TRANSITIONAL JUSTICE AS A NORMATIVE STRUCTURE: What to Expect When You're Expecting Accountability

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The study of transitional justice has benefited from extensive empirical analysis of accountability for atrocities. Specifically, the field of international relations has taken notice of the increasing institutionalization of international criminal law through ad hoc tribunals and the International Criminal Court (ICC), and the role that human rights norms and norm entrepreneurs have played in reconstructing deeply divided societies. But, how can international relations scholars theorize across the case studies of transitional justice and give due attention to context? What do we make of the consistencies and inconsistencies of transitional justice institutions? While the practice of transitional justice does not represent a series of unrelated cases that are solely the result of domestic contexts and actors, can we go so far as to say that that this phenomenon of international relations constitutes a norm or an international institution? I argue that we can theorize about transitional justice as a normative structure: a systemic and systematic collection of norms that constrains and enables the decision makers of transitional justice, and importantly, if not exclusively, constitute the corresponding institutional designs. This paper identifies four key elements of the normative structure of transitional justice: a hierarchical division of criminality; use of limited and conditional amnesties; localization of process and participants; and a discursive goal of reconciliation.

NORMATIVE STRUCTURES

"Normative structure" is an analytically useful concept, but difficult to define and differentiate from other concepts in the study of how, why, and when social and political actors will behave in a particular manner. Some scholars use the term very generally, i.e. the normative structure of world politics. Others, such as Martha Finnemore (1996), use the term with regard to a specific issue area, i.e. the normative structure of humanitarian intervention. Like norms and institutions, a normative structure can regulate and prescribe behaviour and constitute actors; however, a normative structure exists at a higher level of abstraction than an institution and has a greater degree of aggregation than a singular norm.[1] Further defining a normative structure draws on sociological insights into the constraining and enabling effects of structures, and constructivist scholarship on the constitutive and prescriptive effects of norms in world politics.

[1] Katzenstein (1996) defines norms as "collective expectations for the proper behavior of actors with a given identity" and can be classified as regulative, constitutive, and/or prescriptive. Norms can also be issue-specific or more generalized, as is the case with "meta-norms." In comparison, institutions are defined by Reus-Smit (1999) as "stable sets of norms, rules, and principles that serve two functions in shaping social relations: they constitute actors as knowledgeable social agents and they regulate behaviour." An issue-specific institution is identified as a regime, commonly defined by Krasner (1983; Hasenclever, Mayer and Rittenberger, 1998) as "implicit or explicit principles norms, rule and, and decision-making procedures around which actors expectations converge in a given area of international relations."

A normative structure contains a collection of norms that shapes the identities and interests of social and political actors, and constrains and enables their behaviour in a given issue area. Communication and the "reciprocal interaction" between actors allow the structure to endure in a manner that is both "systematic and systemic" (Reus-Smit, 2005: 196-197; Gurowitz, 2008; Finnemore, 1996: 154; Wiener, 2004: 190). What is "structural" about it is the constraining and enabling effects; what is "normative" is the prescriptive and constitutive effects. There are two particularly unique and advantageous aspects of the concept of normative structure: it allows for a consideration and understanding of normative conflict; and it takes seriously the dynamic interaction between domestic and international units of analysis and indeed and allows for multiple sources of structuration.

As a normative structure contains a *collection* of norms, some of these may be inconsistent or incoherent and therefore create a degree of normative conflict. Reus-Smit (2005: 198) explains that "norms may conflict with one another in their prescriptions, which makes moral argument about the relative importance of international normative precepts a particularly salient aspect of world politics." Normative conflict is not only expected, but is argued to be a defining element in the early stages of a norm "life-cycle" when an emerging norm is contested by "embedded alternative norms and frames that create alternative perceptions of both appropriateness and interest" (Finnemore and Sikkink, 1998: 897). Furthermore, as Finnemore (1996: 2) argues, normative conflict is productive and necessary for political change. She states that normative conflict can create change over time and "as internationally held norms and values change, they create coordinated shifts in state interests and behaviour across the system." Therefore, normative conflict among different norms in the structure is not to be viewed as disconfirming the existence of a normative structure, but rather an expected and necessary act of contestation in order for a normative structure to endure and create political change.

One common area for normative conflict to occur is between competing domestic and international normative structures. The literature on this subject is vast and addresses issues such as norm compliance, diffusion, entrepreneurs, and behavioural logics of appropriateness and consequences. What is most relevant for this discussion of normative structures is what the norms literature has to say about the dynamic interaction between the international and domestic levels and how this produces change. As Reus-Smit (2005: 201) argues, this kind of "holistic scholarship" (i.e. that bridges the international and domestic domains) "has the merit of being able to explain the development of the normative and ideational structures of the present international system, as well as the social identities they have engendered." So, what is the relationship between the international and domestic norms and actors?

