CHAPTER 2

Contending with the Past: Transitional Justice and Political Settlement Processes

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This chapter addresses the difficulties in designing and implementing transitional justice in societies attempting to move on from conflict. It does so in part to show how transitional justice mechanisms in transitions from conflict differ from those in transitions from authoritarianism, particularly with regard to the strategic choices that are involved. I argue that transitional justice in post-conflict settings needs to be understood as part of the broader political settlement process in which domestic and international actors are engaged. This process attempts to (re)construct the state to reconfigure how power is held and exercised so as to include previously excluded actors and groups in ways that will end violent conflict. Centrally, peace processes involve negotiations between states and their non-state opponents, with a view to including the latter in new or revised state structures. Political bargaining occurs through both formal, usually elite-level, talks and other less visible informal processes.

Formal processes such as peace talks aim to establish a new or revised set of political and legal institutions for states focused on inclusion. The choice, design, and implementation of the mechanisms to deal with the past are often negotiated as part of the overall package of institutional revision. Beyond formal talks, informal political bargaining processes, including the threat and use of violence, are equally vital in shaping the contours of the resulting political settlement. If a peace deal is reached, the involved parties often view it less as a vehicle for compromise and more as a new way to pursue their old conflict goals. Often international actors invest heavily in the formal peace process and attempt to support and implement any agreement that emerges, without fully understanding how the parties understand the deal they have signed. They are therefore unable to adequately support and build it.

A central inquiry driving this collection concerns where and why transitional justice mechanisms with similar features play out quite differently in different contexts. In this chapter, I suggest that transitional justice mechanisms that appear to be similar connect differently with ongoing political bargaining over access to power in ways that shape and constrain their effectiveness.

They operate against very different underlying political bargaining dynamics in different conflict contexts, not all of which will be easily visible to outside interveners. The very label of transitional justice for mechanisms to deal with the past has perhaps created a sense of a unitary practice across authoritarian and conflict contexts, in ways which have led to a coherent study of mechanisms such as trials and truth commissions but which have at the same time obscured the very different political contexts in which such mechanisms are agreed, institutionalized, and implemented.

The first part of this chapter considers the relationship of transitional justice debates to formal peace processes and their underlying political bargains, with a view to understanding the ways in which transitional justice operates in conflict situations and peace processes, drawing out the distinctiveness from more straightforward transitions from authoritarianism to democracy of the early 1990s. The second part of the chapter sketches out how these challenges of context affect institutional design and implementation. The third part considers the consequences for external interveners, suggesting how those who hope to support both human rights accountability and conflict resolution processes might move from a "lessons learned" approach that focuses on institutional design to an approach that focuses more attention on understanding how political bargaining processes are likely to determine the design and implementation of transitional justice mechanisms.

INTRASTATE CONFLICT, POLITICAL BARGAINING, AND "DEALING WITH THE PAST"

Intrastate conflicts involve conflicts between the state and nonstate armed opposition actors and sometimes also violence between those armed actors. While traditionally known in international law as "internal" armed conflicts, over time they increasingly have been recognized as having transnational dimensions, including regional instability, as external states support rebel groups in neighboring states, and cross-border refugee flows. From the 1990s and the end of the Cold War onwards, formal peace processes involving negotiation, often underwritten and assisted by the international community, became one of the main strategies for terminating these conflicts.[2] Typically, peace processes involved state and armed state actors negotiating (often face-to-face or sometimes through mediators) over how to end the conflict, in processes with a state-building dimension. Provisions and institutions specifically to deal with the past have been a persistent feature of peace settlement terms

and have come to fall under the rubric of "transitional justice." The mechanisms used, however, remain varied and may include the use of international criminal justice courts, truth and reconciliation commissions, and other special forms of investigation.

When parties move to end conflict, the need to deal with the past inevitably penetrates negotiations at several points, as much for practical reasons as for principled ones. International interveners often speak of transitional justice in terms of societal choices that can be shaped and influenced—that is, as a choice over whether to deal with the past or not and, if the former, a further choice over which institutional design to adopt. In practice, however, the past is continually being dealt with in all aspects of the negotiations. From a political bargaining perspective, some sort of approach to the past is an inevitable part of getting parties to the table, and prior to the design of any specific transitional justice institution a set of choices will already have been made with regard to particular accountability and impunity demands, as a necessary part of constructing a peace process. Particular elements of the past will be dealt with in a fragmented way, as a peace process develops. Each past-focused initiative will initiate a transitional justice chain reaction, opening up broader debates about the need to deal with the past, provoking new forms of resistance to accountability, galvanizing new constituencies around justice claims, and prompting new legal strategies. All of these come to be part of the informal tapestry of political bargaining over both the past and the type of peace that is under construction. This dynamic can be illustrated by considering further the types of issues relating to the past that arise at different stages of a peace process, and why.

PRE-NEGOTIATION BARGAINING AND THE PAST

The beginning of a formal negotiation process involves a set of pre-negotiations over how to get the parties to the table: who is going to negotiate, over what, and with what status? For face-to-face or proximity negotiations to take place, each party must be assured that its attempts to engage in dialogue will not be used by the other side to gain military advantage. Issues that touch on "the past" are immediately implicated. To get everyone to the negotiating table, agreement must be reached on matters such as the return of negotiators from exile or their release from prison; safeguards as to their future physical integrity and freedom from imprisonment; and limits on how the war is to be waged while negotiations are taking place, such as through a form of ceasefire, usually temporary and conditional.

Reaching agreement on these matters implicates the state's existing mechanisms of accountability and their legitimacy, but it may also implicate international criminal law, with conflict protagonists suspected of or indicted for war crimes. Typically, in conflicts falling short of the civil war threshold where the state has a functioning legal system, nonstate actors will have been pursued through the domestic criminal justice system. States often seek to avoid defining the violence as "a conflict," in part with a view toward resisting the legal characterization of the conflict as one in which humanitarian law applies.[3] A part of this strategy involves extensive use of emergency legislation that limits the application of human rights and enables their restriction. For nonstate armed opposition groups to enter negotiation processes in such cases, their key negotiators at least will need exemptions from the state's criminal law processes, to get to the negotiating table and guard against the state's using their participation in talks as a means to pursue arrest and detention in a strategy of military victory. On the other side, the state itself will often be using violence under cover of law as part of its "legitimate monopoly on the use of force."

In return for a ceasefire, therefore, nonstate actors often seek to limit or suspend what is understood as the illegitimate use of state force, through the use of emergency legislation and so end the human rights violations that go hand-in-hand with it. To ensure these commitments are kept, the parties to the negotiations may push for special monitoring and investigations to document and uncover human rights violations. The Goldstone Commission in South Africa, discussed below, and the extensive human rights agreements and monitoring associated with the Guatemala and El Salvador peace processes are examples.[4] These types of human rights investigation may also be used as confidence-building measures. One or both sides may seek investigations into particular patterns or incidents of conflict to build the credibility of the process among their constituents. The Bloody Sunday Tribunal in Northern Ireland, dealing with the shooting deaths of Nationalist/Catholic civilians by the British toward the start of the conflict, was agreed to by the UK government during talks as critical to building the trust of that community in the peace process.[5] These mechanisms, arising at an early state of a peace process, play an essentially "in-conflict" accountability role by limiting forms of conflict to enable a climate in which peace talks can take place. However, they also begin to shape how the past is to be dealt with, both by providing accountability for some conflict acts in ways that affect the balance of power in any ongoing negotiation and by adding impetus to calls to deal with the past more substantively in the peace process.[6]

In addition to these process-drivers for contending with the past, the attempt to set out a substantive agenda for peace talks will also begin to implicate the past. Some sort of agreement on an agenda is crucial to establishing formal negotiations, and here parties begin to bargain and sound out each other's positions on the substantive issues at the heart of the conflict. Often bargaining takes the form of attempts to set preconditions on the negotiating agenda, in which questions of the status, legitimacy, and public authority of state and nonstate parties to negotiate are paramount. The past is implicated in these discussions because the "rights and the wrongs" of the conflict are indirectly negotiated through debates on such questions as who are terrorists, who are legitimate democratic actors, what preconditions should apply to participation in talks, and who has suffered most in the conflict and therefore may require concessions to enter talks.

