
MEMORY POLITICS AND TRANSITIONAL JUSTICE
Transitional Justice in Comparative Perspective
Preconditions for Success
Edited by Samar El-Masri
Tammy Lambert · Joanna R. Quinn
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Memory Politics and Transitional Justice

The interdisciplinary fields of Memory Studies and Transitional Justice have largely developed in parallel to one another despite both focusing on efforts of societies to confront and (re-)appropriate their past. While scholars working on memory have come mostly from historical, literary, sociological, or anthropological traditions, transitional justice has attracted primarily scholarship from political science and the law. This series bridges this divide: it promotes work that combines a deep understanding of the contexts that have allowed for injustice to occur with an analysis of how legacies of such injustice in political and historical memory influence contemporary projects of redress, acknowledgment, or new cycles of denial. The titles in the series are of interest not only to academics and students but also practitioners in the related fields.

The Memory Politics and Transitional Justice series promotes critical dialogue among different theoretical and methodological approaches and among scholarship on different regions. The editors welcome submissions from a variety of disciplines – including political science, history, sociology, anthropology, and cultural studies – that confront critical questions at the intersection of memory politics and transitional justice in national, comparative, and global perspective.

Samar El-Masri • Tammy Lambert
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This volume is dedicated to our friend and colleague Chandra Lekha Sriram, who passed away in the middle of this project. Her work informed so much of the field. She is missed.

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About the Book/Conference

The genesis for this collection of papers was a conference held in May 2018, and organised by the Centre for Transitional Justice and Post-Conflict Reconstruction at The University of Western Ontario. Participants were invited to consider whether and how certain kinds of activities and institutions could be put in place that would somehow undergird or shore up the transitional justice activities that are ultimately convoked at a later stage. The premise was that front-ending transitional justice processes with elements that somehow "cement" the transitional justice work will ultimately make it more successful, and it is critical to understand the role that ameliorating factors can play in such processes. The papers in this volume speak directly to that theme, and work together to advance our understanding of how transitional justice could work better.

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CHAPTER 1

Changing the Context: Can Conditions Be Created That Are More Conducive to Transitional Justice Success?

Samar El-Masri, Tammy Lambert, and Joanna R. Quinn

The field of transitional justice has emerged as a complex response to post-conflict societies that are working to redress past injustices using a range of mechanisms, such as trials, truth commissions, and reparations. Despite normative and moral justifications for transitional justice, the literature tells us that many of the transitional justice measures that are put in place in the period following conflict and repression fall well short of their intended purpose.[1] Societies that are in the waning stages of conflict and

[1] David Mendeloff, "Truth-Seeking, Truth-Telling and Post-Conflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6, no. 3 (2004), 355–380; Simon Robins, "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the

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abuse often share a set of characteristics such as instability, division, institutional weakness, and distrust. The impact, of course, is that "moving forward"—or just moving, at all—is difficult and the outcomes of any kind of activity are uncertain, at best.

This book explores whether any given context could be effectively changed to produce conditions that could be more conducive for transitional justice to succeed. This suggests that the dynamism of the stage preceding transitional justice be given more consideration. Indeed, the argument is that efforts to change the underlying context before transitional justice practices are established may increase the success of transitional justice itself.

The transitional justice scholarship has recognised that context matters.[2] While the early literature sought to demonstrate similarities across cases,[3] the ensuing literature has clearly demonstrated that each case has its own particularities and that these are important in how transitional justice is carried out in each case. Elements like the distribution of power,[4] cultural

Disappeared in Postconflict Nepal," *International Journal of Transitional Justice* 5, no. 1 (2011), 75–98; Jamie Rebecca Rowen, "'We Don't Believe in Transitional Justice': Peace and the Politics of Legal Ideas in Colombia," *Law & Social Inquiry* 42, no. 3 (2017), 622–647; Oskar Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010), 329–354; Eric Wiebelhaus-Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact." *International Studies Perspective* 8 (2007), 16–35.

[2] See, for example, Laurel Fletcher and Harvey Weinstein with Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2009), 163–220; Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), 4; and Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (New York: International Center for Transitional Justice, 2017). Context has also been seen to matter in adjacent areas of study including, for example, security sector reform; see Nat J. Colletta and Robert Muggah, "Context matters: interim stabilisation and second generation approaches to security promotion," *Conflict, Security & Development* 9, no. 4 (2009), 425–453.

[3] See, for example, Neil J. Kritz, "The Dilemmas of Transitional Justice," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace, 1995); Jon Elster, *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006).

[4] Gonzalez Enriquez, Alexandra Barahona de Brito, and Aguilar Fernández, *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001), 11. See also Leslie Vinjamuri and Jack Snyder, "Law and Politics in Transitional Justice," *Annual Review of Political Science* 18, no. 1: 322; Mark Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment," *Human Rights Quarterly* 16, no. 4 (1994), 656–675; and Margaret Popkin and Naomi Roht-Arriaza, "Truth as

applicability,[5] political will,[6] or institutional capacity,[7] for example, have been shown to be variable across cases, and arguments are frequently made that their relative absence or presence has aided in the failure or success of the transitional justice that is ultimately established.

What Is Transitional Justice?

Transitional justice is defined as "the range of judicial and non-judicial mechanisms dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law."[8]

At its heart, transitional justice is about helping individuals and communities come to terms with a past that has involved authoritarianism, repression, civil war, or large-scale human rights abuses and atrocity. It has several goals. First is to "satisfy people's needs both to know what happened and to establish a clear break with the past."[9] Second is to somehow institutionalise revenge and deter future wrongdoing.[10] And third is to "remember" and "rectify" historical injustice.[11]

Justice: Investigatory Commissions in Latin America," *Law & Social Inquiry* 20, no. 1 (1995), 79–116.

[5] See, for example, Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, "Context, Timing and Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2009), 153–220; Gearoid Millar, "Between Western Theory and Local Practice: Cultural Impediments to Truth-Telling in Sierra Leone," *Conflict Resolution Quarterly* 29, no. 2 (2011), 177–199; Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone," *Special Report 130* (Washington, DC: United States Institutive of Peace, February 2005), 1–12; Rosalind Shaw, Lars Waldorf, and Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010).

[6] See, for example, Joanna R. Quinn, *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti* (Vancouver: UBC Press, 2010); and Phuong N. Pham, Niamh Gibbons, and Patrick Vinck, "A framework for assessing political will in transitional justice contexts," *The International Journal of Human Rights* 23, no. 6 (2019), 993–1009.

[7] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (Dec. 2007), 411–440; and Roger Duthie, "Toward a Development-sensitive Approach to Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008), 292–309.

[8] Rachel Kerr and Eirin Mobekk, *Peace and Justice* (Malden, MA: Polity Press, 2007), 3.

[9] Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), 3.

[10] Trudy Govier "Chapter 1: Revenge and Retribution," in *Forgiveness and Revenge* (New York: Routledge, 2002), 1–22.

[11] Elster, *Retribution and Reparation in the Transition to Democracy*, 319–325.

Transitional Justice Mechanisms

There is by now a fairly standard set of transitional justice mechanisms that are routinely employed after conflict. The mechanisms that are used may include trials, truth commissions, amnesties, reparations (both material and symbolic), lustration, and informal/local/traditional practices—or a combination of these. Each is outlined below.

Trials are a standard means of dealing with the perpetrators of crimes, of fighting impunity, and of promoting accountability. Trials have occurred at the national level, such as the case of Samir Geagea in Lebanon explored by El-Masri in Chap. 4, or others including the trials of the so-called NIA 9 in The Gambia explored by Kersten in Chap. 7. Sometimes, national trials work in a hybrid arrangement with the international system, which provides any number of supports including funding or technical assistance, as was the case with the Special Court for Sierra Leone (2002–2013), or the Extraordinary Chambers in the Courts of Cambodia (2003–present). Trials have also taken place at the international level alone, through the *ad hoc* tribunals established after the atrocities that occurred in the Former Yugoslavia and in Rwanda, respectively, through the International Criminal Tribunal for the Former Yugoslavia (1993–2017) and the International Criminal Tribunal for Rwanda (1995–present), modelled in part on the international tribunals that took place after the Second World War, the International Military Tribunal (1945–1946) in Germany and the International Military Tribunal for the Far East (1945–1948) in Japan. A permanent court, the International Criminal Court, was established in 2002 to hear cases that arise when states are either unwilling or unable to prosecute.[12]

Truth commissions are another means of coming to terms with the past. Truth commissions are bodies established to look at widespread human rights violations that took place during a specified period of time, on a temporary basis, by the state, often in conjunction with opposition forces and/or the involvement of the international community. Although the first truth commission was established in Uganda in 1974,[13] truth commissions became significantly more mainstream in the years following the end of the Cold War.[14] Clustered largely in Latin America and Africa

[12] *The Rome Statute of the International Criminal Court* (1998), art. 17.

[13] See Richard Carver, "Called to Account: How African Governments Investigate Human Rights Violations," *African Affairs* 89, no. 356 (1990), 391–415.

[14] See Priscilla Hayner, *Unspeakable Truths*, 2nd ed. (New York: Routledge, 2011).

to start, truth commissions were seen as a way to gather information about past atrocity from a large number of people without getting bogged down in the formal requirements of the legal system; as a bonus, they were considered to cost far less and to deal with a much wider array of crimes. Truth commissions have been established in more than 40 countries, including Sierra Leone and the Democratic Republic of the Congo, as outlined by Freedman in Chap. 6, and in The Gambia, as detailed by Kersten in Chap. 7.

Amnesties are another response to the restrictions of formal court processes and the complications that arise from punishment and sentencing, particularly in situations where the perpetrators are still visible in society and may still wield considerable power and influence. As Jeffery notes, "amnesties are instruments of politics."[15] By granting immunity from prosecution for perpetrators of past atrocity, it is understood that societies can move past what Minow calls "impediments to justice."[16] Amnesties are sometimes granted to those who are seen as having been most responsible, as with the amnesty passed by the Lebanese Parliament in 1991, as discussed by El-Masri in Chap. 4. In other cases, as in Uganda, amnesties have been granted to the rank-and-file members.[17] In still other cases, as in South Africa, amnesty is granted in exchange for other information.[18]

In other cases, states award reparations as a remedy for the harm that has been suffered. These may be either material or symbolic; material reparations may take the form of restitution or compensation, while symbolic reparations may be given in the form of an apology. Roht-Arriaza notes that "states are obliged to provide remedies for violations, both as a matter of treaty law and as part of the general rules of state responsibility. Starting in 1989, the U.N. Human Rights Commission and its Sub-Commission … outline[d] restitution, rehabilitation, compensation and satisfaction as

[15] Renée Jeffery, *Amnesties, Accountability, and Human Rights* (Philadelphia: University of Pennsylvania Press, 2014), 21.

[16] Minow, *Between Vengeance and Forgiveness*, 16.

[17] Lucy Hovil and Zachary Lomo, *Working Paper 15: Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation* (Kampala: Refugee Law Project, Feb. 2005).

[18] Audrey R. Chapman and Hugo van der Merwe, eds., *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (Philadelphia: University of Pennsylvania, 2008).

interlinked but distinct obligations on states."[19] Minow, however, notes the "inevitable shortfall" of financial compensation but argues that "the return to a symbolic dimension seems crucial."[20] Reparations have been provided in a number of different cases, including to Indigenous people living in Canada who suffered significant physical and sexual abuse in state-mandated residential schools.[21] Reparation can also be made by means of an apology. Apologies for past actions have been made by states in a number of cases, including an apology made by the government of Germany in 2004 for the genocide of the Herero people in what is now Namibia by the German army between 1904 and 1908.[22]

Lustration is another means that is often used to deal with the past. It involves the vetting of public officials, often resulting in "the mass disqualification of those associated with the abuses under the prior regime."[23] By purging those who may have been responsible from their influential jobs in the public sector, whether as public servants who approved materials used in genocide or as teachers who sought to inculcate students with an abhorrent ideology, it is hoped that the transitional government will also be able to eradicate the ideas and actions that led to the atrocity. Losing their jobs also punishes those who are deemed to be responsible. Lustration has been most famously utilised across Eastern Europe following the end of the Cold War, in places like the Czech Republic, Hungary, and Poland.[24]

The last category of mechanisms is sometimes called informal or local or traditional justice but comprises a series of customary practices carried out, as McEvoy and McGregor have argued, "below the gaze of formal

[19] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," *Hastings International and Comparative Law Review* 27 (2003–2004), 157.

[20] Minow, *Between Vengeance and Forgiveness*, 103.

[21] United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, United Nations General Assembly, 2014, A/HRC/27/52/Add.2, http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf.

[22] Rhoda E. Howard-Hassmann, *Reparations to Africa* (Philadelphia: University of Pennsylvania Press, 2008), 100–102.

[23] Eric Brahm, "Lustration," Beyond Intractability (June 2004), https://www.beyondintractability.org/essay/lustration.

[24] David Roman, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (Philadelphia: University of Pennsylvania Press, 2011).

institutions."[25] Borrows has defined such practices as those that are "developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them."[26] As such, these practices rarely take the same shape or behave in the same ways in any two situations. Informal/local/traditional justice is normally instigated at the community level in places where state institutions are unwilling or unable to address the past, or where people find themselves unable to trust those institutions to do what they think should be done. Waldorf has argued that they have "greater legitimacy and capacity than devastated formal systems, and they promise local ownership, access, and efficiency."[27] They have continued to be used in many parts of Africa, Latin America, the South Pacific, Southeast Asia, Central Asia, and the Middle East, as well as in settler-colonial states like Australia, Canada, New Zealand, Northern Ireland, and the United States. Traditional justice was famously utilised in northern Uganda at the height of the conflict between the Lord's Resistance Army and the Government of Uganda, initiated by a concerned group of local religious and cultural leaders who wanted to bring the conflict to an end and to meet the needs of their communities.[28]

The Secretary-General has been clear that the mixing of various approaches and strategies will ensure a successful transitional justice process.[29] For example, in Sierra Leone, a Truth and Reconciliation Commission was undertaken simultaneously with the Special Court for Sierra Leone. In many Latin American countries like Chile and Argentina, transitional justice has unfolded sequentially through a series of different trials, truth commissions, and amnesties, among other processes. Significant research has been undertaken to demonstrate the interaction effects between the application of different practices of transitional

[25] Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Portland, OR: Hart Publishing, 2008), 2.

[26] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 51.

[27] Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," *Temple Law Review* 79, no. 1 (2006), 3–4.

[28] Joanna R. Quinn, "Comparing Formal and Informal Mechanisms in Uganda," in *Trials and Tribulations of International Prosecution*, eds. Henry (Chip) Carey and Stacey Mitchell (Lanham, MD: Rowman and Littlefield, 2015), 239–254.

[29] United Nations Secretary-General, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict situations*, 2011, S/2011/634.

justice.[30] The sequencing of mechanisms within one context has also been of significant interest.[31]

Context, Conditions, and Challenges

The conditions that engender transitional justice as a response are frequently characterised by weak institutions, violence, and competing priorities making justice difficult to pursue. The challenges of these conditions are acknowledged in the transitional justice literature.[32] The challenge for transitional justice is how mechanisms can work as intended in these contexts. The Secretary-General, for example, outlines a number of measures that can support the operation of transitional justice mechanisms including the establishment of the rule of law through strong justice institutions; respect for human rights; "inclusiveness of marginalised populations"; "properly resourced, planned, and managed" initiatives; and the "involvement of national actors".[33] These measures speak to the necessity of paying attention to how the context may be amended or adjusted to better support transitional justice mechanisms for success. How these measures are established though has not yet received sufficient attention. If that preexisting context is not amended *prior to* the establishment of transitional justice processes, transitional justice is less likely to work effectively—

[30] See, for example, Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: USIP Press, 2010); and Hun Joon Kim and Kathryn Sikkink, "How Do Human Rights Prosecutions Improve Human Rights after Transition?" *Interdisciplinary Journal of Human Rights Law* 7, no. 1(2013), 69–90.

[31] Laurel Fletcher and Harvey Weinstein with Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2009), 163–220.

[32] For example: On judicial capacity and the "justice gap" see David Gray, "An Excuse-Centered Approach to Transitional Justice," *Fordham Law Review* 74, no. 5 (April 2006), 2621–2694. Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: USIP Press, 2010), 15. On continued violence, see: Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *The International Journal of Transitional Justice* 8 (2014), 348; Thomas Obel Hansen, "Transitional Justice: Toward a Differentiated Theory," *Oregon Review of International Law* 13, no. 1 (2011), 1–53. See also Lydia Kemunto Bosire, "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa," *SUR: International Journal on Human Rights* 5 (2006), 71–108.

[33] United Nations Secretary-General, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict situations.*

no matter how many of the conditions laid out by the Secretary-General and others are met. This volume explores a number of factors that are more conducive to meeting those conditions for success.

In almost every instance, following the end of a civil war or the fall of a repressive regime, the impulse on the part of governments, donors, scholars, and practitioners is to immediately implement some process of transitional justice. Mechanisms are sometimes implemented regardless of the conditions that exist, and it is these conditions that are the focus of this volume. In making the case that the contexts can be conditioned to provide transitional justice mechanisms a stronger foothold, it is acknowledged that the transformation anticipated from transitional justice cannot be expected to precede it. Yet, adjusting elements of the context and transitional justice processes may strengthen these outcomes.

A number of things could be done to make those mechanisms work better. This volume suggests that the post-conflict or post-authoritarian context can be ameliorated to create the conditions that will produce more robust and "sticky" transitional justice. In the chapters that follow, the authors suggest a number of different ways that context can be improved. These changes are ameliorating factors. There are two pathways by which these changes can be made, although both have the potential to inform and reshape the broader social ethos of a society, making it more conducive to transitional justice. First, at an attitudinal level, things like building a thin sympathetic response or building democratic certainty work to change the broader social ethos such that individuals and communities are more receptive to the transitional justice efforts that are eventually undertaken. Second, efforts can be undertaken at the institutional level through actions, programmes, and policies that are more directly related to the components of transitional justice. This category includes components like judicial education, legislative reform, or institutional reforms that will change the way people access justice. Our argument suggests that through these pathways, the post-war/post-authoritarian context itself could be changed to make it more receptive to transitional justice.

This does not mean that other pathways are less important, or that all ameliorating factors can be categorised and itemised under a specific pathway. In fact, some aim to make a change at both levels simultaneously. For example, the deliberate use of language in peace agreements may call for institutional reform but also emphasise social reconciliation and transformation through emphasising the rights of victims, changing a school

curriculum, or removing religious identification from an identification card, for example.

It is also important to caution against any inclination to believe that if modified conditions are not in place, transitional justice processes will not "work." Engaging with context might suggest that transitional justice is only accessible to those societies that are "ready" for it. This is not the case. Instead, this volume suggests that transitional justice is likely to work better if it is carried out after contextual adjustments are made.

It is equally important that this volume *not* be read in a determinative frame. The intent of an investigation into an amelioration of context is not to prescribe or determine universal factors in design. Rather, the intent is to consider more seriously how these earlier conditions affect transitional justice outputs.

The focus on earlier conditions correlates to the concept of sequencing in transitional justice.[34] An exploration into efforts to alter existing conditions may help architects of transitional justice determine the timing or the sequencing of transitional justice processes in light of potential ameliorating factors. The order in which transitional justice mechanisms are implemented may be adjusted based on existing conditions. For example, sequencing decisions have been identified as a means to mitigate the apparent contradictions between amnesties and prosecutions[35] but also between accountability models and power-sharing agreements.[36] Sequencing is also implicated in decisions about the order in which transitional justice is attempted in light of other transitional considerations. Thus, sequencing matters for both the tangible, institutional changes like judicial education or microcredit schemes and the attitudinal changes like the development of thin sympathy or democratic certainty—since both offer the possibility of making transitional justice efforts more successful.

[34] Laurel Fletcher and Harvey Weinstein with Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2009), 170.

[35] See Tricia Olsen, Leigh Payne, Andrew G. Reiter, and Eric Wiebelhaus-Brahm, "When Truth Commissions Improve Human Rights," *International Journal of Transitional Justice* 4, no. 3 (2010), 127–152.

[36] In some instances transitional justice mechanisms may be prioritised over peace agreements to limit spoilers and ensure a smoother transition, but in other times prioritising agreements may be necessary. Stef Vandeginste and Chandra Lekha Sriram, "Power Sharing and Transitional Justice: A Clash of Paradigms?" *Global Governance* 17, no. 4 (2011), 498–501.