Finnemore and Sikkink (1998: 893) state that "many international norms began as domestic norms" and "international norms must always work their influence through the filter of domestic structures and domestic norms…" With respect to the latter direction of analysis, some scholarship addresses the agents of norm diffusion, specifically transnational advocacy networks and international organizations (Risse-Kappen, 1996; Finnemore, 1996; Keck and Sikkink, 1998; Risse and Sikkink, 1999). Others have assessed how and why international norms achieve compliance at the domestic level (Gourevitch, 1978; Legro, 1997; Checkel, 1999). Cortell and Davis (2000: 70-71) draw on this literature and identify three measures of an international norm's salience at the domestic level: appearance in domestic discourse, changes in national

institutions, and state policies. Of these three measures of salience, they argue that "discourse is the most important if also the least objective" because "discourse will precede and accompany changes in institutions and policy….and provide insights into 'nonevents' that may be norm-governed" (Cortell and Davis, 2000: 71). The role of discourse figures prominently in the creation and endurance of a normative structure, particularly when communication among actors reflects agreement and/or conflict.

A redirection of this type of analysis focuses on how and when domestic norms are able to become internationally legitimized and institutionalized. It is often argued that the domestic level is most important for emerging norms and "domestic influences lessen significantly once a norm has become institutionalized in the international system" (Finnemore and Sikkink, 1998: 893). This is significant as it is at the earliest stages of a norm where contestation occurs and the discourse is framed, but this does not necessarily privilege the domestic level in shaping the normative structure of a given issue area. As Cortell and Davis (2000: 75) caution,

> "the fact that legitimating discourses are bounded by prevailing domestic understandings should not obscure the dynamic nature of the relationship between domestic and international normative structures. Both are usually evolving. This implies that the match between the two sets of normative structures may change over time –both greater consonance and dissonance are possible…"

Therefore, the assessed relationship between the domestic and international must be holistic in order to understand the discourses and normative conflicts that create political change.

Applying the concept of normative structure to a given issue area requires taking the elements of normative conflict and domestic-international interaction into consideration. The field of transitional justice has rarely been analyzed in a theoretically holistic manner and is often subject to division by normative assumptions (i.e. order vs. justice), institutional typologies (i.e. trials vs. truth commissions), or levels of analysis (i.e. international vs. domestic policies). These approaches have ignored the "systemic and systematic" evolution of a normative structure of transitional justice and left unaddressed the sources of conflict and change. Additionally, careful attention must be paid to which norms are espoused and justified in which domain, and when and where they come into conflict. The remainder of this analysis will assess transitional justice as an international normative structure and identify four key elements that have been born of normative conflict and political change.

THE NORMATIVE STRUCTURE OF TRANSITIONAL JUSTICE

Previous generations of transitional justice have been characterized by the relegation of restorative justice to the periphery of local communities and legitimized retributive justice as a mainstay of the international community. The South African Truth and Reconciliation Commission, the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda, and widespread blanket amnesties in Latin America are the starkest examples of the pattern. While these institutional differences seem clear cut, the study and practice of transitional justice has

been wrought with contradictions and inconsistencies. The international community's political will for prosecution was always directed against the leaders and organizers of mass violence. Yet amnesties for these elite perpetrators were sometimes tolerated and even justified as a means to stability. Conversely, the use of restorative justice strategies for low-level perpetrators was left to domestic institutions but often considered illegitimate by the international community because they offered amnesties in exchange for other transitional justice goals, i.e. truth, stability, and reconciliation. The institutionalization of these dichotomies and inconsistencies delegitimized some transitional justice strategies in favour of others, and distorted a balance between international leadership and local ownership that is needed for justice to affect reconciliation.

As such, there have been important changes in the normative structure of transitional justice. In this paper I demonstrate that a dynamic relationship between cosmopolitan and communitarian justice values and a process of institutional learning have reconstituted the contemporary normative structure of transitional justice. The subsequent institutional mandates and discourse of transitional justice articulates and justifies a norm of "accountability", which does not confine itself to trial and punishment, nor is it permissive of blanket amnesties. "Accountability can take many forms. Aside from imprisonment, it can take the form of a condemnation spoken by a public authority, shame imposed by a public, and reparations" (Philpott, 2006: 23). Therefore, this norm has become institutionalized with the combination of both retributive and restorative justice principles and processes. I argue that the following institutional and ideational components of the normative structure of transitional justice reflect this norm of accountability: a hierarchical division of criminality; limited and conditional amnesties, a localization of process and participation, and a discursive goal of reconciliation.

