of mechanisms to promote TJ. In 2005, a set of principles concerning the right to a remedy and reparations for victims of gross human rights violations was adopted by the General Assembly of the United Nations.¹⁶ In 2011, the Human Rights Council appointed a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence.¹⁷ Thereby, the emergence of TJ was linked then to a growing global interest in a world order based upon peace, liberalism and the rule of law, in short, to a global justice norm,¹⁸ shaped by the gradual diffusion of norms and practices in human rights and conflict transformation, described by Engstrom as the ‘global accountability regime’.¹⁹ In this sense, the TJ paradigm focused upon the legacy of mass atrocities in authoritarian countries undergoing liberalising transition,²⁰ as victims, states and international actors struggled with how to address and redress the impact of past violence in societies characterised by large-scale violations of human rights and humanitarian law and acutely weak, compromised or even non-existent judicial systems.²¹

TJ practices accordingly became commonplace in countries transitioning from dictatorial regimes and internal armed conflict to democratic civilian rule in Latin America, Africa, the

Middle East, and Asia, during and in the wake of the so-called Third Wave of Democratisation in the 1980s. Such developments, it is argued, gave ‘meaning to accountability within broader context of political democratisation’.²² TJ practices, including in particular institutional initiatives,²³ were thus associated with periods of political change, and operationalised in contexts characterised by histories of impunity, the ongoing political power of authoritarian elites, weak legal systems, widespread crimes, and political instability.²⁴

The initial focus of TJ was to develop and support mechanisms, both judicial and non-judicial, formulated by states and international actors oriented not only towards achieving accountability for past crimes (trials, truth commissions), but also victim-oriented restorative justice initiatives (reparations, monuments, public memory projects) and mechanisms of security and peace (amnesties, pardons, constitutional amendments, institutional reform).²⁵ The fundamental objectives of TJ practices were thus driven by the push to guarantee the restitution of the individual and collective dimensions of victims’ rights (the rights to truth, justice, reparation and non-repetition) and, arguably, by efforts to craft sustainable peace and interpersonal reconciliation in the aftermath of gross human rights violations and protracted political violence.²⁶ In this regard, the paradigm was characterised by a core focus upon accountability for victims. Nevertheless, whilst the protection of victims and the guarantee of victims’ rights represented a central aim of initial TJ interventions, a primary constraining factor during this time was the degree to which TJ practices, in particular accountability and justice for past crimes, were subordinated to the task of maintaining the stability and impetus of fragile political transitions.²⁷ Initially then, the prerogatives and interests of high-level political and armed actors often outranked victims’ demands in diverse contexts, in the so-called Peace versus Justice debate, as victims’ interests in accountability were traded against the interests of the armed actors in attaining power and benefitting from amnesty.²⁸

Societies frequently experience a tension between victims’ groups demanding accountability through TJ measures and the demands of other actors, including some victims’ organisations, focused on the desire to forget and turn the page. For example, after the dictatorships in the Southern Cone, states adopted self-amnesties and general and unconditional amnesties in forgive and forget laws during the 1970s and 1980s, which impeded the recognition of justice for the victims. Since then, victims’ organisations have worked for the repeal of the laws and the explicit promotion of victims’ rights. International human rights jurisprudence which

requires the absolute prohibition of blanket amnesties has also since been adopted, representing a thorn in the side for those powerful actors seeking impunity/immunity for past crimes.²⁹ In 1998 in Argentina, for example, the National Congress repealed the Full Stop Law (Law 23.492, 1986) and Due Obedience Law (23.521, 1987), which had conferred effective amnesty upon state actors, opening the way for future prosecutions. In 2003, the executive issued Law 25,779, by which the laws were annulled, and, two years later, in 2005, the Supreme Court of Justice declared the amnesty laws unconstitutional. In Chile, in 1998, the Supreme Court of Justice decided similarly not to apply the Amnesty Decree (Decree-Law 2191, 1978) in cases of human rights violations. It was not the same case in Brazil. In 2010 the Supreme Court of Justice resolved that the Amnesty Law (Law 6.683, 1979) was constitutional (Allegation of Non-Compliance with Fundamental Precept 153). This decision led to the Brazilian state's being condemned by the Interamerican Court of Human Rights in 2010.³⁰ In Uruguay, Uruguayans voted in referendums (1989 and 2009) and decided on both occasions to keep the Law on the Expiration of the Punitive Claims of the State (Law 15.848, 1986), which was finally repealed in 2011.