The dynamic way in which "the past" is bound up with the process of political settlement can be illustrated using the case of South Africa.[7] At a very early stage of pre-negotiation, guarantees against conviction had to be given for exiles to return to participate in the talks. Prisoners, including Nelson Mandela, who had been tried and sentenced, also had to be released through pardons or other extraordinary criminal law measures to participate.[8] Different phases of prisoner release operating also as confidence-building measures dealt with different categories of "political" prisoners. Designing these forms of prisoner release required the state to grapple with criteria to determine what constituted a "political offender" (as opposed to an "ordinary criminal"), what the time scale for an offense to qualify as political was, and which groups the classification should apply to.[9] These negotiations all began to tell a story about the nature of the past conflict and create a pathway dependency for how the past would be dealt with as the process unfolded. The question of prisoner release opened up, for example, persistent arguments and attempts by the South African government to provide amnesty to state human rights violators and on-going resistance to amnesty from the African National Congress (ANC). Pursuant to the National Peace Accord,[10] which attempted to create a climate for talks and was signed by forty different parties, including elements of civil society, the then-National Party South Africa government agreed to set up a Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (the "Goldstone Commission") to investigate political violence, as a mechanism for stabilizing the country during the talks process.[11] This investigation placed questions of state accountability center stage, particularly when it concluded that a "third force," comprising clandestine state and ex-state forces, was at work, sometimes in collusion with rightwing activists

and/or members of the Inkatha Freedom Party (IFP), conclusions which reinforced pressure to deal with the past. As modalities of prisoner release were agreed on and questions of amnesty for state actors came to the fore, the ANC commenced an investigation into its own past abuses in an attempt to combat amnesty and underline its commitment against impunity—another partial investigation into the past.[12] All of these initiatives began to shape understandings of forms both of amnesty and accountability as important to transition, and in so doing they shaped the parameters for the negotiation of these issues downstream. Approaches to the past were also shaped by the particular state-transformation dynamic in South Africa, where negotiations came to revolve around how to achieve a peaceful transfer of power from the then white minority South African government to a democratically elected ANC, rather than any sort of compromise over the nature of the state that was to result. This agreement on the nature and direction of transition was also to determine the contours of the key holistic transitional justice mechanism, the Truth and Reconciliation Commission, which was explicitly understood to be a necessary "bridge" between old and new regime, as discussed further below.

In conflicts involving much larger-scale mass violence, dealing with the past will also be essential to any attempt to state-build.[13] The dynamics can be quite different from those of armed insurrection. In the early 1990s some level of amnesty was often understood as necessary to bring politico-military elites, essentially operating as private actors, into projects of public power and was built into peace agreements involving mass violence.[14] More recently, however, as confidence in negotiated settlements began to wane, and faith in international accountability began to rise, a move towards criminal justice (usually international) has been paramount. From a political bargaining perspective, it is possible to understand the move to international criminal law not just in accountability terms, but as tied up with a more strategic instrumentalist role for international actors who use it to impact on the balance of power in conflicts. International justice has come to be used as a tool to "punish" recalcitrant individuals who have reneged on peace settlements, such as former president of Liberia Charles Taylor (indicted before the Special Court for Sierra Leone) and the Revolutionary United Front (RUF) in Sierra Leone, and so try to remove them from the conflict fray and positions of power. International criminal law can be used against violent actors who resist the transition from war and private gain to peace and public good. This was the case with the International Criminal Court's (ICC's) indictments of members of the Lord's Resistance Army in Uganda and president Omar Al-Bashir in Sudan, the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s

indictment of former president of Serbia and of the Republic of Yugoslavia Slobodan Milošević, and the pursuit by the United States of de-Ba'athification and criminal trials in Iraq.

REACHING FORMAL AGREEMENT AND THE PAST

Dealing with the past is also inevitably implicated in the reaching of any substantive agreement on how to end a conflict. As the South African process illustrated, from a political bargaining perspective the choice as to whether to put into place a transitional justice mechanism, or do something else with the past, or kick it into the long grass of "outstanding implementation issues," is determined by the state-building project on which the parties to the conflict agree. This link arises because of the close connection between discussion of "the past" and political bargaining over how to end a conflict. John McGarry and Brendan O'Leary have usefully argued that intrastate conflict often involves two conflicts: the conflict itself and a "meta-conflict"—that is, a conflict over what the conflict is about.[15] The latter is important and necessary to resolve, if the conflict itself is to be resolved. Parties are often in dispute over the causes of the conflict: is it about competing ethnic identities or nationalisms that need accommodated; authoritarianism and a need for democratization; a need to combat terrorism; or external interference? This meta-contestation drives the conflict itself and must equally be addressed in any conflict resolution process because each meta-conflict position presupposes a different set of solutions to the conflict. Ending the conflict therefore requires some accommodation of competing conceptions of what the conflict was about capable of sustaining agreement to a common approach to what ending the conflict will require. Therefore mechanisms relating to the past are never just about accountability, but also create narratives of state legitimacy and illegitimacy which feed into attempts to reconstruct it.

From this political bargaining perspective, it is therefore important to understand how the past is *always* being negotiated as parties negotiate how to end the conflict. If the past is understood always to be "in play" in peace negotiations, then the question of how to provide for transitional justice should be reframed away from asking whether and how peace negotiations should provide for transitional justice, towards understanding how talking about the future always takes place against the background of arguments regarding both the conflict and the state's legitimacy and morality in the past. Substantive peace agreements couple commitments to end violence to providing for how power will be held and exercised. Agreements typically revise political and

legal institutions to incorporate contenders for power into state structures, along with safeguards against abuse of power in the form of human rights measures. Discussion of the past and its rights and wrongs is central to balance-of-power struggles over which political bargaining outcome will prevail and how it will be reflected in political and legal institutional design. In other words, dealing with the past is vital to the design of all the political and legal institutions of the revised state for the future, and not just a discrete question over appropriate provision for transitional justice. Any resultant transitional justice mechanism or commitment can be better understood, and its implementation difficulties pre-assessed, if it is understood as part of the tapestry of tradeoffs made as part of the agreement as a whole.

