

SPECIFIC APPLICATIONS

The Ethics of Diversity in Transitional Justice

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ABSTRACT

Transitional justice is the process of dealing with wrongdoing in the midst of an attempted transition away from an extended period of conflict and/or repression. In transitional justice scholarship and practice, attention to diversity is prominent in four areas: the negotiation of the terms for a transition, the choice of transitional justice processes, the operation of transitional justice processes, and the evaluation of transitional justice processes. Three kinds of arguments are made in defense of diversity-based concerns. The first points to knowledge gained through the inclusion of diverse voices. The second highlights the ways in which attention to diversity can guard against the duplication of patterns of injustice. The third shows how diversity in the parties to the negotiation of a transition as well as in the selection, operation and evaluation of transitional justice processes satisfies demands of justice.

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INTRODUCTION

Transitional justice refers to the process of dealing with wrongdoing in the midst of an attempted transition away from an extended period of conflict and/or repression to democracy. This paper provides an overview of the role of concern for diversity in transitional justice scholarship and practice. Part I provides basic background to transitional justice. Part II looks at four areas in which attention to diversity is prominent. Part III discusses three arguments made in defense of diversity-based concerns: one epistemic, one concerned with the avoidance of injustice, and one concerned with the promotion of justice.

I. TRANSITIONAL JUSTICE: BACKGROUND

Dozens of societies from all parts of the globe have attempted in recent decades to transition away from extended periods of conflict and/or repression towards a more democratic form of governance.¹ There were transitions in South America following the end of military juntas in Argentina, Chile, and Brazil; in Central America following the end of civil wars in El Salvador and Guatemala; and currently in Colombia as the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement) between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) is in the process of being implemented.² In Europe, transitions occurred following the defeat of the Nazi regime in Germany, the breakup of Yugoslavia, and the signing of the Good Friday Agreement/Belfast Agreement to end The Troubles in Northern Ireland. In Africa, transitions occurred in South Africa following the end of apartheid and the toppling of long-standing dictatorships such as that of Hosni Mubarak in Egypt, as well as in the wake of civil wars in Sierra Leone and Liberia. In Asia, transitions ensued after the end of the reign of the Khmer Rouge in Cambodia, civil war and military occupation in East Timor, and civil war between the majority Sinhalese and the minority Tamils in Sri Lanka.

Part of the legacy of conflict and repression in each of these places is wrongdoing, often heinous in character, frequently widespread, and in many cases systematic. Forcible displacement, limb amputation, rape and other forms of sexual violence, torture, enforced disappearances, and killing are some of the many forms wrongdoing takes.³ Wrongdoing may disproportionately impact some groups, but often the lives of all citizens are touched directly and indirectly by wrongdoing.

1. There are other directions transitions might take, from peace to conflict or from one form of repressive rule to another. For purposes of this paper I focus specifically on transitions where the aspiration is towards a more democratic form of governance. It is this type of transition with which the field of transitional justice is concerned.

2. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, OFICINA DEL ALTO COMISIONADO PARA LA PAZ (Nov. 24, 2016), <http://www.altocomisionadopalapaz.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx> [https://perma.cc/9AM6-CMAT].

3. See COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 51–59 (2017); International Center for Transitional Justice, <https://www.ictj.org/about> [https://perma.cc/UJ3V-L7LP].

Consider Colombia. The 52-year conflict between the Colombian government and the FARC generated many direct victims, including 8 million since 1985 officially registered by the State Victim's Unit.⁴ This number captures over 7 million forcibly displaced from land; 260,000 killed; 10,000 tortured; 17,500 raped or subjected to other forms of sexual violence; 30,000 held as hostages; and 46,000 forcibly disappeared.⁵ The Special Jurisdiction for Peace (JEP), laid out in the Final Agreement, is a set of judicial bodies that will investigate, try, and where applicable, levy penalties for the crimes that fall under its jurisdiction.⁶ After judges for the JEP had already been selected, the Colombian Congress had difficulty passing the requisite legislation.⁷ At one point more than a quarter of Senators claimed they could not participate in a vote because their families had been either victims or victimizers.⁸ Eventually the House and Senate of the Colombian Congress passed the legislation on November 28 and 30, 2017, respectively.⁹

