

Transitional Justice: Meaning, Origin, Applications, and Challenges

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Abstract

The field of “Transitional Justice” emerged in the 1980s to address human rights abuses committed by authoritarian regimes or during conflict. Transitional justice aims to investigate and try past abuses and to prevent the re-occurrence of abuses by establishing conditions that enable the punishment of state leaders and provide a flourishing environment for political change and institutional reforms, therefore accomplishing criminal and social justice, transparency, and democracy. The idea of transitional justice was developed by human rights activists at the national level. It then evolved to the international level through state practice. Now, numerous international instruments contribute to the promotion of transitional justice. This article clarifies the concept of “Transitional Justice” and its boundaries, the origins of the field, and how it has been implemented and expanded. Additionally, this article sheds light on some of the major international instruments promoting transitional justice, as well as state practices that have been influenced by transitional justice. This article concludes by stressing the broad spectrum of challenges to transitional justice. Therefore, the article emphasizes the complexity of implementing transitional justice. The article forms an understanding that the measures of transitional justice may not provide absolute, convenient, and immediate answers or remedies. Rather, transitional justice should be viewed as a long, stressful, and variable roadmap to achieving democracy and stability.

Key words: international criminal law, colonization, transformative, human rights, dictatorship, restorative justice.

I. Introduction

Transitional justice refers to a set of measures undertaken by new regimes in different countries to address injustices incurred by former regimes. These injustices include violations of human rights and international humanitarian law. The UN Special Rapporteur, appointed by the UN Human Rights Council in 2011 and 2017 for supervising the transitional justice process in different countries, has identified transitional justice approaches. These approaches ensure individual criminal accountability (criminal justice), promote victims' right to know the truth, provide remedies to victims (reparation), and undertake preventive measures (guarantees preventing the recurrence of violations) by making comprehensive institutional reforms and focusing on state building.

Historically, the notion of "Transitional Justice" developed from a state practice, mainly to rebuild shattered societies that have experienced dictatorships, slavery, colonial crimes, etc. The set of measures that made up transitional justice was initiated in the Latin American Southern Cone States during political transitions to democracy. Argentina made the earliest attempt to implement transitional measures in 1983. Chile then followed. After that, transitional justice measures spread rapidly to other parts of the world, including Central America, Central and Eastern Europe, and South Africa. However, the international recognition of transitional justice was traced back to South African's Truth and Reconciliation Commission (TRC) experience in the early 1990s.

Transitional justice found its foundation in many international legal instruments, including the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Conventions of 1949, and its Additional Protocols. Nevertheless, the international recognition of the notion/term of "Transitional Justice" during the nineties has contributed to the development of international law, particularly through the creation of international obligations. For instance, the emergence of transitional justice has led to the adoption of several international instruments.

For example, the Rome Statute of the International Criminal Court (ICC) in 1998, the Statute of the International Criminal Tribunal for Rwanda (ICTR) in 1994, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in 2006, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005.

Additionally, numerous state practices have been motivated by transitional justice. To mention some, administrative reparation programs for individual victims, participation of civil society and non-governmental organizations in promoting access to justice and the rule of law, national criminal trials based on a universality principle, international cooperation in the field of extradition and protection of witnesses, truth or fact-finding as well as reconciliation committees, and massive state institutional reforms.

The accomplishment of transitional justice is not an easy task as many challenges exist. These challenges could be historical, civil, social, political, strategic, and economic. In addition, some challenges may relate to the fact that transitional justice is still an evolving and vague idea. As a result, the approaches to transitional justice are non-theoretical based⁽¹⁾. Also, many questions remained without answers in the field of transitional justice. For example, whether transitional justice is the key driver towards change or the goal? Also, whether the timing and the national, regional, and international context of the process of transitional justice impact its effectiveness?⁽²⁾

This article adopts a descriptive approach in parts II and III, respectively concerned with the meaning and origin of transitional justice and the applications of transitional justice in international law. Then, the article uses the analytical approach in part IV regarding challenges to transitional justice.

This article has the following objectives:

1. Identifying the circumstances that lead to the establishment of transitional justice and the measures of transitional justice.
2. To mention some of the major international instruments and notable state practices related to the application of transitional justice.
3. To address challenges that undermine the efforts toward achieving transitional justice.
4. To demonstrate the role of state-building, social unity, politics consensus, and international cooperation for achieving transitional justice.

This article is divided into five parts. Part I is the introduction; part II illustrates the meaning and historical origin of transitional justice; part III highlights the influence of transitional justice on several international legal instruments and

(1) Paul Gready and Simon Robins, *Transitional Justice and Theories of Change: Towards Evaluation as Understanding*, International Journal of Transitional Justice, Oxford University Press, Volume 14, Issue 2, (2020), p. 280.

