

WHITHER THE “TRANSITION” OF TRANSITIONAL JUSTICE?

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The traditional orthodoxy of transitional justice has held that the field is concerned with countries in transition from mass violations of human rights to democratic regimes, yet more institutions have recently been set up in non-transitional societies, including Australia, Canada, and the United States. Others, including Uganda, have been considered to be in “pre-transition” for many years. This article explores the necessity of “transition” in transitional justice, using pre-, post-, and non-transition cases, and considers just how far the term “transition” can and ought to be stretched.

Keywords: transitional justice, transition, transformation, post-conflict rebuilding

I. INTRODUCTION

The transitional justice literature is more and more home to discussions of transitional justice mechanisms that have been appointed in pre-transitional societies and in those societies that show little to no evidence of any transition whatsoever. This article explores the necessity of the “transition” in transitional justice and the resulting question of elasticity, which considers just how far the term “transition” can and ought to be stretched. The article also considers questions of timing, legitimacy, and sincerity, along with questions of definitional precision.

This discussion has begun in the scholarly literature. Several authors have addressed the notion of the “thickness” of transitional justice, which is closely related to the questions posed here. For McEvoy, this entails a critical consideration of the factors that shape institutions.¹ For Bell, Campbell, and Ní Aoláin, the “thickness” of the concept emerges from the expansion of transitional justice discourse beyond the human rights violations normally associated with transitional justice. They argue that transitional justice it must also include “a range of inter-related dilemmas relat-

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¹ Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 *J. L. & SOC'Y* 411, 411–40 (2007).

ing to the role of law in transitional societies.”² Likewise, McEvoy and McGregor consider a range of processes being pursued below the level of the state and outside of its purview.³ This article takes these discussions as a starting-point for an examination of the stretching of transitional justice.⁴

II. TRANSITION

The very idea of transition is a key premise of transitional justice. Logically, it exists prior to the kinds of procedural questions that are often raised in the transitional justice literature—for instance, about the kinds of mechanisms that ought to be used, which approaches ought to be pursued, and so on. If a state is not in “transition,” then surely it ought to be ruled out as a case to study within the field, which is by its very definition concerned with transition,⁵ yet much of the existing scholarship in the field of transitional justice has failed to interrogate the meaning and utility of the very “transition” that lies at its heart. Scholars like the author, for example, have tended to adopt wholesale the idea that states that are at a crossroads of some kind are, in fact, fair game for consideration. The focus has rested, in particular, on those states that have experienced extreme violence and mass violations of human rights. The International Center for Transitional Justice, for example, defines transitional justice as “the set of judicial and non-judicial measures *that have been implemented by different countries in order to redress the legacies of massive human rights abuses.*”⁶ Normally, cases such as Argentina, South Africa, Rwanda, and the former Yugoslavia are included.⁷

When scholars have gone about defining the field, as a result, transitional justice has been defined as the process by which “societies move either from war to peace, or from a repressive or authoritarian regime to

² Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Justice Discourses in Transition*, 13 SOC. & LEGAL STUD. 305, 305–28 (2004).

³ Kieran McEvoy & Lorna McGregor (eds.), *TRANSITIONAL JUSTICE FROM BELOW: GRASS-ROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* (2008).

⁴ See also Ruti Teitel, *TRANSITIONAL JUSTICE* (2000).

⁵ Campbell, Ní Aoláin, & Harvey undertake a useful examination of the inclusion of Northern Ireland in the transitional justice rubric. See Colm Campbell, Fionnuala Ní Aoláin & Colin Harvey, *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 MOD. L. REV. 317, 333–36 (2003). See also Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 275–89 (Mar. 2008); Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT’L L. 1, 1–46 (2011).

⁶ *What Is Transitional Justice?*, International Center for Transitional Justice, www.ictj.org/about/transitional-justice, accessed 10 Apr. 2014 (emphasis added).

⁷ See, e.g., Alexandra Barahona de Brito, Carmen Gonzalez Enriquez & Paloma Aguilar (eds.), *THE POLITICS OF MEMORY AND DEMOCRATIZATION: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* (2001); Audrey R. Chapman & Hugo van der Merwe (eds.), *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* (2008); Scott Straus & Lars Waldorf (eds.), *REMAKING RWANDA: STATE BUILDING AND HUMAN RIGHTS AFTER MASS VIOLENCE* (2011); Valery Perry, *A Survey of Reconciliation Processes in Bosnia and Herzegovina: The Gap Between People and Politics*, in *RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST CONFLICT SOCIETIES* 207, 207–31 (Joanna R. Quinn ed., 2009).

democracy,’ while dealing with resulting questions of justice, and what to do with social, political and economic institutions,”⁸ or as “societal responses to severe repression, societal violence, and systemic human rights violations that seek to establish the truth about the past [and] determine accountability.”⁹ Still others have discussed transitional justice as “the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law.”¹⁰

It is not at all clear that there is any broad understanding, still, of just what it is that is being transitioned *to*. Some of the literature insists that transitional justice contributes to democratization.¹¹ Other scholars and practitioners claim that it leads to long-term peace.¹² Some of the mechanisms themselves have been explicitly branded with names that elucidate their state’s particular hope for what comes next: Peru, Liberia, Timor-Leste, and a host of others, for example, have explicitly included “reconciliation” in the titles of their truth commissions, a sure signal of what they aimed to do.¹³ But even here, there is no broad agreement.

Much of the literature has grandly assumed that transition is tantamount to transformation and that one equates with the other.¹⁴ Definitionally, however, transition is simply not the same thing as transformation. Transition is characterized as “an event that results in a transformation,”¹⁵ and the two are, therefore, separate stages of a larger, sequenced whole. Indeed, as this author has written elsewhere, transitional justice practices are meant, in the end, to lead to some kind of broader, more far-reaching transformation.¹⁶ This is important, for, until one knows what one is looking for, it is impossible to find it.

