1

Introduction

Transitional Justice Foundations

HISTORICAL AND IDEOLOGICAL ORIGINS OF TRANSITIONAL JUSTICE AS A GLOBAL PROJECT

Definitions of transitional justice vary and have evolved and broadened over time,[1] yet the field can be broadly conceived of as a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other forms of profound injustice in the wake of periods of conflict and repression.[2] It is often defined in part by reference to a set of practices now associated with responses to widespread human rights violations. According to a widely cited United Nations (UN) definition, transitional justice comprises

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[3]

[1] Many of these definitions have been quite narrow and legalistic. For example, Ruti Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69. For a review of how some of these definitions have broadened over time, see Rosemary Nagy, "Transitional Justice as a Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008): 277–78.

[2] Chandra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (2007): 582–83. For a review of how definitions of transitional justice have evolved over time, see Nagy, "Transitional Justice as a Global Project," 277–78; see also Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 329–32 (tracing the history of the use of the term "transitional justice").

[3] UN Secretary-General, "The Rule of Law and Transitional Justice in Post-conflict Societies," UN Doc. S/2004/616 (August 23, 2004), ¶ 8.

The use of many such practices can be traced back to antiquity.[4] More recently, however, one could see the Nuremburg Military Tribunals that began shortly after World War II, set up by the victorious Allied powers in order to prosecute high-ranking Nazi officials for war crimes and crimes against humanity, as the first "generation" of modern-day transitional justice.[5] While the importance of this tribunal's legacy should not be underestimated, the Nuremburg moment itself was short-lived, as the emergence of the Cold War soon closed down many of the possibilities for interstate cooperation needed to support further justice initiatives.[6] But whatever the historical antecedents, most agree that the origins of the modern field of what has come to be known as "transitional justice" have firm roots in the 1980s and 1990s and the attempts of nascent democracies to grapple with historical legacies of repression and widespread human rights abuses.[7] Political scientist Samuel Huntington referred to this as the "third wave," a period of global democratization beginning in the mid-1970s that touched more than sixty countries in Europe, Latin America, Asia, and Africa.[8]

If this was a tumultuous time for societies experiencing "third-wave" transitions, it was an especially heady and euphoric era in the liberal West. It was not just that the Cold War had been won. Rather, consonant with Francis Fukuyama's sense of the "end of history,"[9] it was the notion that with the collapse of communism, there really was no viable political or economic alternative to Western liberal market democracy. Free-market capitalism had won. Liberal democracy had won. The "choice" was clear because there was no other plausible choice. Accordingly, the best and most benevolent thing the West could do for the rest would be to help accelerate the inevitable path to global convergence. Recognition of the long and imperfect road that democracy and concepts like the "rule of law" have followed in the liberal West (together with their less-than-perfect state in even their supposed modern-day paragons such as the United States) might seem to call for a certain humility. And yet the projects of this era were animated with a sort of proselytizing and liberalizing zeal premised on the assumption not only that history tends toward

[4] See generally Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004) (reviewing historic practices now associated with the modern field of transitional justice).

[5] Teitel, "Transitional Justice Genealogy," 70.

[6] See John Dugard, "Obstacles in the Way of an International Criminal Court," *Cambridge Law Journal* 56 (1997): 329 (noting that "[t]he enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post war period was . . . abandoned during the Cold War"). Between 1949 and 1954, the International Law Commission prepared several draft statutes that would have led to the creation of a permanent international criminal court, but consensus proved impossible.

[7] See Arthur, "How 'Transitions' Reshaped Human Rights," 325–26. The definitive source that captures the thinking and spirit of the period is Neil Kritz's seminal three-volume work. See generally Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, DC: USIP, 1995).