(2) *Id.* p. 286.

state practice; part IV discusses the challenges to transitional justice; and part V provides the conclusion.

II. Meaning and Origin of Transitional Justice

This part discusses the meaning and conceptual boundaries of “Transitional Justice.” Additionally, it traces the development of the transitional justice field historically and geographically.

A. Meaning and Boundaries of Transitional Justice

Transitional justice refers to a set of judicial and non-judicial measures undertaken by new regimes in different countries to address injustices incurred by former regimes⁽³⁾. These injustices include any form of systematic human rights abuses and violations of international humanitarian law such as social marginalization, genocide, apartheid, rape, torture, enforced disappearances, massive displacement, forced recruitment of children, corruption, and war crimes⁽⁴⁾.

Transitional justice has four main elements or approaches, as specified by the UN Special Rapporteur⁽⁵⁾. They are:

1. Criminal justice:

Promoting prosecutions to confront impunity by holding individuals responsible for violations accountable. This phase of transitional justice concerning determining individual criminal responsibility may begin before the transitional justice process does⁽⁶⁾. Jens Iverson said “The International Criminal Tribunal for the former Yugoslavia and the International Criminal Court have not necessarily waited for a change in regime to proceed, although such regime changes or at changes in government have proven helpful”⁽⁷⁾.

(3) Transitional Justice in the USA, Comparative Lessons: What Is Transitional Justice and How Has It Worked in Other Countries? 24 February 2021, New England Law | Boston’s Center for International Law and Policy, <https://www.youtube.com/watch?v=eVWHkPCeOqc> [Accessed 19 Mar. 2021].

(4) *Id.*

(5) Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, OHCHR, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx> [Accessed 19 Mar. 2021].

(6) Jens Iverson, Transitional Justice, *Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics*, The International Journal of Transitional Justice, Oxford University Press, Volume 7, Issue 3, Nov. 2013, p.440. Available at https://www.academia.edu/4496778/Transitional_Justice_Jus_Post_Bellum_and_International_Criminal_Law_Differentiating_the_Usages_History_and_Dynamics [Accessed 20 Mar. 2021].

(7) *Id.*

With that being said, international criminal law, also known as international criminal justice, and transitional justice can be implemented together at the same time or separately. However, the purpose of criminal justice is to promote accountability and prevent impunity, while the purpose of transitional justice is to change the political regime and facilitate respect for human rights.

Of note, discussion among scholars exists regarding transitional justice's dependency on individual criminal responsibility as a solo methodology or recourse to overcome injustices⁽⁸⁾. Criticisms emphasize that disregarding a state's criminal responsibility impedes the efforts of transitional justice. According to the critiques, a state's accountability is crucial in furthering the rule of law and subsequently attaining sustainable peace⁽⁹⁾.

Thus, despite the political implications, considering the State's accountability as another element of transitional justice has recently deserved the attention of transitional justice scholars. Such discussion becomes even more critical in situations when state institutions or officials are key players in committed atrocities or human rights violations⁽¹⁰⁾. In this case, the state not only failed to fulfil its obligation to protect the victims, but also failed to meet its legal obligation toward the international community in perpetrating atrocities⁽¹¹⁾.

2. Truth seeking or fact-finding:

This means that the right of the victim, his immediate family, and society to know the truth or the facts of any human rights violation happened in the past, as well as the corresponding obligation of the state to investigate and to reveal the facts.

3. Reparation seeking. This means the right of the individual victims or the community to receive effective redress. The reparation may take the form of restitution, compensation or just satisfaction⁽¹²⁾. This can include the

(8) Laurel E. Flecher, *A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, *Fordham International Law Journal*, p. 523. (2016). Available at: <https://www.law.berkeley.edu/wp-content/uploads/2016/04/A-Wolf-in-Sheeps-Clothing.pdf> [Accessed 20 Mar. 2021].

(9) *Id.* at 522

(10) *Id.*

(11) *Id.*

(12) Introduction to Human Rights, Transitional Justice, 6 October 2014, MOOC Chile, <https://www.youtube.com/watch?v=EyMLfAm2KO4> [Accessed 27 Mar. 2021].

return of stolen property, the reunion of a separated family member, the return of stable economic conditions, the facilitation of employment, or access to healthcare and psychological support⁽¹³⁾.