To return to South Africa to illustrate: while the establishment of the Truth and Reconciliation Commission (TRC) is often seen as the key transitional justice mechanism, a broader view of the process reveals it to be in a complex relationship both with the ad hoc approaches to the past that needed to be established for the talks to move forward, and with the meta-bargain at the heart of the transition itself. Ultimately, a clause was added to the peace agreement (in the form of South Africa's interim constitution) that contemplated amnesty and, interestingly, explicitly narrated the past as connected to the "meta-bargain." When read in full, the clause—standing unnumbered at the end of the constitution—linked any process for amnesty to the idea of the constitution's being itself a bridge from the past to the future in a project of state building. It traced a direct line from the past to the future by providing a mechanism which could acknowledge gross human rights violations, but approached their remedy in part as the delivery of a different future through processes of constitutionalism and therefore provided for reparation and *ubuntu* (a form of forgiveness) rather than punishment. In the words of the Constitution itself:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of

> humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[16]

The story of the TRC's establishment is often told as an innovative tradeoff between justice and peace, negotiated against the backdrop of Nuremburg-style trials as the alternative. South Africa is still viewed as a key reference point for truth-commission practice. The TRC, however, can also be understood from a political bargaining perspective to have been context specific and shaped by the negotiation goals of the parties to the conflict as an integral part of a broader set of compromises necessary to peaceful transition. The ANC aim in entering a negotiation process was to try to achieve, first and foremost, a negotiated transition rather than a violent revolution that might be successful but would lay the country to waste. In not holding out for a "victory" that seemed possible but instead opting to enter peace negotiations, the ANC acted on a political calculation that the price of victory in terms of the violence needed to achieve it and the consequences for any stable democratic future was too high. The price of negotiated transition was trading with the enemy, and a part of the tradeoff was the language on amnesty in the interim constitution. This concession was mitigated by leaving its implementation to the post-election period, when the ANC was likely to hold power (albeit initially in a power-sharing government). Accordingly, the ANC knew it would be able to shape the provision of amnesty and even link it to accountability at this later stage, and it did, indeed, eventually tie amnesty to truth telling in a form of compromise.

A similar relationship between political bargaining and the past can be seen in Northern Ireland, but in this case with a quite converse result. Here, the balance of power dynamics at the time of the peace agreement, together with

a central meta-bargain which focused on an "agreement to disagree" about the causes of and solutions to the conflict, meant that during the talks consensus was insufficient regarding the need for, and role of, any transitional justice mechanism. Instead, discrete issues were provided for relating to prisoner release and victims' rights in a piecemeal way rather than through any holistic transitional justice mechanism.[17] This approach evaded the difficult question of the rights and wrongs at the heart of the war, while enabling discrete issues, such as victim's compensation, to be dealt with at least partially. The approach also had the merit of being immediately implementable, because discrete measures could be implemented without the need for a long, complex, and contested truth process. It had, however, the drawback of leaving the question of state human rights abuses suspended in never-ending legal processes, issues of state collusion almost completely unexplored, and society more generally lacking any common narrative as regards culpability in conflict. The past still needs to be dealt with and continues to haunt attempts to build and sustain the political and legal institutions centrally reformed by the peace agreement in ways that keep a holistic approach on the implementation agenda.[18]

IMPLEMENTING AGREEMENTS AND THE PAST

Implementing peace agreements is very difficult. A peace agreement does not resolve or end political bargaining over the nature of the state; at best, this bargaining enters a new, less violent terrain. While transitions in Eastern Europe were fairly straightforward transitions from authoritarianism to a form of democracy, conflict situations often lead to a more complex form of multiple and yet partial transition. The first transition is from conflict to peace (or, at least, "ceasefire"); the second is from forms of authoritarianism to multicultural liberal democracy, in which elections are often coupled with complicated forms of political and territorial power sharing that focus as much on group rights and outcomes as on individual liberal rights protections.[19] In this world of compromise, the political and legal institutions agreed to are crafted not merely to deliver "democracy," as in elections and rule of law, but to enable a tapestry of power dividing between the conflict's antagonists. Rather than viewing peace agreements as creating transfers of power, or even genuine compromises in pursuit of peace, it is better to understand them as operating to contain the conflict, largely by persuading parties that they can continue to pursue the political aspirations that drove the conflict through the agreement's new institutional provision. This dynamic can be evocatively captured in the idea of "Clausewitz in reverse"—that is, where Clausewitz evocatively

described politics as "war with the admixture of other means," so peace agreements are war as "politics with the admixture of other means."[20]

In peace process outcomes, ancient and new regimes are entangled in ways that make it unclear whether the status quo, reform, or transformation are at play. Indeed, the outcome of the process is likely to remain contingent on the continuation of the balance of power that produced the incentive to negotiate. Rather than being eliminated or resolved, the conflict is translated into the new political and legal institutions, which aim to provide a nonviolent context in which the conflict can be continued. The hope is that the conflict, rather than being "resolved," will at least be "transformed" into less violent forms, and that in the future new opportunities to transcend it might become possible.

COMPLEX TRANSITIONS AND PATH DEPENDENCIES

As the case of Northern Ireland illustrates, in many transitions from conflict there is little consensus domestically as to conflict resolution goals and outcomes, and indeed domestic and international actors may understand the goals and outcomes of the peace process very differently. Understanding the contours of the transitional justice mechanisms to be shaped by the attempted state-building project and the political bargaining that takes place between elite actors as to the nature of the new state is helpful to understanding the mechanisms that emerge. Increasingly a negotiated settlement is looked on as the beginning of a process rather than its end. Transition is understood as an ongoing process, involving ongoing contestation over its nature and direction. Mechanisms to deal with the past, therefore, have to be understood both as a response to contestation and as vehicles for the ongoing contestation that comprises an integral part of political bargaining over the nature of the state.

STATE-BUILDING PROJECTS AND TRANSITIONAL JUSTICE CHOICE AND DESIGN

How, then, do political bargaining dynamics relating to state building affect the design and implementation of transitional justice mechanisms? If the contours of transitional justice institutions in transitions from authoritarianism are at least partly set by a consensus on the normative end-goal of democracy, transitional justice mechanisms in intrastate conflict settings are shaped by navigating a *lack of consensus* as to the state's endpoint and nature. I suggest that five factors have been key in influencing the design and effectiveness of

transitional justice mechanisms and therefore must be considered by anyone seeking to influence how the past is dealt with post-conflict: (1) the balance of power and nature of the political-military deal; (2) the internationalization of the conflict and post-conflict environment; (3) the regional human rights system in which the conflict arises; (4) the mobilization and political power of civil society (including victims' groups); and (5) the scale, nature, and context of conflict including its relationship to law.

BALANCE OF POWER AND THE NATURE OF THE "DEAL"

The balance of power between the main antagonists at the point of an agreement is, as the South African example illustrates, very important to conflict and post-conflict settings. First, it controls the interrelationship of the tradeoffs across the agreement as a whole. While academic writings and tool kits tend to deal with transitional justice mechanisms as distinct institutions whose design and internal tradeoffs (for example, between truth and justice) can be compared across contexts, each is located in a quite different relationship to a state-building project. Often what is perhaps more useful—although methodologically difficult—is to compare how transitional justice mechanisms are located in and shaped by a package of tradeoffs across and between issues in particular political settlements. Depending on the political bargaining dynamics, tradeoffs may take place between, for example, prisoner release and the scope of political bodies' power; prisoner release and reform of police; democratic accountability of armies (including vetting); mechanisms for joint control or military power sharing; or accountability for the past and, say, power sharing for the future. In fact, these issues are all typically linked in a complex set of tradeoffs, which together reflect the balance of power and in which transitional justice can lose out to other imperatives.