[8] See generally Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

[9] See generally Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992).

definitive ends but also that the historical sequence followed by the West might be both reengineered and compressed, even in regions with radically different histories and cultures.[10]

With the ascendency of Reaganism and Thatcherism, the political climate and policyscape that came to shape these efforts to remake the world in the image of the West were positively neoliberal ones. Thus, in the development sphere, countries around the world were told that growth would only come with "good governance" reforms inspired by the "Washington Consensus," making deregulation, privatization, elimination of subsidies, free trade, and so forth into near-biblical injunctions to be imposed on developing and postcommunist countries via loan conditionalities. Rule-of-law projects funded by institutions such as the World Bank were largely geared toward commercial and market reforms, making domestic laws more friendly to international investors, all in the name of alleviating poverty. In the human rights arena, Western governments and even major global nongovernmental organizations (NGOs) emphasized the importance of civil and political rights, with scant attention paid to economic, social, and cultural rights (when these same rights were not being affirmatively denied as "real rights" or otherwise derided). International peacekeeping missions of the era emphasized the need for quick elections as the surest path to peace, leading to shallow procedural democracy at best, but often with more calamitous results.[11] While it is true that these spheres of activity were not quite as monolithic as this broad-brush overview might suggest, the symmetry of their common thrust was clear, and they generally shared a common faith that human welfare could be increased, and "the good" brought one step closer to attainment, through a process of social, political, and economic (neo)liberalization.

In keeping with this same zeitgeist, when it first took the global stage in the 1980s and 1990s, transitional justice was largely thought of as a vehicle for helping to deliver important liberal goods in postconflict and postauthoritarian societies, including democracy and the rule of law. Thus, the "transition" at stake was understood as an explicitly political one involving "the move from less to more democratic regimes."[12] If it was hoped that transitional justice mechanisms could help to strengthen transitions to Western liberal democracy, such efforts were also seen by some as bound up with an imperative to provide an effective *legal*[13] remedy for a very narrow (if not egregious) band of international human rights and international humanitarian law violations.[14] Thus, for example, in Argentina, the truth

[10] Linn Hammergren, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transitional Countries* (New York: Routledge 2014), 179.

[11] See generally Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004).

[12] Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 5.

[13] Ruit Teitel defined once defined transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." Teitel, "Transitional Justice Genealogy," 69.

[14] All violations of international human rights law entail legal consequences, including the right to redress and compensation – a fact that has without doubt given impetus to the field of transitional

commission looked solely at forced disappearances, despite a much broader range of physical and economic crimes that the armed forces had committed. Commissions in Chile, Uruguay, and South Africa offered similarly thin conceptions of justice. In short, in many contexts, "transitional justice" came to stand for a sort of "atrocity justice," where accountability was often seen as synonymous with individual criminal accountability for extreme acts of physical violence, and where broader questions of structural, economic, and quotidian violence and justice were either invisible or treated as mere context.

Implicit in the twin impulses of transitional justice – democratization and atrocity justice – was a progressive view of history in which countries evolve, through the redemptive power of law, from barbarism, communism, and authoritarianism to Western liberal democracy. But if the law was a key vector for liberalizing change, it was also important to consider the role of political elites. In analyzing the chances for successfully transitioning to the pinnacle of this evolutionary sequence, influential scholars from the period attempted to predict to what extent the scope of transitional justice would be determined by a set of bargains between the various elite groups facilitating the democratic transition, with more or less justice possible depending on the extent to which previous elites retained a grip on the levers of power.[15] The (clean, good) power of the law to foster liberalizing change might therefore be limited by the (grubby, bad) power of illiberal local politics. Taken together, such work tended to situate the origins of democracy in choices by elite groups and legal-institutional reforms and initiatives rather than being the product of social conditions or some more "bottom-up" process, which had been the more typical way of viewing things in the earlier democratization literature. This top-down

justice. Theo van Boven has noted that the "United Nations Principles and Guidelines on the Right to a Remedy" were developed in the shadow of expanding transitional justice practice. See Theo van Boven, "Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," Introductory Note, December 16, 2005, http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html. Today, the "normative framework supporting transitional justice [includes] the right to justice, truth and guarantees of non-recurrence." See UN Secretary-General, "The Rule of Law," ¶ 8. Yet it is also true that the bulk of international institutional capital has been invested in examining and articulating remedies for "gross" violations, a category heavily associated with genocide, torture, crimes against humanity, disappearances, and other extremely serious violations of physical integrity, and civil and political rights more generally. See van Boven, Introductory Note, 2–3. Many early transitional justice scholars had these sorts of violations in mind when they analyzed the intersection between international legal duties and transitional justice policy, particularly as regarding duty to prosecute. See generally Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100, no. 8 (1991): 2537. As I discuss in Chapter 2, the narrow legalism and focus of transitional justice on physical integrity and civil and political rights violations is increasingly questioned, and the conceptualization of rights violations as either "gross" or "simple" must itself be interrogated as a political and ideological construct.