The kind of imprecision laid out above has allowed for a kind of defini-

⁸ Lucy Hovil & Joanna R. Quinn, *Peace First. Justice Later: Traditional Justice in Northern Uganda* 11 (Refugee L. Project, Working Paper No. 17, 2005).

⁹ Hugo van der Merwe, Victoria Baxter & Audrey Chapman, *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 1–2 (2009).

¹⁰ Rachel Kerr & Eirin Mobekk, *PEACE AND JUSTICE* 3 (2007).

¹¹ See, e.g., Neil J. Kritz, *The Dilemmas of Transitional Justice*, in *TRANSITIONAL JUSTICE* 1 (Neil J. Kritz ed., 1995).

¹² See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations: Report of the Secretary-General*, 3, U.N. Doc. S/2004/616 (23 Aug. 2004).

¹³ Many others have not, making the commonly adopted acronym “TRC” somewhat of a misnomer. For example, Haiti’s commission was called the “Commission nationale de vérité et de justice” (National Commission for Truth and Justice) and Guatemala’s was called the “Comisión para el Esclarecimiento Histórico” (*Historical Clarification Commission*).

¹⁴ See, e.g., Rolando Ames Cobián & Félix Reátegui, *Research Brief: Toward Systemic Social Transformation: Truth Commissions and Development*, INT’L CENTER FOR TRANSITIONAL JUST. (2009).

¹⁵ *Transition*, Synonyms, www.synonyms.net/synonym/transition, accessed 19 Apr. 2011.

¹⁶ The author has, for example, been clear about her own normative prescription for transitional justice success. See Joanna R. Quinn, *THE POLITICS OF ACKNOWLEDGEMENT: TRUTH COMMISSIONS IN UGANDA AND HAITI* (2010).

tional creep, a steady loosening of a once narrow definition¹⁷—in this case, the definition of transitional justice. Not clearly understanding the kind of transition that is expected or required; not having a precise definition on which to proceed; not knowing what is being transitioned to; and not understanding the nature of the transition and subsequent transformation that is expected—necessitates that these misunderstood elements be investigated when looking at transitional justice as a whole, and yet, they remain un-conceptualized, under-theorized, and misunderstood.

An example of this creep may be seen in the recent inclusion of truth commissions in so-called “settler societies” such as Canada and Australia in transitional justice scholarship. In both countries, truth commissions have been convoked to deal with hundreds of substantiated claims of abuses of Aboriginal children at the hands of the state, as discussed further below. Many have questioned the veracity of these commissions, their similarity to the kinds of “transitional” societies typically included in the field of transitional justice, the type of abuses suffered and whether they are “severe” enough to be included, and the authenticity of the transition that they are trying to affect.

A second example may be seen in what have been called “pre-transitional”¹⁸ societies such as Uganda, where the transition itself may not yet have come, or, perhaps, where the transition is still underway, more than 25 years after it began (if, indeed, it did begin when Yoweri Museveni seized power in 1986).¹⁹ Whether and how we define this transition is, in fact, critical. Scholars including Curtis have argued that any transition, rather than happening at a particular moment in time, takes place over a long period and may continue, incomplete, for a period of years after the transition is begun,²⁰ even though many and significant mechanisms have been put in place to try to affect some kind of actual transition.

In comparison, the transitional justice scholarship accepts without question countries such as Chile, which utilized a number of transitional justice practices in attempting to address abuses suffered during the bloody Pinochet era. After Pinochet stepped down from power and a new government was democratically elected, the state sequentially implement-

¹⁷ Margaret Talbot, *The Bad Mother*, NEW YORKER, 9 Aug. 2004, at 62.

¹⁸ The term “pre-transition” is taken from Darryl Robinson, *New Contexts, New Models—International Prosecutors in Pre-Transitional Justice Situations*, paper presented at Cross-Purposes? Int'l Law & Political Settlements, Nationalism & Ethnic Conflict Research Grp. (9 June 2007). See also James Edward Beitler III, *REMAKING TRANSITIONAL JUSTICE IN THE UNITED STATES: THE RHETORICAL AUTHORIZATION OF THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION* (2011); Andrew Gunstone, *UNFINISHED BUSINESS: THE AUSTRALIAN FORMAL RECONCILIATION PROCESSED* (2007); and Mark Byrne, *Roads to Reconciliation*, (Uniya-JRS Occasional Paper No. 9, 2005), www.univa.org/talks/byrne_sep05.html, which examines how Australia's reconciliation process might offer lessons for South Africa and Timor-Leste.

¹⁹ Thanks to David Backer, who suggests that looking backward and judging with the benefit of hindsight is problematic and that many believed in 1986 that the accession of the NRM and Museveni to power was, in fact, a real transition.

²⁰ Devon E. Curtis, *Transforming a Rebel: Peace and Post-Conflict Governance*, paper presented at the Annual Convention of the Int'l Studies Ass'n (17 Mar. 2011).

ed a number of national initiatives, including a truth commission, a National Commission on Political Imprisonment and Torture, the reversal of amnesties, and a series of trials. The issue of “creep” is rarely, if ever, raised when thinking about this kind of “standard” case. Nevertheless, many of the same questions raised above regarding a long period of transition and the implementation of a number of mechanisms to “get it right” echo here, too.