"Transitional justice" broadly refers to the process of dealing with legacies of wrongdoing in the context of a transition away from conflict and repression. The tools adopted for transitional justice vary across contexts. Tools include trials at the domestic level, as well as ad hoc international tribunals or trials conducted by the permanent International Criminal Court. Truth commissions are officially established bodies charged with investigating and documenting the causes, patterns, and consequences of a delimited set of abuses over a specified period of time. Reparations, which can be symbolic or material, aim to repair damage suffered by victims of wrongdoing. Amnesty provisions grant immunity from criminal and/or civil liability to certain categories of offenders for particular offenses. Other tools of transitional justice include official apologies; memorials; and lustration, whereby individuals meeting certain conditions are barred from serving in certain public offices.

In addition to the robust, multidisciplinary literature on transitional justice, think tanks and non-governmental organizations (NGOs) exist that are dedicated to the subject. Arguably the most influential NGO is the International Center for Transitional Justice (ICTJ), working in close to two dozen countries on the

4. Adriaan Alsema, *Colombia's War Victims: The Numbers*, COLOMBIA REPORTS (Apr. 9, 2018), <https://colombiareports.com/colombias-war-victims-the-numbers/> [<https://perma.cc/35CD-D4MX>].

5. *2016/2017 Annual Report for Colombia*, AMNESTY INT'L, <https://www.amnesty.org/en/countries/americas/colombia/report-colombia/> [<https://perma.cc/TJ7H-QTJ8>] (last visited April 7, 2018).

6. *Id.*

7. *Id.*

8. Adriaan Alsema, *Quarter of Colombia's Senate Claims Family Interests Impede War Crimes Tribunal Vote*, COLOMBIA REPORTS (Nov. 1, 2017), <https://colombiareports.com/quarter-colombias-senate-claims-family-interests-impede-war-crimes-tribunal-vote/> [<https://perma.cc/Z5NH-HCHK>].

9. *Colombian House Approves Peace Jurisdiction, High Court Last Stop*, TELESUR (Nov. 28, 2017), <https://www.telesurtv.net/english/news/Colombian-House-Approves-Peace-Jurisdiction-High-Court-Last-Stop-20171128-0018.html> [<https://perma.cc/DAN2-CFL4>]; *Colombian Senate Approves Special Jurisdiction for Peace*, TELESUR (Nov. 30, 2017), <https://www.telesurtv.net/english/news/Colombian-Senate-Approves-Special-Jurisdiction-for-Peace-20171130-0031.html> [<https://perma.cc/ZTT5-KZ4S>].

design, implementation and evaluation of processes for transitional justice. A large portion of the literature on transitional justice consists of social scientific analyses of the factors that influence the choices particular governments make about which processes are adopted and the impact of processes adopted on communities.¹⁰

As I discuss in detail in Part III, the role of diversity in transitional justice discourse and practice is often motivated by ethical arguments, and especially by the connection between respect for diversity and justice. However, there is intense disagreement in both theory and practice about how we should conceptualize the “justice” of transitional justice. For some, transitional justice is at its core viewed as a kind of moral compromise between competing values that come into conflict as societies reckon with past wrongs in the midst of efforts to move forward without conflict or repression.¹¹ The precise values in conflict vary among compromise theorists, from a compromise between peace and justice to a compromise among different kinds of justice (e.g., retributive justice, justice as recognition, corrective justice, and distributive justice). Others view transitional justice as another name for restorative justice, concerned with repairing the relationship among victim, perpetrator, and community ruptured by wrongdoing and emphasizing the role of forgiveness in this process of repair.¹²

In previous work, I have argued that transitional justice is its own type of justice, not reducible to retributive, corrective, or distributive justice and distinct from restorative justice.¹³ Part III draws on this positive account in explaining some of the justifications for the consideration of diversity. Briefly, my account of transitional justice takes as its starting point an insight of 18th century philosopher David Hume: principles of justice are always context-dependent, responsive to a particular problem that a specific set of circumstances generate.¹⁴ I argue that there are four circumstances of justice that are constitutive of societies in transition away from extended periods of conflict and repression. The first circumstance is *pervasive structural inequality*. The subject matter of this circumstance is the basic terms of interaction (i.e., covering both who is permitted to do what to

10. See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5 (2004).

11. See Jonathan Allen, *Balancing Justice and Social Utility: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TOR. L.J. 315 (1999); Simon Cabulea May, *Moral Compromise, Civic Friendship, and Political Reconciliation*, 14 CRITICAL REV. INT'L SOC. & POL. PHIL. 581 (2011); Lucy Allais, *Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission*, 39 PHIL. & PUB. AFF. 331 (2012).