In the case of Colombia, a core aspect of the recent peace process between the Government and the guerrilla group the Revolutionary Armed Forces of Colombia (FARC-EP) (2012-2016) was the discussion around diverse elements of transitional justice. The issue of amnesty, for example, was central to the FARC-EP guerrilla and a make or break theme for their giving up the armed struggle; in other words, the FARC-EP were unlikely to negotiate terms if a significant possibility existed for guerrilla fighters to end up in prison. There was scope at the negotiating table, however, to discuss amnesty for both state security forces and the guerrilla and, in the end, a workable amnesty was reached, which included the provisions of amnesty for rebels who had signed the final peace agreement and had been accused or condemned specifically for political crimes and related offences. In contrast, it was agreed that crimes which were not eligible for amnesty or pardon would be submitted to the Special Jurisdiction for Peace (JEP), which would be able to impose three types of sanctions or punishments: a) ordinary sanctions characterised by a minimum of five to eight years of effective restriction of freedom and rights, not imprisonment; b) restorative sanctions which would involve participation in projects at local level; and c) alternative sanctions which would be imposed upon those who acknowledged responsibility later in the legal process. Alternative sanctions would involve deprivation of freedom - including prison - of between five to eight years.

However, for broader Colombian society, the acceptance of amnesty for the FARC-EP was extremely problematic, both emotionally and politically. During the last two decades of the conflict, the FARC-EP began to use kidnapping and car, animal and collar bombs as a military strategy, strategies which had a disproportionate effect upon civilians. At the same time, the guerrilla also became involved in illicit drug production and trafficking. As a consequence, public support for the guerrilla waned significantly. Whilst state and paramilitary actors carried out similarly grotesque attacks and were also involved in illicit drug production and trafficking,³¹ the emphatic focus of the media upon guerrilla violence ultimately played a key role in crafting negative public opinion of the guerrilla.

Consequently, discussion of amnesty for the guerrilla, whatever the terms of such a provision were likely to be, confronted enormous opposition from public and media actors and represented a key obstacle to the peace process. This issue ultimately played out in the October 2016 plebiscite, when those powerful actors opposing the peace process, including former President Uribe and his political party the Democratic Centre, galvanised public opinion, stating that amnesty for the FARC-EP was an affront to victims and an unacceptable injustice. As a consequence, the package of agreements was initially rejected in the plebiscite, and had to be rapidly renegotiated before being approved by Congress in late November.

Shifting Parameters for the Transitional Justice Paradigm

Scholarship specifically assessing the factors that shape the complex and multiple paths taken by post-conflict societies, in particular of their capacity to prevent recidivism and secure quality peace, have tended then to focus upon state-building, governance and institutionalisation, security and DDR, economic stabilisation and development. Joshi and Wallensteen identify a series of dimensions key to quality peace: post-war security; governance; economic restructuration; the strengthening of civil society and the promotion of social cohesion. However, somewhat unusually, the authors also include *transitional justice and reconciliation*³² as a key requirement for quality peace. Joshi and Wallensteen's assertion reflects the claims by a range of TJ scholars and policymakers that TJ mechanisms (TJMs) and their objectives represent core tenets of sustainable peace. In this regard, scholars have argued that truth-telling,³³ reparations³⁴ and justice initiatives (whether juridical or not)³⁵

represent central pillars of successful peacebuilding and reconciliation, evidencing a clear nexus between TJ and liberal peace politics.³⁶

Over time, a considerable range of practices and measures emerged across a wide spectrum of countries, and became employed by a broad range of actors – governments, local and national institutions, non-governmental organisations, international organisations – consolidating the development of the TJ field through laws, policies and programmes.³⁷ The first trials for perpetrators of human rights violations embedded within transitional contexts had occurred after the end of the authoritarian regimes in Greece and Portugal in the 1970s. However, TJ would reach a turning point in the wake of the trials of the members of Argentina’s former military junta in 1985 – what Sikkink refers to as the ‘cascade effect’. Successive trials followed in Bolivia, Guatemala, Panama, Chile and Haiti, a process that would reach its zenith with the high-profile arrest of former Chilean dictator General Augusto Pinochet in London in 1998. During the same period, victims’ increasing demands to uncover the truth pertaining to the violations which they and their families had suffered at the hands of armed actors began to wield significant impact. In 1983, for example, the newly elected civilian government of President Raúl Alfonsín in Argentina established the National Commission on the Disappearance of Persons (CONADEP). CONADEP’s final report, *Nunca Más* (Never Again), was publicly presented in September 1984, setting a key precedent for subsequent truth commissions, including those in EL Salvador (1992), South Africa (1996), Guatemala (1998), and East Timor (2001), amongst others.