Hierarchical Division of Criminality

While international laws against war crimes, genocide, and crimes against humanity demand that these crimes be prosecuted and punished, the reality is that neither the international community nor domestic judicial institutions have the capacity to prosecute and punish all those responsible for atrocities. Additionally, there are important differences among the participants of extraordinary crimes; in fact, it is the ordinariness of many perpetrators and their motivations that has reconstituted the normative structure of transitional justice. Legal and social distinctions between elite and lower-level perpetrators have resulted in a division of labour between retributive and restorative justice institutions. This division of criminality has forced complementarity between different types of transitional justice institutions and increased the co-dependence of their successes and failures.

The distinction between elite and low-level perpetrators reflects an understanding of how and by whom atrocities are committed, and the social and political environments that sanction their crimes. Elite perpetrators often justify their crimes by citing a duty or obligation to their superiors or state, a lack of knowledge of the extent of the crimes, and a claim of "necessity" to protect themselves or their country. Irrespective of the variety of justifications there is little disagreement over how to hold those "most responsible" (i.e. elite perpetrators, such as the leaders, organizers, and instigators of mass violence, accountable for their crimes) accountable for their crimes. Despite the extraordinary nature of their crimes, ordinary criminal law has increasingly been used to "recognize extreme evil and sanction it as a breach of universal norms"

(Drumbl, 2007: 3). International criminal law for atrocities has been institutionalized through international criminal tribunals that follow a Western legal tradition of trials and punishment of individual crimes. The international community, typically represented by the United Nations in this context, has often assumed responsibility for the trial and punishment of elite perpetrators and does so in judicial forums that are proffered to be politically neutral and legitimate. However, the extent of perpetration of atrocities extends far beyond the role of elite perpetrators who could not have carried out their plans without the popular participation of community leaders, religious figures, educators, and especially average citizens who either willingly participate or are forced into committing crimes.

How these "ordinary people" can commit "extraordinary crimes" is a disturbing aspect of contemporary cases of mass violence. In contexts as disparate as Cambodia, Yugoslavia, Rwanda, East Timor, and Sierra Leone, average citizens actively participated in atrocities against strangers, neighbors and relations. There are a variety of motivations for these perpetrators. On one end of the spectrum there are zealous participants whose racism, hatred and fear motivate their participation in atrocities. These types of perpetrators often serve as local leaders who organize criminal activity and use a variety of motivations and pressures to ensure the participation of those who may not share their extremism. An incentive for participation is sometimes material rewards, i.e. often the property and belongings of victims. Some participate out of a sense of responsibility or civic obligation and their participation in killing is correspondingly perceived as "work". This was commonly referenced among perpetrators of the Rwandan genocide who "worked" in groups throughout the day, and returned home afterwords with their rewards as if this were normal activity (Hatzfeld, 2003). This creates a sense of normalcy and collective responsibility in committing extraordinary crimes. Mark Drumbl (2007: 8) explains that "although widespread acts of extraordinary international criminality transgress *jus cogens* norms, they often support a social norm that is much closer to home. In such cases, participation in atrocity becomes a product of conformity and collective action, not delinquency and individual pathology." Finally, there are also many who are forced to participate in a "kill or be killed" scenario as there is little possibility to be neutral or a bystander without risking one's own life. This set of circumstances is particularly applicable to children who are abducted or recruited into armed groups and forced to commit atrocities against their own communities.[2]

What is to be done with these "ordinary people" who commit "extraordinary crimes" is complicated by a number of factors that are common to post-atrocity societies. First, prison and judicial systems in post-atrocity societies lack the capacity to deal with the tens, if not hundreds, of thousands of perpetrators. Judicial infrastructure and personnel are often targeted by extremists who seek to wipe out a regime that has been repressive. Regardless, even a fully operational and human rights-respecting prison and judicial system would not be able to address such a large number of perpetrators. Second, those "ordinary people" who have committed atrocities are reintegrated or still remain in the communities where their crimes were committed. On the one hand, their "ability to fit in suggests something curious, and deeply disquieting, about atrocity perpetrators: namely their lack of subsequent delinquency of recidivism and their easy integration into a new set of social norms" (Drumbl, 2007: 8). On the other hand, their mere presence creates fear, social distrust, and risks inciting vengeance. Therefore local communities

[2] The participation of children in atrocities is well known in the cases of Northern Uganda, Colombia, Sri Lanka, DRC, etc. and has produced an array of legal and social obstacles to justice and reconciliation.

demand that the crimes of the masses be addressed in some manner to avoid a resurgence of violence. Third, despite the extraordinary nature of the victimization, survivors of atrocities often desire a process of accountability that addresses their very ordinary and daily obstacles to moving past their victimization. These local obstacles are typically left unaddressed and unaltered by the process and outcomes of international judicial institutions whose institutional mandates often prevent them from offering forms of social and economic justice.

