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Introduction

Two men kneel on the dusty ground facing each other. A gourd filled with a brown liquid lies equidistant between them. They lean forward with ceremonial gravity and drink deeply from the vessel, keeping their hands neatly clasped behind their backs, the sides of their heads almost touching. They are surrounded by members of their clans who follow their actions with attention. The two groups have already exchanged sheep, which lie limp by a grass-roofed hut, their still-warm blood slowly thickening with the dust.

A woman wearing a long black robe with two white bands stands behind a long wooden table. She wears headphones and talks into a microphone. She is questioning a man sitting behind two computer screens on an individual table. He wears a suit, and his ears are also bracketed by headphones. A group of people sits at the table around the woman; another group sits at the other end of the room. Between the two groups, on a platform, three men in long black robes with scarlet trimmings listen to the questioning with attention. More people watch the scene from behind a glass screen. The room is decorated with austere, pastel furnishings.

Five people sit at a long table: three men and two women, facing an audience. The man in the middle wears a clerical collar and a heavy crucifix. The long table is punctuated by plastic water bottles, one for each person. An enormous flag covers the wall behind them. Its blue and green halves are bisected diagonally by a yellow bar; five white stars twinkle on the blue field. The whole room listens while a man wearing an orange shirt recounts how he was beaten. Other people wait for their turn to speak to the assembly.

Behind an iron fence stands a solid white building. It has a portico with four columns and two rows of windows. The portico is ornamented with an oval-shaped coat of arms. Underneath it says in Spanish: 'Naval Mechanics School' in bold lettering. Between two of the cylindrical columns, a banner is suspended. The banner reads, also in Spanish: 'Space for memory and the

promotion and defence of human rights.’ A group of students walks up the steps and into the building.

These four scenes do not seem to have much in common: they take place in different countries (Uganda, the Netherlands, the Solomon Islands and Argentina); in different continents; they involve different actors taking part in diverse settings and practices; and they are enmeshed in distinct and separate cultures, histories and political trajectories. Yet, despite these glaring differences, there is a thread that gives this group of disparate scenes coherence: the discourse of transitional justice. That discourse examines, informs and unites these four examples of responses to past widespread or systematic violence: the *mato oput* ceremony of the Acholi in northern Uganda,¹ the trials at the International Criminal Tribunal for the former Yugoslavia (ICTY),² the proceedings of the Solomon Islands’ Truth and Reconciliation Commission,³ and the Naval Mechanics School human rights memorial in Argentina.⁴ For the discourse, they are all instances of transitional justice.

Why are some responses to past widespread or systematic violence considered relevant for transitional justice while others are overlooked? This question has not been sufficiently explored. It remains unclear why the discourse of transitional justice recognises the previously described practices and not others. This book looks into the history of transitional justice to better understand the current contours of this discourse and what forms of dealing with past violence it acknowledges. It argues that the discourse of transitional justice has some characteristics at its core which have framed existing accounts of the history of transitional justice determining which responses are recognised as relevant and which are ignored.

Examining how a distinct discourse came into being and what circumstances influenced this process can help explain the characteristics that the discourse of transitional justice has today, which situations it examines and which mechanisms it privileges. Knowing how historical conditions influence current scholarly debate and policy choices can lead to questioning assumptions and moving beyond the most constraining aspects of some of the

¹ See, eg, Erin Baines, ‘The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda’ (2007) 1 *International Journal of Transitional Justice* 91.

² See, eg, Kirsten Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia’ (2007) 1 *International Journal of Transitional Justice* 411.

³ See, eg, ICTJ, *Transitional Justice Mechanisms in Solomon Islands* (2010) www.ictj.org/sites/default/files/ICTJ-SolomonIslands-Fact-Sheet-2011-English.pdf, accessed 30 July 2018.

⁴ See, eg, Elizabeth Jelin, ‘Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America’ (2007) 1 *International Journal of Transitional Justice* 138.

characteristics of transitional justice. With that purpose, this book interrogates the established narrative of the history of transitional justice.

I TWO DIMENSIONS OF TRANSITIONAL JUSTICE

The term transitional justice can refer to two different dimensions: a set of practices and the discourse that originates from these practices.

Most definitions of transitional justice refer to the first dimension, designating a set of practices or processes.⁵ The United Nations (UN) defines transitional justice as comprising ‘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’.⁶ Since this is the most influential definition of transitional justice, it is a suitable starting point for this analysis.⁷ The definition can be dissected in three parts: a range of mechanisms or processes, the situations where they are implemented and the goals they serve.