According to Sikkink,³⁸ during the 1990s, the so-called ‘justice cascade’ represented a key moment for the evolution of TJ. During this decade, international and national norms and mechanisms with the objective of ensuring individual criminal accountability for perpetrators of human rights violations were gradually consolidated. Sikkink notes that in the 1990s, the cascade effect that had begun in the 1980s was reinforced with the creation of the ad-hoc International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and, ultimately, the ratification of the International Criminal Court (ICC).³⁹ A related wave of domestic and international criminal justice trials took place for human rights violations committed by individual perpetrators. In parallel with this process, the arrest of General Pinochet in the UK in 1998, ushered in the so-called ‘Pinochet effect’, the detention itself making a bold statement that impunity could no longer be the expected norm for individual perpetrators of gross human rights violations. The arrest

of Pinochet then made a resounding statement that third countries could hold foreign leaders accountable and bring them to justice through their own legal systems, marking the clear operationalisation of the principle of universal jurisdiction. In this respect then, for Sikkink, the overriding characteristic of the justice cascade became the consolidation of a framework through which to guarantee mechanisms aimed at ensuring individual criminal accountability for human rights violations, a framework reinforced by international standards and norms that provided the legal basis for the expansion of TJ. Nevertheless, despite this legalistic approach, TJ developed as a multidisciplinary theory and practice drawing upon past experiences of other states and regimes across the world. In the words of McEvoy, TJ became ‘normalised, institutionalised and mainstreamed’.⁴⁰

Reparations measures for victims of political violence have also been adopted during transitions. Initially, the transitional justice agenda focused largely on violations of civil and political rights, providing economic compensation for homicides, disappearance, torture or arbitrary detention or exile. Occasionally said measures included health and education services for the survivors and families of victims of those violations.⁴¹ Said practices were implemented through the decisions of courts and via administrative programmes. For example, after Argentina’s violent dictatorship (1975-1983), a broad policy of economic reparations was gradually approved in the transition between 1983 and 1999. During the 1990s, other political transitions would similarly adopt economic compensation for victims. For example, between 1990 and 2003, Chile carried out a programme of reparations to redress the atrocities committed by the military regime (1973-1990).⁴² In 1995, Brazil issued the Law of Victims of Political Assassination and Disappearance - other violations were not included - after a robust campaign by civil society organisations and victims against an amnesty that had been granted to political prisoners and was followed by the acknowledgement of serious human rights violations by state agents (1964-1985).⁴³ In the case of Peru, a truth commission was created focused upon overcoming the atrocities committed by the military regime (1980-2000). In its 2003 report, the TC recommended the creation of a reparation programme, which was ultimately approved in 2005; in 2010 the government announced the beginning of economic compensation to victims.⁴⁴

Within the context of peace processes, reparations measures have, moreover, been included, for example, as recommendations in the report of truth commissions. For example, after the peace negotiations in El Salvador between the government and the rebel movement the

Farabundo Martí National Liberation Front (FMLN), the 1993 report of the truth commission recommended providing reparations to victims of the political violence carried out between 1980 and 1991. In Guatemala, the 1996 peace accords between the government and the guerrilla group the Guatemalan National Revolutionary Unity (URNG) provided provision for the creation of a truth commission. In its 1999 report, it recommended the adoption of measures to compensate and repair the victims of the conflict (1960-1996). However, the Congress refused to issue a law; consequently, the government subsequently adopted a Governmental Accord in 2003, creating the programme for ten years, which was extended for a further ten years until 2023.⁴⁵ The South African Truth and Reconciliation Commission, headed by the Committee on Reparations and Rehabilitation (CRR), recommended in its 1998 report, for example, the adoption of a reparations programme for victims of the Apartheid regimen (1948-1990). However, only in 2003 was a reduced version of the original reparations policy demanded by the TC adopted.⁴⁶ In 2004, two years after the war, the Truth and Reconciliation Commission (TRC) for Sierra Leone recommended the implementation of a comprehensive reparations programme for the victims of the conflict (1991-2002). This TC was included in the 1999 Peace agreement between the Armed Forces Revolutionary Council (AFRC)/Revolutionary United Front (RUF) rebels and the government represented by the Kabbah regime.