Even more crucially, for the parties to agree to any sort of compromise, they will have had to reach some sort of "meta-bargain," as explained above, on the question of "what the conflict was about." Often this is a very partial bargain, with the parties agreeing to disagree as to the nature of the state, but agreeing to create political institutions that enable them to govern together and continue to work out that disagreement more peacefully than before. This embryonic constitutional understanding can move the parties from the battlefield to some sort of new governmental arrangement. The meta-bargain is essential to how the past will be dealt with. It may put into place a form of separation between protagonists in different state or substate formations, as settlements in the Israel–Palestinian conflict or in Bosnia or East Timor (with

Indonesia) have done, and this often means it is difficult to create any shared institutions across jurisdictions relevant to the conflict, including transitional justice mechanisms. Or the meta-bargain may result in forms of sharing which, in essence, divide power, as in Bosnia Herzegovina or Northern Ireland, meaning that concerted action and agreement to establish joint institutions for addressing the past will remain politically difficult because the new political settlement will depend on those at the heart of the conflict. Any attempt to deal with the past will risk undoing the careful negotiation of an "agreement to disagree," which will be destabilized by any attempt to find some sort of societal accounting of the past rights and wrongs of the conflict in a truth commission or similar mechanism.

INTERNATIONALIZATION OF THE CONFLICT AND POST-CONFLICT ENVIRONMENTS

The degree and nature of the internationalization of the conflict also influences the feasibility and shape of transitional justice mechanisms. It influences the types of carrots and sticks external actors may use to ensure parties accept transitional justice institutions in cases where the meta-bargain presents mutual amnesty as an attractive proposition for both sides. International mediators may get otherwise recalcitrant parties to accept certain terms to gain international approval and financial and political support. Most importantly, perhaps, the degree of internationalization will determine whether international criminal processes are employed. Only the UN Security Council has the power to establish international criminal tribunals and it can also refer cases to the ICC, while other international actors can often work to link peace settlement terms to the prohibition of amnesty. It is unlikely, for instance, that Milošević or Croatian president Franjo Tudjman wanted to agree to the ongoing operation of the International Criminal Tribunal for the former Yugoslavia in the Dayton Accords, which ended the war, but the international community was able to exert leverage to ensure they did so.[21] More subtly, the shadow of the ICC has formed an important backdrop to peace negotiations in the very different contexts of Colombia and Uganda, shaping and constraining negotiations as parties try to craft compromises that will settle the conflict with a measure of criminal prosecution without provoking an ICC intervention.[22]

International organizations can also sometimes change the terms of a deal—essentially unilaterally—later, albeit with political risks. The United Nations, for example, added a "rider" to the Lomé Agreement in Sierra Leone stating it did not support the amnesty the agreement had included.[23] After

renewed violence, the UN Security Council instituted the Special Court for Sierra Leone,[24] alongside the truth commission,[25] which the peace agreement had established as a corollary to the amnesty. The court later indicted Charles Taylor as he arrived for Liberian peace talks in Ghana, critically affecting the balance of power in Liberia, even though the Liberian authorities had not (at that point) sought to put him on trial. In this case, an international court played a role in reopening an accountability compromise produced by a peace settlement.

Where international interveners, from donor states to interstate organizations to the ICC, may have the capacity to influence and to some extent force a transitional justice mechanism to be put into place, the operation and effectiveness of the outcome may depend on the extent to which the international pressure under which it was secured is maintained. Human rights institutions—transitional justice ones included—are not neutral; they operate to constrain power and hold it to account, which in post-conflict contexts has a redistributive function that will often be resisted.[26] Where international actors have "induced" parties to establish a transitional justice mechanism, they must often continue to support it. If their support is to be effective, and they are to anticipate potential resistance, they must understand the power dynamics of the deal and where its pressure points lie.

REGIONAL HUMAN RIGHTS STANDARDS

Connected to the question of internationalization is the regional dimension of conflict, including the relevant regional human rights system (if one exists). Regional human rights courts are increasingly significant to the implementation both of peace agreements and any transitional justice mechanisms.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, for example, have regularly ruled on amnesties and sometimes successfully forced changes in transitional justice initiatives.[27] In the 2012 ruling in the case of the *Massacre of El Mozote v. El Salvador*, the president of the court explained in a concurring opinion that it had never previously had to face the justice-versus-peace dilemma head-on when adjudicating on amnesties, never having dealt with one "created in the context of a process aimed at ending, through negotiations, a non-international armed conflict."[28] He indicated, however, that were the court to do so, it would have to take the imperative to end the conflict seriously and balance it against individual rights.[29] This decision, together with others, has recently been used by the El Salvador Supreme Court to annul an amnesty granted subsequent to the truth

commission, and largely negating its findings, in 1993.[30] As this decision shows, the purchase of regional human rights instruments can be shaped by the politics in country, and the rulings of the apex court in the country in question, even as it seeks to shape them.

The strong and binding European Court of Human Rights has also developed a significant transitional jurisprudence.[31] In post-authoritarian conflicts it has influenced vetting processes, and in Northern Ireland it has been vital to the establishment of a proactive duty to investigate state killings and collusion with Loyalist paramilitaries that took place during the conflict, keeping victims' claims alive where political interventions alone would not have.[32]

MOBILIZATION AND POLITICAL POWER OF CIVIL SOCIETY, INCLUDING THE VICTIMS' CONSTITUENCY

Another key factor in the design and operation of transitional justice mechanisms is the political power of civil society—in particular, the victims' constituency and its capacity to influence elite-level political bargaining. Given that parties may have a powerful self-interest in mutual amnesty, the pursuit of a justice agenda may depend not just on international actors but on a politically active victims' constituency with the capacity to influence debate. This constituency may have its demands backed by the international community or even by some of the main protagonists to the conflict where particular groups of victims may be a core constituency.

While international actors often talk of "victims" as an inevitable force for good whose interests must be heard and responded to, in most transitions from conflict, victim constituencies are themselves divided along conflict lines and have different demands of the peace process. Like all groups, their political views will not be limited to transitional justice institutions, which they will see as part of the entirety of "the deal." At different times, victims may be "used" by political actors in strategically instrumentalist ways to try to influence political bargaining outcomes. As Kieran McEvoy and Kirsten McConnaghie point out, the role of victims' groups is not always "pro-peace," and their demands regarding accountability should not be automatically privileged in political discourse.[33] While certain victims' needs and rights, such as those regarding reparation, can and should be prioritized, their other political demands may need to be treated as part of a broader socio-political negotiation. Although victim demands are often strategically used by political elites when it suits them, this does not mean they can be put back into a box at will, and victims, particularly where they form a core constituency for one party to the negotiations, may

have power to affect and constrain negotiating positions. Like international actors, therefore, victims, while often officially outside the political bargaining process, may find themselves with the capacity to influence it.

SCALE, NATURE, AND CONTEXT OF THE CONFLICT AND ITS RELATIONSHIP TO LAW

The nature and scale of the conflict and its atrocities complicate recourse to transitional justice in a number of ways. First, they affect the scale of the redress and accountability that will be needed and the types of mechanisms that will be practical. In situations of mass atrocity, even if functioning national courts are available, simple matters of scale will prevent the prosecution and punishment of individual killings—never mind the broader tapestry of abuses. Only attenuated, selective, or symbolic prosecution, or some sort of alternative mechanism, is possible. Often judges and legal professionals may have fled the country, courts and legal institutions may have failed to function for a very long time, and the state may have little legitimacy left. Here the dilemma for transitional justice institutions is how to establish rule-of-law institutions at all. Such cases may point to a practical need for international criminal justice measures of some sort, coupled with an attempt to build capacity at the national level.