In this definition, transitional justice is associated with a set of mechanisms for responding to large-scale past abuses. The most widely discussed mechanisms are criminal trials, commissions to establish the truth of what happened, reparations for victims, vetting processes to purge people implicated in abuses and programmes of institutional reform. As some of the scenes described at the beginning of this book show, transitional justice is also linked to other initiatives such as community reconciliation practices⁸ and memorials.⁹

The second part of the UN definition refers to which situations the mechanisms address: societies attempting to come to terms with large-scale past

⁵ Harvey M Weinstein and Laurel E Fletcher, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 *Human Rights Quarterly* 573, 574; Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004) 1; Naomi Roht-Arriaza, ‘The New Landscape of Transitional Justice’ in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006) 2; Paige Arthur, ‘Introduction: Identities in Transition’ in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 1.

⁶ UNSC ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (23 August 2004) UN Doc S/2004/616 (2004) (2004 UNSG Transitional Justice Report), para 8; ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice’ (10 March 2010) (UN Approach to Transitional Justice) 3.

⁷ Pádraig McAuliffe, ‘From Molehills to Mountains (and Myths?): A Critical History of Transitional Justice Advocacy’ (2011) 22 *Finnish Yearbook of International Law* 1, 2.

⁸ Baines, ‘The Haunting of Alice’ 91 (n 1).

⁹ Susanne Buckley-Zistel and Stefanie Schäfer, *Memorials in Times of Transition* (Intersentia, 2014).

abuses. Originally, these were limited to countries trying to transition – hence the name transitional justice – from an authoritarian and repressive past to a democratic future. However, transitional justice mechanisms and concepts are increasingly used in a variety of other settings, even in situations without a clear transition.¹⁰ While the idea of transition that framed transitional justice has somewhat eroded, what remains constant is that the mechanisms and policies respond to ‘large-scale past abuses’.¹¹

The last part of the UN definition concerns the goals that transitional justice mechanisms pursue: ensuring accountability, serving justice and achieving reconciliation.¹² Transitional justice policies are thus meant to achieve a range of goals, from the narrower aim of combating impunity by punishing wrongdoers to the more ambitious attainment of societal reconciliation and positive peace.¹³

Once the deconstructed definition is reassembled, it shows that transitional justice broadly designates a set of practices used to respond to past widespread or systematic violence to pursue a set of goals. Other definitions of transitional justice replicate these elements.¹⁴ For instance, according to Paige Arthur, transitional justice ‘is a response to massive or systematic violations of human rights that aims to recognize victims and to prevent the recurrence of abuse. It is often associated with a set of measures that, taken together, work toward those two aims in ways that reinforce one another’.¹⁵

Other definitions narrow down the scope of transitional justice by referring to a limited number of mechanisms or requiring the existence of political transition.¹⁶ For example, Jon Elster defines transitional justice as ‘made up of the processes of trials, purges and reparations that take place after the transition from one political regime to another’.¹⁷ However, transitional justice is currently widely understood to include a much broader array of responses

¹⁰ See Chapter 2, 23–24.

¹¹ 2004 UNSG Transitional Justice Report, para 8 (n 6).

¹² For a critical approach, see Bronwyn Leebaw, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30 *Human Rights Quarterly* 95.

¹³ See Dustin Sharp, ‘Addressing Economic Violence in Times of Transition: Toward Positive-Peace Paradigm for Transitional Justice’ (2012) 35 *Fordham International Law Journal* 780.

¹⁴ Weinstein and Fletcher, ‘Violence and Social Repair’ 574 (n 5); Roht-Arriaza, *Transitional Justice in the Twenty-First Century* 2 (n 5); Arthur 1(n 5).

¹⁵ Arthur 1 (n 5).

¹⁶ Weinstein and Fletcher, ‘Violence and Social Repair’ 574 (n 5); Roht-Arriaza, *Transitional Justice in the Twenty-First Century* 2 (n 5); Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Justice Discourses in Transition’ (2004) 13 *Social & Legal Studies* 305; Sharp, ‘Addressing Economic Violence in Times of Transition’ 780 (n 13).

¹⁷ Elster, *Closing the Books* 1 (n 5).

than trials, purges and reparations and its mechanisms are applied in situations without a clear transition. Other scholars do not concentrate on the practices of transitional justice in their definitions and refer instead to the legal, political and moral dilemmas that arise when responding to widespread violence¹⁸ or to the conception of justice associated with political transitions.¹⁹ These definitions are primarily concerned with the second dimension of transitional justice that is examined in this section.