III. ACCEPTABLE TRANSITIONS?

It is unclear whether political transitions must look a certain way before they can be acceptable for inclusion in the transitional justice orthodoxy. There are those who argue that they most certainly do. The literature has tended to consider some kinds of cases, such as countries that have faced the grim reality of mass violations of human rights, genocide, or civil war, but that have then put in place a democratically elected government that has decided to take on the challenge of holding individuals accountable for their role in the conflict. “Standard” sorts of cases include Rwanda, South Africa, the Balkans, and so on. What is less clear is whether other kinds of cases also apply.

This article considers four specific questions that attempt to unpack the meaning of the term transition: the facts of the transitional period, the abuses to be considered, the nature of the transitional goal, and evidence of transformation. These are explored below.

A. Transitional Period

Certainly, the idea of a clear-cut transition, or break with a former regime, seems important. This kind of moment is easy to see in the signing of a peace agreement that ends a conflict, as in Haiti’s Governor’s Island Accord, or in the democratic election of Nelson Mandela and the ANC in South Africa following the dismantling of apartheid, but it is less clear in a country such as Australia, where the forcible removal of Aboriginal children, which began in approximately 1869 and had largely ended by 1969,²¹ left behind an untreated legacy of upheaval, poverty, and wide-spread, systematic abuse. Even a national policy put in place to deal with that legacy, which included the “National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families”—its own inauguration seen as a pivotal moment—did not mark any kind of real transition, since then-Prime Minister John Howard steadfastly refused to officially apologize for the role that previous governments had played in the abuses. Thus, the official apology offered by Howard’s successor, Kevin Rudd, might better be seen as the clearer instance of transition, or, in Curtis’s conception, as laid out above, all of these events could, perhaps, be seen as elements of a process of transition.

²¹ Peter Read, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969* (1981).

B. Defining a Legacy of Large-Scale Past Abuses

Based on the definitions outlined above, much of the transitional justice literature has been focused on societies that have encountered mass atrocity, war, repressive or authoritarian regimes, severe repression, societal violence, systemic human rights violations, or large-scale abuse. These definitions have worked well in considering countries like Argentina, the former Soviet states, and Sierra Leone.

However, the definitions work considerably less well in considering cases like Greensboro, North Carolina, where a truth commission, the Greensboro Truth and Reconciliation Commission, was convoked in 2004. In Greensboro, five protestors were killed and 10 others were wounded by the Ku Klux Klan and the American Nazi Party on November 3, 1979.²² However, no mass atrocity occurred, there was no large-scale, systematic abuse, and so on. Relying on a definition such as those adopted above, surely the Greensboro situation would not qualify as a case of transitional justice, yet in 2004, the Secretary General of the United Nations defined transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”²³ Even this most elastic of definitions, however, seems to exclude the likelihood of including situations like Greensboro, which is an instance of smaller-scale, isolated abuses. Nevertheless, because the community in Greensboro is, indeed, trying to come to terms with its legacy of abuse to ensure accountability, serve justice, and achieve reconciliation, perhaps the definition is closer than it might, at first, appear. The social fabric of their society has been torn, too, and it seems that the community in Greensboro is sincere in its quest to affect a real transition.

C. Transitioning to What?

One of the benefits of Transitional justice is supposed to be that the efforts it makes toward dealing with past atrocity are precursors to any number of things, including democracy, peace, and reconciliation. This is clear in places like South Africa, which was overtly transitioning toward democracy at the time that the TRC was appointed, or in the Former Yugoslavia, which was transitioning toward stability and peace at the time that the Security Council established the International Criminal Tribunal for the Former Yugoslavia. Nonetheless, in a “settler” society such as Australia, democracy is firmly established and the country is not—and has not been for many decades—at war. And so the transition, in this case, is certainly not to democracy or to peace. These are already fully “developed” countries.

²² *U.S.A. – Greensboro, NC, Background: Race, Class, and Politics Behind Deadly Violence*, Int'l Center for Transitional Just., www.ictj.org/our-work/regions-and-countries/usa-greensboro-nc.

²³ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations: Report of the Secretary General*, *supra* note 12, ¶ 8.

Nevertheless, the Aboriginal population that was affected by the policies of discrimination and abuse is not afforded the same equality as the non-Aboriginal population. A strong argument could be made that they are not living in the same democratic state as the balance of the country and that the relative peace enjoyed by their non-Aboriginal counterparts does not extend to the majority of Aboriginal people, who continue to fight discrimination and poverty due to unequal national policies that govern their rights and access.²⁴ This duality is not always recognized. Once it is, claims from within the disenfranchised community are strong, but they are often ignored, and hopes for some kind of re-conciliation—where many within the Aboriginal community feel, in fact, that simple conciliation never really existed—are negated.

One wonders whether we are simply more attuned to the problems that exist in the so-called developing world and whether that consciousness somehow blinds us to what is happening in the developed world. In so many ways, the actions of countries in that developed world should be held to higher scrutiny, for their relative wealth should provide them with significantly more capacity to right any wrongs that might exist. Instead, their elevated position affords them a shroud of privacy from other developed countries and the United Nations, which does not push for them to act or react in any particular way to fix the problems inside their borders. This is particularly important in considering why and how events and situations are counted as transition or not, since poor or clouded judgment is not any excuse.

D. Evidence of Transformation

In many ways, any kind of legitimate transition ought to be cemented by meaningful actions that support and undergird the claims and declarations that are being put forward, and that should be demonstrated in an actual transformation of the state, which should serve as evidence of the state’s sincerity. However, determining such sincerity is not always easy. Perceptions of this sincerity depend on the subjective views of victims, perpetrators, and different sectors of society, which may well judge a transition to be insufficient or biased. One example where sincerity was generally recognized and accepted was in post-War Germany, which, after the purges and the trials, put in place rules of governance, for example, that prevented a standing army from being raised in the country, in an attempt, both practical and symbolic, to ensure that events like the genocide of the Jews would never again take place. Another example is the South African case, in which an open and democratic constitution was written to take the place of the former constitution, which had supported Apartheid.

