

Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice

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I. INTRODUCTION

The field of transitional justice was born out of a recognized need to address legacies of violence and widespread human rights violations in times of political transition. In doing so, it has also sought to fulfill a teleological impulse to nudge illiberal, imperfectly liberal, and newly liberal states onto a more democratic path. Particularly for the so-called “third wave” democratic transitions in Eastern Europe and Latin America, which helped shape the core paradigms and normative assumptions of the field,¹ the desired end point of the transition in question typically resembled a Western liberal market democracy.² The Western liberal paradigm undergirding the birth of the field of transitional justice has in turn helped to shape the scope and focus of justice delivered by its core mechanisms.³

In particular, the historically dominant liberal transitional justice paradigm has often resulted in a relatively narrow approach to questions of justice in transition that foregrounds physical violence, including violations of physical integrity and civil and political rights more generally, while pushing questions of economic violence and economic justice to the margins.⁴ It

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1. The “third wave” refers to a period of global democratization beginning in the mid-1970s that touched more than sixty countries in Europe, Latin America, Asia, and Africa. *See generally* SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1992).

2. *See* Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *HUM. RTS. Q.* 321, 325–26 (2009) (noting that the idea of a transition to democracy was the “dominant normative lens” through which political change was viewed in the early years of transitional justice practice and scholarship); *see also* Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 *J.L. Soc’y* 265, 273 (2008) (“‘Transition’, as normally conceived within transitional justice theory, tends to involve a particular and limited conception of democratization and democracy based on liberal and essentially Western formulations of democracy.”).

3. *See* Arthur, *supra* note 2, at 325–26 (exploring the idea that if the paradigmatic political transitions of the 1980s and 1990s had been conceived of as transitions to socialism, the scope, focus, and modalities of transitional justice might look quite different today).

4. *See generally* Dustin Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 *FORDHAM INT’L L.J.* 780 (2012). The reasons for the historic

has at times resulted in a “top-down” approach to justice,⁵ concerned more with the bargains between elite groups needed to sustain the political transition than with a more participatory approach to building democracy from the grassroots.⁶ It has tended to privilege the state, the international, and the purportedly universal over the local and the particular.⁷ And at times, it has shrouded itself in a discourse of technocratic legalism that threatens to obfuscate the underlying politics of transitional justice interventions.⁸ In this sense, transitional justice has often served to reflect many of the biases and predispositions of its parent field, international human rights.⁹

marginalization of economic violence are of course complex and multiple. I have argued elsewhere that two of the factors that help to explain the relative invisibility of questions of economic violence and economic justice are (1) an importation of implicit values and normative hierarchies from mainstream human rights discourse; and (2) the consequences of grounding the field in a paradigm of transitions to Western liberal democracy rather than in a paradigm of transitions to positive peace. *See id.* at 796–801.

5. Of course, the liberal paradigm that has served to undergird transitional justice does not itself necessarily dictate a “top-down” approach to questions of justice or peacebuilding. *See* Roland Paris, *Saving Liberal Peacebuilding*, 36 *REV. OF INT’L STUD.* 337, 363 (2010). At the same time, the close association between transitional justice and largely Western approaches to questions of justice, together with the field’s association with law, legalism, and international human rights more generally, often serves to privilege international institutions, norms, practices, and expertise in ways that may help to explain the historic “top-down” bias of transitional justice mechanisms. Whatever the exact reasons, a number of scholars and practitioners agree that “[g]overnments and international institutions, such as the United Nations, rarely, if ever, consult affected populations when formulating policies aimed at rebuilding post-war societies.” Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 206, 206 (Eric Stover & Harvey Weinstein eds., 2004).

6. Early scholars looking at the possible scope of transitional justice in a given context tended to look at the relative strength of elite groups with a stake in the outcome of the political transition. *See* SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991), *reprinted in* 1 *TRANSITIONAL JUSTICE: GENERAL CONSIDERATIONS* 65, 65–81 (Neil J. Kritz ed., 1995); GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986), *reprinted in* 1 *TRANSITIONAL JUSTICE*, *supra*, at 57–64.

7. Kora Andrieu, *Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm*, 41 *SECURITY DIALOGUE* 537, 541 (2010) (noting that “transitional justice seems to be strongly under the influence of [a] top-down state-building approach”); Chandra Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 *GLOBAL SOC’Y* 579, 591 (2007) (observing that “[t]ransitional justice, and in particular trials, are frequently imported from the outside and occasionally externally imposed”).

8. *See* Lundy & McGovern, *supra* note 2, at 276–77 (noting that “wider geo-political and economic interests too often shape what tend to be represented as politically and economically neutral post-conflict and transitional justice initiatives”); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 *HUM. RTS. Q.* 95, 98–106 (2008) (arguing that a superficial consensus as to the goals of transitional justice can serve to mask a deeper level of politicization and debate, and that assessment of the tensions, trade-offs, and dilemmas associated with transitional justice has become difficult to the extent that they have been conceptualized in apolitical terms).

9. *See, e.g.,* Makau wa Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT’L L.* 589, 592 (1996) (arguing that mainstream human rights theory and practice of the 1980s and 1990s sought to replicate essentially Western liberal models of governance); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *HARV. HUM. RTS. J.* 101, 109–10 (2002) (discussing the ways in which human rights discourse and practice have served to privilege certain elements, such as the state, the international, the individual, and the civil and political, while pushing other elements, such as the local, the traditional, and the economic and social, to the periphery).

Some three decades after the surge of democratic transitions that gave birth to the field, transitional justice is increasingly associated not just with narrow transitions to democracy, but with post-conflict peacebuilding more generally,¹⁰ occasionally even in illiberal states with little pretension to democratic transition.¹¹ While the shift to peacebuilding might suggest a broadening of transitional justice modalities, thus far the differences have been more superficial than substantive. In many instances, post-conflict transitional justice initiatives appear to have become yet another box to tick on the “post-conflict checklist.”¹² Along with initiatives to reform the security sector, strengthen the rule of law, and implement demobilization, disarmament, and reintegration programs, transitional justice is arguably on its way to becoming a core component of liberal international peacebuilding, another paradigm closely associated with transitions to liberal market democracy.¹³

10. The concept of “post-conflict peacebuilding” comprises a range of activities and programs carried out in the post-conflict context. DEP’T OF PEACEKEEPING OPERATIONS, U.N., UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 26 (2008), available at http://pbpu.unlb.org/pbps/library/Capstone_Doctrine_ENG.pdf. It was first defined by the U.N. in 1992 as “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid relapse into conflict.” U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Rep. of the Secretary-General*, ¶ 21, U.N. Doc. A/47/277-S/24111 (June 17, 1992), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/259/61/PDF/N9225961.pdf?OpenElement>. A broad and flexible term, it is now used by a number of organizations both in and outside of the U.N. in order to frame and organize activities relating to development, security, governance, and justice reform. See Michael Barnett et al., *Peacebuilding: What is in a Name?*, 13 GLOBAL GOVERNANCE 35, 52 (2007). Activities now commonly associated with post-conflict peacebuilding include efforts to disarm the previously warring parties, help former soldiers reintegrate into society, demine and destroy weapons, rebuild the security and judicial sectors, and repatriate or resettle refugees, as well as various forms of democracy and governance assistance, including monitoring elections. DEP’T OF PEACEKEEPING OPERATIONS, *supra*, at 26. For a general history of the evolution of the field of peacebuilding, see ROLAND PARIS, *AT WAR’S END: BUILDING PEACE AFTER NATIONALIST CONFLICT* (2004). Increasing connections between the range of post-conflict peacebuilding initiatives and transitional justice have been explored by a growing number of scholars. See, e.g., Chandra Lekha Sriram et al., *Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice* 13 (JAD-PbP, Working Paper Series No. 1, May 2009) (discussing increasing linkages between transitional justice and a broader set of peacebuilding activities); Alan Bryden et al., *Shaping a Security-Governance Agenda in Post-Conflict Peacebuilding* 223–25 (Geneva Ctr. for the Democratic Control of Armed Forces, Policy Paper No. 11, November 2005) (examining policy linkages between security sector reform; disarmament, demobilization, and reintegration; rule of law initiatives; and transitional justice); Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 209, 210 (Alan Bryden & Heiner Hänggi eds., 2005) (arguing that “[t]ransitional justice strategies should be understood as an important component of peacebuilding”).

11. Rwanda is one example of an illiberal state that has made great use of the transitional justice toolbox without strictly hewing to the democratization paradigm of earlier “third wave” transitions. See AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 389 (Phil Clark & Zachary D. Kaufman eds., 2009).

12. See generally Dustin Sharp, *Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique*, 14 CHI. J. INT’L L. (forthcoming 2013).

13. See Andrieu, *supra* note 7, at 541 (describing transitional justice as “an extensive part of the liberal peace ‘package’”).

All of this is not to say that the field of transitional justice should necessarily abandon a democratic transition or peacebuilding paradigm.¹⁴ On the contrary, this Article will argue that if transitional justice is to facilitate building positive peace, along with more democratic societies, transitional justice itself needs to democratize and pluralize its approaches, beginning with a rigorous interrogation of those items traditionally placed at the periphery of mainstream transitional justice concern.¹⁵ Among other things, this expansion of transitional justice would likely involve a greater embrace of participatory and community-level approaches to justice rooted in local norms and traditions,¹⁶ as well as a more holistic approach to the scope of justice issues addressed in transition, including questions of economic justice. The end result would be to bring some of the issues traditionally set in the background of transitional justice theory and practice into the foreground, and thereby strike a better balance when it comes to pursuing justice in transition. In turn, a greater balancing of the field's background and foreground, periphery and center, could also be one means of achieving a more honest and open engagement with the politics that undergird the transitional justice enterprise. Drawing upon Ruti Teitel's notion of three generations or phases of transitional justice,¹⁷ this Article will argue that these outlying and emerging "fourth generation" approaches and dilemmas deserve greater attention at the level of actual policy and practice.

There are small but increasing signs at the level of both theory and practice that transitional justice is diversifying some of its approaches, and that the dominant script of the early years of transitional justice is in fact slowly being rewritten, though the simultaneous normalization and institutionalization of the field might cast some doubt on the potential for radical change.¹⁸ At the same time, pioneering fourth generation efforts are already exposing practical, legal, and policy dilemmas that must be carefully scrutinized by scholars and practitioners.¹⁹ To this end, this Article will briefly look at some of the recent experiments in transitional justice in sub-Saharan Africa, ranging from truth commissions that have broken with tradition by foregrounding economic violence in their work to initiatives involving local or traditional approaches to questions of justice and reconciliation. While the results of these approaches have thus far been uneven, and occasionally

14. See Sharp, *supra* note 4, at 810–12 (arguing that grounding the field of transitional justice in a paradigm of "positive peace" would be one strategy to help transcend the field's roots in a more narrow push toward Western liberal market democracy).

15. The term "negative peace" refers to the absence of direct violence. It stands in contrast to the broader concept of "positive peace," which includes the absence of both direct and indirect violence, including various manifestations of "structural violence" such as poverty, hunger, and other forms of social injustice. See generally Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167 (1969).

16. See *infra* Part III.B for examples of emerging experiments with local justice practices.

17. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69–72 (2003).

18. See *infra* Parts III.B and III.C for a discussion of some of these changes in the field.

19. See *infra* Parts III.B and III.C for examples of a few of these dilemmas.

deeply problematic, they give some important clues as to where the resolution of fourth generation dilemmas must begin.

This Article will proceed in four parts. In Part II, I provide an overview of Ruti Teitel's transitional justice genealogy and outline some of the traditional concerns and preoccupations that have characterized each of Teitel's three eras.²⁰ In Part III, I analyze a few of the key dilemmas and preoccupations associated with what I call "fourth generation" transitional justice: the need to work towards a more honest accounting of the underlying politics of transitional justice work; the discourse of the local; and the invisibility of economic justice. Part IV concludes the Article by reflecting upon the larger implications of tackling fourth generation transitional justice concerns.

II. GENERATIONS OF TRANSITIONAL JUSTICE

While definitions of "transitional justice" vary, they generally attempt to capture a legal, political, and moral dilemma about how to deal with historic human rights violations and political violence in societies undergoing some form of political transition.²¹ While the practices associated with the field of transitional justice go back centuries, if not millennia,²² the surge in activities now associated with the term "transitional justice" is relatively recent, dating only to the early 1980s and 1990s.²³ The most iconic transitional justice mechanisms are perhaps the trial and the truth commission, but the field also includes a wider range of processes and mechanisms, including various forms of reparations, efforts to reform historically problematic institutions, the vetting and dismissal of abusive officials, and efforts to promote reconciliation and preserve collective memory.²⁴ It has been argued that transitional justice did not emerge as a distinct field of practice, policy, and study until at least 2000, though the

20. Teitel, *supra* note 17, 73–74, 78–89, 92–93.

21. For a review of how definitions of transitional justice have evolved over time, see Rosemary Nagy, *Transitional Justice as a Global Project: Critical Reflections*, 29 *THIRD WORLD Q.* 275, 277–78 (2008).

22. See generally JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004) (reviewing historic practices now associated with the modern field of transitional justice).

23. See generally KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011) (outlining a global crescendo of human rights prosecutions that began slowly in the 1970s and picked up steam in the 1980s and 1990s); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* (2011) (outlining the rapid spread of truth commissions across the globe beginning in the 1980s).

24. Many of these elements are captured in a definition of transitional justice offered by a landmark 2004 report by then-U.N. Secretary-General Kofi Annan: "[Transitional justice comprises] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

term itself was coined some two decades ago.²⁵ This somewhat paradoxical combination of ancient roots and modern development complicates any attempt to outline a transitional justice genealogy.

In a seminal 2003 article published in this Journal, Ruti Teitel identified three generations or “phases” of transitional justice.²⁶ The first phase effectively starts and ends with the Nuremburg Military Tribunals that began shortly after World War II, set up by the victorious Allied powers in order to prosecute high-ranking Nazi officials for war crimes and crimes against humanity.²⁷ While the importance of this tribunal’s legacy should not be underestimated, the Nuremburg moment itself was short-lived as the emergence of the Cold War soon closed down many of the possibilities for interstate cooperation necessary to support further international war crimes tribunals.²⁸ As a result, the world would not see another Nuremburg-like tribunal for more than forty years, until the United Nations Security Council created the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”) in the mid-1990s as a response to atrocities committed during war in the former Yugoslavia and the 1994 Rwandan Genocide.²⁹ Key debates surrounding the Nuremburg trials include questions of “victor’s justice” and the retroactive application of human rights laws and norms to past conduct.³⁰

After a period of dormancy following the Nuremburg tribunal, Teitel’s transitional justice narrative resumes with the explosion of democratic transitions associated with the end of the Cold War and the crumbling of the Soviet Union in the 1980s and 1990s. Phase II is characterized in part by a turn away from Nuremburg-style international tribunals and towards national-level prosecutions inside the newly democratized or democratizing states.³¹ For Teitel, this period represents a decline in rule-of-law standards

25. See Arthur, *supra* note 2, at 329–32 (tracing the history of the use of the term “transitional justice”); Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’* 3 INT’L J. TRANSITIONAL JUST. 5, 7 (2009) (arguing that transitional justice did not emerge as a distinct field until after 2000).

26. Teitel, *supra* note 17, at 69–72.

27. *Id.* at 69, 70.

28. See John Dugard, *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE L. J. 329, 329 (1997) (noting that “[t]he enthusiasm generated by Nuremburg and Tokyo for a permanent court in the immediate post war period was . . . abandoned during the Cold War”). Between 1949 and 1954, the International Law Commission prepared several draft statutes that would have led to the creation of a permanent international criminal court, but consensus proved impossible.

29. For a history of the genesis of the ICTY, see GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 206–275 (2000). For an overview of the formation of the ICTR, see Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY*, *supra* note 5, at 49–68.

30. For a detailed history of the Nuremburg tribunal, including an accounting of some of the debates and controversies surrounding it, see Bass, *supra* note 29, at 147–205.

31. Teitel, *supra* note 17, at 76. Indeed, as Kathryn Sikkink’s recent work has amply demonstrated, national-level prosecutions numerically represent the great bulk of worldwide human rights prosecutions. See SIKKINK, *supra* note 23, at 21. That said, the turn to national-level prosecutions during this era can be attributed in part to the fact that there were simply no international options available. Cold War politics had ensured that the Nuremburg tribunal did not lead to the creation of a permanent

to the extent that the transitional justice initiatives of the period fostered pragmatic compromises rooted in the “dilemmas inherent in periods of political flux.”³² As examples of this phenomenon, one might consider the amnesty offered to military officials in Argentina after an initial wave of prosecutions led to unrest and instability.³³ In South Africa, very few prosecutions took place at all, because impunity and preservation of the economic status quo were seen as necessary to ensuring a peaceful transition.³⁴ Perhaps reflecting this pragmatic balancing act, key concerns from this period—including whether there is a duty to punish egregious human rights violations under international law—spawned sharp debates in academic and policy circles relating to pardons and amnesties (peace versus justice), and to whether a truth commission could replace prosecutions as a viable form of justice (truth versus justice).³⁵ Phase II is also associated with an expansion of transitional justice concerns beyond trials and retributive justice to questions of restorative justice,³⁶ peace, and reconciliation, symbolized in part by the explosion of the truth commission as a global phenomenon.³⁷ During phase II, the diversity of initiatives around the globe and the inclusion of civil society organizations among the actors involved in these efforts began to create tensions between global and local decisionmaking when it came to how best to address questions of justice in transition.³⁸

In her third and final phase, Teitel describes how what began as a narrow, exceptional discourse has become a normalized response to post-conflict atrocity. In an era of “steady-state” transitional justice, the field has gone from the exception to the mainstream.³⁹ Increasingly, the question is not

international criminal court, as some had originally hoped it would in the immediate post-World War II era, and new international or hybrid war crimes tribunals were not created again until the mid-1990s.

32. Teitel, *supra* note 17, at 76.

33. See CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 90–104 (1996).

34. See Bell, *supra* note 25, at 14.

35. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2551–94 (1991) (arguing for the existence of a duty to prosecute some violations of physical integrity under international law); *id.* at 2604–06 (contending that amnesties and pardons undermine efforts to combat impunity for human rights violations). For a general exploration of the “truth versus justice” debate, see Miriam Aukerman, *Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice*, 15 *HARV. HUM. RTS. J.* 39 (2002); Reed Brody, *Justice: The First Casualty of Truth?*, *NATION*, Apr. 30, 2001, at 25.

36. Restorative justice, often contrasted with retributive or punitive justice, places a broad emphasis on repairing harm and restoring community relationships after conflict rather than on simply punishing the perpetrator. Practices may focus on truth telling, victim empowerment, restitution, or reconciliation, and tend to place a greater emphasis on recognition of the harm done to the victim and restoration of his or her dignity than on retributive justice. A classic example of a restorative justice practice would be victim-offender mediation. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 91–117 (1998).

37. Teitel, *supra* note 17, at 77–81. For a general account of the growth of the truth commission, see HAYNER, *supra* note 23. Hayner documents the existence of some 40 modern-day truth commissions.

38. Teitel, *supra* note 17, at 88. See *infra* Part III.B for a more in-depth discussion of the issue surrounding the global versus local debate.

39. Teitel, *supra* note 17, at 89; see also Nagy, *supra* note 21, at 276 (noting the standardization of transitional justice); Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional*

whether to conduct some form of transitional justice, but what the scope, modalities, and sequencing might be.⁴⁰ The sense that the field had moved from the periphery of international attention and policymaking to the center was confirmed a year after Teitel's article with the publication of a landmark report by the United Nations Secretary General reflecting an official institutional endorsement of transitional justice.⁴¹ As part of the new "normal," peace and justice are now said to go hand in hand, rhetoric that tries to smooth over frictions arising out of the peace-versus-justice debates of old, even if it cannot eliminate them entirely.⁴² Today, transitional justice is in a sense its own industry, with dedicated NGOs and an army of consultants and experts.⁴³

The birth of the International Criminal Court ("ICC") some fifty years after the end of World War II and the Nuremberg Military Tribunals suggests that Teitel's phases are cumulative, coming together by process of accretion rather than distinct historical phases with sharp delineation.⁴⁴ National prosecutions, the hallmark of Teitel's second phase, now flourish even as international prosecutions, some of them recalling the Nuremberg model, continue to expand.⁴⁵ The various generations of transitional justice and the debates they have engendered may recede, but they rarely disappear. They pile up and intermingle as new concerns and debates arise and are added to the mix.

Teitel's genealogy is presented not as a progressive history, but rather as a critical tool to help move away from essentializing approaches and to situate transitional justice in its political context.⁴⁶ To these same ends, this Article attempts to identify some of the tropes and concerns that have come to characterize transitional justice in the ten years that have followed the publication of Teitel's 2003 genealogy. While the normalization of transitional justice may represent a move by the field as a whole from "periphery to center,"⁴⁷ I argue that even as it moved to the center of international attention, the core and periphery of transitional justice itself remained little

Justice, 34 J.L. & Soc'y 411, 412 (2007) (observing that "[t]ransitional justice has emerged from its historically exceptionalist origins to become something which is normal, institutionalized and mainstreamed"). For an argument that transitional justice is not exceptional, and that the so-called dilemmas of transitional justice are in fact little more than the dilemmas of "ordinary" justice, see Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762 (2003).

40. See Nagy, *supra* note 21, at 276.

41. See U.N. Secretary-General, *supra* note 24, at 1–2.

42. See *id.* at 1 (arguing that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives").

43. See, e.g., INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <http://www.ictj.org> (last visited Sept. 28, 2012).

44. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (4th ed. 2011).

45. SIKKINK, *supra* note 23, at 21.

46. Teitel, *supra* note 17, at 94.

47. *Id.* at 89.

changed. For example, even with its formal embrace by the United Nations, mainstream transitional justice has continued to privilege or place in the foreground civil and political rights rather than economic and social rights; the state and the individual rather than the community and the group; the legal and technocratic rather than the political and contextual; and international rules and standards rather than cultural norms and local practices.⁴⁸ Thus, the historically marginalized aspects of transitional justice remain at the field's edges, even while the field as a whole moves to the mainstream of international policymaking.⁴⁹ To build upon Teitel's genealogy metaphor, I argue that "fourth generation" transitional justice is characterized in part by its increasing willingness to grapple with issues that continue to sit at the periphery of transitional justice concern.

Fourth generation concerns—including the need to account for the underlying politics of transitional justice work, the need to balance local and international agency, and the need for greater economic justice—now sit alongside concerns from previous eras, such as debates over victor's justice and the role of amnesties.⁵⁰ Increasing attention in scholarly and policy circles to fourth generation concerns represents not an evolution in a progressive sense; the debates and dilemmas of previous eras remain relevant and occasionally intractable. Rather, the increasing momentum to interrogate the peripheries of the field likely represents a new phase of maturity in which an established field that has been both normalized and mainstreamed has the confidence to call into question some of its own blind spots and biases.⁵¹ The goal of interrogating the lingering peripheries of transitional justice is not to reverse the tables, suddenly privileging background over foreground, but rather to call into question the reasons for the historic privileging of certain items over others, and to examine what this emphasis might say about transitional justice as a political project. Recovery of the deeper politics of transitional justice would in turn be an important step toward a more balanced and holistic approach to questions of justice in transition, an approach democratic not just in its hoped-for ends but in its means as well.

In the following section, I outline and discuss a few of the preoccupations of fourth generation transitional justice. While these issues are not unique to the last ten years (the roots of these debates extend well into Teitel's earlier phases), I argue that they have taken on increasing prominence in recent years. Moving forward, working through the dilemmas raised by the

48. See *supra* notes 4–9; *infra* Part III (developing these points in much greater detail). In another article, I have discussed at some length the various historic dichotomies common to both international human rights discourse and transitional justice discourse. See Sharp, *supra* note 4, at 798–800.

49. See *infra* Part III.

50. See *infra* Part III (describing these exemplary fourth generation concerns); *infra* Part II (looking at some of the debates and themes from previous eras of transitional justice).

51. See McEvoy, *supra* note 39, at 412 (observing that transitional justice has become "normal, institutionalized and mainstreamed").

concerns of fourth generation transitional justice at the level of theory, policy, and practice will be an important step in the development of the field as a whole.

III. INTERROGATING THE PERIPHERIES: A FEW FOURTH GENERATION PREOCCUPATIONS

A. *Questioning the Notion of Transitional Justice as Neutral Technology*

Since the end of the Cold War, the concept of peacebuilding has provided an important paradigm for structuring international intervention and assistance in the wake of conflict.⁵² Peacebuilding practices—including efforts to disarm former combatants, reform the security sector, build the rule of law, strengthen democracy, and increasingly, implement transitional justice initiatives—are at their core bound up with intensely political choices that can serve to embed future power arrangements.⁵³ Indeed, given that choices relating to the nature of post-conflict governance, justice, rule of law, and democracy all have a direct connection to the distribution of political, economic, social, and cultural power, the deeper politics of peacebuilding and transitional justice would seem difficult to avoid or disguise.⁵⁴ Despite this reality, post-conflict peace and justice initiatives are often advanced as culture-neutral, apolitical technologies.⁵⁵ The idea that justice and the rule of law can be reestablished via a repertoire of apolitical, value-neutral techniques and projects is ultimately counterproductive, because it obscures the difficult choices and tradeoffs required in the wake of conflict in order to

52. See sources cited *supra* note 10.

53. See Sriram, *supra* note 7, at 587–88 (discussing the ways in which post-conflict institutional reform strategies relating to the judiciary, constitution, and security forces may be seen by key protagonists as permanently cementing new power arrangements).

54. For example, post-conflict peacebuilding and justice initiatives may in part determine which former combatants will be included or excluded from the national army, which former warlords and government officials are essential to the functioning of post-conflict governance, and which opposition or government leaders must be vetted out or prosecuted. Such initiatives may also help determine the structure of re-vamped police and judicial systems. These and other post-conflict efforts go to the very nerve centers of the distribution of power in the post-conflict context.

55. See Augustine Park, *Peacebuilding, the Rule of Law and the Problem of Culture: Assimilation, Multiculturalism, Deployment*, 4 J. OF INTERVENTION AND STATEBUILDING 413, 415 (2010) (arguing that “[a]s part of the larger liberal peace enterprise, rule of law programming is advanced as culture-neutral”); Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1349 (2008) (asserting that renewed enthusiasm for building the rule of law in the post-conflict context represents a “desire to escape from politics by imagining the rule of law as technical, legal, and apolitical”); Ole Jacob Sending, *Why Peacebuilders Fail to Secure Ownership and Be Sensitive to Context*, 8 (Norwegian Inst. of Int’l Affairs: Dep’t of Security and Conflict Mgmt., Security in Practice Working Paper No. 755, 2009) (observing that the ends of liberal international peacebuilding are often imagined to be “a-historical and pre-political”).

further objectives such as development and the protection of human rights.⁵⁶

The need for a clear-eyed reckoning with the underlying decisions and compromises in this regard is all the more keen given critiques suggesting that transitional justice initiatives often serve the purpose of replicating essentially Western liberal economic and governance models.⁵⁷ Thus, some scholars have explicitly argued that the underlying politics of transitional justice need to be brought to the surface. Patricia Lundy and Mark McGovern, for example, argue that the “rise in interventionism, based on Western conceptions of justice, has also been paralleled by reluctance on the part of many rule of law experts to acknowledge the political dimensions of such activities.”⁵⁸ They caution that “[e]xpressing transitional justice questions as a series of technical issues offsets this potentially troubling recognition.”⁵⁹ Bronwyn Leebaw similarly worries that it will be difficult to assess the tensions, trade-offs, and dilemmas associated with transitional justice to the extent that they have been conceptualized in apolitical terms.⁶⁰

Despite the open discussion in the academic literature quoted above, as a characteristic of fourth generation transitional justice, the project of bringing politics to the surface is not always discussed in explicit terms. Rather, questioning the notion of transitional justice as neutral technology is often implicit in the interrogation of the general peripheries of the field. For example, the growing work of academics, practitioners, and policymakers in questioning the balance between the local and the international can be seen as one way of bringing some of the underlying politics of transitional justice to the surface.⁶¹ Questioning the marginalization of economic justice within the transitional justice agenda is another way to expose the field’s implicit politics.⁶² The deeper purpose of such inquiries is to make explicit and lay out for study the underlying motivations and purposes that have led to the backgrounding or foregrounding of certain issues, as well as the distributional consequences of placing an issue in either the background or the foreground.⁶³ In so doing, it may be hoped that a deeper sense of transitional justice as a fundamentally political project can be recovered.⁶⁴ This

56. See Rajagopal, *supra* note 55, at 1349 (arguing that a trend toward imagining the rule of law as “technical, legal, and apolitical” ultimately “threatens to obfuscate the tradeoffs that need to be made in order to achieve [security, development, and the protection of human rights]”).

57. See Park, *supra* note 55, at 419–20.

58. Lundy & McGovern, *supra* note 2, at 277.

59. *Id.*

60. See Leebaw, *supra* note 8, at 98–106.

61. See *infra* Part III.B.

62. See *infra* Part III.C.

63. Sharp, *supra* note 4, at 800.

64. Debates within the field of transitional justice often relate to the role of a different set of politics than the overarching type discussed here. For example, a former warlord singled out for prosecution might complain that the choice to prosecute him and not other combatants is a fundamentally “political” decision. In the context of the so-called “peace versus justice” debate, it is sometimes argued that the needs of political transition outweigh the needs of justice in a given instance. See, e.g., *Liberia*:

project of interrogation may ultimately entail questioning the role of transitional justice in liberal international peacebuilding, and transitional justice itself as implicitly grounded in the notion of transition to Western liberal democracy.⁶⁵

B. Questioning the Balance Between the “Local” and the “International”

Concerns over whether an appropriate balance has been struck between the “local” and the “international” in terms of input, ownership, and authority over transitional justice mechanisms have taken a variety of forms over the years.⁶⁶ Worries are expressed that transitional justice initiatives are “externally driven,” planned and implemented in a “top-down” manner

ECOWAS Chairman Urges UN to Lift Taylor Indictment, IRIN HUMANITARIAN NEWS & ANALYSIS, <http://www.irinnews.org/Report/44642/LIBERIA-ECOWAS-chairman-urges-UN-to-lift-Taylor-indictment> (discussing the argument of the then-Chairman of the Economic Community of West African States, President John Kufuor of Ghana, that the U.N. should set aside the indictment of Charles Taylor by the Special Court for Sierra Leone in order to facilitate a negotiated settlement to Liberia’s civil war). Many of these debates implicate a sense of politicized or impure rule of law. See Teitel, *supra* note 17, at 70 (arguing that as a “jurisprudence associated with political flux, transitional justice is related to a higher politicization of the law and to some degree of compromise in rule-of-law standards”). However, when I speak of the need to recover a sense of politics in transitional justice, I am using the term in a somewhat different sense. I refer to those aspects of transitional justice that have historically been marginalized or set in the background, including the local and the economic, the placement of which has consequences for the distribution of political, economic, social, and cultural power. We might think of the distributive consequences of such marginalization as reflecting the deeper politics of transitional justice.

65. Broadly speaking, liberal international peacebuilding conceives of market-oriented economies and Western-style liberal democracies as the unique pathway to peace. Interventions associated with most modern-day peacebuilding are tailored toward pushing post-conflict states in the direction of this particular liberal peace. See Roland Paris, *Peacebuilding and the Limits of Liberal Internationalism*, 22 INT’L SECURITY 54, 56 (1997). It has been argued that such interventions are potentially dangerous and destabilizing because many post-conflict countries are too weak to cope with the forces unleashed by rapid economic and political liberalization. See *id.*; Roland Paris, *International Peacebuilding and the “Mission Civilisatrice,”* 28 REV. OF INT’L STUD. 637, 639 (2003). As with liberal international peacebuilding, Chandra Sriram argues that mainstream transitional justice strategies “share key assumptions about preferable arrangements, and a faith that other key goods—democracy, free markets, ‘justice’—can essentially stand in for, and necessarily create peace.” Sriram, *supra* note 7, at 579. Thus, liberal international peacebuilding and transitional justice arguably serve the ends of a much larger transformative political project that is nevertheless presented as value-neutral and apolitical.

66. One of the key international players in the field of transitional justice is the United Nations, which has a deep repository of transitional justice experience ranging from the ad hoc tribunals for the former Yugoslavia and Rwanda to hybrid tribunals in Sierra Leone, East Timor, and Cambodia. Today, the U.N. agency with the primary responsibility for transitional justice issues is the Office of the High Commissioner for Human Rights (OHCHR), which has supported transitional justice programs in some twenty countries. See Navanethem Pillay, United Nations High Comm’r for Human Rights, Message at the Special Summit of the African Union (Oct. 22, 2009), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/110E705F1034E048C1257657005814CE?opendocument>. In a smaller way, the Bureau of Crisis Prevention and Recovery (BCPR) at the United Nations Development Programme also works to support transitional justice efforts by national actors by facilitating dialogue and developing capacities. Outside of the United Nations system, the International Criminal Court has quickly become perhaps the key actor, and has thus far served as a lightning rod for international-local tensions and controversies. Beyond these institutions, international NGOs, ranging from the International Center for Transitional Justice to Human Rights Watch, have been an important and influential voice on transitional justice policies and interventions.

with little consultation or input from “the locals.”⁶⁷ A similar concern relates to the lack of local agency, control, or “buy in” when it comes to core justice-related choices, often discussed as a lack of “local ownership.”⁶⁸ If these concerns are at least in part about process, other concerns go to the substantive content of transitional justice initiatives, suggesting that they are in large part fundamentally biased toward Western conceptions of justice and that they crowd out local practices⁶⁹ of promoting justice and reconciliation in the wake of conflict.⁷⁰ While hardly new, these concerns—explorations of what we might call “the discourse of the local”—have been the subject of heightened interest in academic and policy circles in recent years.⁷¹ In particular, there appears to be an increasing willingness to probe the proper balance between international standards and approaches on the one hand, and local and cultural norms and justice practices on the other hand.⁷² At the same time, scholars are keen to point out the dangers of

67. See, e.g., Andrieu, *supra* note 7, at 541 (noting that “transitional justice seems to be strongly under the influence of [a] top-down state-building approach”); Sriram, *supra* note 7, at 591 (observing that “[t]ransitional justice, and in particular trials, are frequently imported from the outside and occasionally externally imposed”); U.N. Secretary-General, *supra* note 24, ¶ 17 (asserting that “no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable”).

68. The precise meaning of “local ownership” is very slippery. Some scholars have noted that in its crudest form, it means little more than asking the locals to take responsibility for what the internationals have already planned and done. As Simon Chesterman has pointed out, though lip-service is often paid to the need for local involvement, in practice “ownership . . . is usually not intended to mean control and often does not even imply a direct input into political questions.” SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 242 (2003). Rather, “local ownership” has become a sort of rhetorical device to signal the need for local “buy in,” or support.

69. These practices are sometimes referred to as “traditional practices.” However, some object to the use of the word “traditional,” both because it can be read to suggest that local practices are not dynamic and adaptable, and because it can also have pejorative implications. In this Article, I have chosen to use the word “local” to avoid these suggestions, and also to distinguish these practices from those more often associated with formal, “modern,” or more westernized legal systems.

70. See, e.g., Roger Mac Ginty, *Indigenous Peace-Making Versus the Liberal Peace*, 43 COOPERATION AND CONFLICT: J. OF THE NORDIC INT’L STUD. ASS’N 139, 144–45 (2008) (noting that Western approaches to peacebuilding “risk minimizing the space for organic local, traditional or indigenous contributions to peace-making”); Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT’L J. TRANSITIONAL JUST. 28, 28–34 (2009) (calling for a revalorization of local and cultural approaches to justice and reconciliation); U.N. Secretary-General, *supra* note 24, at 1 (declaring that the UN must “learn as well to eschew one-size-fits-all formulas and the importation of foreign models”).

71. See Erin Baines, *Spirits and Social Reconstruction After Mass Violence: Rethinking Transitional Justice*, 109 AFRICAN AFF. 409, 411–13 (2010); TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE 1–2 (Alexander Hinton ed., 2010); Elizabeth Stanley, *Transitional Justice: From the Local to the International*, in THE ASHGATE RESEARCH COMPANION TO ETHICS AND INTERNATIONAL RELATIONS 275, 276 (Patrick Hayden ed., 2009). See generally LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw & Lars Waldorf eds., 2010). There has been a similar spike in interest in the broader post-conflict peacebuilding literature as well. See, e.g., Timothy Donais, *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes*, 34 PEACE & CHANGE 3, 3–9 (2009); Simon Chesterman, *Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations*, 1 J. OF INTERVENTION AND STATEBUILDING 3, 6–10 (2007).

72. See Rosalind Shaw & Lars Waldorf, *Introduction*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE, *supra* note 71, at 3 (noting that “the current phase of

“romanticizing the local,” noting that, in the context of internationally financed intervention, a local-international balance may be more realistic and desirable than complete local ownership.⁷³

At an official policy level at least, the importance of local ownership is now sacrosanct, having risen to the level of a virtual UN mantra.⁷⁴ Simon Chesterman finds that “[e]very UN mission and development program now stresses the importance of local ‘ownership.’”⁷⁵ Yet despite the proliferation of high-level paeans to the virtues of the local, the precise meaning of buzzwords like “local ownership” remains complex, hotly contested, and poorly understood.⁷⁶ Concepts like local ownership have been described as more of a rhetorical device and vision to strive for than a practical objective.⁷⁷

Though the discourse of the local finds resonance across the spectrum of transitional justice initiatives, frictions between the local and the global are perhaps most heated in the realm of international tribunals, and for good historical reasons.⁷⁸ At its most extreme, international justice has indeed been remote and distant from those local communities most affected by violence. Nuremburg, the prototypical international war crimes tribunal,

transitional justice is frequently marked by disconnections between international legal norms and local priorities and practices” and that “[s]ince the turn of the millennium, the field of transitional justice has been increasingly challenged by the very people it is designed to serve”); see also Alexander Hinton, *Introduction*, in *TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE*, *supra* note 71, at 1–2, 17 (arguing that transitional justice needs to do more to grapple with the intersection of justice and locality).

73. See Oliver Richmond, *The Romanticisation of the Local: Welfare, Culture, and Peacebuilding*, 44 *THE INT’L SPECTATOR* 149, 160, 166–68 (2012); Ellen Stensrud, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, 46 *J. OF PEACE RES.* 5, 12–13 (2009) (arguing for a balance between local and national control of hybrid tribunals); Donais, *supra* note 71, at 21 (arguing that “[t]oo much local ownership, in most peacebuilding contexts, may be as dangerous to the prospects for peace as too little local ownership”).

74. See, e.g., U.N. Secretary-General, *supra* note 24, ¶ 17 (arguing that the U.N. must “learn better how to respect and support local ownership, local leadership and a local constituency for reform”); U.N. Secretary-General, *Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict*, ¶ 7, U.N. Doc. A/63/881-S/2009/304 (June 11, 2009) (observing that “[t]he imperative of national ownership is a central theme of the present report”).

75. Simon Chesterman, *Walking Softly in Afghanistan: The Future of UN Statebuilding*, 44 *SURVIVAL* 37, 41 (2002).

76. Chesterman, *supra* note 71, at 7–10.

77. HANNAH REICH, Berghof Occasional Paper No. 27, Berghof Research Ctr. for Constructive Conflict Mgmt., “Local Ownership” in Conflict Transformation Projects: Partnership, Participation or Patronage 7 (2006), available at <http://edoc.vifapop.de/opus/volltexte/2011/2544/pdf/boc27e.pdf>.

78. Many critics have been quite emphatic in denouncing various perceived failures of international tribunals vis-à-vis the local. For example, one early critic of modern-day war crimes tribunals argued that the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) “orbit in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors in those conflicts.” Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 *TEMP. INT’L & COMP. L.J.* 167, 168 (1997). The International Criminal Court, in many ways the successor to Nuremburg as well as the ad hoc tribunals, has also been subjected to withering criticism in this regard. See, e.g., Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 *ETHICS & INT’L AFF.* 179, 195 (2007) (arguing that the ICC is subverting local judicial and reconciliation processes in Northern Uganda).

was entirely controlled and run by the victorious allied powers, right down to the nationalities of its judges.⁷⁹ Some forty years later, the ad hoc tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”) were both distant from and largely inaccessible to the communities they were intended to serve, with trials for the ICTY held in The Hague, the Netherlands, and those for the ICTR in Arusha, Tanzania. After much criticism of their remoteness, both tribunals finally instituted “community outreach” programs, though making the process meaningful to constituencies in the former Yugoslavia and Rwanda has proven to be a formidable challenge.⁸⁰ Given the circumstances, it may be unsurprising that the ad hoc tribunals remain poorly understood in both regions at best, isolated and irrelevant at worst.⁸¹

While these early experiments left much to be desired when it came to striking an appropriate balance between the local and the international, subsequent efforts have tried to address some of the criticisms to a degree.⁸² In particular, hybrid tribunals in Sierra Leone, East Timor, Cambodia, and elsewhere may be seen as an improvement both insofar as they are located inside the countries where the atrocities took place, allowing for easier participation by victim communities, and insofar as they count country nationals among their judges.⁸³ Given these advances, it would be tempting to see hybrid tribunals as a sort of “Goldilocks” solution to the dilemma of the local in matters of transitional justice, neither too remote nor too parochial. Indeed, it has been hoped that “[t]he combination of international standards through UN involvement and local ownership through physical proximity and national participation may increase the legitimacy of these mechanisms.”⁸⁴ Yet some critics have described the hybrid tribunals as the worst of both worlds, combining the purely international tribunals’ remoteness with the occasional failure to meet the rigor of international standards

79. See BASS, *supra* note 29, at 147–205.

80. See David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 5 (2007). There is a vibrant debate as to what extent international tribunals should be more communicative, be connected to local communities, and pursue wider social aims beyond delivering judgments. See e.g., Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUROPEAN J. OF INT’L L. 43, 45–52 (2012) (reviewing critiques of international courts).

81. See generally Laurel Fletcher & Harvey Weinstein, *A World Unto Itself? The Application of International Justice in the Former Yugoslavia*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 5, at 29; Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 5, at 206.

82. See Cohen, *supra* note 80, at 1–2 (discussing hybrid tribunals as a response to the perceived disadvantages and problems of the ICTR and ICTY).

83. See *id.* at 5; see also Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 356–71, 410–17 (2006) (reviewing theoretical advantages and disadvantages of hybrid tribunals).

84. Stensrud, *supra* note 73, at 7.

seen in wholly local efforts.⁸⁵ Just as with the ad hoc criminal tribunals, each hybrid tribunal is a new learning experience, and it may be that a more optimal balance between the international and the local will one day be struck.

Whatever the merits of hybrid tribunals, the international model of Nuremberg and the ad hoc tribunals has not gone away but rather has been firmly entrenched in the ICC.⁸⁶ Due in part to its international character and headquarters in The Hague, it would seem that the ICC has great potential to create frictions between the global and the local along the lines of those seen in earlier international criminal tribunals.⁸⁷ Indeed, it might be argued that the “unable or unwilling” threshold for admissibility under the principle of complementarity makes the possibility of tension even more likely.⁸⁸ A strong example of the potential for local-global frictions in the context of the ICC can be found in Uganda, where some Acholi constituencies in the North would prefer to address crimes committed by former members of the Lord’s Resistance Army by using the practice of *mato oput*, a local ritual that emphasizes reconciliation among communities, rather than through the ICC’s retributive criminal justice.⁸⁹ ICC critic Adam Branch has argued that the Court’s work in Uganda is subverting local judicial and reconciliation practices such as *mato oput*. At the same time, ICC intervention unwittingly plays into national-level politics as Yoweri Museveni, Uganda’s longtime autocratic ruler, appears to have initially referred the Court to the situation in Northern Uganda in 2003 not because he was

85. See, e.g., Caitlin Reiger, *Hybrid Attempts at Accountability for Serious Crimes in Timor Leste*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 143–70 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

86. Given the costs alone, and especially after the creation of the ICC, the world is unlikely to see another ad hoc criminal tribunal along the lines of the ICTY or ICTR in the near future. See Cohen, *supra* note 80, at 2–4 (discussing the relative expense of the ad hoc tribunals, especially in relation to the number of judgments rendered).

87. It should be noted that a degree of flexibility has been built into the Rome Statute, allowing the Court to sit in locations outside of The Hague. See Rome Statute, *supra* note 44, art. 3 (While “[t]he seat of the Court shall be established at The Hague in the Netherlands,” “[t]he Court may sit elsewhere, whenever it considers it desirable . . .”). In addition, the Rome Statute makes some provision for the participation and compensation of victims. For a critical review of the court’s outreach and work with victims in practice, see Marlies Glasius, *What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court’s First Investigations*, 31 *HUM. RTS. Q.* 496, 508–12 (2009).

88. Under Article 17 of the Rome Statute, the Court may not hear a case if a state with jurisdiction is willing and able to prosecute the crime. See Rome Statute, *supra* note 44, art. 17. For an exhaustive review of the complementarity principle, see JANN KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS* (2008).

89. *Mato oput* consists of ceremonies involving the drinking of bitter herbs, presided over by elders and chiefs, intended to reconcile a perpetrator and his or her clan back to the offended clan or community. It emphasizes community reconciliation, as opposed to the individual punishment stressed in more Western modes of retributive justice. For a more lengthy explanation of the *mato oput* process, see Tim Murithi, *African Approaches to Building Peace and Social Solidarity*, 6 *AFRICAN J. ON CONFLICT RES.* 9, 23–27 (2006). Though *mato oput* has many proponents, it should be noted that Acholi communities are not a monolith, and many in Northern Uganda do not reject international justice. See Branch, *supra* note 78, at 192.

“unwilling or unable” to prosecute rebel leaders under the terms of the Rome Statute, but rather to accomplish with ICC assistance what he could not achieve militarily: capturing Joseph Kony.⁹⁰ Meanwhile, argues Branch, the ICC ignores egregious human rights violations committed by the Ugandan army at the height of the civil war in Northern Uganda, thereby playing to Museveni’s interests but perhaps not those of the Ugandan people.⁹¹

The Uganda example raises an important point: whatever the innovations of hybrid tribunals or the ICC, all of these experiments in international justice continue to represent, at least to many, fundamentally Western approaches of responding to mass atrocity. Arguably, such approaches may at times serve to crowd out local cultural practices of promoting peace and justice in the wake of conflict.⁹² For these and other reasons, there has been a growing interest in recent years in harnessing local approaches to justice and reconciliation to fulfill larger transitional justice goals.⁹³ Examples of the integration of local practice into transitional justice initiatives are expanding. In East Timor, for example, the Community Reconciliation Process combined elements of local ritual (*nabe biti bot*), arbitration, and mediation to facilitate reconciliation between perpetrators and former combatants with members of their estranged communities.⁹⁴ The *nabe biti bot* ritual (literally, “the unrolling of the mat”) reflects various dimensions of restorative justice practice, bringing former perpetrators and victims together face-to-face for acts of truth-telling and acknowledgment, and can involve acts of restitution on the part of the perpetrator by, for example, helping to rebuild a house he burned down.⁹⁵ In Sierra Leone, the non-governmental organization Fambul Tok (“Family Talk” in the Krio language) has taken elements of truth and reconciliation commission practice to the village level by integrating them with local practices of reconciliation and ritual, which vary from community to community.⁹⁶ To a lesser degree, the Sierra Leonean truth commission also incorporated aspects of

90. Branch, *supra* note 78, at 187. Joseph Kony is the longtime leader of the Lord’s Resistance Army, a rebel group that has waged a military campaign against the central government and terrorized civilians for over twenty years.

91. *Id.* at 187–90.

92. *See id.*

93. *See* Shaw & Waldorf, *supra* note 72, at 4 (noting that “transitional justice has itself undergone a shift toward the local” and that “the latest phase of transitional justice is marked . . . by a fascination with locality”). I explore some of the potential reasons for this growing interest in the local below.

94. *See* Patrick Burgess, *A New Approach to Restorative Justice – East Timor’s Community Reconciliation Process*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE*, *supra* note 85, at 176–205.

95. *See id.* at 176–205 (discussing the ways in which *nabe biti bot* was incorporated into a more formal national reconciliation scheme); *see also* Dionísio Babo-Soares, *Nabe Biti: The Philosophy and Process of Grassroots Reconciliation (and Justice) in East Timor*, 5 *ASIA PACIFIC J. OF ANTHROPOLOGY* 15, 17–22, 23–28 (2004) (describing *nabe biti* and its role in grassroots reconciliation in contrast with elite reconciliation).

96. *See* Augustine S.J. Park, *Community-Based Restorative Transitional Justice in Sierra Leone*, 13 *CONTEMPORARY JUSTICE REV.* 95, 112–14 (2010).

local ritual into its work.⁹⁷ In Mozambique, reintegration of some former combatants into their villages was accomplished through the use of ceremonies that included elements of ritual cleansing, confession, and reparation.⁹⁸

At the level of UN policy on transitional justice, it has been noted that “due regard must be given to indigenous and informal traditions for administering justice or settling disputes.”⁹⁹ However, it is unclear what exactly “due regard” might mean, and the United Nations has also expressed reservations as to the compatibility of some local practices with international human rights standards.¹⁰⁰ Due in part to this normative tension, the interface between international norms and local practices has been described as a “complex, unpredictable, and unequal encounter.”¹⁰¹

In this regard, the use of *gacaca* in post-genocide Rwanda helps to illustrate some of the potential promises and pitfalls of drafting into service local justice and reconciliation practices in the wake of mass atrocity.¹⁰² After the Rwandan genocide, well over 100,000 suspected *génocidaires* were detained, grossly exceeding the capacity of Rwanda’s legal system, to say nothing of its overcrowded prisons.¹⁰³ As late as 2003, many of these detainees had yet to be charged.¹⁰⁴ Partly as a response to this state of affairs, the government established *gacaca* courts, loosely rooted in a local practice of community-based informal arbitration traditionally used to settle minor disputes at the village level.¹⁰⁵ While this development was initially heralded by some as an innovative and pragmatic way to deal with the severe backlog of cases relating to the 1994 genocide,¹⁰⁶ it has also been observed that *gacaca* was implemented in ways that served the Kagame government more than the strict needs of community justice and reconciliation. For example, crimes committed by the Rwandan Patriotic Front (“RPF”), the Tutsi-led military force that stopped the genocide, were excluded from the *gacaca* process, a fact that played into the RPF’s national savior narrative if

97. For an extended description of how this incorporation functioned in practice, see Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361 (2005).

98. See Roger Duthie, *Local Justice and Reintegration Processes as Complements to Transitional Justice and DDR*, in 4 DISARMING THE PAST, TRANSITIONAL JUSTICE AND EX-COMBATANTS 228, 233 (Ana Cutter Patel, Pablo de Greiff & Lars Waldorf eds., 2009).

99. U.N. Secretary-General, *supra* note 24, ¶ 36.

100. *Id.*

101. Shaw & Waldorf, *supra* note 72, at 5.

102. For a general background on *gacaca*, see Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1 (2006); Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case of Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765 (2007).

103. Des Forges & Longman, *supra* note 29, at 58.

104. *Id.* at 59.

105. See Waldorf, *supra* note 102, at 48–55.

106. For a cautiously optimistic assessment at the outset of the implementation of *gacaca*, see Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 206, 206–28, *supra* note 85.

also omitting an important part of the truth.¹⁰⁷ At the same time, it has been noted that although the practice of *gacaca* evolved to resolve only minor crimes, it was adapted to incredibly complex circumstances involving mass atrocities and genocide, crimes it was never designed to handle.¹⁰⁸ Applying *gacaca* in the context of serious offenses proved especially problematic due to its lack of full adherence to international human rights standards in terms of protections for the accused, minimal training for *gacaca* judges, and issues of corruption.¹⁰⁹ With the *gacaca* process concluded as of mid-2012, it leaves a mixed legacy, intermingling important gains for truth, justice, and reconciliation in Rwanda with glaring gaps and deficiencies.¹¹⁰ Certainly, the case of *gacaca* illustrates that the turn to the local is no panacea to the thorny dilemmas of transitional justice and that the use of local practice must be subjected to the same strict scrutiny as any other transitional justice experiment.

After over twenty years of growing transitional justice practice since the end of the Cold War, what could explain the surge in interest in the discourse of the local over the last decade? To some extent, frictions between the local and the international are inherent in the idea of international justice and intervention. International justice, predicated as it is upon international norms and standards, automatically sets itself up for a comparison with local norms and practices in cases involving reach into the local sphere. Complicating matters, to some extent the notion of international justice is predicated on some kind of local failure. The ICC does not exercise jurisdiction except insofar as a state party is “unwilling or unable” to do so itself.¹¹¹ Hybrid tribunals are typically created by agreement with a local government after some kind of catastrophic breakdown in the rule of law.¹¹² Thus, even though international justice interventions must be sensitive to context and reach out to local constituencies in order to be seen as legitimate, they may also seek to challenge some of the dynamics or actors that led to a breakdown of rule of law in the first place.¹¹³ For this reason, one way to understand the increasing interest in the balance between the local

107. See Christopher Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS BRIEF 16, 19 (2007), available at <http://www.wcl.american.edu/hrbrief/14/2lemon.pdf>.

108. See Waldorf, *supra* note 102, at 48 (noting that “traditional *gacaca* generally did not treat cattle theft, murder, or other serious crimes, which were handled by chiefs or the king’s representatives”).

109. See HUMAN RIGHTS WATCH, *JUSTICE COMPROMISED: THE LEGACY OF RWANDA’S COMMUNITY BASED GACACA COURTS* 4 (2011), available at <http://www.hrw.org/reports/2011/05/31/justice-compromised-0>.

110. For a comprehensive review of *gacaca*, including both strengths and weaknesses, see PHIL CLARK, *THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS* (2010).

111. See *supra* note 88.

112. Examples include the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, both of which were established pursuant to agreements between national governments and the United Nations.

113. See Leebaw, *supra* note 8, at 117.

and the international in matters of transitional justice lies in the sheer expansion of the field. The fact that it has been normalized, mainstreamed, and institutionalized via the ICC and various UN initiatives, coupled with the growth in the number of human rights prosecutions worldwide, means that the points of contact between the local and the international where friction is potentially created are that much greater.¹¹⁴

Yet at a deeper level, the rise of the discourse of the local could be thought of as a practice of resistance to the perceived hegemony of liberal international peacebuilding, of which transitional justice is a distinct sub-component, insofar as it is conceived of as part of a larger effort to reconstitute post-conflict societies in the image of Western liberal democracies.¹¹⁵ One could also see the interrogation of the peripheral status of the local in transitional justice as part of a project to recover the politics inherent in the backgrounding and foregrounding of the local and the international; that is, to reveal the implications for the distribution of political, economic, social, and cultural power that would result from particular transitional justice interventions in the wake of conflict.¹¹⁶ But whatever the precise impetus for the surge in recent interest, a willingness to probe the historically peripheral status of the local has achieved a certain currency in recent years and may be viewed as an emerging characteristic of fourth generation transitional justice.¹¹⁷ Continuing to work through the dilemmas of the local, including the need to address the occasional tension between local practice and international human rights standards and to find the right balance between local and international ownership, will be an important step in the development of the transitional justice field in the years to come.

114. Kathryn Sikkink has documented the dramatic rise in the number of international human rights prosecutions since the end of the Cold War. See SIKKINK, *supra* note 23, at 21. Each of these prosecutions carries with it the potential for friction as it interfaces with global and local actors and constituencies.

115. This conception of the discourse of the local as a form of resistance does not necessarily apply to all or even most of the recent work looking at transitional justice and the local. In many ways, policy literature and some academic scholarship continue to do so from within a very restricted western liberal paradigm. Interest in using the local to greater effect rarely begins with local knowledge, but rather from within the confines of Western legalized justice that seeks the local only insofar as it resonates with and resembles Western norms and courts. See Baines, *supra* note 71, at 411–12, 414–15. The local becomes a site of intervention, and local ownership a function of consultation, rather than a serious challenge to the dominant liberal Western paradigm that is typically applied in the aftermath of mass atrocity. Merely suggesting that more emphasis ought to be placed on the local, as some of the literature tends to do, “does not in itself represent a shift in the underlying assumptions of the field—at most, it is a shift in emphasis.” Moses Chrispus Okello, *Afterword: Elevating Transitional Local Justice or Crystallizing Global Governance?*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE, *supra* note 71, at 277.

116. See Shaw & Waldorf, *supra* note 72, at 6 (discussing the ways in which transitional justice and human rights discourse tend to depoliticize locality).

117. See sources cited *supra* notes 71 & 72.

C. Questioning the Place of Economic Violence and Economic Justice

In the last three decades, transitional justice mechanisms have exploded and expanded, becoming a truly global phenomenon. There have been scores of human rights prosecutions at the national and international levels.¹¹⁸ The world has witnessed the creation of some forty truth commissions, with new ones being created nearly every year.¹¹⁹ After years of preparation and effort, the ICC is finally beginning to gather steam with its first sentence handed down, over two dozen indictments issued, and several other investigations underway.¹²⁰ All of these developments help further the idea of worldwide institutional and normative momentum. Thus, for example, Kathryn Sikkink argues that a new global norm of accountability, a “justice cascade,” has emerged, even if gaps in enforcement of international human rights and humanitarian law remain conspicuous.¹²¹

Yet while these developments are indeed significant, the talk of a “justice cascade” begs a simple question: *justice for whom, for what, and to what ends?*¹²² Authoritarian repression, widespread human rights abuses, and violent conflict destroy lives and imperil economic survival. In the lead up to conflict, during conflict, and in the post-conflict context, societies may experience widespread violations of civil and political rights, as well as economic and social rights.¹²³ However, when it comes to which particular issues of justice and accountability to address through the various mechanisms of transitional justice, the overwhelming focus for the past three decades has been on harms caused by *physical violence*, such as murder, rape, torture, or enforced disappearances, among other civil and political rights violations.¹²⁴ In contrast, harms caused by *economic violence*, including violations of economic and social rights, corruption, plunder of natural resources, and other economic crimes, have received comparatively little attention. For example, in the 1980s and 1990s, Latin American truth commissions in Argentina, Chile, El Salvador, and Uruguay largely prioritized violations of civil and political rights, with little probing of the role that economic

118. See SIKKINK, *supra* note 23, at 21.

119. See HAYNER, *supra* note 23 (documenting the creation of forty truth commissions). In 2011, new truth commissions were created in Brazil and Côte d'Ivoire.

120. Marlise Simons, *Congolese Warlord Convicted, in first for International Court*, N.Y. TIMES, (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/world/africa/congo-thomas-lubanga-convicted-war-crimes-child-soldiers.html>.

121. See generally SIKKINK, *supra* note 23.

122. See Nagy, *supra* note 21, at 280–86 (employing the categories of when, whom, and what in order to interrogate the limits of mainstream transitional justice).

123. See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

124. See Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266, 275–76 (2008). See generally James Cavallaro & Sebastián Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, in TRANSITIONAL JUSTICE FROM BELOW, GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE (Kieran McEvoy & Lorna McGregor eds., 2008); Sharp, *supra* note 4.

crimes played in the violence.¹²⁵ The much-lauded South African truth commission focused on murder, torture, and other egregious acts of bodily harm, placing relatively little emphasis on the economic and structural violence of the apartheid system itself.¹²⁶ Indeed, the law that resulted in the creation of South Africa's truth commission defined a "gross violation of human rights" as acts limited to torture, killing, abduction or ill-treatment.¹²⁷ To the extent that transitional justice mechanisms have dealt with questions of economic violence and economic justice, these issues have often been treated as little more than useful context for understanding why egregious acts of physical violence took place.¹²⁸

The overall pattern of foregrounding justice for physical violence while pushing questions of economic violence to the margins has held notwithstanding geographic distance and great variability in the underlying conflicts at issue. In looking to the evolution of this pattern in Latin America, James Cavallero and Sebastián Albuja argue that the narrow paradigm of transitional justice arose not because it was particularly well suited to the legacies of conflict in question, but rather out of a process of acculturation whereby a dominant script effectively self-replicates as a result of "repeated information exchange and consultations with prior commission members and a cadre of international scholars and practitioners in the area."¹²⁹ Once established, the Latin American script became the model for export throughout the world, most notably to South Africa.¹³⁰

Whatever the precise historic reasons for the marginalization of economic violence and economic justice within mainstream transitional justice practice, such a narrow approach to questions of justice in transition has its costs. Truth commissions, for example, often help to establish one of the definitive accounts of the conflict in question, identifying some of its "root causes."¹³¹ In these circumstances, relegating questions of economic violence and economic justice to the margins is deeply problematic because it

125. Cavallero & Albuja, *supra* note 124, at 122.

126. See Mahmood Mamdani, *The Truth According to the Truth and Reconciliation Commission*, in *THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE* 176, 181 (Ifi Amadiume & Abdullahi An-Na'im eds., 2000).

127. Pablo De Greiff, *Repairing the Past: Reparations for Victims of Human Rights Violations*, in *THE HANDBOOK ON REPARATIONS* 1, 8 (Pablo de Greiff ed., 2006).

128. See Miller, *supra* note 124, at 275–76.

129. Cavallero & Albuja, *supra* note 124, at 125.

130. As explained by Alexander Boraine, former Vice Chairperson for the South African commission: "In the work leading up to the appointment of the TRC, we were greatly influenced and assisted in studying many of these commissions, particularly those in Chile and Argentina." Alexander Boraine, *Truth and Reconciliation in South Africa*, in *TRUTH v. JUSTICE* 141, 142 (Robert I. Rotberg & Dennis Thompson eds., 2000).

131. See, e.g., TRUTH AND RECONCILIATION COMM'N OF LIBERIA, 2 CONSOLIDATED FINAL REPORT 16–17 (2009), available at http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf (identifying as among the "[r]oot [c]auses of the [c]onflict," factors such as poverty, an "[e]ntrenched political and social system founded on privilege, patronage . . . and endemic corruption which created limited access to education, and justice, economic and social opportunities," and "[h]istorical disputes over land acquisition, distribution and accessibility").

may create a misleading and simplistic narrative in which the conflict is distanced from tightly entwined economic drivers.¹³² While a poorly understood conflict itself might be something to regret, it is doubly problematic insofar as transitional justice mechanisms often help generate recommendations and programs for reform with an eye toward preventing recurrence of conflict in the future.¹³³ In this respect, pushing economic violence to the peripheries will circumscribe and bias the types of justice-oriented reforms that are perceived as essential responses to the conflict.¹³⁴ This consequence is of particular concern when considering that a significant portion of civil wars reignite within five years of their apparent cessation.¹³⁵ Thus, while prosecutions and truth-telling with respect to violations such as murder and torture are incredibly important, in conflicts fuelled in part by economic violence, laying the groundwork for long-term peace may also require measures like affirmative action for historically disadvantaged groups, land tenure reform, redistributive taxation, the creation of anti-corruption commissions endowed with serious power, and special development assistance to regions most economically affected by the conflict.¹³⁶ The failure to address past economic violence in the context of transitional justice may also have the effect of denying would-be reformers and activists an important platform and lobbying tool when it comes to pressing new governments for much needed reforms.¹³⁷

In contrast with these historical patterns, there are growing signals at the level of theory, policy, and practice that the dominant script is being both questioned and changed. While the early work of scholars such as Rama Mani and Mahmood Mamdani questioning the narrowness of the dominant

132. See Miller, *supra* note 124, at 268.

133. Nearly all truth commission reports contain lengthy and detailed sets of policy recommendations targeting a variety of actors. In Sierra Leone, for example, the recommendations section of the commission's final report contains over one hundred pages of proposed recommendations and reforms, a substantial portion of which are designated as "imperative" for the new government. See SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, 2 WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMM'N 115–225 (2004), available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>.

134. See Okello, *supra* note 115, at 275 ("Because these transitional justice processes remain effectively blind to the consequences of the underlying socioeconomic structures, they are unable to conceptualize remedying the socioeconomic consequences of civil and political violations.").

135. See Paul Collier & Anne Hoeffler, *On the Incidence of Civil War in Africa*, 46 J. CONFLICT RESOL. 13, 17 (2002); Astri Suhrke & Ingrid Samset, *What's in a Figure? Estimating Recurrence of Civil War*, 14 INT'L PEACEKEEPING 195, 195 (2007).

136. See Andrieu, *supra* note 7, at 544 (arguing that transitional justice should be "connected to a broader project of social justice and development that could take the form of redistributive policies or affirmative action programs"); see also Arthur, *supra* note 2, at 359 (speculating as to whether broader approaches to issues of justice in transition might include things like affirmative action and special taxation).

137. See Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT'L J. TRANSITIONAL JUST. 331, 350 (2008) (arguing that truth commissions need to make connections between forms of economic violence and economic and social rights in order to provide "national groups a powerful lobbying tool to challenge the government's inaction or resistance").

transitional justice paradigm was both important and pioneering, it was largely the exception that proved the general rule.¹³⁸ In recent years, however, work by Louise Arbour, former United Nations High Commissioner for Human Rights, the dedication of an issue of the *International Journal of Transitional Justice* to the topic, and a volume produced by the International Center for Transitional Justice have further raised the profile of the issue.¹³⁹ The importance of the inclusion of economic justice within the transitional justice agenda has also recently been recognized at the highest policy levels of the United Nations.¹⁴⁰

Perhaps most importantly, an increasing number of truth commissions in the last decade, many of them African, have taken steps to shift economic violence into the foreground of their work.¹⁴¹ A few of them have gone so far as to identify forms of economic violence as a “root cause” of the conflict in question and include among their recommendations measures intended to address the underpinnings of economic violence.¹⁴² Commissions in Chad (1990–1992), Sierra Leone (2002–2004), East Timor (2002–2005), Ghana (2003–2004), and Liberia (2006–2009) have all focused on facets of economic violence to a greater degree than the great bulk of truth commissions throughout history.¹⁴³ While these efforts have varied in terms of quality and rigor, they nevertheless represent an important step in moving eco-

138. Mani’s work was pioneering in its holistic approach to questions of justice in transitional and post-conflict situations. She argued that building lasting peace with justice requires addressing three dimensions of justice: retributive, rectificatory, and distributive. *See, e.g.*, RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 5 (2002). Mamdani was a strong and early critic of the narrow approach taken by the South African truth and reconciliation commission, which de-emphasized, among other things, economic harms suffered under the apartheid system. *See* Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *DIACRITICS* 33, 33–34, 36–37, 57–58 (2002); Mamdani, *supra* note 126, at 176.

139. Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 *N.Y.U. J. INT’L L. & POL.* 1 (2007) (analyzing the role and importance of economic, cultural, and social rights in transitional justice); 2 *INT’L J. TRANSITIONAL JUSTICE* (2008) (featuring multi-disciplinary, wide-ranging approaches to questions of justice in transition); *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* (Pablo de Greiff & Roger Duthie eds., 2009) (International Center for Transitional Justice publication focusing on intersection between transitional justice and economic development). *See also* *JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION* (Dustin Sharp ed., forthcoming 2013).

140. U.N. Secretary-General, *supra* note 24, ¶ 24 (observing “growing recognition that truth commissions should also address the economic, social and cultural rights dimensions of conflict to enhance long-term peace and security”).

141. I have elsewhere explored the work of these truth commissions in much greater detail. *See* Dustin Sharp, *Economic Violence in the Practice of African Truth Commissions and Beyond*, in *JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION* (Dustin Sharp ed., forthcoming 2013).

142. This is particularly true of the truth commissions in Sierra Leone and Liberia. *See* SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, *supra* note 133, at 27, 121, 160–66; TRUTH AND RECONCILIATION COMM’N OF LIBERIA, *supra* note 131, at 16–17, 370–76 (2009).

143. *See generally* LES CRIMES ET DÉTOURNEMENTS DE L’EX-PRÉSIDENT HABRÉ ET DE SES COMPLICES: RAPPORT DE LA COMMISSION D’ENQUÊTE NATIONALE, MINISTÈRE TCHADIEN DE LA JUSTICE (1993) [hereinafter *MINISTÈRE TCHADIEN DE LA JUSTICE*]; SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, *supra* note 133, at 27; COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR LESTE, CHEGA!, *THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR LESTE* (CAVR) (2005); GHANA NATIONAL RECONCILIATION COMM’N, *THE NATIONAL RECON-*

conomic violence into the foreground of the transitional justice agenda, and in linking analysis of the economic drivers and sustainers of conflict with necessary policy reforms and initiatives.¹⁴⁴

At the same time, the work of some of these commissions helps to illustrate the risks of expanding the mandate of transitional justice mechanisms without a corresponding increase in temporal or fiscal resources. In Chad, for example, a poorly staffed and under-equipped truth commission made great strides in illustrating the links between economic crime and political terror by documenting the extent to which the budget of President Hissène Habré's secret police was funded by monies and goods stolen from his political opponents.¹⁴⁵ Nevertheless, the commission appeared to lack the time and means to properly unravel the maze of presidential accounts used to embezzle public money for private gain.¹⁴⁶ In Liberia, a fractious commission was both ambitious and pioneering in its efforts to document official corruption and plunder of natural resources; yet the analysis in its final report has a loose and freewheeling quality, unmoored from the rigors of international human rights law.¹⁴⁷ Ultimately, the report falls far short of its potential, and many of its recommendations seem unlikely to be adopted.¹⁴⁸

Despite the uneven quality of the work produced by some of these pioneering commissions, there are also bright spots, with the innovative work of the Sierra Leonean truth commission providing one such example. Leaving as many as 50,000 dead,¹⁴⁹ the civil war that erupted in 1991 in Sierra Leone soon became famous for its brutality, as drug-addled child soldiers

CILIATION COMMISSION REPORT (2004); TRUTH AND RECONCILIATION COMM'N OF LIBERIA, *supra* note 131.

144. For example, the Sierra Leonean truth commission examined in some detail the role that corruption and disaffected, unemployed youth played in helping to generate and sustain the decade-long civil war. The recommendations ultimately issued by the commission reflect this analysis and contain a number of policy prescriptions intended to fight corruption and empower youth. See SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, *supra* note 133, at 211–12.

145. See MINISTÈRE TCHADIEN DE LA JUSTICE, *supra* note 143, at 27–28. Hissène Habré was the president of Chad from 1982 to 1990. The truth commission appointed after his ouster in a *coup d'état* estimated that he was responsible for as many as forty thousand “victims.” *Id.* at 97.

146. The commission specifically notes, for example, its inability to fully investigate a number of important external transfers of funds out of key presidential and military accounts due to a lack of time and money. It also noted that a number of other potential lines of inquiry had to be abandoned for similar reasons. See MINISTÈRE TCHADIEN DE LA JUSTICE, *supra* note 143, at 210.

147. The commission's final report has been criticized by a number of observers as lacking rigor and was even described by one critic as “unsightly and horribly flawed.” Jonny Steinberg, *Liberia's Experiment with Transitional Justice*, 109 AFR. AFF. 135, 136 (2009). For an account of the commission's internal divisions and occasional lack of professionalism, see Lansana Gberie, *Truth and Justice on Trial in Liberia*, 107 AFR. AFF. 455 (2008).

148. In this regard, it has been argued that the commission's recommendation that a number of sitting politicians be barred from public office, including Ellen Johnson-Sirleaf, Liberia's current president, has made enemies of even some of the report's natural allies. Steinberg, *supra* note 147, at 136.

149. John Bellows & Miguel Edward, *War and Institutions: New Evidence from Sierra Leone*, 96 AM. ECON. REV. 394, 394 (2006).

raped, pillaged, maimed, and killed with impunity.¹⁵⁰ It was also a war that gave the world a new vocabulary for thinking about the linkages between natural resources and violent conflict, as factions vied for control of Sierra Leone's lucrative alluvial diamond fields, the so-called "blood diamonds" that helped in part to sustain the conflict.¹⁵¹

The Lomé Peace Accord, signed in the final years of the decade-long conflict, called for the creation of a truth and reconciliation commission.¹⁵² Tasked with making sense of a war that seemed to many to be without purpose, the Sierra Leone Truth and Reconciliation Commission took a historically deep and thematically broad view of the roots and causes of the conflict. In interpreting its mandate, the commission adopted a broad view of the concept of human rights, including civil and political rights, economic and social rights, and "other categories such as the right to development and the right to peace."¹⁵³ It emphasized in its analysis dimensions of both physical and economic violence, going so far as to identify corruption, poverty, and structural violence as the core building blocks of the conflict.¹⁵⁴ Rather than treat facets of economic and structural violence as mere context, the commission traced the intertwined nature of economic, physical, and political violence both before and during the conflict itself. For example, in documenting violence that took place in the course of the conflict, the commission listed destruction of property, looting of goods, and extortion alongside killing, assault, and rape as among the most common "violations," with no attempt to create hierarchies of suffering.¹⁵⁵ The commission also examined the conflict's secondary impacts on economic and social rights, such as its effect on the health and education of women and children.¹⁵⁶

The inseparable nature of economic and physical violence in the Sierra Leonean conflict is perhaps expressed most clearly in the way that natural resources played into conflict dynamics—both before and during the war itself—an issue explored by the commission in some depth. While to many outsiders the conflict in Sierra Leone was viewed as little more than a brutal scrum for the nation's diamond resources, in fact the war played out against the backdrop of diamond and other natural resources in fairly complex

150. For a detailed history of the civil war, see LANSANA GBERIE, *A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE* (2005).

151. See Marilyn Silberfein, *The Geopolitics of Conflict and Diamonds in Sierra Leone*, 9 *GEOPOLITICS* 213, 213 (2004).

152. Peace Agreement Between the Government of Sierra Leone and The Revolutionary United Front of Sierra Leone, art. VI(2)(ix), June 3, 1999, available at <http://www.sierra-leone.org/lomeaccord.html>.

153. SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, 1 WITNESS TO TRUTH, REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 37–38 (2004).

154. SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, *supra* note 133, at 27.

155. *Id.* at 35.

156. *Id.* at 99–106.

ways.¹⁵⁷ For example, the commission examined the role of elites in siphoning off the country's diamond wealth in the decades before the eruption of violence, which created some of the conditions—including widespread frustration with corruption—that made the conflict possible.¹⁵⁸ Once the conflict erupted, control of diamond production became a key strategy for several factions, influencing the targeting of certain areas with attendant human rights consequences.¹⁵⁹ In the commission's view, diamonds helped to fuel and sustain the conflict even if plunder was not the driving factor that precipitated the Revolutionary United Front's initial brutal campaign at the outset of the civil war.¹⁶⁰

The report's recommendations are ambitious and wide-ranging, touching upon a broad gamut of rights. While many of the recommendations appear to target stronger rule of law and greater respect for civil and political rights, there are also recommendations tailored to dimensions of economic violence as expressed before and during the conflict, including a repeal of laws preventing women from owning land, the need for a stronger anti-corruption commission, better basic service delivery, and better and more transparent use of diamond revenues.¹⁶¹ Taken together, the recommendations of the Sierra Leonean Truth and Reconciliation Commission were perhaps the most comprehensive and most holistic set of recommendations issued by any truth commission up to that time. Of course, as with so many other truth commissions, a number of recommendations remain unimplemented;¹⁶² yet the existence of Sierra Leone's Human Rights Commission and the passage of three gender bills are important exceptions and serve as an important legacy to the far-reaching work of the truth commission.¹⁶³ The commission's recommendations have also occasionally provided an important platform to civil society groups, which are now able to press the government to take certain actions based on the recommended measures.¹⁶⁴

The groundbreaking work of truth commissions in Sierra Leone, Chad, Liberia, and elsewhere demonstrates that whatever is to be the dividing line

157. In its final report, the commission dedicates over fifty pages to an analysis of the role of mineral resources in the war. Its analysis suggests that diamonds were inextricably woven into the logic of the conflict; yet the commission resists the "simplistic" and "widely held belief in the western world" that the conflict in Sierra Leone was initiated solely because of the diamonds. SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, 3(b) WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 1–54 (2004).

158. *See id.* at 6–7.

159. *Id.* at 21–39.

160. SIERRA LEONE TRUTH AND RECONCILIATION COMM'N, *supra* note 133, at 12. The Revolutionary United Front was the rebel army that initiated the 11-year civil war in Sierra Leone.

161. *Id.* at 206–25.

162. ALEX BATES, ATLAS PROJECT, TRANSITIONAL JUSTICE IN SIERRA LEONE: ANALYTICAL REPORT 76–77 (2010), available at <http://projetatlas.univ-paris1.fr/spip.php?article69> (noting that the "vast majority" of the commission's recommendations have not been implemented).

163. Specifically, the Domestic Violence Act, the Registration of Customary Marriage and Divorce Act, and the Devolution of Estates Act.

164. This observation is based on the author's experience in Sierra Leone working with human rights and civil society activists as part of a regional human rights capacity-building program.

between what is inside or outside of a truth commission's mandate, it should not be determined by simplistic categories of civil and political or economic and social rights. The collective work of these truth commissions, combined with increasing if still modest attention within academic and policy circles, shows that there is a growing interest in questioning the historic dichotomies and peripheries of the field of transitional justice. It seems reasonable to anticipate that this interest will continue to grow, making resolution of the theoretical, practical, and policy dilemmas inherent in the expansion of transitional justice mandates one of the key fourth-generation issues to be worked on in the years to come.¹⁶⁵

IV. FROM PERIPHERY TO CENTER

The issues explored in this Article are not intended as an exhaustive survey. Rather, they are just a sampling of the peripheries that need to be interrogated, and they signal the emerging willingness of the transitional justice field to question its own constructed boundaries, blind spots, and limitations. Other areas that need to be—and are being—questioned include the privileging of the state as an agent for justice and change,¹⁶⁶ and the teleological foundations of the transitions paradigm, bound up in notions of historical progress and development,¹⁶⁷ to name only a few.

In the growing willingness to question some of these peripheries we see the growing strength and confidence of the field. The normative and policy objectives that early advocates fought for years to establish—including basic notions of accountability for former government officials, for example—are now gaining a toehold.¹⁶⁸ More and more, the question is not whether

165. For example, in Kenya and the Solomon Islands, where the work of each country's respective truth commission is ongoing, questions of economic violence and economic justice feature prominently, suggesting that the work of commissions in Chad, Ghana, Liberia, East Timor, and elsewhere was more than an aberration. Yet all of this work also has the potential to create new challenges. For instance, even if a truth commission expands its work to include facets of economic violence, just how broadly should it approach the matter? Should investigations be limited to economic crimes that occurred during the conflict itself, or should a commission also look deeply into historical violations that created the conditions of structural violence that may have helped to precipitate the conflict in the first place? Will expanding mandates be matched by expanding resources, and if not, might a commission's coverage of more traditional areas be reduced as a result? I have explored some of these potential dilemmas in greater detail elsewhere. See Sharp, *supra* note 4, at 801–05.

166. See Baines, *supra* note 71, at 414 (arguing that transitional justice scholars and practitioners often “assume that social change is led by state or state-like institutions through the rule of law,” an assumption that ignores some of the actual mechanisms of social change at work).

167. See Okello, *supra* note 115, at 278–79 (discussing the foundations of transitional justice as rooted in a liberal paradigm and the “unintended consequences of assuming that we are all progressing towards the same destination”); Harvey M. Weinstein et al., *Stay the Hand of Justice: Whose Priorities Take Priority?*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE, *supra* note 71, at 36 (stating that “[i]t is time to reconsider whether the term *transitional justice* accurately captures the dynamic processes unfolding on the ground”). See also Leebaw, *supra* note 8, at 117 (questioning the “assumption that the influence of transitional justice will be progressive and linear”).

168. See e.g., SIKKINK, *supra* note 23, at 96–97.

there will be some kind of transitional justice in the wake of mass atrocities, but what that transitional justice will look like.¹⁶⁹ A field that has been mainstreamed and institutionalized may then experience an increasing confidence that allows it to explore its own limitations. To be sure, the willingness to plumb the various peripheries explored in this Article is not entirely widespread. Some of these critiques emerge most strongly from academics working in a critical studies tradition rather than those at the centers of power and decisionmaking.¹⁷⁰ Be that as it may, many of these same critiques have already begun to be assimilated at the level of policy and practice, albeit superficially.¹⁷¹

Every field has its own core and periphery. What can be hoped is that as transitional justice as a whole continues to move into the mainstream of international attention, the emerging willingness to question the historic marginalization of certain issues within the field will not be lost. Maintaining a critical perspective that questions foundational paradigms while simultaneously entering the mainstream of power and policymaking is a task fraught with contradiction. Yet the push and pull of these centripetal and centrifugal forces could also serve as one of the central creative tensions in the development of new approaches to transitional justice in the years to come.

New approaches are badly needed if transitional justice is to facilitate building positive peace in the wake of massive repression and widespread human rights violations.¹⁷² Transitional justice is often said to be backward-looking, insofar as it focuses concern on justice for past atrocities, and forward-looking, insofar as grappling with the past is conceptualized as a means of building a better future.¹⁷³ But in looking forward, the field must deepen its commitment to fostering more democratic societies by interrogating its own remaining biases and peripheries. It must become more democratic not just in its aspirations, but in its core approaches and methodologies as well, seeking to help build actual democracy rather than merely replicating Western democratic governance models as part of the broader project of liberal international peacebuilding. Beginning to recover

169. See Nagy, *supra* note 21, at 276.

170. The excellent work of these scholars is cited throughout this paper, including the work of Kora Andrieu, Erin Baines, Roger Mac Ginty, Kieran McEvoy, Rosemary Nagy, Augustine Park, Balakrishnan Rajagopal, Chandra Sriram, and many others.

171. See, e.g., U.N. Secretary-General, *supra* note 24, ¶ 36 (affirming the need to incorporate local cultural practices into justice delivery mechanisms and dispute resolution); *id.*, ¶ 24.

172. A recent study reviewing empirical work on the state-level effects of transitional justice, including effects on levels of political violence, adherence to the rule of law, democratization, and a political culture of human rights and pluralism, observes a “prevailing ambiguity surrounding TJ impacts.” Oskar N.T. Thoms et al., *State-Level Effects of Transitional Justice: What Do We Know?*, 4 INT’L J. TRANSITIONAL JUST. 329, 332 (2010). While this study certainly points to the need for additional empirical research, it may also suggest the need to consider whether traditional approaches to transitional justice are indeed having the impact that some advocates had hoped.

173. See Arbour, *supra* note 139, at 8 n.20 (discussing a “consensus” that transitional justice is both backward- and forward-looking).

the deeper politics of the transitional justice project by questioning the historic marginalization of economic justice or the role of local norms and practices (among other peripheral items) is an important first step. In time, such efforts may pave the way for approaches to questions of justice in transition that are more holistic, potentially yielding a more just distribution of political and economic power in post-conflict societies and reflecting fundamental commitments to local deliberation and political autonomy.¹⁷⁴ In this sense, the preoccupations of fourth generation transitional justice go to the heart of the field's potential to serve as an instrument for the consolidation of more democratic societies grounded in positive peace.

174. See Branch, *supra* note 78, at 193–94 (2007).