In this book, transitional justice practices are defined as responses to past widespread or systematic violence. Only this ample approach captures the whole range of mechanisms and situations that the discourse of transitional justice currently addresses. Since the object of this book is the whole discourse of transitional justice, this broad definition is capacious enough to suit its purposes. Referring to responses to violence rather than to human rights violations or abuses avoids restricting transitional justice to instances where an act of violence is in breach of an obligation under international human rights law. This is especially important when this book examines historical practices that took place before human rights obligations were incorporated into international law.

The definition adopted for this book limits the practices it includes to those that respond to past widespread or systematic violence. Characterising the violence as widespread or systematic excludes sporadic and isolated episodes of violence. Limiting the definition to past violence ensures that initiatives that target violence in the present or in the future, such as humanitarian interventions, are not included. These two limitations prevent the definition from becoming overbroad and therefore losing its descriptive power.

It is important to clarify that the definition does not limit the responses to past widespread or systematic violence to those conforming to human rights standards or promoting democracy, liberalism or any other expressly normative content. Most authors do not expressly ascribe normative value to transitional justice.²⁰ For instance, Brian Grodsky and Anja Mihr have explored the

¹⁸ Sharp, 'Addressing Economic Violence in Times of Transition' 780 (n 13); Bell, Campbell and Ní Aoláin, 'Justice Discourses in Transition' 305 (n 16).

¹⁹ Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.

²⁰ This does not mean that their conception of transitional justice is entirely value-free but that they do not expressly acknowledge its normative content. As examined throughout the book, the discourse of transitional justice does indeed have a normative framework that influences which mechanisms and initiatives are regarded as instances of transitional justice. For a recent examination of the values inherent in evaluating transitional justice programmes, see Kirsten Ainley, 'Evaluating the Evaluators: Transitional Justice and the Contest of Values' (2017) 11 *International Journal of Transitional Justice* 421.

use of transitional justice by repressive and autocratic regimes.²¹ Accordingly, most definitions of transitional justice do not restrict the practices they include to those subscribing to a particular set of values, ideology or political standpoint.²² For example, for Dustin Sharp, transitional justice ‘relates to a set of legal, political, and moral dilemmas about how to deal with past violence in societies undergoing some form of political transition’.²³ This definition concentrates on the dilemmas surrounding a political transition but does not prescribe the normative content of the responses to these dilemmas.

At the same time, those definitions that do include a normative element usually frame it around a set of goals that the responses to past widespread or systematic violence must pursue. However, these goals are broad enough to accommodate a wide range of normative viewpoints. Thus, in the definition proposed by Arthur, these goals are to recognise victims and to prevent the recurrence of abuse; and in the UN’s definition, on which this book’s definition is based, the goals are to ensure accountability, serve justice and achieve reconciliation.²⁴ The breadth of these goals is such that few, if any, responses to past widespread or systematic violence could not claim to pursue them in some way. Furthermore, given that the purpose of the definition of transitional justice practice in this book will be to assess whether a particular practice or mechanism constitutes an instance of transitional justice, adopting a relatively value-free definition would avoid excluding some responses for purely normative reasons. Hence, throughout this book, transitional justice practices are defined as responses to past widespread or systematic violence.

The second dimension of transitional justice refers to the discourse that has developed around the practices of transitional justice. The discourse of transitional justice encompasses all knowledge referring to that social practice. This is an enormous archive including books, journal articles, policy papers, judicial decisions, legislation establishing mechanisms and journalistic coverage referring to transitional justice practices. This massive collection of statements dealing with transitional justice practices constitutes the discourse. To give a sense of its extent, the bibliography of transitional justice compiled by Andrew

²¹ Brian Grodsky, ‘Justice without Transition: Truth Commissions in the Context of Repressive Rule’ (2008) 9 *Human Rights Review* 281; Anja Mihr, ‘Regime Consolidation through Transitional Justice in Europe: The Cases of Germany, Spain and Turkey’ (2017) 11 *International Journal of Transitional Justice* 113.

²² Weinstein and Fletcher, ‘Violence and Social Repair’ 574 (n 5); Elster, *Closing the Books* 1 (n 5); Roht-Arriaza 2 (n 5); Sharp, ‘Addressing Economic Violence in Times of Transition’ 780 (n 13); Bell, Campbell and Ní Aoláin, ‘Justice Discourses in Transition’ 305 (n 16).

²³ Sharp, ‘Addressing Economic Violence in Times of Transition’ 780 (n 13).

²⁴ 2004 UNSG Transitional Justice Report, para 8 (n 6); Arthur, ‘Introduction’ 1 (n 5).