While it seems simple and obvious to distinguish between elite and low-level perpetrators, the institutionalization of this distinction is significant for the normative structure of transitional justice. I argue that the institutional response to the differentiation in degrees of perpetration and the needs of post-atrocity societies has been to transform the social hierarchy of perpetration into a legal distinction and institutional division of labour. There is consensus among the international community and within the societies affected by violence that those most responsible for atrocities should be held accountable through a retributive justice process – ideally at the national level, and if not, in an international tribunal. This is the exact purpose of the International Criminal Court, which is a court of last resort to prosecute and punish elite perpetrators. Alternatively, low-level perpetrators are often held accountable through non-traditional judicial mechanisms that have greater capacity and are more in tune with local expectations and communitarian norms of justice. These non-traditional judicial mechanisms are often restorative justice processes which operate at the communal level. Restorative justice focuses on community participation and judgment to encourage truth-telling, forgiveness, and reconciliation.[3] The social and economic benefits of restorative justice are as important for survivors as they are for perpetrators. Survivors can receive both knowledge and compensation from perpetrators, and perpetrators receive forgiveness and reintegration in exchange. In sum, two very different justice processes are deemed appropriate forms of accountability because they reflect a hierarchical division of criminality that is true to the degrees of perpetration, ameliorate local incapacity, and better meet the social justice demands of reconciliation.

That this institutional division is considered appropriate is evident in the increased use and accommodation of restorative justice practices by the international community and that willingness of local communities to "upgrade" their methods of dispute resolution to accommodate and coordinate with retributive justice processes in their jurisdiction.[4] This has largely been the result of a dynamic relationship between international and domestic justice expectations and institutions, evidenced by the increasing acceptance of communitarian justice values which were previously considerable to be off the table. The consequence of a hierarchical division of criminality and the increased complementarity of restorative and retributive justice is significant as the successes and failures of these institutions have become increasingly co-dependent. If one of these institutions fails, accountability cannot and is not perceived to be accomplished and reconciliation will be partial at best. For example, if only lower-level perpetrators are held accountable there is an inevitable perception of unfairness because those who planned and directed the masses were not punished. Likewise, if only elite perpetrators are punished the political and social impact on the post-atrocity society will be minimal as the reality of the survivor-perpetrator relationship is that they live in the same communities and desire assurances of both justice and stability. Furthermore, the carrots offered to perpetrators in a

[3] For a good discussion of restorative justice and its comparison to retributive justice see (Amstutz, 2006)
[4] This also is the basis of the complementary principles of the International Criminal Court.

restorative justice strategy can only be effective if the sticks of retributive process are a credible threat. Non-punitive sanctions, such as amnesties (which will be discussed in the next section), are only effective if there is a credible threat of punishment; perpetrators therefore have an incentive to confess, pay compensation, etc. if they know the alternative is surely imprisonment or the death penalty. The Truth and Reconciliation Commission in South Africa, the truth commission in East Timor, the Gacaca courts in Rwanda, etc all retained the possibility of trial and punishment if perpetrators did not participate in the restorative justice process. This interdependence is the key to overall effectiveness of multi-process transitional justice strategy.

Therefore, the significance of this element of the normative structure of transitional justice is that the conflictual and dichotomous relationship between retributive and restorative justice, and the alleged dilemma between prosecutions and amnesties that framed much of the initial debate, has been somewhat resolved with the division of labour created by a hierarchical division of criminality. The resulting complementarity and co-dependence of these institutions is perceived by the international and local communities as an appropriate and holistic measure of accountability. One of the main obstacles to justifying the use of retributive and restorative justice as complementarity and co-dependent methods of accountability is the range of sanctions applicable to perpetrators. Not surprisingly, lower-level perpetrators often receive lighter punitive sentences than elite perpetrators. However, it is the use of non-punitive sanctioning that proves to be an obstacle to the procedural complementarity of institutions and the perception that each process should hold perpetrators proportionately accountable. The use of amnesties is one such kind of non-punitive sanctioning that has been institutionalized and justified as a form of accountability that, with the proper limits and conditions, might make the goals of justice realizable.

Limited and Conditional Amnesties

Amnesties have gained currency as a legitimate and effective form of accountability and are now often embedded into the standard options of tribunals and truth commissions. They have therefore become part of the normative structure of transitional justice, albeit with a great deal of normative conflict. The Amnesty Law Database shows an upward trend in the use of amnesties worldwide since the end of World War Two: over 430 amnesties have been meted in out in this time and many of these occurred since the advent of the ad hoc tribunals (Mallinder, 2007: 209).[5] The debate of whether amnesty is impunity or accountability has been somewhat mediated by the above discussed hierarchical division of criminality. Limited and conditional amnesties are increasingly used as a form of accountability for low-level perpetrators, and justified in both pragmatic and idealistic terms by domestic and international actors. Alternatively, amnesties for elite perpetrators are considered off-the-table and previous offers of amnesties have recently been revoked. The remainder of this section will discuss what constitutes an amnesty in the normative structure of transitional justice and explain how limited and conditional amnesties have been justified.