In recent years, other conflicts, such as the cases of Uganda, Democratic Republic of Congo (DRC) and Kenya,⁴⁷ have seen reparation programmes incorporated as part of a 'package' of transitional justice measures. Such measures have arguably been used by governments to give the appearance of taking appropriate remedy for victims to overcome political violence. Nevertheless, a so-called 'implementation gap' has often arisen, characterised as a problem of 'scandalous proportions' by the UN Special Rapporteur on Transitional Justice.⁴⁸

Programmes and measures worldwide have, in fact, faced similar shortcomings to a greater or lesser extent. The absence of adequate budgets for the comprehensive implementation of the measures, governments' lack of political will to make consistent and comprehensive measures of reparation, the lack of coordination between state entities to meet the victims' needs, political instability, the continuity of political violence and human rights violations that generate new victims, the lack of victims' participation, the exclusion of entire categories of victims on the basis of political considerations and the gender insensitivity of many reparation programmes have been common problems that programmes have faced.

Consequently, the achievements of said programmes have been minimum or null, evidencing that reparations are often unfeasible in practice.⁴⁹

Transitional Justice and Peacebuilding

Since the end of the Cold War, the closure of armed conflicts through negotiated peace settlements has become more frequent, levelling out, in part, the historical tendency towards conflict termination resulting from military victory.⁵⁰ In the aftermath of the launch of the United Nations *Agenda for Peace*, and in parallel with the *justice cascade*, international peace support initiatives have moved away from their previous emphasis upon peacekeeping, as policymakers and states have sought to meet the challenges brought by changing patterns of conflict and violence and address more effectively their causes and consequences. The development of policies oriented towards redressing the impact of political violence and atrocities upon non-combatants has become a priority in this regard, as has the question of how to deal with victims and perpetrators of political violence.⁵¹ International actors, including IGOs and INGOs, and individual states have since formulated increasingly complex multi-level and multi-dimensional strategies, which seek to craft sustainable peace and improve its quality through ambitious peace-making efforts and peacebuilding and state-building programmes.⁵² Significantly, TJ practice and thinking have become core components of these strategies.

TJ has gradually become an integral component of the liberal peace repertoire, intrinsic to post-conflict state-building and embedded within the predominant global peacemaking and peacebuilding architecture. Engagement with TJ concerns during peace negotiations and in post-conflict peacebuilding practice have meant a shift away from the paradigm's original domain of authoritarian transition and post-authoritarian societies.⁵³ Accordingly, peace negotiations oriented towards the closure of internal armed conflict and civil war are now increasingly likely to incorporate the paradigm as a mechanism through which to frame discussions of provisions integral to the respective peace agenda, in particular with regard to justice provisions for perpetrators and rights provisions for victims.⁵⁴ Whilst victims' rights have consequently become pivotal to mainstream peacemaking and peacebuilding initiatives then,⁵⁵ the rights framework upon which the liberal peace paradigm was initially forged (fundamental human rights; individual civil and political rights) has, in turn, been extended, as victims' rights frameworks have begun to shape spheres of peacemaking and

peacebuilding directly. As it has been incorporated into the liberal peacemaking framework, so TJ has been consolidated as a staple of peace negotiations and post-conflict reconstruction, central both to disarmament, demobilisation and reintegration (DDR) and to broader provisions relating to democratisation, statebuilding, reconciliation and human rights protection.⁵⁶ For example, amnesty provisions consistently represent a core theme determining whether negotiations commence and subsequently stay on track, or whether actors return to armed struggle. As conflict parties and mediators negotiate what kind of justice regime perpetrators may face, discussions relating to amnesty for armed actors (whether state or non-state) or the nature of justice provisions for human rights violations have become framed within the language of TJ. Armed actors are not likely to negotiate in order to end up behind bars, and framing demands for immunity and amnesty within TJ language may confer them with a veneer of legitimacy. Since the Rome Statute and the International Criminal Court have come into force, blanket amnesties are no longer accepted as legitimate outcomes of peace negotiations – international crimes such as genocide and crimes against humanity cannot be ‘amnestied’. However, amnesties for certain crimes – such as sedition and rebellion – are often granted as part of a peace settlement, and increasingly likely to be combined with other provisions to satisfy victims’ rights, such as mechanisms to guarantee the rights to truth and reparation. In this regard, peace negotiations addressing the satisfaction of broader victims’ rights, such as the rights to truth, reparation and non-repetition, have been grounded in the TJ paradigm.