12. See Jennifer Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TOR. L.J. 355, 357 (1999); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68–98 (Robert I. Rotberg & Dennis Thompson eds., 2000); DANIEL PHILPOTT, JUST AND UNJUST PEACE: AN ETHIC OF POLITICAL RECONCILIATION, 251–85 (2012).

13. See COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017).

14. DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., Oxford University Press 1978) (1739); DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (Tom L. Beauchamp ed., Oxford University Press 1998) (1751).

whom and what are the sanctions for non-compliance) governing relationships among citizens and between citizens and officials. Such terms are defined by a wide range of institutions, including legal, political, economic, social, and cultural institutions. They are unequal in the sense that they grant different opportunities to different groups of citizens to do and become things of value (e.g., being educated, participating in government, being employed) and in the sense that they grant different opportunities to shape the institutional rules and norms themselves. The fault lines of inequality vary significantly across transitional contexts, being grounded in ethnic or racial identities in certain contexts like apartheid South Africa and being based on access to certain clientelist networks in other contexts like Sierra Leone.

The second circumstance is what I call *normalized collective and political wrongdoing*. Wrongdoing refers to human rights violations, which become normalized in the sense of being a basic fact of life around which individuals must orient their conduct. For example, the anticipation of being kidnapped, raped, and/or killed if you go to certain places or speak out against the government—regardless of whether such actions are permissible according to declared legal rules—is something to take into account when deliberating about how to act. Wrongdoing is collective in the sense of both the targeting of and the commission by groups. It is political in that it both is ultimately done to further political objectives (e.g., defense of the state or contestation of the control of the state over territory) and is committed by state agents, or agents acting with the permission of the state or by groups acting to displace the state. Such wrongdoing is thus not ordinary criminality.

The third circumstance is *serious existential uncertainty*. The basic trajectory of a political community is profoundly unclear in transitions. Indeed, most transitions fail to achieve their aspiration to end conflict or repression. Thus it is extremely difficult for citizens and observers to know what the appropriate narrative is to tell about unfolding events. In Colombia, though the Final Accord has been signed, it remains deeply unclear whether its terms will be successfully implemented and whether the cessation of violence will prove to be permanent.

Lastly, there is *fundamental uncertainty about authority*, as the state is implicated in the wrongs that are now the subject of processes over which it presides. Establishing the standing of the state to deal with such wrongs becomes critical.

Against this set of circumstances, the problem of justice is not the problem of retributive justice, corrective justice or distributive justice as those are generally conceptualized. It is rather the following: how can societal transformation be justly achieved? The presence of both pervasive structural inequality and the commission of political wrongdoing that became normalized makes transformation necessary. Being necessary does not make transformation possible in the relevant sense. There are many contexts of ongoing conflict and/or repression during which wrongdoing in the form of violations of human rights is occurring but where transformation is not a real practical possibility at the present moment. Serious existential uncertainty is the circumstance that makes transformation

possible. In the context of such uncertainty, the status quo gets called into question in ways that make the upending of settled rules and norms a practical possibility. I define transformation relationally, as the process of overhauling the terms for interaction among citizens and between citizens and officials. It is how citizens and officials interact and relate that must be fundamentally different moving forward if the prospects for a return to conflict and continuation of repression characterized by atrocities are to be reduced. Such transformation has institutional implications, as it is institutions that shape and define who can do what to whom and the penalties for violation of rules and norms. It also has interpersonal dimensions, as relationships among citizens are relationships navigated concretely among people, where the presence or absence of attitudes, like trust, profoundly shape the character of political interaction.