4. Preventive measures. These are guarantees to prevent the recurrence of violations by making comprehensive institutional reforms. The reforms could target the existing state political and social institutions that were either fragile, negligent, or even partners in the commission of past atrocities. Such institutions may include the police, judiciary, military, and public service institutions⁽¹⁴⁾. Alternatively, the reforms could mean establishing new institutions to be responsible for the transitional justice process.

These approaches are complementary to one another, not alternatives⁽¹⁵⁾. Additionally, the approaches are not exclusive. This means that every country has the discrete authority to adopt any measure of the abovementioned list or different measures.

Transitional justice is different than ordinary forms of justice that we are used to. The focus of transitional justice is the victim, regardless of whether the victim is an individual or a group. The transitional justice system is not concerned with issues such as equal opportunities, fair distribution of resources, negotiating disarmament, ceasefire, peace agreements, punishment or rehabilitation of offenders, or state criminal responsibility⁽¹⁶⁾. Instead, transitional justice seeks to assist victims in overcoming suffering, restoring their confidence in state and social institutions, and moving on with their lives.

Transitional justice takes place particularly after the suffering has ended and before the society has achieved complete recovery. Transitional justice may or may not be preceded by an armed conflict. In this sense, transitional justice is different from peace building. The first concerns the transition from authoritarianism to democracy, while the latter concerns the transition from war to peace⁽¹⁷⁾. Peace building refers to the process of negotiating peace agreements

(13) Marieke de Hoon, *Transitional Justice*, in *Research Handbook on Post-Conflict State Building*, ed. Paul R Williams and Milena Sterio (Edward Elgar) (August 2020), p. 168.

(14) *Id.* p. 169

(15) About the International Center for Transitional Justice, ICTJ, <https://www.ictj.org/about> [Accessed 29 Mar. 2021].

(16) *Id. Also*, Laurel E. Flecher, *supra* note 8, 523-526.

(17) Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, *Human Rights Quarterly*, vol. 31(2), p. 360, (2009). Available at https://biblioteca.cejamerica.org/bitstream/handle/2015/570/Paige_arthur.pdf?sequence=1&isAllowed=y [Accessed 1 Apr. 2021].

when there is an ongoing armed conflict that results in great human pain. Transitional justice refers to the process of creating the conditions necessary for transitioning a state from a period of imbalanced powers or instability toward a balanced and stable post-conflict society⁽¹⁸⁾.

The ultimate goal of peace building is to end suffering without paying too much attention to the cost in the context of justice⁽¹⁹⁾. Peace negotiators or peace builders are more focused on the outcome, namely, ending wars, rather than the approach⁽²⁰⁾. To illustrate, injustices can be tolerated throughout the way toward maintaining peace. The conclusion of ceasefire or disarmament agreements represents the outermost goal of the peace negotiations process.

B. Historical and Geographical Origin of Transitional Justice

The notion of Transitional justice developed from state practice, particularly to rebuild shattered societies that have experienced dictatorship, slavery, colonial crimes...etc. The set of measures that made up transitional justice was initiated in Latin American Southern Cone States during political transitions to democracy⁽²¹⁾. The earliest attempt to implement transitional measures was made by Argentina in 1983⁽²²⁾.

Chili then followed Argentina⁽²³⁾. After that, the measures of transitional justice have spread rapidly to other parts of the world, including Central America, Central and Eastern Europe, and South Africa⁽²⁴⁾. However, the international recognition of transitional justice traces back to the experience of South African's Truth and Reconciliation Commission (TRC) in the early 1990s⁽²⁵⁾.

The term "Transitional Justice", also known as "transformative justice"⁽²⁶⁾ or

(18) Marieke de Hoon, *supra* note 13, p. 162.

(19) Michael Scharf and Paul R. Williams, The Functions of Justice and Anti-Justice in the Peace-Building Process, *Case Western Reserve Journal of International Law*, vol. 35(2), p. 161 (spring 2003). Available at <https://static1.squarespace.com/static/581769bbe4fcb5fd5921aa89/t/5820c0ec46c3c40f06272a11/1478541550509/The+Functions+of+Justice+and+Anti-Justice+in+the+Peace-Building+Process.pdf> [Accessed 1 Apr. 2021].

(20) *Id.* p. 189.

(21) Introduction to Human Rights, *supra* note 12.

(22) *Id.*

(23) Transitional Justice in the USA, *supra* note 3.

(24) *Id.*

(25) Xavier Guignard, Transitional Justice Course Syllabus, Bard Honors College Al-Quds University (Fall 2014) page 1. Available at: https://www.academia.edu/15361097/Transitional_Justice_Fall_14_Bard_Honors_College_Al-Quds_University_ [Accessed 3 Aug. 2021].