In cases like Australia, Canada, and elsewhere, however, that kind of transformation is not so readily apparent. For example, as discussed

²⁴ See, e.g., Health Council of Can., *EMPATHY, DIGNITY, AND RESPECT: CREATING CULTURAL SAFETY FOR ABORIGINAL PEOPLE IN URBAN HEALTH CARE* 9 (Dec. 2012), www.activecircle.ca/files/resources/Aboriginal_Report_EN_web_final.pdf.

above, Prime Minister Howard's refusal to apologize to Aboriginal Australians was evidence that no real transformation had yet taken place, in spite of protest marches and "sorry books" and other endeavors that had been carried out throughout the country. Even when Prime Minister Rudd finally issued his apology, there were cries from within the Aboriginal community that the apology was not sincere enough, that it was too little too late, and that it failed to bring with it the systemic and structural kinds of changes that were really needed to ameliorate the lives of the Aboriginal people living in Australia.

IV. TYPOLOGY OF TRANSITIONS

A more in-depth consideration of the types of transitional societies in which practices of transitional justice have been addressed, then, is required, keeping in mind the four questions that have been addressed above. Broadly, these types of transitions can be divided into three types. As defined above, this author is concerned particularly with (a) run-of-the-mill post-conflict transition, (b) pre-transition, and (c) non-transition. Although the particular nuances of each of the cases selected for discussion has in many ways shaped and formed the discussion, the lessons to be learned are more generally applicable. Each of the types of transition is discussed in more detail below.

A. Post-Conflict Transitional States

Post-conflict transitional societies are most familiar to scholars of transitional justice. Whatever definition is chosen, these societies nearly always fit neatly; these are clear-cut cases of transitional justice. They are countries in a period of recovery after mass atrocity, civil conflict, genocide, authoritarian regimes, and so on. They are clearly in the process of seeking to move forward from the past, by dealing with questions of justice.²⁵

The case of Chile is particularly instructive in this regard. In 1973, Salvador Allende's programs began to fail, causing his opponents to seek retribution.²⁶ Allende and his administration were overthrown, and he himself died in the military coup. His successor, General Augusto Pinochet Ugarte, put in place dramatic plans to return the country to its former condition. The social cost of Pinochet's dramatic turn-about plans for Chile was enormous.²⁷ To legitimize many of these changes, Pinochet turned to a

²⁵ Many scholars have rightfully argued that many Latin American transitions, including Chile—as, indeed, transitions throughout the world—have failed to redress more structural problems, including those related to violations of socio-economic rights. See, e.g., Naomi Roht-Arriaza, *Chapter 1*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266, 266–91 (2008).

²⁶ *Chile*, in THE WORLD ALMANAC AND BOOK OF FACTS 2000 784 (Robert Famighetti ed., 1999).

²⁷ Arturo Valenzuela, *Chile: Origins and Consolidation of a Latin American Democracy*,

number of forms of repression. Human rights abuses became targeted and disappearances precise. Many hundreds were killed and still more were disappeared.²⁸

Following Pinochet's ouster, newly-elected President Patricio Aylwin Azocar was supported by those united in the cause of obtaining justice and truth. The key to Aylwin's election platform was an emphasis on four areas: truth, justice, political prisoners, and reparations.²⁹ He also espoused a return to democracy.³⁰

His term in office was, however, not without opposition. The military was able to retain a relatively high degree of control, and Pinochet himself stayed on as head of the army until early in 1998.³¹ The hands of congress were also tied with regard to bringing charges against military perpetrators.³² Such laws were put into place to placate those who had been implicated in the abuses perpetrated under Pinochet, whether they chose to retire into civilian life, or chose to retain positions of prominence and power under the new regime. Upon leaving office, as is the Chilean custom, former presidents become eligible for a seat as senator-for-life.³³ Former president General Augusto Pinochet³⁴ was also named a senator-for-life once he retired from the army and assumed a new position within the system of government.³⁵ This was eventually questioned, and attempts were made to bring Pinochet to justice, which, ultimately, were thwarted by his old age and ill health.³⁶

The transition in the Chilean case is clear: upon the democratic election of President Aylwin, transitional justice types of policies were put in place. In the years since, Chile has convoked two truth commissions, the National Commission for Truth and Reconciliation (1990–1991) and the National Commission on Political Imprisonment and Torture (2003), as

in *POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY* 70 (Larry Diamond, Juan J. Linz & Seymour Martin Lipset eds., 2nd ed., 1995).

²⁸ For a particularly useful analysis of the Chilean case, see Cath Collins, Katherine Hite & Alfredo Joignant, *THE POLITICS OF MEMORY: CHILE FROM PINOCHET TO BACHELET* (2013).

²⁹ Alexandra Barahona de Brito, *HUMAN RIGHTS AND DEMOCRATIZATION IN LATIN AMERICA: URUGUAY AND CHILE* 152–55 (1997).

³⁰ Timothy R. Scully, C.S.C., *Chile: The Political Underpinnings of Economic Liberalization*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE: SOUTH AMERICA IN THE 1990S*, 99, 99–118, (Jorge I. Domínguez and Abraham F. Lowenthal, 1996).

³¹ Cath Collins, *Human Rights Trials in Chile During and After the 'Pinochet Years'*, 4 *Int'l Journal of Transitional Justice* 67, 72 (2010).