[15] Samuel P. Huntington, "The Third Wave: Democratization in the Late Twentieth Century," in Kritz, *Transitional Justice*, 54–81; Guillermo O'Donnell and Philippe Schmitter, "Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies," ibid., 57–64.

theory of change would implicitly shape many of the transitional justice initiatives in the decades to come.

The conceptualization of the field as an expression of these twin aims and its subsequent global dissemination can thus be linked to the broader globalization of international human rights and Western governance ideals, especially those civil and political rights norms strongly associated with liberalism and neoliberalism.[16] Together with postconflict peacebuilding, development, and human rights, transitional justice has, since the end of the Cold War, been an important feature of liberal postconflict governance, a means by which Western liberal values are pushed from core to periphery.[17] Some three decades after the Latin American and Eastern European democratic transitions associated with the field's naissance, the idea of transitional justice as handmaiden to liberal political transitions – the "paradigmatic transition" of transitional justice – remains a deeply embedded narrative.[18]

Examined closely, therefore, the core narratives of the field contain something of a contradiction. Transitional justice is at times imagined as a postpolitical and postideological enterprise, part of the "end of history," and yet is also heavily associated with liberal democratic political transitions, has been dominated by largely Western conceptions and modalities of justice, and has significant implications for the distribution of power in the postconflict context. In this way, viewing transitional justice as an apolitical "toolbox," a notion implicit in UN and other definitions,[19] fails to account for the important historical and ideological underpinnings of the field. While transitional justice is dynamic and evolving, these origins remain key to understanding some of its modern conceptual boundaries, assumptions, and blind spots, shaped as they have been by a particular faith in the ability of key liberal goods, including the rule of law, democracy, and human rights, to create peace.[20]

FROM THE EXCEPTION TO THE MAINSTREAM

Though the term was arguably coined in the 1991,[21] transitional justice probably did not emerge as a distinct field until at least 2000.[22] Despite being a very new

[16] Paul Gready and Simon Robins, "From Transition to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice* 8, no. 3 (2014): 341.

[17] Philip Cunliffe, "Still the Spectre at the Feast: Comparisons between Peacekeeping and Imperialism in Peacekeeping Studies Today," *International Peacekeeping* 19, no. 4 (2012): 428.

[18] See generally Arthur, "How 'Transitions' Reshaped Human Rights."

[19] See, e.g., UN Secretary-General, *The Rule of Law*, ¶ 8.

[20] Sririam, "Justice as Peace?," 579. On the dominance of law and legalism in transitional justice, see generally Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 412.

[21] Ruti G. Teitel, "Transitional Justice Globalized," *International Journal of Transitional Justice* 2, no. 1 (2008): 1.

[22] See Arthur, "How 'Transitions' Reshaped Human Rights," 329–32 (tracing the history of the use of the term "transitional justice"); Christine Bell, "Transitional Justice, Interdisciplinarity and the State of

field, transitional justice has become ever more prominent in the years that have followed. The voyage the field has taken from the exception to the mainstream is an important one for understanding policy and practice today.

At the outset, transitional justice mechanisms and interventions were premised on a notion of a special "window of opportunity," a period of rupture in which some kind of extraordinary justice might be carried out, involving both prosecutions and amnesties that might not be possible during ordinary, nontransitional times. While the duration of the transitional opportunity was not entirely clear, wisdom at the time held that one had to strike while the proverbial iron was hot and the political context made some kind of justice possible.[23] The sense was that transitional justice was an extraordinary justice for exceptional times, an opportunity that might not come again. The exceptionality of transitional justice was exemplified in part through a greater willingness to accept some form of amnesty as a necessary compromise even if this deviated from the rule-of-law ideal.[24] As examples of this phenomenon, one might consider the amnesty offered to military officials in Argentina after an initial wave of prosecutions led to unrest and instability.[25] In South Africa, very few prosecutions took place at all, because impunity and preservation of the economic status quo were seen as necessary to ensuring a peaceful transition.[26] Perhaps reflecting this pragmatic balancing act, key concerns from this early period – including whether there is a duty to punish egregious human rights violations under international law – spawned sharp debates in academic and policy circles relating to pardons and amnesties (peace vs. justice), and to whether a truth commission could replace prosecutions as a viable form of justice (truth vs. justice).[27]