Smaller-scale conflict constrains transitional justice mechanisms in other ways. Fionnuala Ní Aoláin and Colm Campbell, for example, draw out a number of distinct issues facing "conflicted democracies," such as Northern Ireland, Sri Lanka, and Basque Country.[34] Notably, conflicted democracies assume that a reform agenda is required, rather than a transformation agenda, because they take their own legitimacy for granted. The state's formal commitment to liberal democracy and its formal commitments to accountability can, in a sense, blind it from seeing the ways in which the conflict was related to problems with both, leading it to rule out special forms of post-conflict accountability, particularly where they are to focus on its own actions. Yet, the rule of law may be particularly degraded precisely because the state had espoused a commitment to it and people believed it should prevail. As Ní Aoláin and Campbell suggest, establishing any sort of mechanism for dealing with the past in such circumstances is often very difficult because it involves the state addressing human rights abuses it should have prevented in the first place, and because the state will argue that "ordinary criminal justice" was and remains sufficient to deal with the accountability issues that arise.

Second, the nature of the conflict also affects which international legal regimes are implicated and, therefore, which legal standards on accountability

are applicable. Different levels of conflict are governed by different legal regimes. Lower-scale conflicts may be governed entirely by human rights law, but, as higher conflict thresholds are met, humanitarian and international criminal law also apply. Their accountability requirements are not entirely coterminous, and difficulties determining the appropriate legal regime can help shape transitional justice mechanisms. In practice, transitional justice mechanisms may be advocated as a technical solution capable of applying all three regimes to cover both state and nonstate abuses.[35] They can, in effect, create new composite legal regimes to govern accountability and enable examination of both state and nonstate atrocities and patterns of conflict. A difficulty remains, however: this approach may come to be challenged by international or regional courts related to a particular regime, such as human rights law. These regimes often have no explicit jurisprudential means of addressing the peculiarities of the post-conflict terrain or the need for past-focused mechanisms that provide justice to individual victims as regards the past and that also serve broader social needs as regards a peaceful future. Regional human rights courts, for example, have no jurisprudential frame within which to balance an individual's rights to truth and accountability against broader societal needs relating to the past—for example, the need to provide as much truth and accountability to as many victims as possible—in cases where these two imperatives conflict.

Third, the scale of the conflict can affect its internationalization. Mass atrocity that spills beyond borders can potentially elicit the intervention of the UN Security Council in the name of international peace, including referral to the ICC or the creation of international tribunals of inquiry. Situations of mass atrocity often happen where the state is weak—where, almost by definition, little normal state apparatus remains—meaning that international intervention is more likely to be seen as necessary and the state less likely or able to resist. In contrast, fairly functional and powerful states with lower levels of armed-opposition violence, such as South Africa, Sri Lanka, and the United Kingdom, are able to resist internationalization of the conflict more easily.

A COMPLEX MATRIX OF POLITICAL BARGAINING

The five factors addressed above do not stand in a hierarchy of importance. Rather, they interact in complicated ways. The balance of power between political and military elites may be shaped by the wider engagement of civil society or the leverage of the international community. International interveners may be prepared to support certain forms of political and legal institutions,

including transitional justice mechanisms and forms of power sharing, which regional human rights courts may later attempt to revise or undo. Considerations of "international tutelage" of failed domestic legal systems may interact with questions of accountability, international political will, financial cost, and international legitimacy to produce hybrid courts, as they did in Sierra Leone. The point remains that transitional justice mechanisms emerge from processes of domestic and international contestation, related to different priorities for the state-building project to which they are connected.

POLITICAL BARGAINING AND THE POLICIES OF EXTERNAL INTERVENERS

So far, this chapter has argued that transitional justice mechanisms following conflict emerge from, and are shaped by, the complex political bargaining processes of political elites, which can sometimes be influenced by other domestic and international constituencies. I have also suggested five key factors that shape and determine the design and effectiveness of a transitional justice mechanism under such conditions. This section now considers what this analysis means for external intervention in support of accountability and peace.

International interveners increasingly doubt that transitions from authoritarianism or conflict track evenly toward democracy or peace.[36] They are also aware that even where compelling the adoption of particular political or legal institutions by the parties to a conflict is possible, it does not ensure that such institutions will achieve the goals the international actors ascribe to them. As Gerhard Anders and Olaf Zenker point out, transitional justice after conflict is now understood to be much less about "new beginnings" than new battlegrounds. Its promise of transformation seems to fall far short of its messy delivery, and the need for context-specific approaches seems to stand in tension with the international blueprinting that drives the process.[37]

These types of concerns about the effectiveness of post-conflict (or, more correctly, post-settlement) interventions extend beyond transitional justice across a range of development and peacebuilding settings.[38] Whereas for several decades external interveners responded to failures by focusing on "better institutional design" and "lessons learned," increasingly they are questioning whether they have paid sufficient attention to the political context, and in particular to elite and societal political bargaining processes. International interveners are coming to understand the need to pay more attention to the complex and often hidden dimensions of the political bargaining that determines the outcomes of individual institutions and entire transitional processes.[39]

Yet, how to understand political bargaining processes, and how to navigate through them to achieve such goals as justice and accountability, remains under-theorized and under-researched. The injunction to avoid blueprints or standardized approaches does not, on its own, point the way to more effective forms of intervention. Some recent attempts to step back from a focus on institutional design to question the conditions under which truth commissions have been effective provide a useful starting point.[40] However, even this approach has found generalizing about those conditions difficult. Unsurprisingly, case studies illustrate the specificity of each conflict's political bargaining dynamics around what are essentially different state-building projects.

I suggest that the core challenge for those seeking effective transitional justice mechanisms is to engage further with their state-building dimension. This engagement requires a careful assessment of political context with a view to understanding how transitional justice mechanisms relate to political bargaining between powerful domestic actors over the nature of the state.

Such an assessment has a key difficulty: international interveners seeking effective transitional justice institutions are called on to exercise political judgments they often lack the capacity, expertise, and/or legitimacy to make. Moreover, while it is easy in hindsight to see that the preconditions for an effective truth commission, for example, were not present, making that judgment in the moment is much more difficult. Furthermore, in such cases, a normative institution like the United Nations will not necessarily be able to "do nothing" and walk away from trying to ensure some place in the process for accountability even if they have decided that the moment is unpropitious.

Given these observations, I make preliminary suggestions for framing and understanding interventions as an important starting point.

NEGOTIATING ENDS TO CONFLICT AS PROTECTION OF HUMAN RIGHTS

An important starting point for designing more effective transitional justice in transitions from conflict is to understand negotiated ends to conflicts as centrally concerned with more inclusive and peaceful state formations, and therefore as important human rights projects in their own right. The complexities of transitions from conflict in comparison to transitions from authoritarianism have led to much more ambiguous transitions in human rights terms, meaning that the importance of ending conflict for human rights needs to be better understood.

Transitional justice mechanisms in authoritarian transitions have been based on consensus among the parties and the international community regarding the nature and direction of transition (from authoritarianism to democracy) but also on acceptance of this type of transition as a normative good. As Paige Arthur writes, what initially differentiated transitional justice from the straightforward application of human rights was the addition of the "normative aim of facilitating a transition to democracy."[41] To the extent that transitional justice mechanisms in transitions from authoritarianism have been imperfect, a level of compromise can be tolerated as long as the mechanism is understood as contributing to combatting impunity and establishing the rule of law.[42] To put it briefly, in transitions from authoritarianism a link between transitional justice and state building has been understood to exist, but state-building imperatives (linked to democratization) have been those understood to require accountability and the vindication of human rights. In these transitions, transitional justice is a relatively straightforward assertion of a human rights project.