Put simply, an amnesty is a pardon granted by a governing authority for a legal offense. As the debates surrounding their legality, legitimacy, and effectiveness suffer from grand

[5] According to Mallinder (2007), sixty-six of the total amnesties have been used between January 2001and December 2005.

generalizations about how they are used and to whom they apply, a brief typology of the many different amnesty practices is necessary.

a) *Self-accorded* amnesties are those granted by political leaders who pardon their own crimes.[6] Self-accorded amnesties are generally regarded as impunity of the worst kind.

b) *De facto* amnesties are undeclared and apply to perpetrators that have committed crimes but have not been held accountable by any means of transitional justice, i.e. an unofficial policy of doing nothing.[7] De facto amnesties are also generally regarded as blatant impunity.

c) *Blanket* amnesties are granted by a governing authority to a large group of individuals who have committed similar crimes (usually presented in the form of a general "amnesty law").[8]

d) *Limited* amnesties are those granted by a governing authority to specific groups or individuals for a specific set of crimes committed. In this circumstance, individuals are usually required to go through an amnesty application process to prove their eligibility.[9]

e) *Conditional* amnesties are granted by a governing authority in exchange for the perpetrator performing one or more of the following acts (usually in a public forum): acknowledgement, truth, apology, and compensation/restitution. It is important to note that blanket amnesties are sometimes conditional, whereas limited amnesties are almost always conditional. Generally speaking, the more limited and conditional the amnesty the more politically and legally palatable it is to the international community.[10]

Human rights activists, international lawyers, academics, and the United Nations have challenged the legality, legitimacy, and effectiveness of amnesties. Legally, amnesties for atrocities are not permissible under international criminal and human rights law because they violate victims' right to justice and the state's duty to investigate and prosecute these crimes. Since the early 1990s, the UN has been the biggest diffuser of international criminal and human rights law through transitional justice institutions; the UN gave mandates to tribunals for the

[6] The most prominent example of a self-accorded amnesty is that granted by Chilean dictator, General Augusto Pinochet, to himself and his accomplices in 1978.
[7] These undeclared amnesties are exemplified by the cases of the paramilitaries in Colombia, the RPF in Rwanda, and the Taliban in Afghanistan.
[8] The 1992 peace accord in Mozambique contained blanket amnesties for both sides of the civil war. The Ugandan government also created an Amnesty Act in 2000, which offers a blanket amnesty to all those who have committed offenses in an insurgency against the government. The Ugandan Amnesty Act of 2000 applies to all Ugandans who were previously or are presently engaged in war or armed rebellion against the government since January 26th, 1986.
[9] This was the case in South Africa where the Amnesty Committee of the Truth and Reconciliation Commission (TRC) received over 7,000 applications. The TRC limited amnesty to politically motivated crimes, and excluded crimes committed out of racism and/or malice.
[10] Of the blanket and limited amnesties in South Africa, Uganda, East Timor, and Rwanda, the conditions of acknowledgement, truth-telling, apologies, and compensation were a significant part of the process.

former Yugoslavia, Rwanda, East Timor, Sierra Leone and Cambodia. Given the UN's prominent role in post-conflict societies, it is instructive to note that it claims not to use amnesties as standard practice: "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights, where we are mandated to undertake executive or judicial functions" (United Nations, 2004: 5, para 10).

Amnesties also face accusations of illegitimacy from the international human rights community. Self-accorded amnesties and blanket amnesties offered to negotiate an end to violence are often justified as a necessary tradeoff of justice for peace. This is seen as illegitimate by those who argue that justice should be free of politicization and not subject to use as a bargaining tool. The effectiveness of using amnesties to bring about peace and reconciliation[11] has also been seriously debated (Snyder and Vinjamuri, 2003/2004; Mendeloff; 2005; Sikkink and Booth-Walling, 2007). While the provision of amnesties may bring about a temporary peace among political elites, reintegrating perpetrators back into the communities where their living victims remain can often incite revenge violence and population displacement. Furthermore, it has been argued that amnesties embolden future perpetrators by institutionalizing impunity and guaranteeing that they will be able to negotiate their way out of justice.