In the decades that have followed, transitional justice practices have become increasingly widespread. Priscilla Hayner, for example, has documented the existence of some forty modern-day truth commissions.[28] Starting with the Sábato Commission (Comisión Nacional sobre la Desaparición de Personas, CONADEP)

the 'Field' or 'Non-Field,'" *International Journal of Transitional Justice* 3, no. 5 (2009): 7 (arguing that transitional justice did not emerge as a distinct field until after 2000).

[23] Samuel P. Huntington, "The Third Wave: Democratization in the Late Twentieth Century," in Kritz, *Transitional Justice*, 74–75.

[24] Teitel, "Transitional Justice Genealogy," 76.

[25] See Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1998).

[26] See Bell, "Interdisciplinarity," 14.

[27] See Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal* 100 (1991): 2537 (arguing for the existence of a duty to prosecute some violations of physical integrity under international law). For a general exploration of the "truth versus justice" debate, see Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (2002): 94–97; Reed Brody, "Justice: The First Casualty of Truth?," *Nation*, April 30, 2001, 25.

[28] Prisilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2011), 256–62.

in Argentina and its best-selling report, *Nunca Más* (Never Again), the truth commission has become a worldwide phenomenon.[29] Exported to South Africa where the postapartheid drama and the charisma of Nelson Mandela and Desmond Tutu riveted international attention, new commissions now spring up almost as a matter of course in postconflict scenarios. Beyond the truth commission phenomenon, Kathryn Sikkink has documented an increasing crescendo of human rights prosecutions taking place at national and international levels, leading, she argues, to the emergence of a new global norm of accountability, at least for certain harms.[30] Though the rich and powerful often evade accountability, a former president from Liberia sits in a jail cell in the United Kingdom for crimes he abetted in Sierra Leone, a former president of Chad has been convicted by a special court in Senegal, and a former president of Côte d'Ivoire now stands trial before the International Criminal Court in the Hague. Legal theorist Ruti Teitel has posited that such developments reflect a "steady state" transitional justice, a time in which we see transitional justice as a sort of default option, a normalized response to postconflict atrocity.[31]

The sense that the field had moved from the periphery to the core of international attention and policy making was cemented with the publication of a landmark 2004 report by the UN Secretary-General reflecting an official, if rhetorical, institutional endorsement of transitional justice.[32] While the UN's embrace of transitional justice has not always been translated into consistent practice,[33] it has nevertheless come to possess a deep repository of transitional justice experience ranging from the ad hoc tribunals for the former Yugoslavia and Rwanda to hybrid tribunals in Sierra Leone, East Timor, and Cambodia. Today, the UN agency with the primary responsibility for transitional justice issues is the Office of the High Commissioner for Human Rights (OHCHR), which has supported transitional justice programs in more than twenty countries.[34] As part of the "new normal," the UN holds that peace and justice go hand in hand, rhetoric that tries to smooth over frictions arising out of the peace versus justice debates of the previous decades, even if it cannot eliminate them entirely.[35] Paralleling these developments at the UN, transitional justice is now, in

[29] *Nunca Más, Report of the Argentine National Commission on the Disappeared* (New York: Farar, Straus, and Giroux, 1986).

[30] See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton, 2011), 21.

[31] See Teitel, "Transitional Justice Genealogy," 89.

[32] See UN Secretary-General, *The Rule of Law*.

[33] See Padraig McAuliffe, "The Marginality of Transitional Justice within Liberal Peacebuilding: Causes and Consequences," *Journal of Human Rights Practice* 9, no. 1 (2017).