Since the 1990s, reflecting the provisions within the Agenda for Peace and wider developments within the normative frameworks relative to human rights, victims’ rights, peacebuilding and TJ, the nature and scope of peace negotiations have evolved. As they have adopted an increasingly ambitious and thematically broad remit,⁵⁷ so peace negotiations often address an extensive spectrum of issues over and above demobilisation, disarmament and reintegration (DDR). Themes including governance, political participation, power sharing, security sector reform, human rights, human security, reconciliation, economic reform and local development are frequently the subject of formal negotiations between armed actors. As perpetrators (states, armed groups), international actors, and victims themselves struggle to come to terms with the causes and consequences of violence in post-conflict states, so transitional justice has itself become a key component of peace negotiations. To this end, policymakers such as the International Centre for Transitional Justice and Swisspeace (through its strategy *Dealing with the Past* - DwP) have sought to guarantee the effective

incorporation of TJ into conflict transformation frameworks. Swisspeace, for example, has urged negotiators and mediators to recognise ‘the value of incorporating transitional justice principles and mechanisms as early as possible’ in mediation processes.⁵⁸ In this regard, the approach seeks to institutionalise TJ as a normative framework to which mediators are bound and expected to promote during mediation processes. Building on the more limited framework of the UN Guidance for Effective Mediation, Guidance Principles and framework for United Nations approach to transitional justice processes and mechanisms,⁵⁹ the strategy aims to guarantee that equipping UN mediators with relevant human rights and transitional justice expertise within the UN system, and ensuring participation of UN human rights experts during peace negotiations, including potentially during the pre-negotiation phase.

Within this historical context, since the 1990s, there has been a growing acknowledgment by policymakers and scholars alike that TJ may play a role in crafting sustainable peace,⁶⁰ although it is not a sole indicator of it. In this regard, scholarship has identified a constituent relationship between peacebuilding and the pursuit of justice,⁶¹ arguing that both TJ and peacebuilding work on similar assumptions pertaining to adequate post-conflict institutional arrangements – such as democratic politics – which may generate sustainable peace.⁶² As a result, ambitious arguments have been made that identify a causal logic linking TJ paradigm to the broader remit of peacebuilding. Scholars have posited that TJ processes are integral to peacebuilding and reconciliation, given their potential to recover truth and bring healing at the individual and societal levels, whilst also potentially providing victims with justice, reforming state institutions, strengthening the rule of law and guaranteeing the non-repetition of human rights violations. Olsen et al. are perhaps more cautious, arguing that, at best, transitional justice practices may wield an important impact upon human rights protection measures and democratic consolidation by building capacities and strengthening institutions, elements themselves integral to Liberal Peacebuilding. However, Backer goes further, positing that transitional justice mechanisms may lead to coexistence and social harmony and thus establish shared values and norms integral to sustainable peace; such a process may balance power between groups, whilst at once institutionalising intergroup trust and collaboration. In this regard, Backer posits that a ‘vital synergy’ can in fact exist between TJ and quality peace.⁶³ Similarly, broader discussions have contended that truth-telling,⁶⁴ reparations⁶⁵ and justice guarantees⁶⁶ represent key pillars of peacebuilding and may contribute to reconciliation.⁶⁷ LaPlante, for example, identifies symbiotic relationship between TJ and peacebuilding, contending that sustainable peace is an intrinsic goal of

transitional justice.⁶⁸ Lambourne goes perhaps further still, contending that the contribution of the TJ paradigm to peacebuilding is essential, given both its causal link to intergroup reconciliation (a key aspect of sustainable peace) and the necessarily ‘transformative’ role that TJ ought to play in building sustainable and just peace.⁶⁹

Scholars have specifically further argued that top-down TJ mechanisms, in particular truth-telling mechanisms, may go at least some way towards precipitating reconciliation and fostering conditions for peace, despite the severe challenges faced, such as the extant legacy of violence, culture of fear, lack of trust and ongoing structural inequalities in transitional contexts.⁷⁰ Formal truth commissions, it is contended, may go some way towards establishing the truth about the past, provide a public platform for victims, inform and catalyse public debate, recommend victim reparation and legal and institutional reforms, whilst at the same time generating intergroup empathy, tolerance and understanding by allowing conflicting parties to witness each other’s grievances and suffering.⁷¹ Scholarship has also focused upon whether the effective implementation of TJ mechanisms may lead to individual / collective healing and reconciliation between formerly warring parties and their constituencies and between victims and perpetrators and, in turn, contribute to self-enforcing peace.⁷² Hayner, for example, has argued that transitional justice processes can contribute to sustainable peace through truth recovery, fostering reconciliation, healing at individual and national levels, the provision of justice for victims, the strengthening of the rule of law and the guarantee of non-repetition.⁷³ Freeman and Hayner have in fact gone as far as to argue that ‘Historical accounting via truth-telling is one of the most important steps in the reconciliation process’.⁷⁴