In contrast, processes of negotiating transitions from conflict appear to be built on fundamental compromises regarding the immediate democratic and human rights outcomes of any state-building project. They create new state structures in which those who have most opposed democracy often retain a level of power, without having conceded their core conflict goals. From this perspective, understanding transitional justice to be linked to state building requires understanding it to be shaped by a very ambivalent, contested, and contingent process. Transitional justice, rather than reinforcing human rights imperatives, can be often understood to compromise them, as the framing of a "peace vs. justice" dilemma bears witness to. Negotiated outcomes to conflict and the compromises they produce—including compromises over accountability—are often seen, at best, as necessary evils.

Yet negotiated settlements are often one of the few ways to end protracted social conflict. Only two alternatives appear possible. The first is to let the conflict continue indefinitely, to "give war a chance" to produce a more just solution or a better balance of powers, as has essentially been tried in Syria.[43] Wars, however, tend to reward the party (or parties) who are stronger militarily and politically, rather than those with the most just cause, and they often lead to forms of chaos and unintended consequences. The second alternative is to marshal forms of international intervention to determine who wins and loses; but here the international community has no capacity for consistent or convincing adjudication of the situations in which it should intervene and tends

to be not very good at leaving behind a more peaceful and just country where regime change is achieved.

In practice, the problematic moral and legal compromises of negotiated ends to conflict are often—rightly—more palatable to human rights advocates and democratizers than either of these alternatives. As Justice Diego Garcia-Sayán put it in *El Mozote*, "Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and the State must achieve it."[44]

Many criticisms of transitional justice mechanisms in post-conflict contexts as imperfect focus on how the balance-of-power compromises of a peace agreement frustrate them. These criticisms in essence bemoan the peace-justice tradeoff that has taken place, and offer little in terms of a constructive response beyond wishful thinking that some other realpolitik had prevailed.[45] While the concerns are well founded and useful to articulate, it is also important to remember that the pursuit of peace has a normative imperative: it meets human rights concerns relating to the right to life and physical integrity, and it meets victims' and society's need for violations not to be repeated.

Without a ceasefire, constructing a rule-of-law future is impossible, and at best very partial forms of accountability can be achieved. In-country balances of power are real, and the international community has only limited tools, will, capacity, and legitimacy to affect them. Therefore, the starting point for any strategy for developing effective intervention must be to be realistic about the task and the related constraints and dilemmas. This involves understanding better the linkages between transitional justice and the complex nature of state reconstruction attempted by peace settlements.

CREATING POSITIVE "CHAIN REACTIONS": ENGAGING ACCOUNTABILITY OPPORTUNITIES

On the positive side, understanding this linkage can lead to better recognition of opportunities for advancing debates about accountability. Trying to figure out a formula for "which transitional justice mechanism works when" is perhaps less useful than to identifying the ways in which peace negotiations will be forced to engage with the past and considering how these can be shaped so as to move questions of justice and accountability forward rather than backwards. Discussions about responsibilities for and causes of conflict will create path dependencies: even the crudest of amnesties involve decisions as to the time period covered, types of persons exempt from prosecution, and types of

offenses to be covered, which open up possibilities for residual accountability but can also initiate broader justice debates and claims and galvanize victim constituencies. In other words, singular transitional justice events can trigger "chain reactions" which have unintended consequences in both good and bad directions; they can prompt new justice initiatives and attempts to keep accountability agendas on the table, or trigger other counter-claims. To a large extent, the development of transitional justice "toolkits" has been as much an attempt to support creative ways to deal with a past that keeps raising its head at key moments in diverse conflicts, by encouraging communities to define their own justice agendas and pursue them whenever the opportunity arises, as it has been an attempt to produce global diffusion of particular tools and mechanisms.

FROM BLUEPRINTS TO "HOOKS": TRANSITIONAL JUSTICE AS A "BATTLEFIELD"

International interveners also need to recognize that in conflict contexts what the transition is "from" and "to" remains much more contested than in many post-authoritarian cases. They must be aware of how technical decisions about institutional design have different consequences in terms of power.[46] Decisions that appear technical—such as the time period a transitional justice mechanism covers, the definition of the wrongs it deals with, and whether human rights law or humanitarian law standards are used—all have highly political consequences as regards who will be held accountable. Time periods may capture some phases of the conflict but not others in ways that are biased between actors in the conflict; whether wrongs are framed in terms of human rights or humanitarian law will determine the extent to which the accountability of state or nonstate actors is contemplated; and definitions of crimes as "political," conflict related, or merely criminal will involve judgments about the nature of the conflict and the parties' motivations that are closely linked to meta-conflict negotiations. International actors may not always be aware of these linkages, but conflict parties will be, and they will be negotiating transitional justice mechanisms with a high degree of awareness of their impact on the balance of power. Conflict parties will always have greater knowledge of where responsibility for atrocities lies and which technical approaches evade which forms of accountability.

The difficulty with international blueprints and toolkits for conflict-related transitional justice is that they often appear to contemplate transitions as linear, accountability as synonymous with criminal process, and "truth" as

simple and unitary. From this perspective, choices about institutional design can appear stark and permanent. Transitional justice mechanisms are assumed at the point of creation to be providing the last word on accountability; amnesties are assumed to be putting a full stop to trials, when we now know that, over time, new mechanisms and trials are likely to find ways to emerge. Instead, modest approaches may be useful. Transitional justice mechanisms or amnesties should be understood not as once-off "events" that operate as an "end of (domestic) history" moment, as either "good or bad," but as part of a political settlement process that can be influenced to move the protection of human rights forwards rather than backwards. Investing in events as singular and final may lead to a failure to consider in advance what should happen with amnesties or truth commissions to which parties commit in peace agreements in the event they renege and return to war, leaving institutions stranded and creating problematic tasks (such as prisoner recall). As a result, opportunities can be missed with regard to nuancing particular past-focused mechanisms in ways that might anticipate and enable different choices about accountability in the future. From this perspective, the important focus of international and domestic actors with relatively little influence should be less on accepting or condemning particular institutions and language on accountability, and more on working to ensure the appropriate "hooks" that can be inserted at each stage of an imperfect process to enable rather than inhibit new forms of accountability at a later stage when more accountability may be possible, and even desirable and required.

International interveners could also be more prepared to take a longer view of how the past will need to be contended with, and work creatively with a number of simultaneous transitional justice mechanisms, some of which they will have sought and some of which they will have tolerated, that pull in slightly different directions with little coordination. Viewing different mechanisms as "different horses for different courses" might be useful for creating different pathways for different issues in ways that avoid some of the straightforward compromises of unitary holistic mechanisms, even if some of the pathways seem imperfect and the resultant transitional justice landscape a little chaotic. So, for example, multiple different transitional justice mechanisms operating with a level of inter-institutional pluralism while appearing to tell complicated and contradictory stories can, in fact, usefully serve to "complicate" the past, so as to disrupt the ways in which parties to the conflict rely on it to underwrite claims to power. Failure to recognize the messiness of transitional justice mechanisms as reflecting, in part, the messy realities of the conflict can result

in a loss of opportunities to move away from a focus on ideal institutions. Such a change in focus is needed if the parties are to contemplate how to provide for ongoing processes in which they can continue a national deliberation process over accountability issues that are seldom black or white and truth that is seldom simple and unitary.