³² De Brito, *supra* note 29, at 105–06.

³³ *Chile: Country Report on Human Rights Practice*, U.S. Dep't of State (23 Feb. 2000), www.state.gov/j/drl/rls/hrrpt/1999/379.htm.

³⁴ Pinochet was arrested in 1998 in the United Kingdom, where he had gone for medical treatment, for human rights crimes perpetrated in Chile from 1973 to 1990 and was detained until March 2000, when psychologists determined that Pinochet was apparently mentally unfit to be brought to trial. See *The Pinochet Precedent*, Human Rights Watch, www.hrw.org/legacy/campaigns/chile98/precedent.htm.

³⁵ *Chile Country Report on Human Rights Practices for 1998*, U.S. Dep't of State (13 Sep. 13 1999), www.state.gov/www/global/human_rights/1998_hrp_report/chile.html.

³⁶ *The Pinochet Prosecution*, Human Rights Watch, www.hrw.org/legacy/campaigns/chile98/index.htm.

well as a number of trials to strike down the amnesty laws that Pinochet had declared. In addition, Chile conducted subsequent prosecutions, and formed a National Corporation for Reparation and Reconciliation to distribute reparations. The country has successfully transitioned from the period of the mass atrocities to a period of democracy and reconciliation.

Even the scope and scale of the abuses suffered by the Chilean population is not in question. The truth commission “report documented 3428 cases of disappearance, killing, torture and kidnapping.”³⁷ It has been determined that the majority “of the forced disappearances committed by the government took place between 1974 and August 1977 as a planned and coordinated strategy of the government,” particularly by members of the National Intelligence Directorate (DINA).³⁸

There is no question that Chile was transitioning toward peace and democracy. This was clear in the platform on which Aylwin was elected, in which he presented himself as a man “who could reunite the Chilean family and build peace and democracy.”³⁹ The country has subsequently held free and fair democratic elections, and has once again been classified as a democratic state.⁴⁰

That same entrenched democracy is evidence of the very transformation that Aylwin and subsequent presidents have had in mind, and which has been wrought since the transition in 1989. The transition has been supported by policies such as the creation of standing Human Rights Committees to draft human rights legislation within both the houses of Parliament.⁴¹

The fact that Chile is nearly always considered as a clear-cut case of post-conflict transition could be due to several factors, including the country’s use of a number of different mechanisms in support of the transition itself. However, it is also likely that the length of time since the transition, nearly 20 years, affords the luxury of hindsight—something that is not possible in many current and on-going transitions.

B. Pre-Transitional States

Pre-transitional states, conversely, are those in which there has not been a definite transition from one regime to the next, nor a clear move from conflict to peace. Fighting often continues, and the population continues to live in a state of “suspended animation,”⁴² waiting for the security that they hope will come with a transition. In these countries, mechanisms

³⁷ *Truth Commission: Chile 90*, U.S. Inst. of Peace, www.usip.org/publications/truth-commission-chile-90.

³⁸ *Id.*

³⁹ Nat’l Democratic Inst. for Int’l Affairs, CHILE: DECEMBER 14, 1989 ELECTIONS 10 (1990), www.ndi.org/files/1361_cl_elec.pdf.

⁴⁰ *2010 Human Rights Report: Chile*, U.S. Dep’t of State (20 Apr. 2011), www.state.gov/g/drl/rls/hrrpt/2010/wha/154498.htm.

⁴¹ *Id.*

⁴² In medical terminology, suspended animation refers to the slowing of vital functions by external means without resulting in death.

of transitional justice may even have been tried on an *ad hoc* basis.

As the author has written elsewhere, Uganda stands out as a case of pre-transition.⁴³ Since independence in 1962, Uganda has been wracked by conflict. Under both Idi Amin and Milton Obote, many thousands of Ugandans were wounded and killed. It is estimated that between 300,000⁴⁴ and 500,000⁴⁵ Ugandans were killed during the time of Idi Amin, from 1971 to 1979. Under the rule of Obote, between 1980 and 1985, approximately 300,000⁴⁶ to 500,000⁴⁷ were killed. The current president, Yoweri Museveni, seized power by means of military force in 1986. He has consistently been re-elected in elections whose “free and fair” status has been questioned.⁴⁸

As with his predecessors, Museveni has faced considerable opposition from many of the 56 different ethnic groups throughout the country. Between 1986 and 2008, Museveni faced more than 27 armed insurgencies.⁴⁹ The most recent and long-lasting of these has been the conflict perpetrated by the Lord’s Resistance Army (LRA) under the leadership of Joseph Kony in Northern Uganda. At the height of the conflict, it was estimated that between 30,000 and 45,000 children had been abducted by the LRA,⁵⁰ and that 1.8 million⁵¹ people were internally displaced (IDP) within the region and living in ostensibly protected camps for the internally displaced.

These conflicts have devastated the country. Throughout the country, and especially in the north, although also in Luweero Triangle and elsewhere, people continue to suffer the effects of conflict. The physical scars on people and infrastructure are easy to see: women in Luweero Triangle have been ostracized from their communities because of gynecological fistulae, many former abductees in Northern Uganda have only scar tissue where once there were noses and lips, and hospitals and schools are in a state of disrepair, yet the emotional and social costs, though harder to spot

⁴³ See, e.g., *The Supposed Accountability/Peacebuilding Dilemma: The Case of Uganda*, in *TRANSITIONAL JUSTICE AS PEACEBUILDING*, (Chandra Lekha Sriram, Jemima García-Godos, Olga Martín-Ortega & Johanna Herman eds., 2012).

⁴⁴ Philip Briggs, *UGANDA* 23 (1998).