Transitional processes pursue transformation by responding to atrocities; atrocities that had particular direct victims and were committed by particular groups of perpetrators. Considering only what is the most effective way to promote societal transformation when choosing, designing, and evaluating processes risks treating those who are direct participants in such processes as mere means for the sake of a broader societal end. Attention to the claims of victims and moral demands on perpetrators avoids treating victims and perpetrators in a purely instrumental manner. The just pursuit of transformation signals the need for processes to treat victims and perpetrators in a fitting and appropriate manner. Whether a response is fitting or appropriate will depend on a number of factors, including whether it recognizes the kind of wrong committed (e.g., political in nature and committed by groups as opposed to ordinary criminality), the relationship between responder (e.g., the state or perpetrator), and the subject of a response (e.g., victim.) Fitting and appropriate responses must also contribute to the aims widely recognized as important for responses to victims and/or perpetrators. These include recognition that the act done was *wrong* and recognition of the victim as a rights bearer and equal member of the political community.

It is against this background understanding of transitional justice that I examine the ways in which attention to diversity can prevent injustice and promote transitional justice.

II. THE PLACE OF DIVERSITY IN TRANSITIONAL JUSTICE

Emphasis on diversity is increasingly prominent in the discourse about and practice of transitional justice. Diversity is understood to include women and LGBTQI individuals; members of historically marginalized groups, where which groups are historically marginalized is understood to be context-specific; and sub-national actors. In this section, I provide an overview of the ways in which diversity considerations inform transitional justice. Gender figures most prominently in my summary, reflecting the more systematic study of and emphasis on gender in transitional justice. In the next section, I turn to the arguments in defense of consideration of diversity.

To understand why diversity is increasingly important in the theory and practice of transitional justice, it is necessary first to recognize the profoundly international character of transitional justice. Many scholars of transitional justice are from the global north and study processes that largely, though by no means exclusively, are adopted in countries in the global south. International institutions and organizations are deeply involved in the design, implementation, and evaluation of transitional justice processes. Some processes of transitional justice, such as the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), ad hoc International Criminal Tribunal for Rwanda (ICTR), and International Criminal Court (ICC), are explicitly international processes. Yet the role of the international community is pervasive even when processes are not overtly international, such as when NGOs provide advice, the ICC monitors and evaluates, countries and international organizations fund, and foreign observers serve as personnel for truth commissions or other domestic transitional processes.

One result is that international priorities have come to shape transitional justice priorities. Since the 2000 United Nations Security Council Resolution 1325, there has been an explicit international commitment to the inclusion of women in all stages of conflict resolution and peacebuilding. Security Council Resolution 1325 “reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.”¹⁵

The message of this resolution was further underscored by UN Security Council Resolution 2242, adopted in 2015, which reiterates themes from 1325 and urges Member States “to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, and resolution of conflict.”¹⁶

These UN resolutions highlight the particular places in which attention to diversity is increasingly emphasized in transitional justice. First, the *negotiation of a transition* itself, including the terms that parties in conflict will adhere to as they attempt to wind down conflict, should be conducted by diverse actors. That is, those chosen to represent conflicting sides to a conflict should be themselves diverse, reflecting the diversity of individuals who comprise each general party to a conflict. Rhetoric does not always reflect reality, and the call for diversity remains in large part an aspirational aim. Indeed, the representation of women in peace negotiations is underwhelming. As the United States Institute for Peace notes, “[b]etween 1992 and 2011, women comprised 9 percent of negotiators,

15. Office of the Special Adviser on Gender Issues and Advancement of Women, *Landmark Resolution on Women, Peace and Security*, UNITED NATIONS OSAGI (Oct. 31, 2000), <http://www.un.org/womenwatch/osagi/wps/> [https://perma.cc/AGJ6-X6C9].

16. S.C. Res. 2242 (Oct. 13, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2242.pdf [https://perma.cc/C335-LEQP].

4 percent of witnesses and signatories to accords, and 2 percent of peace mediators.”¹⁷