In general then, scholarship exploring both theoretical aspects of TJ and a wide range of empirical case studies has pursued the argument that the implementation of truth commissions, reparations programmes, and the prosecution of perpetrators⁷⁵ contribute to sustainable peace and reconciliation.⁷⁶ Nevertheless, in a significant contribution to the debate, however, Mendeloff critiques the assumption that TJ mechanisms lead inexorably to sustainable peace and reconciliation.⁷⁷ Mendeloff correctly argues that such lofty objectives have not been borne out by empirical experience, including particularly at community level, where intergroup prejudice often persists and the objectives at the core of TJ do not reflect local demands and interests.⁷⁸

As a consequence of the growing links between TJ and peacemaking/peacebuilding, engagement with the issue has become increasingly prevalent during peace negotiations; the challenge for negotiators and mediators in this regard has been how and when to address TJ during negotiations. In an initial analysis of those peace agreements (available in English, French, Russian, Spanish, Portuguese and Arabic) signed across all regional contexts between 1975 and 2019, many of which were subject to external mediation, there were over 300 episodes in which agreements incorporated the topic of transitional justice, either directly or indirectly. Significantly, TJ was employed within said agreements to refer to a series of considerably broad provisions, among them⁷⁹ :

Provisions	Peace Agreements
Reconciliation and governance/power-sharing	Burundi 2000; Central African Republic 1997; Northern Ireland 1998
Reconciliation	Libya 2015; South Africa 1991
Democratization, political participation and inclusion through amnesty	El Salvador 1992; Georgia/Abkhazia 1994; Guatemala 1996; Somalia 2004
Human rights and international humanitarian law	Mali 2013; South Africa 1991; Sudan 2005; Central African Republic 2015; South Sudan 2015
Amnesty, truth-telling mechanisms and reparations	Bosnia and Herzegovina 1995; Burundi 2006; Colombia 2016; Democratic Republic of Congo 2013; El Salvador 1991; Guatemala 1996; Iraq 2010; Ivory Coast 2007; Libya 2015; Mali 2015; Nepal 2006; Sudan 2011
Demobilization, disarmament and reintegration	Colombia 2004; Guatemala 1996; Liberia 2003; Sierra Leone 1999; Uganda 2008
Healing (by traditional mechanisms or otherwise)	Democratic Republic of Congo 2013; Nepal 2006; Solomon Islands 2000; South Sudan 2015; Uganda 2007
Victims' rights	Colombia 2015/16; Nepal 2006

This brief sample evidences how, in spite of the increasing visibility of the theme of TJ within the context of peace negotiations, there has been little consensual understanding of or agreement upon its core meaning or objectives within said context, over and above its generic

relevance to the resolution of intergroup antagonism and conflict management. The concept has accordingly been employed to refer to a considerably broad set of provisions situated within the overall framework of the liberal peace paradigm and, specifically, its objective of establishing ‘new structures for governance’ and mechanisms for the management of intergroup differences ‘on a minimally cooperative basis’.⁸⁰ Said interventions posit that intergroup antagonisms are best addressed through the institutionalization of, on the one hand, democratic frameworks that seek to foster and guarantee mutual cooperation⁸¹ and, on the other, initiatives that aim to redress the wrongs of the past through the transitional justice paradigm.⁸² Both approaches ultimately seek to transform intergroup relations based on antagonism, distrust, disrespect and violent interaction by engendering trust, compromise, cooperation and respect and by establishing mechanisms to deal with past abuses.