⁴⁵ Yoweri Kaguta Museveni, *SOWING THE MUSTARD SEED* 41 (1997).

⁴⁶ *UGANDA* 53 (1998); Thomas P. Ofcansky, *UGANDA: TARNISHED PEARL OF AFRICA* 55 (1996).

⁴⁷ Interview with Abdul Nadduli, LC5 District Chairman, in Luweero Town, Uganda (17 Nov. 2004).

⁴⁸ See, e.g., Barry Malone & Elias Biryabarema, *Uganda’s Museveni Set for Win, Opposition Cry Foul*, *REUTERS* (19 Feb. 2011), www.reuters.com/article/2011/02/10/us-uganda-election-idUSTRE71133620110210.

⁴⁹ See Lucy Hovil & Zachary Lomo, *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda* 4 (Refugee L. Project, Working Paper No. 11, 2004); Lucy Hovil & Zachary Lomo, *Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation* 6 (Refugee L. Project, Working Paper No. 15, 2005).

⁵⁰ Tim Allen points out that “the scale of abduction is a matter of speculation” due to insufficient monitoring. See Tim Allen, *WAR AND JUSTICE IN NORTHERN UGANDA* iii (2006).

⁵¹ Interview with Geresome Latim, Sec’y to the Paramount Chief of Acholi, in Gulu Town, Uganda (22 Nov. 2004). See also World Vision, *PAWNS OF POLITICS: CHILDREN, CONFLICT AND PEACE IN NORTHERN UGANDA* 4 (2004).

at first glance, also remain.

There has never truly been a “transition” in Uganda. The election of President Museveni might once have signaled a kind of opening for the possibility of democracy and peace, but more than 25 years after he first seized power, this seems increasingly less likely. His actions, almost from the very beginning, when as a rebel leader he seized the capital, belie any semblance of democratic intention.

There is no question that Uganda has seen incalculable atrocity and violence. By any measure, the deaths of 600,000 to 1,000,000 people and the abuses perpetrated against many thousands of survivors are qualification enough for a country to be in need of transition and subsequent transformation. Abuses continue and are reportedly on the increase as Museveni is faced with growing pressure from others who would rule the country.⁵²

Museveni has not been shy about implementing the mechanisms of transitional justice,⁵³ although the various plans for transitioning Uganda toward democracy and peace seem not to be part of this package any more. Two truth commissions have been appointed to deal, in turn, with the disappearances committed specifically under Idi Amin⁵⁴ and all of the abuses committed between 1962 and 1986.⁵⁵ Subsequently, an Amnesty Act was promulgated, under which 22,107 ex-combatants had received amnesty by July 2008.⁵⁶ The International Criminal Court (ICC) began an investigation into the crimes perpetrated by Kony and other senior LRA members in 2004.⁵⁷ Aside from the ICC, national courts and customary courts are also entitled to hear evidence in such cases, although no cases have yet been heard in the War Crimes Division of the High Court, and Kony and many members of the LRA remain at large.

Evidence of any kind of transformation, as a result, is negligible. In fact, the country is sliding back toward the circumstances in which it existed prior to Museveni’s seizing of power. Even the strides made in the respect of human rights and the capacity-building that has been done in government ministries is for naught, since Museveni’s stranglehold increases.

Critics of the inclusion of pre-transitional states as sites of transitional justice will no doubt suggest that this result was the only real possibility and that Museveni, who came to power by means of the gun, necessarily

⁵² Josh Kron, *Protests in Uganda Over Rising Prices Grow Violent*, N.Y. TIMES, 21 Apr. 2011, at A9.

⁵³ Joanna R. Quinn, *Chicken and Egg? Sequencing in Transitional Justice: The Case of Uganda*, 14 INT’L J. PEACE STUD. 35, 35–53 (2009).

⁵⁴ See Richard Carver, *Called to Account: How African Governments Investigate Human Rights Violations*, 89 AFR. AFF. 391, 391–415 (1990).

⁵⁵ See Joanna R. Quinn, *THE POLITICS OF ACKNOWLEDGEMENT: TRUTH COMMISSIONS IN UGANDA AND HAITI* (2010).

⁵⁶ Interview with Moses Draku, Principal Public Relations Officer, Amnesty Commission, in Kampala, Uganda (7 July 2008).

⁵⁷ Joanna R. Quinn, *Accountability and Reconciliation: Traditional Mechanisms of Acknowledgement and the Implications of the Juba Peace Process* 25 (Reconstructing Northern Uganda, Nationalism and Ethnic Conflict Research Group, Working Paper, 2008).

continued the same patterns once he was in power. However, the critical openings that were presented by both Museveni and the international community at critical junctures over the past 25 years represented real possibilities for change. The signals that Museveni was sending, by implementing mechanisms of transitional justice and by agreeing to peace talks⁵⁸ and ideas that might have led to democratic development,⁵⁹ the author believes, suggested otherwise.

C. Non-Transitional States

This last category, non-transitional states, refers to countries that are normally regarded by the rest of the world as solidly democratic, peaceful states. Under their “good guy” veneer often lurks a violent past. In the case of the United States, the violence perpetrated in Greensboro in 1979 is just one example; others include the 1960s race riots and the illegal detention of prisoners of war in Guantanamo Bay, Cuba.

Each of these abuses affects just one small, discrete subset of the country’s population. It is possible that a citizen not directly impacted by these abuses could go about his or her daily business without even realizing that such problems exist. Any necessary transition could be seen as having an effect only upon that small group. However, it is the case that these small instances of abuse, such as the abuse perpetrated in Greensboro, serve to weaken the social fabric of the whole society, if not to tear it outright. Such abuses should be of concern to the broader population. The transition should not be limited to one subgroup, and its impact should be widespread.