(26) Transitional Justice in Post-Conflict Societies: What Works Best? Part 1, Woodrow Wilson Center, <https://www.youtube.com/watch?v=1D2GE9u3p8k> [Accessed 3 Aug. 2021].

“post-conflict justice”⁽²⁷⁾ emerged during the nineties⁽²⁸⁾. The term was not widely used until the late nineties to early Twenties⁽²⁹⁾.

Throughout history, violations or conflicts that have been subjected to transitional justice measures have recurred. According to the Centre of Transitional Justice, “Most countries that suffer from a national conflict experience a recurrence. Between 1945 and 2009, 57% of all such conflicts relapsed at least once. From 2000 to 2011, the figure is worse—a 90% recurrence rate”⁽³⁰⁾.

Thus, it has been determined by several scholars that transitional justice must be treated and viewed as a continuous process to maintain peace and prevent future conflict as well as a mechanism for sustainable post-conflict state building and society development⁽³¹⁾.

Therefore, in September 2011 the UN Human Rights Council adopted resolution 18/7, renewed in 2017 by resolution 36/7, under which the Council appointed a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The mandate of the Special Rapporteur is to supervise the transitional justice process in several states and report annually to the Human Rights Council and the UN General Assembly⁽³²⁾.

III. The Applications of Transitional Justice in International Law

Transitional justice has contributed to the development of international law. Particularly through the creation of international obligations. For instance, the emergence of transitional justice has led to the adoption of several international instruments and state practice.

A. International Instruments

Transitional justice found its foundation in many international legal instruments, including the Charter of the United Nations, the Universal Declaration

(27) Ruti Teitel. (2004). *Post-conflict Justice*. Edited by M. Cherif Bassiouni. Ardsley NY: Transnational Publishers, 2002. Pp. xx, 1,041. Index. \$145. American Journal of International Law, volume 98, Issue 4, p. 872. doi:10.2307/3216727. Available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DC62CD786D64AA21B762F0C7CE8B1AA1/S0002930000013683a.pdf/postconflict_justice_edited_by_m_cherif_bassiouni_ardsley_ny_transnational_publishers_2002_pp_xx_1041_index_145.pdf [Accessed 8 Aug. 2021].

(28) About the ICTJ, *supra* note 15.

(29) Transitional Justice in the USA, *supra* note 3.

(30) About the ICTJ, *supra* note 15.

(31) *Id.*

(32) About the mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, OHCHR, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx> [Accessed 2 June. 2021].

of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Conventions of 1949 and its Additional Protocols⁽³³⁾. However, the following are international legal instruments that are highly related to the transitional justice process and undertaken by the international community accompanying or following the recognition of the notion of transitional justice.

1. Rome Statute established the International Criminal Court (ICC), which was adopted in 1998 and entered into force in 2002. With 123 states parties to the Statute, it is considered a symbol of the normalization of transitional justice⁽³⁴⁾. The ultimate objective of the Statute is the advancement of criminal justice. The ICC enables the international community to hold state leaders accountable for human rights abuses and humanitarian law violations⁽³⁵⁾. Several ad hoc international criminal tribunals preceded the ICC with the aim of promoting criminal justice, including the International Criminal Tribunal for Rwanda (ICTR), which was created by the UN Security Council in 1994 to prosecute persons responsible for genocide and other serious violations of international humanitarian law.

Additionally, the Rome Statute, particularly article 68, and the ad hoc international criminal tribunals for former Yugoslavia and for Rwanda ensure the protection of the witnesses and victims who participate in the court's proceedings. Such protection is beneficial to advancing the right to truth⁽³⁶⁾. Without this protection, witnesses and victims would not cooperate. Therefore, it would be impossible to learn about serious crimes and offenders or to obtain the evidence needed to facilitate prosecution and conviction⁽³⁷⁾. Similarly, the United Nations Convention against Transnational Organized Crime (UNODC) instructs states to take effective measures to protect witnesses and

(33) Resolution adopted by the General Assembly on 18 December 2013 regarding right to the truth, A/RES/68/165, UNGA, 21 January 2014, <https://undocs.org/A/RES/68/165> [Accessed 8 Aug. 2021].

(34) Ruti Teitel, *Transitional Justice Genealogy*, Harvard Human Rights Journal, vol. 16, 2003, at 90, pp. 69-94, https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1339&context=fac_articles_chapters [Accessed 2 Aug. 2021].