Transitional Justice in Peacemaking and Peacebuilding at the Local Level

Over the last few decades, there has also been an increase in discussions on the way in which formal mechanisms of TJ are adopted, designed, approved and implemented, as well as their accountability potential. Such discussions have increasingly taken place at the local rather than international level. Scholars and practitioners/activists have convincingly evidenced how the implementation of TJ is not an apolitical issue, in part responding to demands from local actors for inclusion in TJ processes. Specifically, local actors have claimed that TJ practices often lack legitimacy, local ownership and effective participation.⁸³ As a result, multiple authors have highlighted the failure of formal TJMs as part of peacemaking strategies, particularly when implemented as one-size-fits-all models and argued against the instrumental use by states of TJ mechanisms to privilege state interests.⁸⁴

As a consequence of said debates, a more hybrid structure has emerged for TJ mechanisms, according to which formal systems and local practise coexist, pursuing with the common goals of achieving justice and supporting a successful transition. Important examples of the implementation of exclusively local mechanisms have been studied in order to understand and compare results with cases where internationally standardised, top-down TJ measures were implemented. In the case of Rwanda, for example, a local-dispute resolution mechanism called Gacaca was created independently from the international TJ toolkit measures. It sought to apply practices of conflict resolution at the local level via the participation of the actors involved. For instance, combatants were called to give their confessions regarding violent

events, victims could accuse perpetrators, and testimonies were also collected throughout the country and in each community, with the aim of seeking accountability including for lower-level perpetrators.⁸⁵ However, as Waldorf⁸⁶ has explained, this local mechanism still reproduced several of the problems that are associated with the formal mechanisms of TJ, such as state-led top-down implementation that was modified multiple times to respond to external and internal needs and pressures. With each change, the model became less participatory, more formalised and increasingly coercive. In some cases, the model arguably led to greater obstacles for reconciliation between communities and contributed to conflicts between local powers. Similar conclusions were reached in other cases where local models were applied, such as in Burundi, Uganda and the Republic of Congo.⁸⁷

Based on these experiences, specific TJ practices and TJ within peacebuilding contexts have sought to combine the formal mechanisms promoted by international agencies, including the UN, with the needs, priorities and local demands for justice.⁸⁸ In this way, an approach that recognizes the necessity of bottom-up construction has been, in part, advanced. This research does not ignore the tensions and challenges that academics and practitioners highlight about such efforts. However, as different authors have pointed out, the extremes that separate one model from another do not lead to desirable results or represent experiences to be replicated.⁸⁹ In this sense, the inclusion approach of formal TJMs as a viable means to achieve greater civil and political rights for victims and the promotion of their economic, social and cultural rights is successful only when it encourages the understanding, participation and inclusion of the local context in which it is applied.

Transitional Justice and Peacebuilding: closing remarks

As discussed in this chapter, peace processes and post-conflict reconstruction interventions have progressively and explicitly incorporated discussions over how to address the legacies of past violence, leading, in practice, to the adoption of specific TJ provisions within peace accords and the almost inevitable inclusion of TJ provisions within liberal peacebuilding operations. Transitional Justice is now part of the ‘checklist’ of peacemaking and peacebuilding interventions, given the assumption that enduring peace rests upon ‘dealing with the past’, as well as other fundamental elements of liberal peacebuilding.⁹⁰ Not only has TJ become operationally situated within and, at times, conflated with liberal peacebuilding architecture; the very achievement of peace has also increasingly become understood by

many scholars and practitioners as contingent upon effectively *dealing with the past*. Nevertheless, as has been argued in this chapter, such lofty claims have not been borne out in practice. Transitional Justice practices have not led inexorably to self-sustaining peace, and have, at times, in fact challenged fragile transitions, manifest, for example, in the confrontation between those actors seeking accountability and those habitually powerful actors and sectors struggling to maintain both historical power and impunity. Reparations programmes have themselves enjoyed low levels of success, neither compensating victims of violence in a meaningful manner, nor leading to broader transformation. Whilst important changes have taken place as regards the locus of agency in TJ debates and practices – in short, the so-called ‘victims’ turn’ – locally-led TJ measures have tended not to be able to escape from the instrumentalization or control by elite actors. Whilst significant changes have on paper taken place with respect to which actors participate in the design and implementation of TJ mechanisms within the context of peacemaking then, in practice, as yet such changes have not led to lasting and meaningful transformation; in short, the contention that TJ leads to peace has not been significantly proven. Nevertheless, victims and survivors continue to seek more meaningful response from both TJ and liberal peacebuilding frameworks, suggesting that the nature of both paradigms will continue to evolve over time.