The Canadian case is a good example. It fits squarely as an example of a non-transitional state that has adopted a mechanism of transitional justice, but which shows no signs, either inward or outward, of any kind of transition and whose politicians seem unaware that any kind of transition is needed. At issue is the Indian Residential Schools system, which ran from the early 1800s until the last school closed in 1996. Under that system, Aboriginal children were required to attend schools that would “take the Indian out of the child,”⁶⁰ a form of “aggressive assimilation.”⁶¹

Psychological and emotional abuses were constant: shaming by public beatings of naked children, vilification of native culture, constant racism, public strip and genital searches, withholding presents and letters from family, locking children in closets and cages, segregation of sexes, separation of brothers and sisters, proscription of native languages and spirituality. In addition, the schools were places of profound physical and sexual violence: sex-

⁵⁸ Joanna R. Quinn, *Getting to Peace? Negotiating with the LRA in Northern Uganda*, 10 HUM. RTS. REV. 55, 55–71 (2009).

⁵⁹ Joanna R. Quinn, *supra* note 57, at 26.

⁶⁰ Ward Churchill, *KILL THE INDIAN, SAVE THE MAN* (2004).

⁶¹ *A History of Residential Schools in Canada*, CBC News (16 May 2008), www.cbc.ca/news/canada/story/2008/05/16/f-faqs-residential-schools.html.

ual assaults, forced abortions of staff-impregnated girls, needles inserted into tongues for speaking a native language, burning, scalding, beating until unconscious and/or inflicting permanent injury.

They also endured electrical shock, force-feeding of their own vomit when sick, exposure to freezing outside temperatures, withholding of medical attention, shaved heads (a cultural and social violation), starvation (as punishment), forced labour in unsafe work situations, intentional contamination with diseased blankets, insufficient food for basic nutrition and/or spoiled food. Estimates suggest that as many as 60 percent of the students died (due to illness, beatings, attempts to escape, or suicide) while in the schools.

...

It is generally accepted that the forced removal of children from their families was devastating for Aboriginal individuals, families, communities and cultures. This is regularly being confirmed by researchers today.

First Nation communities experience higher rates of violence: physical, domestic abuse (3x higher than mainstream society); sexual abuse: rape, incest, etc. (4-6x higher); lack of family and community cohesion; suicide (6x higher); addictions: drugs, alcohol, food; health problems: diabetes (3x higher), heart disease, obesity; poverty; unemployment; illiteracy; high school dropout (63 percent do not graduate); despair; hopelessness; and more.⁶²

“In all, about 150,000 First Nation, Inuit and Métis children were removed from their communities and forced to attend the schools.”⁶³

In early 1998, in reporting on the Royal Commission on Aboriginal Peoples, then-Minister of Indian Affairs and Northern Development, Jane Stewart, offered “a solemn offer of reconciliation,” which acknowledged the role of the Government of Canada in the Indian Residential Schools.⁶⁴ Although there was significant negotiation between Aboriginal groups and the churches that had, in many cases, run the schools, the Government did very little on this question until it finally signed the Indian Residential Schools Settlement Agreement (IRSSA) in 2006.⁶⁵ The Settlement Agree-

⁶² David Diamond, *THEATRE FOR LIVING: THE ART AND SCIENCE OF COMMUNITY-BASED DIALOGUE*, 134-36, (2007).

⁶³ CBC News, *supra* note 61.

⁶⁴ Hon. Jane Stewart, Minister of Indian Affairs & N. Dev., *Address On the Occasion of the Unveiling of Gathering Strength—Canada’s Aboriginal Action Plan* (7 Jan. 1998), in *Notes for an Address by the Honourable Jane Stewart, Minister of Indian Affairs and Northern Development, on the Occasion of the Unveiling of Gathering Strength—Canada’s Aboriginal Action Plan*, *Aboriginal Aff. N. Dev. Can.* (15 Sept. 2010), www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726.

⁶⁵ *A Condensed Timeline of Events*, in *FROM TRUTH TO RECONCILIATION: TRANSFORMING THE LEGACY OF RESIDENTIAL SCHOOLS* 64–65 (Marlene Brant Castellano, Linda Archibald & Mike DeGagné eds., 2008).

ment is touted by the Government as “the largest class action settlement in Canadian history . . . Implementation of the IRSSA began on September 19, 2007.”⁶⁶ The Settlement Agreement included a common experience payment for Indian Residential Schools survivors, an independent assessment process to investigate claims of sexual and other abuse, a truth and reconciliation commission, and other commemorative activities. In 2008, then-Prime Minister Stephen Harper made a “Statement of Apology” in which he recognized the negative consequences of the Indian Residential Schools policy and further recognized the impact that a lack of apology had had on conciliation processes. His lackluster apology was this: “Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this Chamber so central to our life as a country, to apologize to Aboriginal peoples for Canada’s role in the Indian Residential Schools system.”⁶⁷

The difficulty, of course, is that this in no way marks a transition of any kind in Canadian society. No democratic reform is taking place, and the human rights violations against Aboriginal people continue. For all the speeches, the remarks, and the agreements signed, the sum total has not impacted the wider Canadian society in any way. Only \$1.9 billion was ever earmarked for the Settlement Agreement in total, for example,⁶⁸ compared to a whopping \$191 million earmarked in the 2011 budget for minor things like the “Initiative for the Control of Diseases in the Hog Industry” and the implementation of a “management and monitoring strategy to contain and prevent the spread of plum pox.”⁶⁹ There has been no follow-up. It is confounding that a developed society such as Canada has had no real uptake of these important issues, the recognition of which might spark the beginnings of a transition. Canadians are still wilfully ignorant of these events.