(35) *Id.*

(36) Protecting witnesses, UNODC, <https://www.unodc.org/unodc/en/frontpage/protecting-witnesses.html> [Accessed 5 Aug. 2021]. Also, Good practices for the protection of witnesses in criminal proceedings involving organized crime, UNODC, https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf [Accessed 7 Aug. 2021].

(37) Combating Serious Crimes in Postconflict Societies, USIP, at 109, https://www.usip.org/sites/default/files/resources/sc_chap4.pdf [Accessed 7 Aug. 2021].

victims in articles 24 and 25, respectively⁽³⁸⁾.

2. International Convention for the Protection of All Persons from the Enforced Disappearance (ICPPED) adopted by the General Assembly in its resolution 61/177 on 20 December 2006 and entered into force in December 2010⁽³⁹⁾. The convention mentions the right to truth in the preamble and in article 24(2). Additionally, article 24(3) sets forth State party obligations to "...take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."
3. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 on 16 December 2005⁽⁴⁰⁾. In the same regard, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) mentions in article 24(4) and (5) the right of the victims to obtain reparations⁽⁴¹⁾.

B. State Practice

There is a trend among states toward incorporating transitional justice measures within their domestic legal systems. Examples include the following:

1. The development of massive administrative reparation programs for individual victims⁽⁴²⁾. For example, the German government adopted such a program for reparations after the 2nd World War⁽⁴³⁾. Another example is that the Czech government required the return of all

(38) United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, UNODC, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> [Accessed 7 Aug. 2021].

(39) International Convention for the Protection of All Persons from Enforced Disappearance, https://treaties.un.org/doc/source/RecentTexts/IV_16_english.pdf [Accessed 7 Aug. 2021]. Also, Resolution, supra note 33, at 2.

(40) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly resolution 60/147 on 16 December 2005, OHCHR, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [Accessed 7 Aug. 2021].

(41) International Convention for the Protection of All Persons from Enforced Disappearance, supra note 39.

(42) Experiences of domestic reparation programmes: report, OHCHR, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/DomesticReparation.aspx> [Accessed 8 Aug. 2021].

(43) *Id.*

property confiscated during the communist period to its owners⁽⁴⁴⁾. Additionally, Uganda enacted the National Transitional Justice Legislation of 2019, which entitled victims to reparation and redress⁽⁴⁵⁾. Similarly, in Morocco a National Forum on Reparations was organized in 2005 to design a reparation program targeting the regions where the populations are economically and socially marginalized due to the human rights abuses they experienced in the past⁽⁴⁶⁾.

2. Advancing the role of civil society organizations, non-governmental organizations (NGOs), and international organizations in promoting access to justice. Examples of these organizations include, but are not limited to, Human Rights Watch (HRW), Amnesty International (AI), International Centre for Transitional Justice (ICTJ), The Public International Law & Policy Group (PILG), European Union (EU), United Nations Development Program (UNDP), World Bank, and High Commissioner for Refugees, and the United Nations High Commissioner for Human Rights (OHCHR). The organizations are responsible for conducting investigations, documentations, and observations necessary to ensure accountability and state compliance.

Additionally, they provide national consultations for the most vulnerable in society to ensure inclusive participation, in order to tackle such issues as gender inequality. Additionally, they play an active role in raising awareness and empowerment efforts by, for instance, ensuring that victims are well informed about their rights under national and international law. Furthermore, it ensures the effective participation of women and youth in advocacy networks and decision-making to influence the formation of future legislations, policies, and institutions that affect them.

3. Enabling international and national criminal trials alike to investigate and prosecute crimes committed abroad based on the principles contained in the UN Charter concerning international cooperation, as well as the universal jurisdiction principle and the principle of com-

(44) Marieke de Hoon, *supra* note 13, p. 169.

(45) *Id.*

(46) Sandrine Lefranc and Frédéric Vairel, *The Emergence of Transitional Justice as a Professional International Practice* (2014), p. 239, https://www.researchgate.net/profile/Frederic-Vairel/publication/280812376_The_Emergence_of_Transitional_Justice_as_a_Professional_International_Practice/links/59d6c167458515db19c502c7/The-Emergence-of-Transitional-Justice-as-a-Professional-International-Practice.pdf [Accessed 4 Aug. 2021].

plementarity of the Rome Statute of the ICC⁽⁴⁷⁾. Examples in this regard include the reference by the UN Security Council to the ICC of the Situation in Darfur, Sudan Concerning Alleged War Crimes and Crimes Against Humanity Committed by the Former Sudanese President Omar AlBashir. Furthermore, the case brought before the International Court of Justice (ICJ) by Gambia against Myanmar concerning allegation of Myanmar's involvement in the crime of genocide against the Rohingya minority Muslims in Myanmar. Moreover, European trials of atrocities committed in Syria, and several ad hoc tribunals, such as courts for Sierra Leone, Cambodia, Rwanda, Yugoslavia, and Lebanon were established.

Also, the extradition of individuals accused of committing international crimes or human rights violations abroad to enable prosecutions. The most notable example in this regard is the Pinochet case. Without any doubt, the Pinochet case was a turning point in the field of international criminal law that is one of transitional justice's elements. After this case, the notion of holding a former dictator accountable outside his country for criminal acts he committed in the past in his country emerged⁽⁴⁸⁾.

4. Establishing international and national reconciliation, truth commissions, and fact-finding commissions⁽⁴⁹⁾. These commissions are necessary for advancing the right to truth, which is an established right recognized by the UN Human Rights Council and recognized by the judiciary in many countries, including South Africa, Indonesia, Colombia, Peru, Argentina, and Chile⁽⁵⁰⁾. The commissions have objectives to document violations and collect evidence in a timely manner to enable prosecutions whenever criminal trials become possible⁽⁵¹⁾.

Furthermore, the commissions have a mandate to unveil historical facts about past human rights violations and to elaborate a repara-

(47) About the ICTJ, *supra* note 15.

(48) Susan Waltz, Prosecuting Dictators: International Law and the Pinochet Case, *World Policy Journal*, volume 18, No. 1, 2001, p. 101, Duke University Press.
<https://www.jstor.org/stable/40209737?seq=1> [Accessed 8 Aug. 2021].

(49) The Place of Reconciliation in Transitional Justice, ICTJ,
<https://www.ictj.org/publication/reconciliation-transitional-justice> [Accessed 8 Aug. 2021].

(50) Transitional Justice in Post-Conflict Societies, *supra* note 26.

(51) Sandrine Lefranc and Frédéric Vairel, *supra* note 46, p. 238.

tions policy for the victims⁽⁵²⁾. Examples include the commission established by the UNGA in Syria, the UN Envoy in Myanmar, and the commission created in Germany to investigate crimes committed during the war in Syria. Additionally, truth committees were formed during the transitional period in many countries, including El Salvador, Chile, and Sierra Leone and the Truth and Reconciliation Committee in South Africa⁽⁵³⁾. However, the commission of South Africa, which was adopted in the 1990s as a response to apartheid, has been considered to be the most successful, and since then it has been treated as a model for truth and reconciliation commissions⁽⁵⁴⁾.

5. Adopting preventive measures and fostering state-building. To prevent the recurrence of violations, states have undertaken major reforms to their political and social institutions. Examples of political reforms include the establishment of democratic constitutions, such as the Iraq Constitution⁽⁵⁵⁾ and the 2015 federal constitution of Yemen⁽⁵⁶⁾. Additionally, the establishment of a transformative government post-conflict, such as the Iraq Temporary Transitional Government formed in 2004 following the fall of Saddam Hussain's regime in 2003. Additionally, the establishment of reliable robust state institutions responsible for the facilitation of democratic elections post-conflict, such as the Interim Election Administration in Mozambique and El Salvador.

Furthermore, reforms to security service institutions, including the police and military, such as the Civilian Police Advisory Training Team (CPATT), were created in Iraq in 2004 to resolve issues re-

(52) *Id.* p. 237.

(53) Ahmad Al-Mohtadi Billah, *The Role of Truth Committees during Transitional Justice in the Arab Spring Countries*, Kuwait International Law School Journal, Volume 1, Issue 2, June 2013, p. 299.

(54) *Transitional Justice Genealogy*, *supra* note 34, p. 78.

(55) *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, PILPG and the Century Foundation, May 2003, https://static1.squarespace.com/static/581769bbe4fcb5fd5921aa89/t/5820c1e446c3c40f062739c6/1478541797702/Establishing+a+Stable+Democratic+Constitutional+Structure+in+Iraq_+Some+Basic+Considerations.pdf [Accessed 2 Aug. 2021]. See Also, Darin E. W. Johnson, *Iraq: seeking stability after Saddam*, in *Research Handbook on Post-Conflict State Building*, ed. Paul R Williams and Milena Sterio (Edward Elgar) (August 2020), p. 423.