Despite strong moral arguments against them and legal and human rights efforts to prevent them, the use of amnesties is increasing and the normative structure of transitional justice has reflected both pragmatic and idealistic justifications for it. The primary pragmatic justification for amnesties is the aforementioned tradeoff of justice for peace. This is particularly true in contexts where accountability is part of the negotiation to end an ongoing conflict, or if the peace that has just been brokered is threatened by spoilers and weak institutions (Snyder and Vinajmuri, 2004/2005). This concern was at the forefront of justifications for the widespread use of amnesties in Latin America and in the contemporary case of Northern Uganda. In these types of political and security contexts, "the fear of retribution by those perpetrators may convince even the staunchest human rights advocate that amnesties are preferable to coups" (Sriram, 2004: 10).

Another pragmatic justification for the use of amnesties is that post-atrocity societies commonly lack the capacity to prosecute and punish tens of thousands of perpetrators. The physical and human resources needed to process, try, and imprison the large volume and variety of perpetrators is simply absent in these contexts. The aforementioned distinctions between the degrees and contexts of criminality come into play here. In order to mitigate to problem of institutional incapacity and lengthy judicial processing time, low-level perpetrators of lesser crimes are offered amnesties to unclog the judicial and penal systems. Alternatively, amnesties for the small minorities of elite perpetrators are still considered off the table are and typically these individuals are processed and detained in completely separate institutions from low-level perpetrators.

The increasing legitimacy at the international level of using limited and conditional amnesties stems from the local legitimacy and ownership attached to communitarian dispute resolution practices, which can conceptualize justice in different ways. It follows then that an additional

[11] In fact, even the conceptual validity and utility of "reconciliation" is increasingly being questioned by transitional justice scholars and practitioners – an issue which I will return to later in this article.

justification for amnesties is that they can enable non-punitive transitional justice goals, i.e. truth, compensation, reintegration, and social reconstruction; these goals are often central to restorative justice strategies and community dispute resolution mechanisms. Limited and conditional amnesties require an exchange, or trade-off, of truth and possibly compensation from the perpetrator in return for a pardon from the state and even sometimes the victims themselves. Furthermore, removing the threat of prosecution encourages displaced populations to return and reintegrate into their communities. The subsequent idealistic claim is that truth, compensation, and reintegration resonates with the lived realities of victim-perpetrator relationships that are in need of social reconstruction.

The empirical record shows that the practice of amnesties for atrocities is an increasingly used element of transitional justice. The criticisms of amnesties in general are sound but they do not apply equally to all types of amnesties. Self-accorded and blanket amnesties certainly violate standards of international criminal and human rights law. Such amnesties run the risk of creating further instability in the short term, and entrenching impunity in the long term. However, the use of limited and conditional amnesties for low-ranking perpetrators through restorative justice practices has been met with less resistance from the international community and become an important element of the normative structure of transitional justice. Despite heavy initial resistance to amnesties from political, ethical, and legal perspectives, the international structure has come to embody the influence of domestic conceptions of accountability as inclusive of non-punitive sanctions.

Localization

The localization of transitional justice is the third element identified in the normative structure. To be considered legitimate and effective, transitional justice institutions increasingly involve international *and* local legal participants and seek to ensure that those victimized and implicated by atrocities participate in the process. As such, transitional justice institutions at the local (i.e. national or communal) level are now considered the ideal, whereas international institutions are a last resort. This aspect of the normative structure has not gone uncontested, and it often entails conflict between and among international and domestic agents and participants of transitional justice who may have different expectations and political motivations. This change corresponds to, but is not necessarily the equivalent of, the combined use of retributive and restorative justice strategies. To be sure, the international community has institutionalized retributive justice in many fora and has been slow to embrace and design restorative justice processes for atrocities. Likewise, communal groups often desire a form of accountability that is consistent with local and restorative traditions of dispute resolution. However, there are no straightforward correlations between retributive justice as international/cosmopolitan and restorative justice as domestic/communitarian. The international community has now not only sanctioned but mandated restorative justice institutions, such as the truth commission, and domestic institutions and policies of transitional justice are recognizing the pragmatic necessity of complementary approaches to accountability. Therefore, the focus here will not be retributive versus restorative justice but on the international/local nexus as the dynamic element in the normative structure of transitional justice.

To "localize" transitional justice means several things. First, it is to involve local participants in the process as witnesses and legal and administrative personnel. At the communal level, using local participants can often lead to more collective participation in transitional justice and a sense of ownership over the process and outcomes. Second, localization requires incorporating local laws and legal customs in addition to respecting international standards of criminal law. This is precisely where localization correlates with the use of restorative justice, the processes of which can be incorporated into an internationalized and retributive institution, or it can define a separate institution that is complementary to a retributive one. Third, localization also means physically situating transitional justice institutions in the territory where the crimes were the committed and the perpetrators and survivors continue to live. This is a departure from the models of the Nuremberg Tribunal and the ad tribunals for Yugoslavia and Rwanda that were purposely isolated from the societies affected by violence in an effort to free the institutions from politicization and interference.