UNDERSTANDING POST-CONFLICT TRANSITIONAL JUSTICE AS META-BARGAIN

The search for a societal narrative that limits "permissible lies" about the past is important to moving the new power map from particularistic bargain to constitutional framework. It is important for international interveners to understand that transitional justice mechanisms do not just serve individual accountability requirements, but often also play a key role with regard to stabilizing and extending the fragile meta-bargain by providing a shared narrative of the rights and wrongs of the conflict capable of underwriting a new political and constitutional settlement. This is a complicated area for international intervention, as societal narratives are closely bound up with attempts to define and create a concept of political community at the heart of the state—in some senses a preeminently domestic political project. For international interveners to attempt to shape the narrative is therefore difficult, and even inappropriate and counterproductive. However, external interveners sometimes tend to see narratives as a "soft" alternative to individual accountability and underinvest. By at least recognizing this dimension of transitional justice to be legitimate, necessary, and instrumental in enabling the state to function, it can perhaps be better supported as an important contribution to building the type of political consensus that must underlie constitutionalism and other projects of state reform. The attempt to define and create a political community operating in a frame of public power is a project of constitutionalism that always involves both particularistic power bargains born of the balance of power at the moment of agreement and the aspiration to a longer-term, value-driven basis for government.[47]

In summary, a need exists for recognition of the distinctness of conflicts, their particular conflict resolution imperatives, and the ways in which transitional justice language and mechanisms are strategically deployed by parties, including international intervenors. This recognition can be useful in enabling the design and pursuit of transitional justice initiatives that take account of the power dynamics that will give them meaning or constrain their operation, but understand that those dynamics will change over time. Such a conclusion appears frustratingly at odds with worthy international attempts to provide

guides and blueprints. However, it sits with the recognition that not all truth commissions are the same, not all serve human rights purposes, and, conversely, not all are "second best" to human rights trials. Context is everything.

CONCLUSION: REFRAMING TRANSITIONAL JUSTICE AS "CONTENDING WITH THE PAST"

In conclusion, it may be best to understand post-conflict transitional justice not as the pursuit of accountability but, rather, as a process of "contending with the past" in ways that help society move beyond it. Where transitions from authoritarianism sought a form of justice that could enable the move to democracy, transitions from conflict have sought ways of dealing with the past that enable the move to peace. The need to deal with the past involves accountability but crucially also nonrepetition. Both ending the conflict and accountability have human rights dividends and must be regarded as to some extent indivisible. Designing and assisting transitional justice mechanisms in such contexts requires thinking beyond the criminal accountability box. Rather than focusing on achieving particular mechanisms to particular specifications, it may be useful to focus more on how to create political and legal spaces in which societies can contend with the past in ways that keep justice agendas on the negotiating table to exert pressure on the political bargaining, while viewing a successful bargaining outcome as vital to nonrepetition.[48]

Peace processes are forward-looking state-building projects of providing political and legal institutions capable of serving as an alternative route to gaining access to power than that of violence. The transition is a project at once of justice and state building, which go hand in hand and, at different points, create dilemmas that can be managed but never entirely eliminated, and certainly not pretended away. This chapter has sought to argue that a key part of that context is the nature of political bargaining over the settlement or power map that will emerge, in which any turn away from violence is often only contingent, and will need to be consolidated rather than undermined by transitional justice approaches.

While the term "transitional justice" has been useful for capturing and creating a common discussion about how to deal with the past across very different contexts using a common suite of mechanisms, it can also obscure and cloak important differences of context and motivation in choice of transitional justice mechanism in different types of transition.[49] Interestingly, the special rapporteur position created in the area of transitional justice has avoided the

term transitional justice, instead using a title that speaks to multiple needs and functions relating to the past: the special rapporteur on "truth, justice, reparation and guarantees of non-recurrence."[50] These are needs that will not always be perfectly reconcilable at each moment in a peace process, but which all need pursued over time.

Sometimes societies begin to contend with the past through the very act of debating what their specific transitional justice mechanisms should look like and be used for. The debate over when and how to deal with the past may initially be one of the key ways in which the past is contended with. The key question for institutional design can be reframed from how to arrive at an end of history communal moment, to how to find spaces in which to contend with the past in ways that will enable different institutional responses, with different relationships to law, at different stages of conflict and peace processes. The past will need to be contended with on an ongoing basis, and it will indeed be contended with, come what may. Failure to provide constructive spaces in which to contend with it will not postpone contending with the past but will, rather, displace it to other arenas where it may be disruptive of political progress.

Better acceptance of the inevitable link between past and future might lead to more coherent institutional design focused on providing a useful space for contending with the past at any one time, rather than ideal-type institutional blueprints to resolve issues for all time. It might lead to more modest ambitions for some institutions in some situations; to toleration of a slightly chaotic landscape of multiple pluralist transitional justice mechanisms in others. It might also lead to evaluation of mechanisms less in terms of ambitious and inevitably on-going end-goals such as peace, democratization, accountability, or reconciliation, and more in terms of the simple question of whether an institution provided a useful and important space in which issues relating to the past could be fairly deliberated in ways that enabled the country to move further away from its past. On this measure, some of the early truth commissions in El Salvador and Guatemala and South Africa could be celebrated for what they were—important processes that enabled contending with the past in ways that bolstered the move towards democratic peace, in a form appropriate to their moment. They were of course imperfect, because the past in all those countries still needs to be contended with, still requires dedicated institutional space, now in different forms—because it remains a difficult and contested past that continues to affect the future.

NOTES

1 This piece was supported in part by the Political Settlements Research program funded by UK Department for International Development. Views remain the author's own.

2 See further Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008), 305–344, for the numbers of peace settlements and peace agreements.

3 See further Fionnuala Ní Aoláin and Oren Gross, *Law in Times of Crises: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), 328–9, 359–63.

4 See El Salvador's San Jose Agreement on Human Rights, 1990, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/pa_es_07261990_hr.pdf; and Guatemala's Comprehensive Agreement on Human Rights, 1994, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/guat_hr_940329.pdf

5 See further the Inquiry website for its remit, "The Bloody Sunday Inquiry," www.bloody-sunday-inquiry.org.uk/; and Angela Hegarty, "Truth, Law and Official Denial: The Case of Bloody Sunday," in *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth,* ed. William A. Schabas and Shane Darcy (Dordrecht: Kluwer Academic Publishers, 2004), 199–246, for an account of the process.

6 See further Leonardo Franco and Jared Kotler, "Combining Institution Building and Human Rights Verifications in Guatemala: The Challenge of Buying in Without Selling Out," in *Honoring Human Rights: From Peace to Justice,* ed. Alice Henkin (Washington, DC: The Aspen Institute, 1998), 39–70, for an account of how human rights related to balance of power issues in Guatemala.

7 See further Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), 273–8.

8 See further Peter Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting," *Human Rights Law Journal* 17 (1996): 1–13, 2.

9 See further Indemnity Act 36 of 1990.

10 National Peace Accord, 14 September 1991.

11 For information about the Commission and a copy of its reports, see African National Congress, "Goldstone Commission," www.anc.org.za/themes.php?t=Goldstone Commission.

12 See African National Congress, Skweyiya Commission, *Report of the Commission of Enquiry into Complaints by the Former African National Congress Prisoners and Detainees, August 1992* (Bellville: Centre for Development Studies, 1992), http://www.anc.org.za/show.php?id=95', and Mostuenyane Commission, *Report of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members, 20 August 1993.*

13 Cf. Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3 (2009): 28–48.

14 See, for example, Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996, https://peaceaccords.nd.edu/site_media/media/accords/Abidjan_Peace_Plan_1996.pdf; Peace Agreements between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lome, 7 July 1999, http://www.sierra-leone.org/lomeaccord.html.