There is no question that the atrocity itself is significant. The lasting impact on the Aboriginal community as a whole in Canada is astonishing. But the Government of Canada, if it does recognize that fact, is not prepared to alleviate the problems that the Indian Residential Schools system created. The Government is reluctant, even, to engage with Aboriginal peoples in a meaningful dialogue about what those issues are.⁷⁰

A real transition in Canada could mean the implementation of policies and practices that would ensure that every Canadian, regardless of ethnici-

⁶⁶ *Frequently Asked Questions*, Indian & N. Aff. Can. (15 Sept. 2010), www.ainc-inac.gc.ca/ai/rqpi/faq-eng.asp#IRSSA-1.

⁶⁷ Stephen Harper, Prime Minister of Can., *Statement of Apology to Former Students of Indian Residential Schools* (11 June 2008), in *Statement of Apology, Aboriginal Aff. N. Dev. Can.* (15 Sept. 2010), www.ainc-inac.gc.ca/ai/rqpi/apo/index-eng.asp.

⁶⁸ *Statistics on the Implementation of the Indian Residential School Settlement Agreement*, Aboriginal Affairs and Northern Canada Development, www.aadnc-aadnc.gc.ca/eng/1315320539682/1315320692192.

⁶⁹ *Archived – Budget 2011*, Gov’t of Can. (6 June 2011), www.budget.gc.ca/2011/glance-apercu/brief-bref-eng.html.

⁷⁰ See Christian Aboriginal Infrastructure Dev., *MEANINGFUL CONSULTATION IN CANADA: THE ALTERNATIVE TO FORCED ABORIGINAL ASSIMILATION* (2009), <http://caid.ca/MeaCono92409.pdf>.

ty, had equality and equality of access and was included as an equal partner in decision-making that affected the whole country. Unfulfilled treaty obligations; non-recognition of rights including “levels of poverty, average life spans, violence against women and girls, dramatically disproportionate levels of arrest and incarceration or access to government services such as housing, health care, education, water and child protection”;⁷¹ re-writing the shameful *Indian Act* that continues to regulate most aspects of the lives of Aboriginal peoples; and re-working the Department of Indian and Northern Affairs would be on the discussion table. The Canadian government might begin by taking seriously the commitments it has already made or by effectively publicizing its shameful history to the wider Canadian community, which remains largely unaware of what the Indian Residential Schools were and of their connection to the wilful devastation of the Aboriginal community.

The transition that is such a critical piece of change is missing. So, too, is evidence of change that might suggest the beginnings of a social transformation. It seems as though transformation is in many ways a litmus test for sincerity. The genuineness of the Government’s activities to this point seems in question, since there do not appear to be any deeds to back up the commitments that have been made. The Canadian government has yet to “walk the talk.”

It is possible, of course, that the advances surrounding the Indian Residential Schools Settlement Agreement mark the beginning stages of the transition of Canadian society. It could even be argued that the Canadian state finds itself at an early stage of pre-transition. However, the evidence seems to demonstrate otherwise.

V. CONCLUSIONS

One question raised by this discussion of pre-, post-, and non-transition states is, how early is too early? There are important questions that must be considered: At what point in any given peacebuilding process is it appropriate for scholars and practitioners to intervene and introduce transitional justice?⁷² Should scholars and practitioners be looking ahead to assess particular strategies well ahead of time, or should we wait until some future opportunity to begin to sort out what comes next in such communities? In a research project that this author conducted in another pre-transitional state, Fiji, one of her interviewees, Joseph Camillo, Executive Director of the Ecumenical Centre for Research, Education and Advocacy (ECREA), said that the kinds of questions she was asking were important, but he only half-jokingly said that she was a few years too early

⁷¹Canada: *Annual Report 2012*, Amnesty International, www.amnesty.org/en/region/canada/report-2012; Olivia Ward, *Canada Gets Human Rights Failing Grade from Amnesty International*, STAR (19 Dec. 2012) (quoting this Amnesty International report).

⁷²The author thinks here, for example, of Kingdon’s “policy window,” an opening which may occur only rarely and especially unpredictably. See John Kingdon, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 171–98 (1984).

and should come back once “things” have settled down.⁷³ It remains unclear just what that means to scholars of transitional justice, for whom it is difficult to tell how early is too early. It does seem that the seeds of transition need to be sewn early on in the process.

It is also unclear, if we count pre- and non-transition states out as cases of transitional justice, whether their use of mechanisms that are normally considered transitional justice instruments represents an aberrant use of those mechanisms. We have no real way of knowing whether, if the mechanisms are utilized outside of their normal context, they will act differently, whether their results will be different, or whether they are less legitimate as mechanisms. Scholars within the field must think clearly about this and consider carefully the conclusions that they draw in the different-than-usual cases.

It is possible that the inclusion of pre- and non-transition states within the transitional justice framework simply marks a “new wave” of transitional justice scholarship and that we as a field have been so successful as to broaden the field beyond its former parameters. This explanation is certainly, the author thinks, the most optimistic and, perhaps, naive, and yet it is entirely possible that a new subfield is emerging.

In any event, it is critical for transitional justice scholars to carefully consider the question of “transition.” In all instances, they must clearly identify the transitional processes that are at work and decide whether the cases are at all, in fact, transitional. The careful definition and explanation of how and why a case is to be investigated, and a careful notation of its transitional stage, will make a stronger case study.

⁷³ Interview with Joseph Camilla, Exec. Dir., Ecumenical Ctr. for Research, Educ. & Advocacy, in Suva, Fiji (29 June 2010).