The use of hybrid institutions has become a popular way to localize transitional justice. The mix of international and local institutional characteristics is what defines a hybrid tribunal. This entails international and local participants, a national location and jurisdiction, and a combination of international and national laws that can have a dramatic impact on issues such as legal representation and the death penalty. Naomi Roht-Arriaza (2006: 10) argues, "in theory, these hybrid institutions can combine the independence, impartiality and resources of an international institution with the grounding in national law, realities and culture, the reduced costs, and the continuity and sustainability of a national effort." The Guatemalan Historical Clarification Commission (1994) and the Haitian Truth and Reconciliation Commission (1995) "pioneered the use of 'hybrid' institutions", which have now proliferated to the post-conflict societies of Kosovo (1999), East Timor (2000), Sierra Leone (2002), and potentially Cambodia (2003) (Roht-Arriaza, 2006: 10).

What are the justifications for localizing transitional justice? The 2004 Secretary-General's Report on *The rule of law and transitional justice in conflict and post-conflict societies* (United Nations, 2004: 6, para 15) articulates some of these changes in the normative structure of transitional justice with particular emphasis on localization; the report stresses involving the local level at the consultation stage of designing transitional justice institutions, and states that the "United Nations is looking to nationally led strategies of assessment and consultation carried out with the active and meaningful participation of national stakeholders." The report goes one step further and even equates the "most successful transitional justice experiences" with the "quantity and quality of public and victim consultation carried out" prior to institution building (United Nations, 2004: 7, para 16). Another justification for localization is the goal of fostering local ownership over transitional justice. Local ownership is an ill-defined concept often associated with peacebuilding in transitional societies. In most cases, local ownership means local actors are designing, managing, and implementing transitional justice policies and institutions. Local ownership is easiest with community based processes, however local ownership of international institutions is also possible if those responsible for its implementation foster awareness and engagement of the institution in order to give it value and relevance to the local population. The United Nations (2004: 7, para 17) has learned that local outreach and legitimacy was a major failure of the ad hoc tribunals and recommends that they "must learn

better how to respect and support local ownership, local leadership and a local constituency for reform…"

This discussion of the normative structure so far relates to the conceptual and procedural elements that guide transitional justice institutions. It is equally important to establish how the normative structure has created expectations about the outcomes of transitional justice institutions. Is their purpose to ensure stability and security? If so, for who? Alternatively, is accountability for atrocities expected to achieve reconciliation in a deeply divided society? The concept and measure of reconciliation is often equated with the success of transitional justice institutions. The following will discuss how reconciliation is treated in the normative structure of transitional justice and with what implications for outcomes.

Discursive Goal of Reconciliation

The concept of reconciliation and its place in transitional justice is hotly contested. Reconciliation is sometimes referenced as the ultimate measure of success for transitional justice. Conversely, some contend that transitional justice cannot promise reconciliation, which is personal and subjective, and therefore not the stuff of politics or justice. This raises a number of empirical and normative questions. What is reconciliation and which persons or groups are to be reconciled? Do restorative justice institutions have the monopoly on reconciliation, or can retributive justice also achieve this goal? How do we know if reconciliation has been achieved? Should reconciliation be a goal of transitional justice institutions and how is the discourse of reconciliation part of the normative structure?

Reconciliation means the "restoration of right relationship" (Philpott, 2006: 14) "between antagonistic or formerly antagonistic persons or groups" (Hayner, 2001: 155). Reconciliation can be social and/or political, and as such it can occur among and within several levels of society. Transitional justice commonly seeks to affect social inter-communal reconciliation and political reconciliation between political elites, or between political elites and society. The intended targets, or beneficiaries, of reconciliation will highly depend on the context of the violence itself and which groups constitute the perpetrators and victims. For example, in Latin America and South Africa the crimes committed by political elites and the complicity of state institutions in killings, disappearances, and torture, required that post-conflict governments acknowledge and take responsibility for past crimes. In cases where large numbers of "ordinary people" committed atrocities, such as Rwanda, it is communal and individual relationships that must be repaired.

The feasibility of achieving reconciliation with transitional justice institutions has ebbed and flowed with changes in institutions designs. In previous generations of transitional justice, reconciliation did not transcend the boundaries between retributive and restorative justice. The UN mandates "creating the ICTY make no mention of the need to build foundations for social reconstruction in the former Yugoslavia" and while the mandate for the ICTR made reference to reconciliation as a goal, it created no means with which to do so (Fletcher and Weinstein, 2004: 37). Fletcher and Weinstein provide a comprehensive account of how and why trials have little effect on reconciliation (2002). Drawing from their extensive interview data in Bosnia, they demonstrate that the selectivity of prosecution in trials leaves out accountability for ordinary

citizens swept up by the violence and the masses of bystanders, therefore rendering justice incomplete. Additionally, they insightfully explain that individualizing guilt "may contribute to a myth of collective innocence", which distorts the truth and hinder the healing of victim-perpetrator relationships (Fletcher and Weinstein, 2002: 580). Fletcher and Weinstein (2002) therefore argue that the selectivity of prosecution and individualization of guilt inherent in the legal paradigm is ill-suited to affecting the kind of communal and social healing required of reconciliation.

Thus, reconciliation was solely the purview of restorative justice institutions, particularly truth commissions, which provide communal healing processes in response to communal violence.[12] The National Commission on Truth and Reconciliation in Chile "was the first to use the term prominently – its TRC was a prototype for attempts at political restoration" and South Africa's Truth and Reconciliation Commission used the term "most famously – its TRC is the most ambitious socially restorative effort yet" (Philpott, 2006: 12). However, the contemporary normative structure no longer confines reconciliation to restorative justice institutions; "reconciliation now shows up regularly in political discourse" (Philpott, 2006: 12) and is so commonly referenced in institutional mandates and political justifications of tribunals and truth commissions that is has nearly become constitutive of transitional justice itself.

There are a number of drawbacks with the concept and practice of reconciliation. First, many find the concept to be too imprecise or malleable to be of analytical use. Stover and Weinstein (2004: 5) contend that reconciliation

> "is a murky concept with multiple meanings. Although reconciliation is a lofty and worthwhile goal, our studies have led us to question the validity of this vague assertion, the narrow perspectives of each of the disciplines that study and work with societies after mass violence, and the lack of attention to the opinions and wishes of those whose lives have been destroyed."[13]

Second, the "vocabulary of 'reconciliation' and 'healing' is based primarily upon theological and medical model", which excludes other cultural and political perspectives on the concept and may not resonate with all local contexts and communities (Fletcher and Weinstein, 2002: 600). Third, measuring reconciliation is highly contextual and requires extensive interviewing and surveying of conflict affected societies. Acquiring such sensitive information from populations is difficult to attain as there are inherent political, social, and ethical obstacles. Finally, reconciliation is often incorrectly conflated with stability. The conflation of stability and reconciliation has had important political consequences in post-conflict societies. Oftentimes, political elites will reference the relative harmony among communal groups, individuals, and a lack of military hostilities as a sign that the institutions of post-conflict societies have achieved reconciliation. Some will contend that a minimalist definition justifies reconciliation as "non-lethal coexistence," however, this kind of basic stability is merely a prerequisite of reconciliation and is

[12] There is an expansive literature on truth commissions as transitional justice (Popkin and Roht-Arriaza, 1995; Hayner, 2001; Boraine, 2001; Quinn, 2001; Mendeloff, 2005).

[13] Given the extent to which the contributors to Stover and Weinstein's volume have spent time with victims and perpetrators of mass violence, and the volumes of interview data they have produced as a result, it is particularly relevant that they find the conceptual utility of reconciliation to be problematic.

not indicative of the kind of mended relationships between perpetrators and victims that will prevent a resurgence of mass violence.

Reconciliation is addressed here as part of the normative structure of transitional justice by identifying how and by whom the concept is used, and with what implications for institutional outcomes. The purpose here is not to "measure" reconciliation in post-atrocity societies nor do I make a normative argument that reconciliation should be a goal of transition justice. In the contemporary normative structure of transitional justice, reconciliation is an explicit element of political discourse among political and civil society elites and identified in institutional mandates as a long term goal. However, evoking the concept of reconciliation can sometimes have perverse effects on the legitimacy of transitional justice institutions. Reconciliation can be used to justify the choice of a particular approach to transitional justice and thus garner a sense of legitimacy. Alternatively, reconciliation has also been increasingly evoked to justify political bargains and mask unresolved communal tensions that have the potential to disrupt political stability.

CONCLUSION

In summary, this paper has described four key elements of the normative structure of transitional justice. First, a hierarchical division of criminality has corresponded to a complementary and codependent relationship between retributive and restorative justice institutions. Second, limited and conditional amnesties are justified if they are limited to low-level perpetrators and conditioned upon truth-telling, compensations, etc can therefore enable the realization of non-punitive goals of transitional justice. Third, localization has influenced the mandates and processes of all varieties of transitional justice institutions. Localization, most often institutionalized through hybrid tribunals, requires the local participation and ownership over transitional justice through outreach awareness and cultural sensitivity. While localization brings with it more serious risks of failure, it also has greater potential to achieve reconciliation. Finally, the discursive goal of reconciliation is the fourth component of the normative structure of transitional justice. The concept of reconciliation increasingly justifies the choice and design of transitional justice institutions, but brings with it the stuff of politics that obscures the intended contributions of justice to conflict affected populations.

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