(56) P. Williams and T. Sommadossi and A. Mujais, *A Legal Perspective on Yemen's Attempted Transition from a Unitary to a Federal System of Government*, *Utrecht Journal of International and European Law*, 33(84), (2017), p. 4, available at <https://utrechtjournal.org/articles/10.5334/ujiel.366/> [Accessed 2 Aug. 2021].

lated to police pay and corruption⁽⁵⁷⁾. Moreover, the abolishment of any discriminatory laws, such as the bill of right of South Africa⁽⁵⁸⁾. Examples of other reforms include educational reforms, such as the empowerment of women and the promotion of gender equality in accessing schools, as in Afghanistan following the Taliban's fall in 2001⁽⁵⁹⁾. Additionally, economic reforms develop short- and long-term plans to elevate the destroyed economy.

For example, the post-conflict economic recovery plans for Afghanistan, Angola, the Democratic Republic of the Congo, Ethiopia, and other countries⁽⁶⁰⁾. Furthermore, health sector reforms should be implemented by building hospitals, raising the capacity of intensive care units, providing medicine and medical equipment, and training medical staff. For example, the experience of Northern Uganda⁽⁶¹⁾. Additionally, family-related reforms, such as family reunions for families separated as a result of conflicts.

To do so, the UN High Commission for Refugees (UNHCR) and International Committee of the Red Cross (ICRC) operate in many countries, including the Central African Republic, Myanmar, South Sudan, Yemen, and other places⁽⁶²⁾. Moreover, reforms related to the protection of minority rights, such as combating radicalization and

(57) Combating Serious Crimes, *supra* note 37, p. 76.

(58) Laurel E. Flecher, *supra* note 8, p. 523.

(59) Report of the Committee of Experts on Nation Rebuilding in Afghanistan, 10 December 2001, *New England Law Review*, <https://static1.squarespace.com/static/581769bbe4fcb5fd5921aa89/t/5829c771e58c628c3cac86be/1479133042104/Report+of+the+Committee+of+Experts+on+Nation+Rebuilding+in+Afghanistan.pdf> [Accessed 8 Aug. 2021]. Also, Jamie E. Vinson, *Educating Girls and Empowering Women: Gender and Post-Conflict Educational Reform in Afghanistan*, Harvard University Graduate School of Education, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.533.5969&rep=rep1&type=pdf> [Accessed 8 Aug. 2021].

(60) Report, *Post-Conflict and Economic Recovery*, UNDP, 2008, file:///C:/Users/share/Downloads/undp-cpr-post-conflict-economic-recovery-enable-local-ingenuity-report-2008.pdf [Accessed 8 Aug. 2021].

(61) Input Paper Prepared for the Global Assessment Report on Disaster Risk Reduction 2015, *Post-Conflict Recovery as an Impetus for Strengthening Health System Resilience in Africa: Experiences and lessons from the Northern Ugandan Humanitarian Crisis*, UNISDR, <https://www.preventionweb.net/english/hyogo/gar/2015/en/bgdocs/inputs/Olu%20et%20a1.,%202013a.%20Post%20conflict%20recovery%20as%20an%20impetus%20for%20strengthening%20health%20system%20resilience%20in%20Africa.pdf> [Accessed 3 Aug. 2021].

(62) Note on Family Reunification, UNHCR, 13 August 1981, EC/SCP/17, available at: <https://www.refworld.org/docid/3ae68cd48.html> [Accessed 4 August 2021]. Also, *Reuniting Families Torn Apart by Conflict*, ICRC, <https://www.icrc.org/en/support-us/operation/restoring-family-links> [Accessed 4 August 2021].

discrimination forwarded against national ethnic, religious, or linguistic groups within the state⁽⁶³⁾. For example, the 1993 and 1996 post-apartheid constitutions of South Africa contain principles for the promotion and protection of cultural and linguistic diversity within the state⁽⁶⁴⁾.

IV. Challenges to Transitional Justice

State practice shows that there are international, regional, and national challenges that hinder the achievement of transitional justice. These challenges could be historical, civil, social, political, strategic, or economic⁽⁶⁵⁾.

A. Historical, Civil, and Social Challenges

The legacy of discrimination and human rights violations may have a long-term impact post-conflict. Mostly, the division has lasted for a long amount of time. Additionally, the roots of the division are very deep and implanted in society's culture that is formed because of a combination of traditions, customs, and religious teachings. The duration of division and society's culture are factors that collectively promote bias or attitude, as well as inequalities. They thus impede the effectiveness of transitional justice. For example, the U.S. and slavery.

Even though several years have passed post slavery era, the U.S. still struggling with racism. There are continuous accusations that state institutions and particularly criminal justice systems in the U.S. discriminate against African Americans. In this regard, law enforcement, namely, the police, uses excessive force against suspects that are African Americans. This led to the creation of civil society movements such as Black Lives Matters (BLM), calling for the activation of transitional justice.

B. Strategic, Political, and Economic Challenges

Strategic interests, as well as international and national politics, are vital for an effective and smooth transition toward just and democratic systems. For instance, foreign states or non-State actors may have interest in maintaining the conflict, and the internal division persists. For instance, the 2002 Report on Nation Building in Afghanistan asserts that "From the day of the creation

(63) Nikhil Narayan, *Minority Protections*, in *Research Handbook on Post-Conflict State Building*, ed. Paul R Williams and Milena Sterio (Edward Elgar) (August 2020), p. 279.

(64) *Id.* p. 291.

(65) Report of the Special Rapporteur to the Human Rights Council on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/39/53, UNGA, 25 July 2018, <https://undocs.org/en/A/HRC/39/53> [Accessed 14 July 2021].

of the Afghan state, its neighbors and other interested states have sponsored proxies within Afghanistan in order to promote their unique interests.

To structure a successful nation rebuilding effort, there must be agreement among all the interested states, including Russia, China, Iran, India, Pakistan, Tajikistan and Uzbekistan to cease their efforts for predominate influence in Afghanistan⁽⁶⁶⁾. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence emphasizes the role non-State actors can play in the effectiveness of transitional justice's measures by stating that "Beyond this specific type of non-State actor, the Special Rapporteur will dedicate his attention to the constructive role that other non-State actors can play in transitional settings, including for example (transnational) companies, religious or other faith-based actors, the media and artists. He believes that the productive potential of such actors has to date been understudied and therefore underutilized"⁽⁶⁷⁾.

Furthermore, the lack of political censuses between the political parties within the State could destroy any efforts to pursue transitional justice. This means that some institutions or groups would form a barrier to the work of truth or fact-finding commissions by prohibiting them from achieving their full potential. For instance, by denying them access to public and official records, restricting their movement, and impose constraints on interviewing victims and witnesses. For example, the UN Fact-Finding Mission in Myanmar concerning alleged human rights violations against the Rohingya population reported that "Due to the non-cooperation of the Myanmar authorities, the Mission was unable to conduct site visits or to hear the Tatmadaw's version of events"⁽⁶⁸⁾.

Transitional justice requires reparation funding. Additionally, it requires financing projects related to state building, such as reconstructing destroyed infrastructure, including roads, utilities, schools, and hospitals. Funding may not be available, particularly in poor states that are economically struggle after years of war, conflict, or division. Even if money is available, censuses between political parties and those in control of the state's resources are necessary to facilitate reparation and state-building funding. There is also the challenge posed by corruption in a number of countries⁽⁶⁹⁾.

(66) Report of the Committee of Experts on Nation Rebuilding in Afghanistan, *supra* note 59, p. 711.

(67) Report of the Special Rapporteur to the Human Rights Council, *supra* note 65, p. 10 para. 61.

(68) Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, OHCHR, 17 September 2018, at 32, para 116, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf [Accessed 30 Jul. 2021].

(69) Report of the Special Rapporteur to the Human Rights Council, *supra* note 65, p. 12 para 75.

V. Conclusion

The road towards establishing a clear conceptual framework for transitional justice passes by many boundaries, disciplines, and controversial ideas and concepts such as truth, reconciliation, peace, democracy, sustainability, and justice⁽⁷⁰⁾.

Additionally, accomplishing transitional justice encounters many challenges. This may include the legacy of discrimination and marginalization in some societies, the weak institutions responsible for the identification and implementation of the transitional justice policy framework, the absence of international assistance and cooperation where it is necessary, and the lack of political will and censuses, which might have implications on such issues as the success of truth commissions' work and financing reparations.

Further, there are some concerns regarding the field's actual value and whether it is a realistic expectation that transitional justice could stand as a separate legal discipline.

Therefore, tackling the theoretical and practical aspects of transitional justice could be the best approach undertaken by any state towards developing an effective framework for the transitional justice process. This can be stimulated at two levels altogether. The first level requires answering the novel questions around transitional justice, like what is the purpose of establishing this process in the meantime and under the current national, regional, and international contexts? The second level requires the identification of the contemplated challenges.

The unique circumstances and needs of each society must be taken into consideration, for example, the historical roots of division or conflict, as well as the social and political context that has led to violations. These considerations alongside the current legal, economic, and civil conditions should determine the appropriate approach to achieving transitional justice in every country⁽⁷¹⁾.

(70) Paul Greedy and Simon Robins, *supra* note 1, p. 281.

(71) About the ICTJ, *supra* note 15.

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