15 John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Oxford: Wiley-Blackwell, 1995), 1.

16 Act No. 200 of 1993, Parliament of South Africa.

17 See Christine Bell, "Dealing with the Past in Northern Ireland," *Fordham International Law Journal* 26 (2002): 1095–1147.

18 For one of the recent attempts to provide for a transitional justice mechanism, see Proposed Agreement 31 December 2013, "An Agreement Among the Parties of the Northern Ireland Executive, on Parades, Select Commemorations and Related Protests; Flags and Emblems; and Contending with the Past," www.northernireland.gov.uk/haass.pdf (this document was the fruit of an attempted negotiation between the parties by US Special Envoy Richard Haass, see further http://panelofpartiesnie.com/).

19 But there may be important differences between whether power-sharing is "corporatist" or "liberal," see Brendan O'Leary, "Debating Consociational Arguments: Normative and Explanatory Arguments," in *From Power-sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies*, ed. Sid Noel (Montreal: McGill-Queen's University Press, 2006), 3–43.

20 Carl Maria Von Clausewitz, *On War* (Princeton: Princeton University Press, [1873] 1976), 75.

21 General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM (1996) [hereafter DPA], http://www.ohr.int/dpa/default.asp?content_id=380.

22 See Uganda: Annexure to Agreement on Accountability and Reconciliation, 29 June 2007, http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf; Colombia: Leye 975 de 2005, *Justicia de Ley y Paz* (julio 25), Diario Oficial No. 45.980 de 25 de julio de 2005, http://www.fiscalia.gov.co:8080/Documentos/Normativa/LEY_975_250705.htm; and measures on the past in the more recent Acuerdo Final (final peace accord) 24 August 2016 in Colombia (agreed by the parties but subsequently rejected by a narrow majority in a public referendum), (in Spanish) https://www.mesadeconversaciones.com.co/sites/default/files/acuerdo-final-1473286288.pdf.

23 See U.N. Security Council, 54th Year, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone* 1999 (New York: Official Record S/1999/836, 1999), para 7.

24 The Special Court for Sierra Leone, "The Residual Special Court for Sierra Leone," www.rscsl.org/.

25 Sierra Leone Truth and Reconciliation Commission, "Witness to Truth," www.sierraleonetrc.org/.

26 Eva Bertram, "Reinventing Governments: The Promises and Perils of United Nations Peacebuilding," *Journal of Conflict Resolution* 39 (1995): 387–418.

27 See, e.g., Inter-American Digest, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, http://www.cidh.oas.org/pdf%20files/Colombia-Demobilization-AUC%202008.pdf. See also *Gustavo Gallón Giraldo y Otros v. Colombia* Sentencia C-370/06, Corte Constitucional de Colombia, 2006.

28 Inter American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of October 25, 2012 (merits, reparations and costs), Concurring Judgment of Diego Garcia-Sayán, http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf, para 9.

29 Ibid., see in particular paragraph 37.

30 See further "Court Throws Out El Salvador Civil War Amnesty Law," BBC News, July 15, 2016, http://www.bbc.co.uk/news/world-latin-america-36800699. See Amnestía Sentencia 44-2013/, http://ow.ly/d/51gl.

31 For review of this jurisprudence, see Antoine Buyse and Michael Hamilton, eds., *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: Cambridge University Press, 2014).

32 *Jordan v UK* (2003) 37 EHRR 2 (ECtHR).

33 Kieran McEvoy and Kirsten McConnaghie, "Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy," *European Journal of Criminology* 9 (2012): 527–538.

34 Fionnuala Ní Aoláin and Colm Campbell, "The Paradox of Transition in Conflicted Democracies," *Human Rights Quarterly* 27 (2005): 172–213.

35 See further Christine Bell, "Of *Jus Post Bellum* and *Lex Pacificatoria*: What's in a Name?" in *Jus Post Bellum: Mapping the Normative Foundations,* ed. Carsten Stahn, Jennifer Easterday, and Jens Iverson (Oxford: Oxford University Press, 2014), 181–206.

36 See, for example, Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13 (2002): 5–21; Volker Boege et al., "On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility," *Berghof Handbook for Conflict Transformation* 8, Online Version (2008); Roger MacGinty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Houndmills, Basingstoke, UK: Palgrave Macmillan, 2011); Roger MacGinty, "Hybrid Peace: The Interaction between Top-down and Bottom-up Peace," *Security Dialogue* 41 (2010): 391–412.

37 Gerhard Anders and Olaf Zenker, "Introduction," in *Transition and Justice: Negotiating the Terms of New Beginnings in Africa*, ed. Gerhard Anders and Olaf Zenker (Bognor Regius:

Blackwell-Wiley, 2014). See also Christine Bell, "The Fabric of Transitional Justice: Binding Local and Global Political Settlements," in *Transitional Justice*, ed. Christine Bell (New York: Routledge, 2016).

38 See, for example, Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice," March 2010, http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf, which sets out need to take account of political context and unique country context, and a need to address "root causes of conflict."

39 Ibid., but see also similar conclusions of other external interveners: e.g., "The Politics of Recovery: Elites, Citizens and States. Findings from ten years of DFID-funded research on Governance and Fragile States 2001-2010. A Synthesis Paper," London, UK Department for International Development, 2010; Jonathan Di John and James Putzel, "Political Settlements: Issues Paper," Governance and Social Development Resource Centre, June 2009; Edward Laws, "Political Settlements, Elite Pacts, and Governments of National Unity, A Conceptual Study," Development Leadership Program: Background Paper 10, August 2012.

40 International Center for Transitional Justice and Kofi Annan Foundation, "Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?" (New York: ICTJ, 2014). See also Matiangai V.S. Sirleaf, "The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-conflict Societies," *Cardozo Law Review* 35 (2014): 2263–2347.

41 Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–367.

42 Two of the key proponents of post-conflict accountability in Latin American transitions, Naomi Roht-Arriaza (in "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review* 78 (1990): 449–513) and Diane Orentlichter (in "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal* 100, no. 8 (1991): 2537-2615) argued, for example, that while wholesale amnesty could not be justified, neither was comprehensive prosecution required, and that some sort of focus on the most serious offenders and most serious abuses might satisfy requirements of accountability, concomitant with working with the "constraints commonly faced by transitional governments" (quote from Orentlicher, 2612).

43 Some do indeed argue that this results in a better balance of power and more stable settlement; see Edward N. Luttwak, "Give War a Chance," *Foreign Affairs* 78 (1999): 36–44.

44 See *El Mozote*, para 37.

45 Cf. Laura Davies, "Power Shared and Justice Shelved: The Democratic Republic of Congo," *International Journal of Human Rights* 17 (2013): 289–306; Andrea Armstrong and Gloria Ntegeye, "The Devil is in the Details: The Challenges of Transitional Justice in Recent African Peace Agreements," *African Human Rights Law Journal* 6 (2006): 1–25.

46 Cf. Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1 (2007): 23–44.

47 See Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2009).

48 The phrase "contending with the past" is artfully used in the Haas review in Northern Ireland 2013.

49 See further Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-field,'" *International Journal of Transitional Justice* 3 (2009): 5–27.

50 For mandate and work, see United Nations Office of the High Commissioner for Human Rights, "Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence," www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx.