

# Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition

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## Introduction [L1]

Transitional justice is a relatively new field of policy intervention in states moving from conflict to peace, or from repression to democracy. In transitions from dictatorship to democracy in countries like Chile and Argentina, it mainly focused on unveiling the truth about atrocities that had occurred in the context of primarily violations of civil and political rights. But it has been applied in states with very different political and economic landscapes and post-conflict situations, such as Liberia, Nepal, and East Timor, where demands for transition have extended beyond the spheres of truth seeking, accountability, reparation, reconciliation, and institutional reform. In these states, there have been strong calls for social justice transformations to address structural inequalities, poverty, and social exclusion, and transitional justice principles, processes, and mechanisms have, to a certain extent, been seen as vehicles to those ends.<sup>1</sup>

Such calls are partly a response to a perceived failure of transitional justice, to date, to address many of the key causes or consequences of repression or conflict—for example, the failure of the South African Truth and Reconciliation Commission to fully address racial discrimination and its devastating consequences.<sup>2</sup> Similarly, important literature on peacebuilding has put forward the idea that a “just peace” should be sought, meaning “a dynamic state of affairs in which the reduction and management of violence and the achievement of social and economic justice are undertaken as mutual, reinforcing dimensions of constructive change.”<sup>3</sup> The perceived failures of past transitional justice efforts, coupled with this literature, have had a significant impact on the field.

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<sup>1</sup> Makau Mutua, “What is the Future of Transitional Justice?,” *International Journal of Transitional Justice* 9, no. 1 (2015): 1–9, at 1.

<sup>2</sup> Mamdani Mahmood, “Reconciliation without Justice,” *Southern African Review of Books* 46 (1996): 3–5, [http://web.uct.ac.za/depts/sarb/X0045\\_Mamdani.html](http://web.uct.ac.za/depts/sarb/X0045_Mamdani.html).

<sup>3</sup> John Paul Lederach and R. Scott Appleby, “Strategic Peacebuilding: An Overview,” in *Strategies of Peace: Transforming Conflict in a Violent World*, ed. Daniel Philpott and Gerard F. Powers (New York: Oxford

Some believe that transitional justice processes and mechanisms constitute tools to deal with these other dimensions of conflict, such as inequality, poverty, and social exclusion, regardless of whether they are root causes or consequences of violence. This has forced policy makers, practitioners, and academics to consider how, and if, transitional justice can contribute to such ends.

Some of the literature supports either the enlargement of transitional justice to deal with violations of economic, social, and cultural rights or the widening of possible perpetrators to include certain types of nonstate actors like corporations.<sup>4</sup> Others have tried to create synergies and linkages between transitional justice and parallel interventions, like development or peacebuilding,<sup>5</sup> while still others have even suggested an alternative agenda for the field under the concept of “transformative justice.”<sup>6</sup>

While the debate is growing, it does not always shed light on the transformative potential of transitional justice. The meaning of *transformative justice* remains vague and unclear, as are its desired goals and the ways to achieve them. Equally, the role of context—for example, in situations of ongoing conflict, failed states, new states, new forms of conflict, and cross-border conflicts—as a key variable for understanding the field’s transformative potential is often overlooked. Further, the preconditions for bridging the gap between what is feasible in a transitional justice context and what is normatively desirable from a transformative justice point of view have not been given proper attention.

These shortcomings need to be addressed. It is essential to understand the limits and possibilities of transitional justice’s role in achieving major social change such as the reduction of structural inequalities, discrimination, and poverty. This is important if creating

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University Press, 2010), 19–44, at 23. See also John Paul Lederach, “Justpeace: The Challenge of the 21<sup>st</sup> Century,” in *People Building Peace* (Utrecht: European Centre for Conflict Prevention, 1999).

<sup>4</sup> Sabine Michalowski, ed., *Corporate Responsibility in the Context of Transitional Justice* (London: Routledge, 2013); Office of the High Commissioner for Human Rights (OHCHR), *Special Issue on Transitional Justice and Economic, Social and Cultural Rights*, 2014; Evelyne Schmid and Aoife Nolan, “Do No Harm? Exploring the Scope of Economic and Social Rights in Transitional Justice,” *International Journal of Transitional Justice* 8, no. 3 (2014): 362–282.

<sup>5</sup> Paul Gready and John Ensor, eds., *Reinventing Development? Translating Rights-based Approached from Theory into Practice* (London/New York: Zed Books: 2005); Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009); Dustin N. Sharp, *Justice and Economic Violence in Transition* (New York: Springer, 2013); Gaby O. Aguilar and Felipe G. Isa, eds., *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Belgium: Intersentia, 2011); Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Basingstoke: Palgrave Macmillan, 2011); and Oliver Richmond, *A Post-Liberal Peace* (London: Routledge, 2011).

<sup>6</sup> Paul Gready and Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice,” *International Journal of Transitional Justice* 8, no. 3 (2014): 339–361.

false expectations among victims and societies undergoing transition is to be avoided. It will also help to focus the work that transitional justice processes and mechanisms can and should do in the future.

This chapter constitutes a contribution to this ongoing debate by changing the terms of the discussion. It argues that transitional justice has the potential to contribute, albeit in a modest way, to how societies could address some pervasive problems through structural social changes that are part and parcel of its remit, but it disagrees with those who see this field as a magic solution to the problems of structural inequality, discrimination, and poverty. To this end, it shows the importance of answering fundamental questions, such as: What is transformative justice? How can transitional justice measures have a transformative effect? What are the preconditions for transitional justice to be transformative? And what is the nature of social change in periods of transition?

### **The Transformative Potential of Transitional Justice: Tracing Its Origins and Making Distinctions [L1]**

Transitional justice has been traditionally understood as “the set of measures implemented in various countries to deal with the legacies of massive human rights abuses. These measures usually include criminal prosecutions, truth telling, reparations, and different forms of institutional reform.”<sup>7</sup> While this definition does not contain a promise to deliver social justice,<sup>8</sup> many see in the field a unique opportunity to achieve significant social transformations, including poverty reduction and the elimination of discrimination.<sup>9</sup> This view has gained so much momentum that the United Nations has even changed its institutional approach to transitional justice. An important development in this area is evident in the contrast between the UN Secretary-General’s 2004 report on the rule of law and transitional justice in conflict and post-conflict societies and the 2010 *Guidance Note of the Secretary-General: The United Nations Approach to Transitional Justice*. While the 2004 report recognized the problematic issue that very little was being done to address the root

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<sup>7</sup> Pablo de Greiff, “Theorizing Transitional Justice,” in *Transitional justice, NOMOS 51*, ed. Melissa Williams, Rosemary Nagy, and Jon Elster (New York: NYU Press, 2012), 31–77, at 34.

<sup>8</sup> The meaning of social justice is contested. For the purposes of this chapter, social justice should be taken to mean all social changes aimed at providing people in a state with opportunities to live in a world free of poverty, marginalization, and discrimination and where they are able to exercise their rights and live with dignity.

<sup>9</sup> Mutua, 1; Rama Mani, “Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development,” *International Journal of Transitional Justice 2* (2008): 253–256.

causes of conflict,<sup>10</sup> the 2010 Guidance Note went a step further by stating that the United Nations should “strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights,”<sup>11</sup> with the understanding that these actions could include dealing with discrimination, exclusion, poverty, and violations of economic, social, and cultural rights, if applicable.<sup>12</sup> The Guidance Note implies that transitional justice mechanisms and processes have the capacity to deliver on these issues, which are deemed to be central for significant social transformations to occur.<sup>13</sup>

This shift is not without controversy, as transitional justice has had a much more limited remit in practice and many of its advocates consider it to be an inadequate means to deal with social transformation. For example, Lars Waldorf argues that “transitional justice in its current form is ill-suited to addressing socio-economic wrongs,” as it “struggles to deliver on its original promises of truth, justice and reconciliation.”<sup>14</sup> Its mechanisms are too weak to deal with these issues because budgets are already tight and those working on transitional justice are sometimes less knowledgeable about how to tackle social justice issues.<sup>15</sup> Nevertheless, the call for social justice is supported by key stakeholders, including civil society organizations and victims, as well as the academic literature.

### ***Transformative Reparation [L2]***

It is unsurprising that the first discussions of the idea of *transformative justice* appear in the context of reparation. From very early on, practitioners and academics alike have rightly argued that reparation is the most victim-friendly, or victim-focused, transitional justice measure.<sup>16</sup> The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and

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<sup>10</sup> United Nations, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616\*, August 23, 2004, para. 4.

<sup>11</sup> United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 2010, principle 9, [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>12</sup> The commentary to Principle 9 of the Guidance Note clearly states that “Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.” See principle 9, at 7.

<sup>13</sup> Peacebuilding literature also makes constant reference to “root causes of conflict,” a concept which has permeated UN work on peacebuilding and the rule of law. By the time of the 1992 Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, the UN Secretary General already believed it was essential to address the root causes of conflict. See A/47/277 – S/24111, June 17, 1992, paras. 15, 23 and 25.

<sup>14</sup> Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,” *Social and Legal Studies* 21, no. 2 (2012): 171–186, at 179.

<sup>15</sup> *Ibid.*, 171–172 and 186.

<sup>16</sup> Ruben Carranza, “The Right to Reparation in Situations of Poverty,” International Center for Transitional Justice Briefing (New York, September 2009), at 4.

Reparation (2007) asserts that “reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women’s and girls’ human rights predate the conflict situation.”<sup>17</sup> This call for gender justice (or full gender equality and equal enjoyment of rights) means, for example, that a woman who is raped would not be adequately redressed if she is merely provided with access to mental and physical health services or is awarded compensation for the harm she suffered, if the enabling conditions themselves have not changed. This is because she will continue to suffer the stigma of being a rape victim, while the conditions that made the sexual violence possible continue, preventing her from recovering from the harm she suffered or potentially leading to her suffering further harms. Reparations should therefore aim to not only address the violation and ongoing harm suffered but also transform the conditions that initially made them possible, such as cultural stereotypes and stigma surrounding sexual violence.

Guarantees of nonrepetition, a core aim of transitional justice, would be a useful tool to this end and remain crucial to realizing the transformative potential of transitional justice. Such measures are required in a state that is transitioning from dictatorship to democracy or from conflict to peace, to ensure that gross human rights violations and serious breaches of humanitarian law do not recur.<sup>18</sup> As Pablo de Greiff states, this component of transitional justice is not like the other measures as it refers to a function that can be carried out by diverse preventive measures; some of these will overlap with truth seeking, criminal justice, and reparation but will also go beyond them.<sup>19</sup>

For example, the Inter-American Court of Human Rights had to decide in *González et al. “Cotton Field” v. Mexico* whether Mexico was internationally responsible for failing to

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<sup>17</sup> Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007), para. 3, [https://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf). This view also influenced the work of the UN Special Rapporteur on sexual violence, who argued in a special report on reparations that “adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strive to have a transformative potential. Reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after the conflict.” United Nations, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, A/HRC/14/22, April 19, 2010, para. 31.

<sup>18</sup> United Nations, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, E/CN.4/2005/102/Add.1, February 8, 2005, Principles 35–38.

<sup>19</sup> United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, A/70/438, October 21, 2015, paras. 5–9.

prevent the sexual abuse and murder of a woman and two girls in a case emblematic of the *feminicidios* (gender-related killings) that have ravaged Mexico and other Central American countries. The court found the state responsible for various violations, but, more importantly, for the first time in its ground-breaking jurisprudence on reparation, it stated that the redress should be transformative:

Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State . . . the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.<sup>20</sup>

The argument here was that it would be wrong simply to return the victims to the same situation they were in before the violation took place—*restitutio ad integrum*—because that situation was one of structural discrimination. In adopting this position, the court sought to strike a balance between *corrective justice*, which is achieved through reversing the harm done, and *distributive justice*, which not only rectifies the previous situation but also takes measures to address issues related to the distribution of resources, benefits, and burdens of victims as well as any systemic discrimination. The court also outlined some criteria to assess the request for reparations—for example, stating that the forms of reparation requested should aim to restore the victim to the status quo ante (“the way things were before”) “to the extent that this does not interfere with the obligation not to discriminate” or that the reparations “are designed to identify and eliminate the factors that cause discrimination.”<sup>21</sup> Despite the importance of these new criteria, the court did not apply them to the reparations it ordered in this case, so questions remain about the best way for the state to provide transformative reparations.<sup>22</sup>

While the *Cotton Field* case did not deal with violations committed in the context of conflict or repression, the move toward transformative reparations converged with similar ideas developed in the context of transitional justice, particularly in the area of gender justice. Indeed, gender experts like Ruth Rubio-Marín have argued that reparations for women could

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<sup>20</sup> Inter-American Court of Human Rights, *Cotton Field v. Mexico*, November 16, 2009, preliminary objections, merits, reparations and costs, para. 450.

<sup>21</sup> *Ibid.*, para. 451.

<sup>22</sup> Ruth Rubio-Marín and Clara Sandoval, “Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment,” *Human Rights Quarterly* 33, no. 4 (2011): 1062–1091.

have transformative potential.<sup>23</sup> Specifically, she contends that the design and implementation of reparations should avoid formal gender discrimination, find ways to ensure “that patriarchal norms and sexist standards and systems of values are not leaked into reparations,” and explore ways “to optimize the (admittedly modest) transformative potential of reparations programs so that they serve to advance toward the ideal of a society altogether free of gender subordination.”<sup>24</sup>

The idea that reparations should be transformative has been incorporated into UN policy and operational guidance as requested by the UN Secretary-General in his 2014 *Guidance Note on Reparations for Conflict-Related Sexual Violence*.<sup>25</sup> Indeed, the document establishes, as a key guiding principle for operational engagement, that “reparations should strive to be transformative, including in design, implementation and impact.” However, it acknowledges that reparations cannot, by themselves, remove the root causes of conflict or repression, though they can contribute to promote, and trigger change.<sup>26</sup>

Rodrigo Uprimny also has made a call for reparations to be transformative, emphasizing the importance of challenging unjust economic and power structures. When providing reparations in a transitional society, he argues, “we are making efforts to correct past harms but in an unjust society, with deep inequalities and widespread poverty.”<sup>27</sup> Therefore, “states should make a deliberate effort to harmonise reparation efforts with poverty reduction policies and development strategies.”<sup>28</sup> Again, Uprimny attempts to reconcile and balance corrective and distributive approaches to justice when awarding reparations in transitional societies. In his view, policy makers could achieve this through their selection of beneficiaries and benefits, procedural designs, and the inclusion of reparation efforts focused

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<sup>23</sup> There are those who disagree with the idea that gender reparation should be transformative. Margaret Walker, for example, claims that aiming to transform social structures through gender reparations is not only politically and practically difficult, it additionally “threatens to bypass or displace reparative justice as a distinct and distinctly victim-centered ideal in favour of a different kind of justice agenda.” See Margaret Urban Walker, “Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations,” *International Journal of Transitional Justice* 10 (2016): 108–125, at 110.

<sup>24</sup> Ruth Rubio-Marín, “The Gender of Reparations in Transitional Societies,” in *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, ed. Ruth Rubio-Marín (Cambridge: Cambridge University Press, 2009), 66.

<sup>25</sup> United Nations, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, June 2014, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>

<sup>26</sup> *Ibid.*, 8–9.

<sup>27</sup> Rodrigo Uprimny, “Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice,” *Netherlands Quarterly of Human Rights* 27, no. 4 (2009): 638, 635–647.

<sup>28</sup> *Ibid.*, 643.

on the provision of social and welfare services.<sup>29</sup> An example would be to provide significant material reparations to the most vulnerable victims, while minimizing them for those who are less vulnerable and more affluent.<sup>30</sup> Certainly, taking context into account, as suggested by Uprimny, could conflict with victims' equal right to adequate, prompt, and effective reparation. Yet, for Uprimny, "a transformative concept, far from wakening the right of victims to reparation, makes it more meaningful, because it shows that compensation of victims is compatible with the pursuit of a more just society for all."<sup>31</sup>

It is important to note, however, that while both Rubio-Marín and Uprimny appear optimistic about the important transformative potential of reparations, they also recognize that the contribution of such an approach remains modest overall. This point is crucial because they do not see reparations as a panacea with the potential to solve deep-seated inequalities and poverty. In fact, Rubio-Marín considers that gender reparations have an important preventive role, as they can prevent the perpetuation of patriarchal hierarchies and ideologies and help to empower women. For Uprimny, reparations can "deepen democracy and improve distributive justice."<sup>32</sup>

### ***Enlarging the Field of Transitional Justice: Transitional Justice and the Economic and Social Dimensions of Conflict or Repression [L2]***

The claim that reparations should be transformative is one of the current transitional justice conceptual challenges, but it is not the only one. Other conceptual views could be classified as follows, transitional justice should: 1) deal with the economic and social dimensions of conflict or repression; 2) deal with violations of economic, social, and cultural rights and the root causes of conflict or repression, not just with violations of civil and political rights; and 3) tap into development and other policy interventions that occur in parallel with it. Given the interrelatedness of these issues, they are presented here under the broad heading of the "economic and social dimensions of conflict or repression." These challenges may affect distributive-justice issues but not to the same extent and not necessarily as a result of a deliberate choice. For example, it is possible to advocate for the need to investigate and prosecute corporations, and to secure reparation from them, for their involvement in the commission of serious international crimes, simply because this is a natural consequence of

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<sup>29</sup> Ibid., 644.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., 646.

<sup>32</sup> Ibid., 647.

pursuing accountability and redress for violations and not because it will achieve distributive justice.<sup>33</sup> There is nothing inherently transformational in these challenges, although they may still prove to be the trigger for important social change in transitional societies.

Some practitioners and academics have challenged traditional transitional justice discourse, arguing that a key opportunity to deal with the economic and social dimensions of conflict or repression is being missed when transitional justice mechanisms have not addressed violations of economic, social, and cultural rights as well as economic crimes, poverty, economic policies, development, structural discrimination, corruption,<sup>34</sup> and/or the responsibility of nonstate actors like corporations. They believe that

in many instances economic and social conditions and policies are closely linked to human rights abuses and might constitute a cause, means and/or consequence of conflict and authoritarianism [and that] ignoring potential links might then mean to ignore an important side of past injustices and could, at worst, lead to the recurrence of conflict and abusive practices.<sup>35</sup>

They also argue that

the failure to include economic concerns in transitional justice mechanisms tends to make transition into a political rather than an economic story, limiting knowledge of the economic underpinnings of conflict, narrowing the story of regime change and quelling discussion of development plans by quarantining them within the state and the executive rather than making them part of the transitional justice conversation.<sup>36</sup>

In short, there is a wide range of views supporting the expansion of what transitional justice commonly addresses, but not all are based on the same assumptions. For some, transitional justice should be enlarged to deal with violations of economic, social, and cultural rights as they believe that doing so would allow justice to “contribute as it should to societies in transition.”<sup>37</sup> Indeed, they assert that some degree of distributive justice is implicit in the respect, protection, and fulfillment of economic, social, and cultural rights.<sup>38</sup> As the preamble

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<sup>33</sup> Clara Sandoval, Roberto Vidal, and Leo Filippini, “Linking Transitional Justice and Corporate Accountability,” in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (London: Routledge, 2013).

<sup>34</sup> Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?,” *International Journal of Transitional Justice* 2 (2008): 310–330.

<sup>35</sup> Lisa Hecht and Sabine Michalowski, “The Economic and Social Dimensions of Transitional Justice,” 2014, 1, <https://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf>

<sup>36</sup> Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2 (2008): 266–291, at 280. See also Ismael Muvingi, “Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies,” *International Journal of Transitional Justice* 3 (2009): 163–182.

<sup>37</sup> Louise Arbour, “Economic and Social Justice in Transition,” *International Law and Politics* 40, no. 1 (2007): 1–27, at 1.

<sup>38</sup> Uprimny.

to the International Covenant on Economic, Social and Cultural Rights states, these rights “establish the minimum conditions required for people to live in a dignified way, to ensure freedom from fear and want, and the continuous improvement of these conditions.”<sup>39</sup>

According to Louise Arbour,

Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social and cultural rights.<sup>40</sup>

Addressing violations of economic, social, and cultural rights through transitional justice mechanisms has also been understood by some as a key way to restore capabilities of diverse sectors of society and promote the meaningful participation of historically marginalized groups.<sup>41</sup>

While discussion continues about the extent to which these rights should be included within the field of transitional justice,<sup>42</sup> their inclusion in the work of various recent truth commissions, such as Timor-Leste’s, Kenya’s, and Tunisia’s or the truth commission discussed in Colombia,<sup>43</sup> have demonstrated the need and inclination to address them in certain situations.<sup>44</sup> Even the United Nations has moved toward operationalizing this inclusion.<sup>45</sup>

Others have advocated for linking transitional justice and development through issues such as poverty reduction, land redistribution, universal education, health care, good governance, and human rights,<sup>46</sup> with the potential to at least, to some degree, “improve the socioeconomic

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<sup>39</sup> Preamble to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Res. 2200A (XXI), December 16, 1966.

<sup>40</sup> Arbour, 3.

<sup>41</sup> Thomas Bundschuh, “Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity,” *International Journal of Transitional Justice* 9 (2015): 10–32.

<sup>42</sup> OHCHR, *Special Issue on Transitional Justice and Economic, Social and Cultural Rights*.

<sup>43</sup> CAVR, *Chega: The Report of the Commission for the Reception, Truth and Reconciliation in Timor-Leste*, Part II; Kenya Truth, Justice and Reconciliation Commission, 2013, Vol. IIB.

<sup>44</sup> United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, A/HRC/21/46, August 9, 2012, para. 17.

<sup>45</sup> OHCHR, *Special Issue, Transitional Justice and Economic, Social and Cultural Rights*.

<sup>46</sup> Roger Duthie, “Toward a Development-sensitive Approach to Transitional Justice,” *International Journal of Transitional Justice* 2 (2008): 292–309.

conditions of people.”<sup>47</sup> However, different views exist about the type of relationship that should be fostered between the two fields.<sup>48</sup> Some have suggested one possible angle would be via the concept of human development, given that a failure to address past atrocities would hinder the development and exercise of victims’ capabilities and thereby prevent them from being and doing what they choose.<sup>49</sup> But most of the literature addressing this connection looks at particular transitional justice measures and the way they can coexist harmoniously with development, or the way that development tools, such as aid or conditionalities (pursuing certain policies or achieving certain results), should be managed.<sup>50</sup>

Those looking at reparations, for example, contend that efforts to redress serious harm should be done from a development angle, as Uprimny has proposed.<sup>51</sup> Instead of providing monetary compensation, for instance, which might be used to pay victims’ debts or be distributed among family members, some argue that compensation could take the form of shares in microfinance institutions because this practice might empower victims in the future.<sup>52</sup> Others argue that development packages and aid could include the financing of reparation programs.<sup>53</sup> By understanding guarantees of nonrepetition as a reparation measure with both forward- and backward-looking dimensions, they could be used to prevent corruption and other financial crimes and setbacks that both hamper development and spark conflict or repression.<sup>54</sup>

But enlarging the field of transitional justice—that is, extending its scope to include development issues (such as poverty and marginalization), corruption, or violations of economic, social, and cultural rights—is not the same as claiming that transitional justice is or could be synonymous with transformative justice. Indeed, as has been argued, these matters may be addressed by transitional justice mechanisms because they are either a root cause or consequence of conflict or repression, and/or because not dealing with them would prevent transitional justice from achieving its goals. Certainly, if a serious attempt is made to tackle a conflict’s root causes or consequences it will inherently constitute a transformational

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<sup>47</sup> Roger Duthie, “Introduction,” in *Transitional Justice and Development*, 17.

<sup>48</sup> Duthie, “Toward a Development-sensitive Approach,” 309.

<sup>49</sup> Pablo de Greiff, “Articulating the Links Between Transitional Justice and Development: Justice and Social Integration,” in *Transitional Justice and Development*, 48–55.

<sup>50</sup> Marcus Lenzen, “Roads Less Travelled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice,” in *Transitional Justice and Development*, 77–99.

<sup>51</sup> See the section on transformative reparation in this chapter.

<sup>52</sup> de Greiff, “Articulating the Links,” 37.

<sup>53</sup> Mani, 256.

<sup>54</sup> de Greiff, 38.

effort; however, that is not the same as saying that transitional justice is, by itself, transformational of social conditions. Therefore, it is vital to understand that while commonalities exist between the transformative justice discourse in the field of transitional justice and the views of those appealing for the enlargement of the field, they do not necessarily have a common transformative agenda. To understand more about the differences between these two strands, it is important to examine the literature on transformative justice.

### **“Transformative Justice”: Beyond Enlarging the Field of Transitional Justice [L1]**

The term *transformative justice* frequently appears in the writings of practitioners and scholars working on transitional justice issues and related fields. Indeed, and just by way of illustration, a search for these words in the leading journal on the subject, *The International Journal of Transitional Justice*, highlights the importance of the concept in current literature. Of the more than 300 articles published by the journal between 2007 and the first issue of 2016,<sup>55</sup> the term *transformative justice* or alternative terms such as *transformative change*, *transformative transitional justice*, or *transformative* as an adjective appear in almost every single article. This reflects the perception among both practitioners and academics that the transformative dimension of transitional justice is a key area of inquiry, even if disagreements remain over the extent to which transitional justice could be transformational, how much transformation could be achieved, and how to operationalize it.

Two such articles are of particular note. The first, “Transitional Justice and Peacebuilding After Mass Violence,” written by Wendy Lambourne in 2009, shows the impact of peacebuilding literature on transitional justice. It aims to “develop a model of *transformative justice* that supports sustainable peacebuilding.”<sup>56</sup> While Lambourne explicitly identifies some conditions for transformation—such as civil society participation; transdisciplinary, long-term, and sustainable processes; the inclusion of different cultural approaches to justice; and the transformation of social, economic, and political structures<sup>57</sup>—she does not flesh out the concept or provide an agenda for change. Indeed, her article is an attempt to diagnose the problems of the field in order to claim that “what is needed is a revolution in thinking that challenges the dominance of western legal discourse and creatively and inclusively develops

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<sup>55</sup> The count includes all components of any single published journal: the editorial notes, the articles, notes from the field, and book reviews.

<sup>56</sup> Wendy Lambourne, “Transitional Justice and Peacebuilding after Mass Violence,” *International Journal of Transitional Justice* 3 (2009): 284–8, at 28. Emphasis added.

<sup>57</sup> *Ibid.*, 30.

new ways of conceiving of accountability mechanisms that provide a more comprehensive and holistic experience of justice.”<sup>58</sup>

The second article, “From Transitional to Transformative Justice: A New Agenda for Practice,” written by Paul Gready and Simon Robins in 2014, was one of the journal’s most-read articles as of July 2016. The authors build on Lambourne’s analysis but go further in their attempt to outline a concept of *transformative justice* that involves “transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.”<sup>59</sup> They also support enlarging the field of transitional justice to address issues such as development and violations of economic, social, and cultural rights. However, they believe that existing attempts in this direction have “fall[en] short of a transformative approach”<sup>60</sup> because they have prioritized civil and political rights; dismissed the value of positive peace<sup>61</sup>; taking a top-down, a state-centered approach controlled by an elite of professionals and donors, which undermines local participation and empowerment; and failed to address the ongoing and changing violence that persists well after a transition has “ended.”<sup>62</sup> They argue for a different approach, developed in close cooperation with peacebuilding and conflict-transformation efforts,<sup>63</sup> that would emphasize the process through which victims are empowered, rather than just outcomes.

Articles calling for transformative justice share some underlying assumptions.<sup>64</sup> First, transitional justice should and could deal with structural inequality and discrimination, including gender power relations. This implies enlarging the field to deal with, among other issues, development questions and violations of economic, social, and cultural rights but also to work in tandem with other peacebuilding and conflict-transformation activities.

Accordingly, dealing with these areas is not only about enlarging the field but also about transforming social conditions. Second, a different type of response is needed, one that prioritizes process, context, participation, and needs over outcomes and that adopts a bottom-

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<sup>58</sup> Ibid., 47.

<sup>59</sup> Gready and Robins, 340.

<sup>60</sup> Ibid., 340 and 360.

<sup>61</sup> Ibid., 341.

<sup>62</sup> Ibid., 348.

<sup>63</sup> Ibid.

<sup>64</sup> Other articles on transformative justice that look at particular dimensions include Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194; and Dustin N. Sharp, “Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,” *International Journal of Transitional Justice* 9, no. 1 (2015): 150–169.

up approach to addressing violations and providing redress, one that is not state-centered and that is driven by victims and for victims.<sup>65</sup> Third, transitional justice is not just a legally driven field; a transformative approach would also involve drawing on other disciplines beyond law, such as politics or economics.

Collectively, these common assumptions denote a change in approach to transitional justice that goes beyond merely enlarging the scope of the field; they emphasize the form and the process through which the field is enlarged. In a way, they put forward a victim-centered approach to transitions. While the literature on transformative justice has yet to provide concrete tools to fulfill these ambitions, it nevertheless constitutes a radical attempt to change the field of transitional justice.

### **Preliminary Considerations Regarding the Search for Transitional Justice's Transformative Potential [L1]**

Missing from the transformative justice literature is a detailed examination of the capacity and potential for the field to be truly transformative. Such an inquiry would require consideration of the meaning of transitional justice and its goals, the context in which transitional justice processes and mechanisms are used (the types of conflict and/or repression to which it responds, along with other variables, like state fragility or failure), the meaning of social change, and the nature of the field of transitional justice itself.<sup>66</sup> These essential building blocks frame the limits and opportunities for any type of transformation. What follows are some reflections on the *capacity* of transitional justice to be transformative.

#### ***The Transitional Justice Context [L2]***

Transitional justice processes take place in a context where, as a general rule, a political rupture in the continuum of violent conflict or repression has occurred. The rupture results from a new configuration of political forces that is able to challenge the dominant system.<sup>67</sup> For instance, in Argentina, the 1982 embarrassing defeat in the Falklands War and economic stagnation that followed helped to bring about the fall of the military junta in 1983 and the

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<sup>65</sup> Ibid., 358.

<sup>66</sup> Other considerations are also important such as the relationship between serious human rights violations and breaches of humanitarian law, and the root causes and consequences of conflict or repression.

<sup>67</sup> Michelle Parlevliet, "Rethinking Conflict Transformation from a Human Rights Perspective," Research Center for Constructive Conflict Management, 13, [http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/parlevliet\\_handbook.pdf](http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/parlevliet_handbook.pdf)

end of the so-called Dirty War, which then led to the restoration of democracy.<sup>68</sup> In Liberia, international pressure against the rule of President Charles Taylor during the Second Liberian Civil War (which began in 1999) brought the country to a political breaking point, leading Taylor to step down and paving the way for a peace agreement to be signed in 2003 and a transitional government, to be installed until new elections were held in 2005.<sup>69</sup>

Such ruptures represent a break from the old system and from the ideology (political, legal, social, cultural, and so on) that allowed atrocities to occur. These breaks have multiple causes, often related to the loss of political power and legitimacy of one of the sides and/or the need to address the root causes of the conflict or political repression. They give rise to unique opportunities for the reconfiguration of politics and power that allow transitional justice mechanisms and processes to be deployed. Nevertheless, the social, political, economic, and cultural contexts behind the atrocities, including their root causes and perpetrators, tend to vary greatly between countries, particularly between countries transitioning from a repressive regime and those transitioning from conflict. One constant, however, is the gross nature of the violations that have taken place, even if the scale of the atrocities and damage differs from one place to another.

In Liberia, for example,

the country's infrastructure was destroyed: there were no electrical grids, public running water, sewage, or other utilities . . . Bullet holes adorned the buildings, lampposts, and street signs. Hundreds of thousands of internally displaced Liberians fled to Monrovia, a city that could accommodate far fewer, resulting in massive slums of tin shacks, garbage, human waste and disease.<sup>70</sup>

There was “devastation of both the people and state institutions, denoting the collapse of both state and society.”<sup>71</sup>

The nature of the violence in Argentina was very different. There, the government and right-wing death squads carried out violence against very specific groups of people targeted

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<sup>68</sup> Thomas Carothers, *In the Name of Democracy: U.S. Policy Toward Latin America in the Reagan Years* (Berkeley, CA: University of California Press, 1991), 147.

<sup>69</sup> UN Security Council, *Report of the Secretary-General to the Security Council on Liberia*, S/2003/875, September 11, 2003, paras. 3–19.

<sup>70</sup> John Blaney, Jacques Paul Klein, and Sean McFate, “Wider Lessons from Peacebuilding: Security Sector Reform in Liberia,” Policy Analysis Brief, The Stanley Foundation, June 2010, <http://www.stanleyfoundation.org/publications/pab/LiberiaPAB610.pdf>.

<sup>71</sup> Adedeji Ebo, “The Challenges and Opportunities of Security Sector Reform in Post-Conflict Liberia,” Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper no. 9, December 2005, 6, <http://www.dcaf.ch/Publications/The-Challenges-and-Opportunities-of-Security-Sector-Reform-in-Post-Conflict-Liberia>.

because they were seen as political or economic threats: left-wing activists and militants, political dissidents, and those suspected of supporting socialism, including trade unionists, students, and journalists.

Those responsible for violations were mainly state servants, members of the police or the military, under the command of four different military juntas that were in power from 1976 to 1983, or the *Montoneros*, a leftist rebel group. As in Liberia, other states also played a role in authoritarian regimes, as illustrated by Operation Condor, a campaign of political repression and state terror involving intelligence operations and assassination of opponents, carried out in the Southern Cone of South America.<sup>72</sup>

Yet, the economy was not in relatively good shape; poverty was far less widespread than in Liberia. State institutions used by the junta to carry out atrocities needed to be purged, not built from scratch. The challenge at the time mainly related to how to turn repressive institutions into rights-respecting ones and to improve the economy.<sup>73</sup> In Liberia, perpetrators of atrocities included government officials, members of various militias and rebel groups, such as the National Patriotic Front of Liberia, the Independent National Patriotic Front of Liberia, Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the Revolutionary United Front, as well as powerful political figures like Samuel Doe and Charles Taylor. All of these individuals and groups had control over different parts of the country and, in some cases, even enjoyed the support of neighboring states. The root causes of conflict in Liberia included competition for resources, tribal and ethnic tensions, poverty, and inequality. In terms of the types of violations and their scale, it is calculated that in Liberia between 1989 and 2003 over 250,000 persons were killed, over one million were internally displaced, and hundreds of thousands were made refugees.<sup>74</sup> These numbers are particularly high if we consider that, in 2000, Liberia had approximately 2.9 million inhabitants.<sup>75</sup> This means that approximately 50 percent of the population were victims of the conflict.

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<sup>72</sup> Peter Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (New York: The New Press, 2003), 323.

<sup>73</sup> Javier Lewkowicz, "La Herencia Económica que Dejo Videla," *Página 12*, May 18, 2013, <http://www.pagina12.com.ar/diario/economia/2-220300-2013-05-18.html>.

<sup>74</sup> Liberia, Truth and Reconciliation Commission, Preliminary Findings and Determinations, December 19, 2008, Vol. I, at 44.

<sup>75</sup> See <http://www.worldmeters.info/world-population/Liberia-population/>.

In Argentina, on the other hand, an estimated 10,000-30,000 individuals went missing and were likely forcibly disappeared during the Dirty War.<sup>76</sup> Many others were tortured, detained, and denied civil and political rights, with certain political parties being banned—and their family members and friends intimidated. At the height of the repression 26 million inhabitants lived in the country, meaning the percentage of victims in Argentina was significantly lower than in Liberia. This is in line with the state's targeted use of violence.

Different contexts, root causes, perpetrators, and scales of violence mean not only different challenges for transitional justice mechanisms but also different opportunities for social change. While social change was and is possible in both Argentina and Liberia, it is important to clarify the nature of the type of potential social change in each country. The deployment of transitional justice mechanisms constitutes a unique, if small, window of opportunity to contribute to the transformation of dominant ideologies and structures that permitted or consented to atrocities. Nevertheless, the transformative potential of transitional justice depends highly on the capacity of its mechanisms to respond to and deal with challenging conditions that predate their work.

### ***The Meaning and Forms of Social Change: Ordinary, Structural, and Fundamental [L2]***

The idea that transitional justice can be transformative relies on the assumption that social change is possible. In other words, one must believe that it is possible to remove the social, political, economic, and cultural conditions that allowed for the repression or conflict to take place—and to move toward the realization of certain desired social goals, such as human rights protection, democracy, and rule of law.

However, the potential for social change is often taken for granted, while the capacity of the social system to remain unchanged is usually overlooked.<sup>77</sup> The degree of “fixity” of those elements of the social system that prevent transformations from taking place should be

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<sup>76</sup> Human rights groups in Argentina estimate approximately 30,000 persons were disappeared during the repression. El Clarín, “Una duda histórica: no se sabe cuántos son los desaparecidos,” October 6, 2003, <http://edant.clarin.com/diario/2003/10/06/p-00801.htm>. According to the findings of CONADEP, the National Commission on the Disappearance of Persons, 8,960 people went missing. *Nunca Mas*, Part IV, Recommendations and Conclusions, September 1984. The real number of disappeared and executed people is considered to be higher.

<sup>77</sup> Robert Nisbet develops a powerful argument to show the priority of fixity over change in the social sphere. He claims that “change is, however, not ‘natural’, not normal, much less ubiquitous and constant. Fixity is.” He then continues: “In the realm of observation and common sense, nothing is more obvious than the conservative bent of human behaviour, the manifest desire to preserve, hold, fix and keep stable. Common sense tells us that, given the immense sway of habit in individual behaviour and of custom, tradition, and the sacred in collective behaviour, change could hardly be a constant, could hardly be ubiquitous.” Robert Nisbet, *Social Change and History* (New York: Oxford University Press, 1969), 271.

carefully scrutinized to understand whether these preexisting conditions can be changed in a transformative manner.<sup>78</sup> One key aspect in this regard is the existence of a dominant ideology, that is, a set of beliefs about what is right and wrong that permeates everyday life and that exists and is reproduced, reinforced, and perpetuated using law, education, politics, media, culture, and religion. Dominant ideologies can facilitate or permit atrocities—when, for example, they are supported by those with political and economic power to persuade others of what is right and wrong.

We may distinguish between three different types of social change: *ordinary change*, *structural change*, and *fundamental change*. These types of change can apply in any type of social context, but the key to distinguishing between them is the impact each has on dominant ideologies and social structures. In the case of transitional justice, it is important to understand whether, when, and why these changes are possible.

When political, social, economic, and/or cultural changes result in a transformation of *both* the ideologies *and* the structures that supported the conflict or the repressive regime, then they will constitute fundamental social change. If they do not, they constitute ordinary social change or structural social change alone. Structural change on its own does not amount to fundamental change even if it can contribute to ideological change.

*Ordinary social change* refers to everyday changes that align with dominant ideologies and structures in society. For example, during the so-called Global War on Terror, security concerns in many countries have been prioritized over human rights considerations. It may even be said that people in general believe that strong security measures are needed to fight terrorism. This belief is not new but simply builds on existing ideologies and structures reproduced through law, education, media, and other means.

Equally, the enactment of an amnesty law or a statute of limitation in a given country could constitute, depending on the context, a form of *ordinary change* common during transitional periods, even if it also represents a legal change. While these laws, as well as antiterrorist views, could be seen as extraordinary measures because they are adopted under exceptional circumstances, they are generally put in place or enacted to maintain the ideologies that facilitated atrocities or to arrive at a compromise with them. Though they may emerge as a

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<sup>78</sup> Consider, for example, how difficult it is to enact a new political constitution, especially when inside rigid legal systems, or to enact a new treaty in the international arena. Most of the changes in the law are gradual changes that have to follow certain patterns in order not to violate the essence of the system in which they take place.

result of a significant political struggle and face significant resistance, ultimately they do not necessarily threaten or transform the dominant ideology or structures. They either perpetuate them or, at most, weaken them without transforming their foundations.

*Structural change* is a bit more complex; it can sometimes give the illusion that fundamental social change is at stake. A good example is the adoption of a new constitution. Such a change is often considered to be fundamental, given that the very foundations of the legal system have been overhauled. However, this type of change is, in fact, structural because, while it may be necessary, it is insufficient to transform the dominant ideologies and structures. The adoption of a new constitution, while an important guarantee of nonrepetition, will not constitute, in and of itself, a fundamental change.

The case of South Africa illustrates this point. The 1991 National Peace Accord provided for the creation of a multiparty democracy and the promotion of social reconstruction and development.<sup>79</sup> Subsequently, the post-apartheid interim constitution of 1993 and the constitution of 1996 established civil, political, economic, social, and cultural rights, along with various remedies for individuals and important social institutions to transform the status quo established by the apartheid regime. Even so, despite the existence of these legal documents and the work carried out by institutions like the South African Constitutional Court to protect rights, deep inequalities that became entrenched in South African society under apartheid remain present. Therefore, important aspects of the apartheid ideology persist in South African society today, even if structural transformation has taken place.<sup>80</sup> It is undeniable that the right to racial equality has gained currency in South Africa, but more work needs to be done to ensure that people truly believe in and cherish this right. Equally, ideological change is insufficient if it does not penetrate and transform all the preexisting conditions that facilitated apartheid, such as access to land or basic living conditions.

The establishment of transitional justice mechanisms, such as truth commissions, commissions of inquiry, civil and criminal tribunals, and reparations programs, during moments of crisis or change would, in principle, constitute structural changes if they help to transform the ideologies that made the atrocities possible. They do so, in particular, by providing truth to counter harmful, destructive narratives, justice and reparation to restore the rights and dignity of victims, and institutional reform that removes repressive policies and practices.

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<sup>79</sup> South Africa's National Peace Accord, <http://www.anc.org.za/show.php?id=3967>.

<sup>80</sup> Bundschuh, 11–12.

Nevertheless, there is nothing intrinsic to any of these mechanisms that makes them structural changes per se. Indeed, they could be created merely to give the impression that the dominant ideology is changing, when in reality, the objective is to maintain the status quo. Where this is the case, such measures are elements of ordinary change because they are built on the foundations of the previous regime, and their tasks will be driven by dominant ideologies that permitted atrocities. Therefore, it is not the presence of transitional justice mechanisms themselves that determines the nature of the change but rather other factors, such as the powers the mechanisms are given (human, financial, legal) to achieve their aims, the seriousness with which the state takes their decisions/recommendations, and the impact they have on dominant ideologies.

*Fundamental social change* occurs when various structural changes provide foundations for new dominant ideologies inspired by radically different values to those evident during the repression or conflict to flourish. Furthermore, these values must be respected, endorsed, adopted, and articulated by different political sectors and ideologies of society and be given life through different norms, institutions, education, and culture, so that they are ultimately able to affect the economic, social, political, and other conditions that permitted the conflict or repression. In the words of Erin Daly, “part of the process of transformation, therefore, entails inculcating new values in the society.”<sup>81</sup>

While transitional justice mechanisms can contribute to the transformation of dominant ideologies, they do not lead to such changes on their own but rather only in combination with other structural changes. In cases like Liberia where competition for resources, poverty, and tribal and ethnic conflicts were at the heart of the conflict, transitional justice mechanisms cannot alone transform such social conditions. They can certainly contribute to change but not in isolation; it is recognized that such measures work better when instituted comprehensively. Structural changes to overcome poverty in post-conflict situations include the design of a poverty-reduction strategy that takes due account of the conflict and local context but also include a good aid policy and, among other things, the involvement of entities other than transitional justice mechanisms and stakeholders like development actors.<sup>82</sup>

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<sup>81</sup> Erin Daly, “Transformative Justice: Charting a Path to Reconciliation,” *International Legal Perspectives* 12, no. 73 (2001): 81.

<sup>82</sup> For more on the needed reforms in such contexts, see Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What can be Done about It* (Oxford: Oxford University Press, 2008), 175–192.

Furthermore, ideological transformation is intergenerational. It does not happen within a short period of time and would be highly unlikely to occur within the brief lifespan of most transitional justice mechanisms, which by their very nature are meant to be transitory,<sup>83</sup> though they should leave a lasting legacy (including by making recommendations for needed fundamental and structural changes). Cases like Chile and Argentina illustrate this point. It is only now—more than two decades after the transitions began in those states—that structural changes, including those implemented through multiple transitional justice mechanisms, such as criminal accountability for past crimes of major perpetrators have gained force.

Transitional justice happens, as already indicated, during a rupture where a particular configuration of political forces gives rise to opportunity for change, though within constraints. Therefore, the majority of changes taking place in processes of transitional justice are ordinary or structural. This does not mean that change in states undergoing transitions is not important. Indeed, transitional justice principles and mechanisms can be meaningfully deployed only in states where dominant ideologies have been weakened, are under threat, and have lost legitimacy (as happened with the apartheid regime in South Africa or with the dictatorships in the Southern Cone). This situation constitutes a unique, if small, window of opportunity to contribute to social transformation. If transitional justice mechanisms and processes are deployed under the right conditions, then they offer important opportunities for triggering or contributing to fundamental change.

### ***The Nature of Transitional Justice Mechanisms and Processes [L2]***

It is equally important to understand the nature of transitional justice processes and mechanisms, as this frames the possibilities for ordinary, structural, and fundamental social change within and outside the field. The following variables influence the work of these mechanisms and the way they bring about social change.

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<sup>83</sup> Transitional justice mechanisms have been defined as transitory in nature, meaning that they are created to act in an extraordinary manner in a particular situation and then cease to exist. This has been the rule for truth commissions, for example, with the lifespan of these mechanisms ranging from eight months in Haiti to slightly over two years in Peru or Uruguay. Nevertheless, this remains a contentious issue. Transitional justice mechanisms are taking longer to carry out their work, as demonstrated by Colombia under the Justice and Peace Law and the likely upcoming experience under the Special Jurisdiction for Peace, or by what has happened in countries like Argentina where trials were reopened. Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 318–325. See also Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University, 2010).

First, transitional justice mechanisms have *preestablished aims* that are regulated by a normative framework that sets limits and offers opportunities. Four branches of public international law drive the mechanisms: international human rights law, international humanitarian law, refugee law, and international criminal law.<sup>84</sup> Driven by this framework they aim to achieve as much truth seeking, criminal justice, reparation, reform, and prevention as possible, but to do so, important policy choices must be made. As a result of these decisions, the investigation of some crimes is prioritized above others, the parameters for classifying who does and does not count as a victim are set, the areas of truth to be elucidated are established, and forms of institutional reform and guarantees of nonrepetition are negotiated. While bound by this normative framework, the mechanisms are also *extraordinary*. They deal with serious atrocities that happened in a systematic manner, causing irreparable harm to victims and society. They do not deal with everyday crimes but with complex situations. They are also extraordinary in the sense that they deal with such atrocities in a distinctive way that takes due account of context and the magnitude of the challenges faced.

Second, because these mechanisms (like the societies in which they are implemented) are relatively *weak and fragile*, their work faces constraints. They often lack important political leverage to carry out their mandates and are contingent on the specific circumstances of their post-repression or post-conflict context. Institutional settings, political support, and availability of human and economic resources all affect the role that transitional justice mechanisms can play during the transition.<sup>85</sup> For example, the final report of Kenya's Truth, Justice and Reconciliation Commission was altered by several of the commissioners before it was officially handed to the government because it contained allegations of wrongdoing by President Uhuru Kenyatta and members of his family.<sup>86</sup> Likewise, because of a lack of political will or financial resources, reparations—and many of the other recommendations made by truth commissions—remain a promise rather than a reality for the majority of victims, including in states like South Africa, Sierra Leone, Liberia, and East Timor. A

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<sup>84</sup> UN Secretary-General, *United Nations Approach to Transitional Justice*, 3.

<sup>85</sup> See the caveats expressed by de Greiff when considering the possible links between development and transitional justice mechanisms in de Greiff, "Articulating the Links."

<sup>86</sup> ICTJ Briefing, "Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission," May 2014, 1–3, <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>.

consequence of being *weak and fragile*, and contingent on outside variables, is that these mechanisms work in an *imperfect* manner.<sup>87</sup>

Third, as already mentioned, these mechanisms are also *transitional*. They are established to operate for a particular period of time. Therefore, institutional continuity, sustainability, and capacity building are all challenges because the mechanisms are set up to deal with a particular situation for only a brief period of time and then cease to exist.

In most cases, however, expectations for transitional justice do not account for these features and inherent limitations and therefore fail to provide ways to overcome them. Transitional justice mechanisms have not been designed to achieve social justice, development, democracy, rule of law, or peace in themselves, but they can contribute toward the realization of some of these goals. It is best to be realistic about the field of transitional justice. In such terms, transitional justice is about reckoning with a legacy of mass atrocities and achieving as much justice, truth, reparation, and prevention as possible given existing constraints. These can be meaningful structural changes that are meant to contribute to a fundamental transformation of the ideologies that allowed such atrocities to occur. These are goals that transitional justice can work toward, using the various forms of change already indicated. This is not to set the bar too low. Indeed, transitional justice has struggled for decades to deliver even on these terms. There are also compelling moral reasons for remaining realistic, such as to avoid raising the hopes of victims, which could potentially lead to their revictimization, and to ensure that scarce resources are used in the best possible way.

From the above analysis, it follows that fundamental social change cannot be achieved exclusively during a transitional moment. During such moments, ordinary and structural social changes could, and often do, take place. Multiple structural changes can combine to bring about fundamental social changes, but these must occur both within and outside of transitional justice measures, affecting key areas where repressive ideologies and structures used to dominate. As a result, these changes can take a great deal of time to happen. While transitional justice cannot deliver fundamental change on its own, it can contribute to it by way of structural social changes. Indeed, as de Greiff has said, we cannot neglect the “significance of transitional moments for the articulation and establishment of norms, values, and institutions, including those that both sustain and are sustained by legal systems of

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<sup>87</sup> de Greiff, “Theorizing Transitional Justice,” 36.

justice.”<sup>88</sup> Such changes could have a lasting impact on the future of states ravaged by repression or conflict.

### **Maximizing the Transformative Potential of Transitional Justice [L1]**

An important question remains about how to reconcile a realistic approach to transitional justice with a more normative approach to transformative justice. In other words, how can we maximize the transformative potential of transitional justice? How do we get transitional justice to deliver on its stated goals, those of dealing with a legacy of mass atrocities while paving the way for a rule-of-law system where human rights protection is possible, while also contributing to broader social change? This section identifies essential conditions to this end. Context is an important and constant variable. The transformative potential of transitional justice will be, as already indicated, partly determined by the context in which it happens—post-conflict or post-repression, for example—and there will be striking differences even within and across conflict situations, for example, that will determine the possibilities for social change.

There is broad consensus that transitional justice is meant to deal with the legacy of mass atrocities through four pillars: truth seeking, criminal justice, reparation, and institutional reform.<sup>89</sup> Seen from this perspective, transitional justice is not only about dealing with violations that occurred and their consequences; it also has a significant preventive dimension that requires addressing the root causes of conflict or repression and the empowerment of victims as much as possible. Bearing this in mind, the following conditions would be necessary to maximize the transitional justice’s transformative potential.

First, it should be recalled that ideally transitional justice will not be seen as a menu of processes from which states can pick and choose.<sup>90</sup> Transitional justice mechanisms should be seen as complementary and interdependent,<sup>91</sup> which means that their success in achieving their aims and maximizing the transformative potential of the field depends strongly on their capacity to coexist and reinforce each other. If they are seen and used as a package, structural changes are more likely to take place. As de Greiff puts it, there is “convincing empirical

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<sup>88</sup> Ibid.

<sup>89</sup> As exemplified by the UN Secretary General, *United Nations Approach to Transitional Justice*, 3, and by the almost 80 member states of the Human Rights Council which voted by consensus HRC Res. 18/7 creating the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-repetition. Both of these documents show the consensus that exists across these issues.

<sup>90</sup> *Report of the Special Rapporteur*, A/HRC/21/46, paras. 22–27.

<sup>91</sup> Ibid., paras. 22–24.

evidence that they work best, as justice measures, when designed and implemented in a comprehensive fashion rather than in isolation from one another.”<sup>92</sup>

In practice, however, states have been very selective about the processes they are ready to engage in, and those they do implement face various limitations (political, financial, legal, and human). For example, truth seeking is sometimes prioritized by those in power as a means to obviate the need for criminal trials, as was the case in El Salvador. Reparation is often nothing more than an undelivered promise. Indeed, few examples exist of states that have taken seriously the obligation to redress victims. Guarantees of nonrepetition are also lacking in almost every state pursuing transitional justice. Persuading states to consider the aggregate value of all transitional justice processes and mechanisms is not just a political challenge. Various questions remain about how to link the mechanisms in a way that enhances their potential to achieve their corrective and distributive aims and about whether sequencing is necessary.

However, as the field of transitional justice evolves and new experiences emerge, we continue to learn about the added value of using all of these measures together. Colombia is a good example of a country attempting to do this. Indeed, during the peace negotiations in Havana, the state, the Revolutionary Armed Forces of Colombia—People's Army (FARC) and other actors supported justice, truth, reparation, and guarantees of nonrepetition through a package called the Victims' Agreement. While, arguably, more work could be done on the prevention side, Colombia is not picking and choosing among mechanisms. Moreover, it has accepted that transitional justice is not only backward- but also forward-looking. The peace deal endorsed by Congress in November 2016 looks at the root causes of conflict and includes a distributive dimension. Indeed, in Colombia, the Victims Agreement would set up an Integrated System of Truth, Justice, Reparation, and Non-Repetition,<sup>93</sup> complemented by other measures that have been agreed on at the negotiating table. For example, in the agreement on the Integrated Agrarian Development Policy, the government and the FARC “establish the foundations for the structural transformation of rural land” through the Rural Comprehensive Reform (Reforma Rural Integral) and create better living conditions for those

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<sup>92</sup> United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, A/HRC/24/42, August 28, 2013, para. 26; and Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington D.C: US Institute of Peace Press, 2010), 131–151.

<sup>93</sup> Colombian Government and the FARC, *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, November 24, 2016, Point 5 of the Agreement: *Acuerdo sobre las Víctimas del Conflicto*, 124–192, <http://www.altocomisionadoparalapaz.gov.co/Paginas/inicio.aspx>

living in those areas.<sup>94</sup> They equally acknowledge that land was a root cause of conflict or, at the very least, was a condition that facilitated the persistence of violence.<sup>95</sup> Therefore, a key aspect of the Colombian negotiations has been rural reform with a territorial approach. At the same time, the FARC and the government have agreed on the establishment of a truth commission with a broad mandate that includes looking into root causes of conflict; determining the impact of the conflict on economic, social, and cultural rights and the environment; and clarifying the responsibility of different actors, not only armed actors.<sup>96</sup> The Special Jurisdiction for Peace, the justice element of the peace negotiations, is also envisaged to have jurisdiction over more than just armed actors,<sup>97</sup> and the new agreement contains important provisions on reparations for victims, including from the FARC.<sup>98</sup>

A holistic strategy linking the various transitional justice measures, including guarantees of nonrepetition, requires action at various social levels. The lack of one of the measures could be an indication that the state is adopting ordinary social change, in the form of individual mechanisms, as opposed to structural change. Indeed, the will of states to reckon with the past can be measured by their acceptance of criminal justice, truth seeking, reparation, and guarantees of nonrepetition as necessary parts of a successful transition. The less states are willing to work toward those aims together and implement structural change, the more questions will be raised about their will to deal with the legacy of mass atrocities and the more elusive fundamental social change will be.

Second, transitional justice processes cannot be designed in isolation from other interventions. Planners should instead find ways to complement and enhance such measures, including development projects; the protection and fulfillment of economic, social, cultural, and environmental rights; the work of disarmament, demobilization, and reintegration (DDR) and other peacebuilding programs; and humanitarian aid initiatives. They must always aim to maximize their lasting and distributive impact,<sup>99</sup> particularly in post-conflict states. As stated by Lambourne, if “sustainable peace building requires pursuit of the twin objectives of preserving ‘negative peace (absence of physical violence) and building ‘positive peace’

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<sup>94</sup> Ibid., 10.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid., 134.

<sup>97</sup> Clara Sandoval and Sabine Michalowski, “Can Colombia’s New Peace Agreement Hold All Parties to Account,” *The Conversation*, November 25, 2016, <https://theconversation.com/can-colombias-new-peace-agreement-hold-all-parties-to-account-65437>

<sup>98</sup> Acuerdo Final para la Terminación del Conflicto, 178-192.

<sup>99</sup> Ibid., para. 50.

(presence of social justice), as well as alleviation, if not elimination, of the underlying causes of conflict,”<sup>100</sup> then transitional justice can contribute to such objectives. For example, in a post-conflict situation, a truth-seeking mechanism can shed light on the root causes of conflict so that they can then be targeted by other measures to prevent the recurrence of war. The recommendations of a truth commission in this area could be particularly useful, as could its proactive work of communicating their findings to relevant actors.

Third, dealing with the legacy of mass atrocities is a long-term undertaking. The task of entirely expunging the ideology and structures that allowed and consented to such atrocities takes more than just a few months or years. This is particularly true in post-conflict or failed-state situations, where almost everything, including institution building, may require starting from scratch. It takes time to build new institutions and establish legal frameworks, but it takes even longer to change ways of thinking about humanity, right and wrong, and the goals that society should pursue. Unfortunately, transitional justice continues to be thought of in the short term. States emerging from repression or conflict usually support such processes for only a brief period of time. Sustained investment (human and financial) in reckoning with the past, however, is essential to maximize the transformative potential of transitional justice. It is not only that structural and fundamental social changes take time to materialize but also that states engaging with transitional justice have to constantly adjust their policy interventions in this area.

Chile’s experience with this process presents a good example of the decades it can take to move forward and transform ideologies. Though more than a quarter of a century has now passed since Augusto Pinochet left power and Patricio Aylwin became president of the country, the country’s constitution is still the one instituted under Pinochet in 1980 (although it has been amended on various occasions), and the amnesty law of 1978 (Decree 2191/1978) that prevents those suspected of committing human rights violations between 11 September 1973 and 10 March 1978 from being tried in court, remains part of the legal system. Even today, crimes committed by Pinochet and his followers are still being investigated. This is not to suggest that ordinary and structural changes have not taken place. Without a doubt, Chile has made significant advances in a transitional justice process that has included providing reparations, memorialization, truth seeking, and criminal justice measures. However, it did not deliver on these rights immediately after the state returned to democratic rule. Indeed, while its Truth and Reconciliation Commission, to clarify the truth about enforced

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<sup>100</sup> Lambourne, 34.

disappearances and killings and related violations such as torture,<sup>101</sup> was established in 1990, it was not until September 2003, 13 years later, that the National Commission on Political Imprisonment and Torture (Comisión Nacional Sobre Prisión Política y Tortura, “Valech Commission”) was created to identify the victims of detention and torture for political reasons.<sup>102</sup> In Chile, transitioning from a repressive to a democratic regime remains an ongoing project. Nevertheless, support for its transitional justice efforts, from both within the state and the international community, has slowly dissipated.

Fourth, transitional justice processes should always focus on empowering victims and those most vulnerable as a consequence of the conflict or repression, aiming to transform their lives as much as possible. Empowerment in this context must be understood as “the process of enhancing an individual’s or group’s capacity to make purposive choices and to transform those choices into desired actions and outcomes.”<sup>103</sup> Emphasis on empowering victims is important because only if they feel and understand that they matter to society, and that they are agents of social change, will they help to transform repressive ideologies and social structures that permitted and promoted violations. Otherwise, victims will remain marginalized and victimized.<sup>104</sup>

Empowerment requires removing the barriers that hinder victims’ active participation in society, on the one hand, and the active promotion of their social inclusion and participation in transitional justice measures, in particular, and society in general, on the other. For example, structural discrimination is a key barrier that needs to be removed and transitional justice mechanisms could contribute toward this, even if they cannot overcome it on their own. They can help to explain how discrimination has permitted or promoted violence, through the work of a truth commission, for example, while a reparations program can take such barriers into account and provide communities who have suffered discrimination with some forms of financial empowerment thorough micro-credits or investment projects. Transitional justice mechanisms can also design or recommend affirmative action measures. Equally, institutional reform could transform the laws and policies that facilitated structural discrimination. An additional obstacle to overcome relates to the effects of mass atrocities on

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<sup>101</sup> Ministry of Justice, Supreme Decree N 355 of April 25, 1990, which established the Rettig Commission.

<sup>102</sup> Ministry of Interior, Supreme Decree N 1040 of September 26, 2003, which established the Valech Commission.

<sup>103</sup> Ruth Alsop, Mette Frost Bertelsen, and Jeremy Holland, *Empowerment in Practice: From Analysis to Implementation* (Washington, DC: World Bank, 2006), 1.

<sup>104</sup> *Report of the Special Rapporteur, A/HRC/21/46*, paras. 29–35. In this report, de Greiff reminds us of the importance of recognition and trust for victims.

victims' mental and physical well-being. If victims do not have access to adequate health services and medicines to facilitate their recovery, they are unlikely to be able to exercise their rights and be a positive contributor to social change. Here, rehabilitation as a form of reparation is essential.

Empowering victims also implies promoting their active inclusion in society. Transitional justice measures can also contribute to that end, by providing victims with information on the process and their rights and allow them to participate in the design and operation of those processes. Education is a key tool for this process, especially for children, youth, and those who missed out on schooling as children due to violence or repression; it is also a form of rehabilitation. It is not only a human right but also crucial to promoting victims' recovery. It can help them to prepare for the future by developing their creative and critical thinking that facilitates their engagement in society and help them better realize their potential.<sup>105</sup>

Legal empowerment of victims is also crucial to enhance the transformative potential of transitional justice. It implies providing victims with access to and knowledge of the law so that they can exercise and protect their rights.<sup>106</sup> Waldorf shows how difficult it is to link transitional justice and legal empowerment given that both have developed in "separate policy silos."<sup>107</sup> Moreover, transitional justice mechanisms are often understaffed, lacking relevant skills, and underperforming.<sup>108</sup> However, if an overall transitional justice strategy is designed to maximize its transformative potential, legal empowerment should be seen as a key tool for all transitional justice mechanisms. All of the mechanisms can be used to raise victims' legal awareness and to let them experience the law as a tool to vindicate themselves as human beings.

Fifth, guarantees of nonrepetition remain the missing piece of the transitional justice puzzle. These promises represent structural changes that contribute to transforming the ideologies that permitted the violence and influence people's behavior. While they seem relevant in policy parlance and in the literature, very little has been done in countries undergoing

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<sup>105</sup> Clara Ramirez Barat and Roger Duthie, *Education and Transitional Justice: Opportunities and Challenges for Peacebuilding* (New York: ICTJ and UNICEF, 2015).

<sup>106</sup> The Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol. 1 (New York: UNDP, 2008), 3.

<sup>107</sup> Lars Waldorf, "Introduction: Legal Empowerment in Transitions," *International Journal of Human Rights* 19, no. 3 (2015): 229–241, at 235.

<sup>108</sup> *Ibid.*

transitions to actually implement an overall strategy that addresses the root causes of conflict and repression or to effectively prevent the recurrence of violations. This is not to suggest that the same strategy should be implemented in all contexts because each situation requires a tailored approach that draws on different measures. But designing such a strategy requires first correctly identifying the root causes of conflict or repression and taking context into account.

Transitional justice measures should help to strengthen the new foundations (legal and institutional) that are established after conflict or repression. However, in contrast to transitions from repressive regimes, in post-conflict situations an even greater potential exists to change the legal and institutional foundations, given that states are devastated after conflict and in need of reconstruction. Undoubtedly, there are fewer available resources (both financial and human) to achieve this, but such situations also offer a unique opportunity to start (almost) from scratch. Transitional justice mechanisms should seize this opportunity.

Guarantees of nonrepetition need to work at various levels to address the root causes of conflict or repression.<sup>109</sup> They should target various state sectors, such as the security and justice sectors, in accordance with the particular local context, but they should also go further when required and address, for example, the country's socioeconomic structure. The measures required would include, but not be limited to, legal reform, prosecutions, vetting or lustration, and the establishment of new institutions or the reform of existing ones. Equally important, any reform of the establishment needs to go hand in-hand with a transformation of the dominant ideologies that allowed violence to flourish.

Some could argue that guarantees of nonrepetition would enlarge the field of transitional in a way that blurs its normative boundaries. Yet this is far from the case. Indeed, an overall prevention strategy must be designed in a state emerging from conflict or repression, and transitional justice mechanisms can make important recommendations or carry out important work in this regard given the insights they have previously gained or the mandates they aim to fulfill. A different issue is who should take responsibility for delivering on the various guarantees of nonrepetition. Here, the state is obliged to carry out with due diligence the identification and implementation of guarantees of nonrepetition. Such guarantees take years, if not decades, to fully implement and effect significant social change. The responsibility for delivering them falls not only on state institutions engaged in the transition but also on other

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<sup>109</sup> *Report of the Special Rapporteur, A/70/438*, para. 9.

state institutions, the international community, and nonstate actors, such as civil society or corporate actors.

## **Conclusions [L1]**

While transformative justice might be seen in some circles as morally desirable, its advocates have yet to explain what is transformative about the notion or to provide a working agenda for transformative praxis that clearly addresses how, why, and when to establish a different and more radical form of intervention to deal with the past and the future of states ravaged by war or repression. The proponents of transformative justice need to provide more reliable evidence that such forms of intervention would work better and be more transformative than the ones currently in use. For example, the view that transitional justice should be a bottom-up approach needs to be further discussed. We need more evidence that it would work in a way that would generate structural change in society. Surely, empowering victims is crucial and could constitute a structural change, but how to best deliver on this requires careful consideration.

Criticisms of traditional transitional justice approaches often fail to see these methods as a field of political contestation where victims have agency—even if it is limited and asymmetric in comparison to other actors. Important examples exist in this regard, such as the Abuelas de Plaza de Mayo in Argentina, who in their own terms have called for abuses “never [to happen] again” and have achieved some of their claims for justice. It is important to balance out criticisms of transitional justice with an understanding of the power of agency in these processes and their capacity to contribute to social change.<sup>110</sup>

Yet, this chapter has aimed to reflect not only on the transformative justice discourse and the challenges that lie ahead, but, more importantly, offer a framework for understanding the relationship between social change and transitional justice, making explicit the types of changes that can be expected from the latter—namely, ordinary and structural changes. It has argued that transitional justice faces various limitations in its capacity to effect social change, which should be acknowledged, such as the context of recent conflict or repression, the nature of its mechanisms and processes, and the enormous challenge of transforming dominant ideologies and structures that allowed atrocities to take place.

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<sup>110</sup> Catalina Diaz, “Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia,” in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008), 189–216.

The discussion about social change and transitional justice should be framed in terms of the transformative potential of transitional justice, rather than on alternative forms of justice. This seems a better approach, as it makes an explicit acknowledgment of the difficulties faced by transitional justice mechanisms when trying to achieve their objectives and contribute to achieving broader social change, while recognizing the opportunities that exist within the confines of transitional justice to bring about structural change.

In this regard, some conditions have been identified as essential to inform any debate about the transformative potential of transitional justice, among them using transitional justice measures in a holistic manner, recognizing the need for long-term investment, empowering victims, and building synergies between parallel policy interventions such as humanitarian aid, peacebuilding measures, and development. More importantly, transitional states continue to underperform with respect to guarantees of nonrepetition, despite the huge opportunities for structural social change that a transitional justice approach provides. An argument has been put forward for them to take center stage in transitional justice processes, if prevention and social change are the objectives. Without guarantees of non-repetition, both will remain elusive. The advocates of transformative justice discourse need to consider how best to deliver on guarantees of nonrepetition to rebuild societies and provide victims with an entirely different experience of justice.