Reiter in 2010 listed 2,497 entries.²⁵ This bibliography did not take into account the contributions from non-scholarly sources. The number of scholarly and non-scholarly statements referring to transitional justice has continued to grow steadily since then. For instance, while a search of the term ‘transitional justice’ on Google Scholar for the year 2010 yields 3,020 results, for 2017 there are 5,010 results.

Discourses are dynamic. Michel Foucault defined a discourse as a regularity in dispersion.²⁶ That is, discourses can harbour contradiction and change. Within a given discourse, many contradictory positions can be held; scholars and practitioners can argue over what transitional justice means and what purposes it should serve. Yet in that dispersion, there is some regularity. There are some characteristics that mark the core of the discourse and frame most discussions. At the same time, even these characteristics can change over time because discourses are not closed entities; their meanings are open to contestation and reconfiguration.²⁷

The two dimensions differ in how they conceive the temporality of transitional justice. In its first dimension, transitional justice is a descriptive label that can be applied to any practice that fits the parameters of the definition. This label is timeless because it can be applied to a practice in the past. In contrast, in its second dimension, the discourse of transitional justice is historically situated in the sense that it reflects the context of the time. The discourse of transitional justice appeared at a specific point in time with a particular political and intellectual baggage tied to this historical juncture. The analogy of medicine can help to illustrate these two dimensions of transitional justice. Medicine refers to a set of practices and techniques used to heal the body. Any such technique, regardless of its antiquity, can be regarded as a medical practice. The label as such is ahistorical. At the same time, medicine also refers to the knowledge related to these practices as manifested in textbooks, medical journals, research institutes and academic institutions. This medical discourse is situated in time and has a specific history.²⁸

²⁵ Andrew G Reiter, ‘Transitional Justice Bibliography’ (*Transitional Justice Data Base*, 2015) <https://sites.google.com/site/transitionaljusticedatabase/transitional-justice-bibliography>, accessed 13 March 2018.

²⁶ Michel Foucault, *L'Archéologie du Savoir* (Gallimard, 1969) 53.

²⁷ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, 1985) 105.

²⁸ See Michel Foucault, *Naissance de la Clinique: Une Archéologie du Regard Médical* (Presses Universitaires de France, 1963).

There are other ways of characterising the second dimension of transitional justice instead of as a discourse. One of them is as an academic discipline. Indeed, transitional justice can boast specialised academic journals, dedicated courses and research centres. However, the knowledge related to transitional justice is not limited to an academic pursuit; it includes the activity of policy-makers, judges and international organisations. Moreover, people from different disciplines participate in the transitional justice conversation which has led to its characterisation as a ‘rendezvous discipline’.²⁹ As Phil Clark and Nicola Palmer note, transitional justice ‘encompasses manifold disciplines: law, politics, international relations, sociology, development studies, history, philosophy, psychology, anthropology, criminology and area studies’.³⁰ Given this diversity, transitional justice lacks the agreed norms and methods that a discipline entails.

By far the most popular way to refer to the second dimension of transitional justice is as a field.³¹ The concept of ‘field’ has the advantage of being broader and more fluid than the concept of ‘discipline’. Scholars of many disciplines could contribute to the field of transitional justice. Moreover, the concept of field covers both scholarship and practice. Thus, unlike discipline, it does not exclude the practice of transitional justice. Accordingly, Louis Bickford characterises transitional justice as a ‘field of activity and inquiry’.³² Nevertheless, in an influential 2009 article, Christine Bell criticised the idea of transitional justice as a field for cloaking contradictions and tensions under the guise of a

²⁹ Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *Journal of Law and Society* 411, 433.

³⁰ Phil Clark and Nicola Palmer, ‘Challenging Transitional Justice’ in Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia, 2012) 1.

³¹ See, eg, Vasuki Nesiah, ‘Discussion Lines on Gender and Transitional Justice’ (2006) 15 *Columbia Journal of Gender and the Law* 799; IJTJ, ‘Editorial Note’ (2007) 1 *International Journal of Transitional Justice* 1; McEvoy, ‘Beyond Legalism’ (n 29); Erin Baines, ‘Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice’ (2010) 109 *African Affairs* 409; Kora Andrieu, ‘Dealing with a “New” Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?’ (2012) 11 *Journal of Human Rights* 537; Fionnuala Ni Aolain, ‘Advancing Feminist Positioning in the Field of Transitional Justice’ (2012) 6 *International Journal of Transitional Justice* 205; Par Engstrom, ‘Transitional Justice and Ongoing Conflict’ in Chandra Lekha Sriram and others (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (Routledge, 2013); Nevin Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies* (Routledge, 2013); Dustin Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’ (2013) 26 *Harvard Human Rights Journal* 149; Lavinia Stan and Nadya Nedelsky, *Encyclopedia of Transitional Justice* (Cambridge University Press, 2013).