[34] See UN High Commissioner for Human Rights, Message by Ms. Navanethem Pillay at the Special Summit of the African Union (October 22, 2009), www.unhchr.ch/huricane/huricane.nsf/0/110E705F1034E048C12576570058l4CE?opendocument.

[35] See UN Secretary-General, *The Rule of Law*, 1 (arguing that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives").

a sense, its own industry, with dedicated NGOs and an army of consultants and experts deployed all over the world.[36]

In a relatively brief span of history, therefore, transitional justice has gone mainstream, embraced by the UN and bilateral donors, together with activists and NGOs. In the postconflict context, the question no longer seems to be *whether* there will be some kind of transitional justice, but *what* particular interventions will be deployed, and what their scope and sequencing might look like.[37] Given that the default option as recently as the 1970s was a gilded exile for most architects of mass atrocity, the emergence this "new normal" is nothing short of extraordinary. This is not to say that mass murderers do not continue to benefit from enormous impunity but, Sikkink argues, there has been a shift in terms of our expectations about what *should* happen.[38] This shift has been both pushed and pulled by the legalization of transitional justice, with amnesties for certain crimes increasingly seen as intolerable if not illegal, a development both symbolized and foretold by the UN's refusal in 1999 to endorse the blanket amnesty provisions of a Sierra Leone peace agreement.[39]

Not surprisingly, for the activist concerned with questions of accountability and impunity for atrocity crimes, the normalization of transitional justice is often seen as a good thing. To others, however, the mainstreaming, together with the increasing legalization and internationalization of transitional justice that has come with it or perhaps because of it, is a more ambiguous development in the sense that it represents yet one more way in which the postconflict context has become enmeshed in and colonized by both law and international actors. When combined with good governance, rule of law, and other justice-sector reforms, the mobilization of the law – seen as distinct from politics and political choices – may have the effect of justifying intrusive interventions and limiting sovereign policy autonomy under the guise of apolitical technocratic assistance. This raises concerns resonant with arguments made by Abdullahi An-Na'im, who has suggested that the historical and ideological underpinnings of the field include an implicit neocolonial logic that places dominant conceptions of transitional justice within "the grand 'modernizing' mission of North Atlantic societies."[40]

But whatever their effects or implicit logic, the spread of transitional justice ideas around the world and the field's journey from exception to the mainstream, has

[36] See, e.g., International Center for Transitional Justice, www.ictj.org.
[37] See Nagy, "Transitional Justice as a Global Project," 276; see also McEvoy, "Beyond Legalism," 412.
[38] See generally Sikkink, *The Justice Cascade*.
[39] See generally Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge* (Center for Humanitarian Dialogue/International Center for Transitional Justice, December 2007 Report).
[40] See Abdullahi Ahmed An-Na'im, "Editorial Note: From the Neocolonial 'Transition' to Indigenous Formations of Justice," *International Journal of Transitional Justice* 7, no. 2 (2013): 197.

been less part of some grand conscious and intentional conspiracy on the part of transitional justice actors to place a colonial yoke on the Global South than the often prosaic day-to-day work of transitional justice "experts," professionals and epistemic communities operating with the best of intentions. After all, it is commonly thought: *Impunity for mass murderers is unacceptable and justice of one kind or another must be done. How should we address these problems if not through the mechanisms of transitional justice?* As David Kennedy has argued, it is increasingly difficult to understand the workings of global governance without understanding the quotidian choices, values, and sensibilities of such experts.[41]