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- ⁸¹ C. Cheng, J. Goodhand and P. Meehan, *Synthesis Paper: Securing and Sustaining Elite Bargains that Reduce Violent Conflict* (London: Stabilisation Unit, 2018); J. Madhav and P. Wallenstein, *Understanding Quality Peace: Peacebuilding after Civil War* (London: Routledge, 2018); See also D. Bloomfield, T. Barns and L. Huyse, *Reconciliation after Violent Conflict. A Handbook* (Stockholm: International IDEA, 2003).
- ⁸² In fact, Bloomfield (2003:12) has gone as far as arguing that an interdependent relationship exists between reconciliation and democracy, situating the former firmly within the remit of the liberal peace paradigm.

⁸³ P. Lundy, P. and M. McGovern “Whose Justice? Rethinking Transitional Justice from the Bottom Up”, *Journal of Law and Society*, vol. 35 (2008) pp. 265-292; L. Fletcher and H. Weinstein ‘Violence and social repair: Rethinking the contribution of justice to reconciliation’, *Human Rights Quarterly*, vol. 24 (2002) pp. 573–639.

⁸⁴ L. Arriaza and N. Roht-Arriaza, ‘Weaving Braid of Histories: Local Post-Armed Conflict Initiatives in Guatemala’, in R. Shaw, L. Waldorf with P. Hazan (eds.), *Localizing Transitional Justice. Interventions and Priorities after Mass Violence* (Stanford Studies in Human Rights. Stanford, California: Stanford University Press, 2010); R. Duthie, ‘Afterword: The consequences of Transitional Justice in Particular Contexts’, in L. A. Hinton (ed), *Transitional justice: Global mechanisms and local realities after genocide and mass violence* (New Jersey: Rutgers University Press, 2011) pp. 249-255.

⁸⁵ P. Clark, *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (Oxford: University of Oxford, 2011); J. Burnet, ‘Justice truth, Reconciliation, and Revenge in Rwanda’s Gacaca’, in L. A. Hinton (ed) *Transitional justice: Global mechanisms and local realities after genocide and mass violence* (New Jersey: Rutgers University Press, 2011).

⁸⁶ L. Waldorf, ‘“Like Jews waiting for Jesus”: posthumous Justice in Post/Genocide Rwanda’, in R. Shaw, L. Waldorf with P. Hazan (eds.) *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, California: Stanford University Press, 2010) pp.183-202.

⁸⁷ A. Nee and P. Uvin, ‘Silence and Dialogue: Burundians alternatives to Transitional Justice’, in R. Shaw, L. Waldorf, with P. Hazan, *Localizing Transitional Justice: interventions and priorities after mass violence* (Stanford: Stanford University Press, 2010); S. Finnstrom, ‘Reconciliation Grown Bitter? War, Redistribution and Ritual Action in Northern Uganda’, in R. Shaw, and L. Waldorf with Hazan P. (eds.) *Localizing Transitional Justice. Interventions and Priorities after Mass Violence* (Stanford Studies in Human Rights. Stanford, California: Stanford University Press, 2010).

⁸⁸ A. Robben, ‘Testimonies, Truths, and Transitional Justice in Argentina and Chile’, in L. A. Hinton (ed) *Transitional justice: Global mechanisms and local realities after genocide and mass violence* (New Brunswick: Rutgers University Press, 2011); L.A. Hinton, *Transitional justice: Global mechanisms and local realities after genocide and mass violence* (New Jersey: Rutgers University Press, 2011); L. Arriaza and N. Roht-Arriaza, ‘Weaving Braid of Histories: Local Post-Armed Conflict Initiatives in Guatemala’, in R. Shaw, L. Waldorf with P. Hazan (eds.), *Localizing Transitional Justice. Interventions and Priorities after Mass Violence* (Stanford Studies in Human Rights. Stanford, California: Stanford University Press, 2010).

⁸⁹ M. Sieff and L. Vinjamuri, ‘Prosecuting war criminals: the case for decentralisation’, *Conflict, Security & Development*, vol. 2, no. 2 (2002) pp. 103-113; P. Gready, ‘Analysis: Reconceptualising transitional justice: embedded and distanced justice’, *Conflict, Security and Development* vol. 5, no. 1 (2005) pp. 3-21.

⁹⁰ D. Sharp, ‘Beyond the Post-Conflict Checklist; Linking Peacebuilding and Transitional Justice Through The Lens Of Critique’, *Chicago Journal of International Law* (2013). See also A. L. Bronwyn, ‘The Irreconcilable Goals of Transitional Justice’, *Human Rights Quarterly*, Vol. 30, No. 1 (Feb 2008), pp. 95-118, and K. Andrieu, ‘Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm’, *Security Dialogue*, Vol. 41, No. 5 (2010) pp. 537-558: 538.