³² Louis Bickford, *Transitional Justice* (Macmillan Reference, 2004) 1045.

coherent arena.³³ Despite the ripple of citations generated by that article, characterising transitional justice as a field has become, if anything, more popular since then.³⁴

Approaching transitional justice as a discourse has a number of advantages. First, its broadness allows for including all facets of the practice and knowledge of transitional justice. Inasmuch as the discourse includes the statements produced by practitioners, transitional justice mechanisms and policymaking bodies, it effectively covers the scholarly and practical aspects of transitional justice. Second, calling transitional justice a discourse underscores the importance that language, concepts and tropes have in this phenomenon. Third, it countenances internal tensions and accommodates change. The meaning of the concepts and objects of a discourse is contested and open to change. It thus avoids the problem that some ascribe to the notion of ‘field’ of focusing on the reproductive aspects whilst neglecting its changeability.³⁵ Accordingly, this book examines transitional justice as a discourse.

II HISTORIES OF TRANSITIONAL JUSTICE

Every history has to begin somewhere. Narratives are temporally bound with a beginning and an end. Existing historical accounts of transitional justice can be sorted depending on their starting points. The choice of a particular point in time as the beginning of transitional justice’s history reflects how transitional justice is conceived. There are three approaches to transitional justice history with diverging beginnings. Yet, in spite of these differences, one narrative has become established as the prevalent account of the origin and development of transitional justice. This dominant narrative accommodates elements of all three approaches, reconciling their differences.

For some, the origin of transitional justice lies in Ancient Greece. If transitional justice is approached exclusively as a timeless descriptive label, any historical practice fitting a modern definition of transitional justice can be considered an instance of transitional justice. Following this approach, Jon Elster traced transitional justice to the retributive policies implemented in ancient Greece in the aftermath of the collapse of oligarchic regimes in the fifth century BC.³⁶ This method is grounded on a comparative perspective

³³ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3 *International Journal of Transitional Justice* 5.

³⁴ As evidenced by the chronology of citations in note 31.

³⁵ Patricia Thomson, ‘Field’ in Michael Grenfell (ed), *Pierre Bourdieu Key Concepts* (Acumen, 2008).

³⁶ Elster, *Closing the Books* (n 5).

that aims at finding suitable lessons in the past. The dilemmas of transitional justice are thus assumed to be similar and comparable across time and space. Hence, for Elster, the ‘Athenians faced problems and proposed solutions that are strikingly similar to those of recent transitions’.³⁷ Using the definition of transitional justice as a descriptive label, other authors have found episodes of transitional justice following the French Revolution,³⁸ the Napoleonic Wars,³⁹ and the American Civil War.⁴⁰

While this approach has the advantage of unearthing past examples which might be of use today, it ignores the historicity of the modern discourse of transitional justice.⁴¹ In conceiving of transitional justice as a timeless practice, this method fails to take into account historical differences. Whereas the Athenians might have confronted problems that, to a certain extent, can be compared with those besetting transitional societies today, the intervening 2,500 years pose some limits to the comparison. The historical context in which the Athenians grappled with the legacy of the oligarchs’ rule was radically different from that of societies in the twenty-first century. Of course, the limits of commensurability apply to any comparative endeavour, but the more distant in time and context two examples are, the wider the gulf precluding meaningful comparisons. More importantly, the *discourse* of transitional justice certainly did not exist in classical Greece. Categories, concepts and ideas of the present cannot automatically be transposed to the past without taking into account the different historical context.⁴² Thus while the contemporary concept of transitional justice can certainly be applied to the past, it has to be recognised that the concept did not exist at the time and the meaning of attending categories like justice, crime and rights might have been quite different. Failing to do it risks falling into what Quentin Skinner has called

³⁷ Ibid 21.

³⁸ Ronen Steinberg, ‘Transitional Justice in the Age of the French Revolution’ (2013) 7 *International Journal of Transitional Justice* 267.

³⁹ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000).

⁴⁰ Robert Meister, ‘Forgiving and Forgetting: Lincoln and the Politics of National Recovery’ in Carla Alison Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (Zone Books, 1999).

⁴¹ For a similar argument about human rights, see Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap, 2010).

⁴² See Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321, 328.