From the outset, such experts and advocates played a critical role, both in creating a shared collective sense of a new and common field and in disseminating the field's norms, practices, and institutional parameters around the world. Paige Arthur, for example, has documented the critical role that a 1988 conference held at the Aspen Institute funded by the Ford Foundation played in generating an initial sense of the emergence of a new field with shared sets of concerns, approaches, and practices.[42] By furnishing the vocabulary, central concepts, binaries, and debates, together with the institutions, mechanisms and "best practices" that key actors around the world turn to when they engage thorny questions of postconflict justice, the shared mental map that these experts came to generate has in turn shaped the real-world postconflict policyscape for millions. Albuja and Cavallero have emphasized that such shared mental maps often go on to be replicated again and again not because they are particularly well suited to a range of contexts, but through a process of "acculturation" that takes place through "repeated information exchanges and consultations with prior [truth] commission members and a cadre of international scholars and practitioners in the area."[43] As this process continued, the field has, over time, become increasingly internationalized as seasoned scholars and experts fluidly navigate between the academy, NGOs, and international organizations, themselves strongly internationalized social worlds.[44] In tandem, the field has been increasingly professionalized as salaried employees have replaced volunteers.[45] No longer the sole province of activists and the aggrieved, transitional justice work is now often carried out by liberal legal professionals, many of them trained and socialized in a handful of elite Western universities. Taken together, all of these developments help

[41] See generally David Kennedy, "Challenging Expert Rule: The Politics of Global Governance," *Sydney Law Review* 27 (2005).

[42] See Arthur, "How 'Transitions' Reshaped Human Rights," 325.

[43] James Cavallaro and Sebastián Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below, Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart, 2008), 125.

[44] Sandrine Lefranc and Frederic Vairel, "The Emergence of Transitional Justice as a Professional International Practice," in *Dealing with Wars and Dictatorships: Legal Concepts and Categories in Action*, ed. Liora Israël and Guillaume Mouralis (New York: Springer, 2013), 237–41.

[45] Ibid., 246.

to explain the overall mainstreaming and normalization of the field of transitional justice.[46]

PROFESSIONAL SENSIBILITIES AND THE PREDISPOSITIONS IN THE FIELD

It turns out that who these experts and professionals are has much to do with the origins of the field as well as what it has become, and so understanding the dominance of certain disciplines, approaches, and professional sensibilities is key. In the abstract, the question of how best to respond to mass atrocities is one well suited to a range of disciplines, including philosophy, history, religion, anthropology, and psychology, yet in practice the field has for the most part been dominated by lawyers and, to a far lesser extent, political scientists.[47] Given the dominance of lawyers, it is perhaps not surprising that mass atrocities have been largely analogized as a form of mass crime,[48] and that the tools that have been marshaled in response have had a heavily legal character, often focusing more on retributive justice via formal courts and tribunals rather than other forms of justice.[49] As the saying goes, if you only have a hammer, everything looks like a nail. This "prosecution preference," under which anything short of Western-style courtroom justice is often seen as comprised justice, is seemingly hardwired into the DNA of mainstream transitional justice.[50] It has been and continues to be persistent source of debate and the global-local frictions that will be discussed in greater detail in Chapter 3.[51]

As a thought experiment, Paige Arthur observes, one might consider the possible orientation of theory and praxis if the intellectual origins of transitional justice had been rooted in paradigmatic transitions to socialism and the dominant disciplines

[46] For a helpful synthesis of the role of internationalization, professionalization, and legalization in the gradual normalization of transitional justice, see Line Engbo Gissel, "Contemporary Transitional Justice: Normalising a Politics of Exception," *Global Society* 31, no. 3 (2016): 353–69.

[47] See Arthur, "How 'Transitions' Reshaped Human Rights," 333.

[48] Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (2002): 94–97.

[49] Rama Mani stands as an early exception to this trend, arguing for a more balanced approach to postconflict reconstruction that would include three dimensions of justice: retributive, rectificatory, and distributive. See Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden: Blackwell, 2002).

[50] Aukerman, "Extraordinary Evil," 39–44 (describing the "prosecution preference").

[51] The prosecution preference can be seen in debates that raged in the late 1990s concerning whether a truth commission alone could constitute an adequate form of justice. See, e.g., Brody, "Justice: The First Casualty of Truth?," 25 (arguing that truth commissions can serve as "a soft option for avoiding justice.") More recently, one can look to controversies sparked by ICC indictments of leaders of the Lord's Resistance Army rebel group in Uganda where some members of the Acholi community in Northern Uganda would prefer to forgo prosecutions in favor of *Mato Oput*, a local ritual that emphasizes reconciliation and reintegration rather than simple retribution. See generally Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (2007): 179.