The second place for diversity is in the individuals or groups that shape the *choice of transitional justice processes*. There are three specific dimensions to the choices of processes where diversity concerns are prominent. The first is in terms of the level (national or sub-national) of a process itself. It is common to have some national level commitments to transitional justice processes included in peace agreements and terms that shape a transition itself. Thus, diversity in the parties that negotiate a transition will lead to diversity in the parties that select national level transitional justice processes. However, an additional call for diversity that is found in transitional justice discourse is for recognizing and ideally encouraging more local-level actors and processes.¹⁸ That is, not only should there be diversity among the elite voices having input into the kind(s) of processes that will be pursued at the national level, but also there should be room for locally led initiatives at the grass-roots level shaped by diverse voices at the local level. Second, diverse voices should inform the decisions about *which* wrongs will be addressed by particular processes. Here, there are worries about the international community’s priority of wrongs to be addressed silencing or overshadowing priorities that may be at odds with the international community’s agenda. There are also worries about the ways in which the priorities of some local actors may be excluded or silenced by other local actors. Often this plays out in challenges to the prioritization of violations of political and civil rights over violations of economic rights.¹⁹ Finally, decisions about the form that a particular process will take should be influenced by diverse voices, including importantly those of members of historically marginalized groups. Reparations, for example, can take multiple forms. They can be material, in the form of money, or resources, like land. They can be programmatic in the form of policies like affirmative action in areas like education, hiring, and/or political representation. Or they can be symbolic in the form of memorials.

The third place where calls for diversity are prominent is in the *functioning of transitional justice processes*. In the case of the officials who will run transitional justice processes, special attention is paid to the inclusion of women as well as members of historically marginalized groups, and in many contexts, importantly, indigenous voices. This priority has had concrete results in some transitional contexts. In late September 2017, 51 Colombian judges for the JEP were selected from 2,300 applicants. Importantly and not unintentionally, 28 of the judges are

17. Carla Koppell, *Want Women at Peace Talks? Mandate It*, U.S. INST. PEACE ANALYSIS & COMMENT. (Oct. 31, 2017), <https://www.usip.org/publications/2017/10/want-women-peace-talks-mandate-it> [<https://perma.cc/TR47-VMZPJ>].

18. See Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT’L J. TRANSITIONAL JUST. 152 (2008).

19. See Tristan Anne Borer, *Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa*, 15 VIOLENCE AGAINST WOMEN 1169, 1173–76 (2009).

women, 6 are Afro-Colombian, and another 4 are indigenous. This composition is the product of a concerted, intentional effort for the JEP to be representative of the broader Colombian population. In East Timor, the Commission for Reception, Truth and Reconciliation, which completed its final report in 2005, had equal numbers of men and women serving in the capacity of the staffs responsible for taking statements and for supporting victims.²⁰ In South Africa, the composition of the Commissioners for the Truth and Reconciliation Commission was carefully crafted to be representative both racially and in terms of political affiliation. The other area in which calls for diversity are found is in terms of those who participate in such processes; that is, those who provide testimony in truth commissions, apply for and receive reparations, are eligible for and are granted amnesty, are the subject of memorials, and are investigated and tried by criminal justice processes.

Finally, we find an emphasis on diversity when it comes to *the evaluation of the success or failure of transitional justice processes*. This plays out in increasing calls to evaluate not success or failure as such, but to evaluate success of reparations programs in meeting the needs of women, or of indigenous groups, and/or across certain regions of the same country.²¹

III. JUSTIFICATIONS FOR DIVERSITY

Though the calls for diversity in transitional justice are frequent, there has been no systematic overview of the justifications for such calls. However three main justifications have emerged in the scholarship for the inclusion of diversity considerations in transitional justice. The first is epistemic. The second and third appeal to considerations of justice. The second argument looks at the injustice entailed by excluding diverse voices. The third argument looks at the role of diversity in the successful promotion of transitional justice.

A. *Epistemic Defenses of Diversity*

According to the epistemic argument, there is important knowledge gained by the inclusion of diverse voices. Our knowledge of the consequences of human rights violations is enriched. Furthermore, our knowledge of the dynamics of conflict and repression itself—including the conditions that enable, facilitate and maintain conflict and repression as well as the atrocities committed in their pursuit or contestation—is enhanced. And our knowledge of conditions that need to be in place for transitional justice mechanisms to be effective is increased.

20. See Lia Kent, *Narratives of Suffering and Endurance: Coercive Sexual Relationships, Truth Commissions and Possibilities for Gender Justice in Timor-Leste*, 8 INT'L J. OF TRANSITIONAL JUST. 289, 292 (2014).

21. See, e.g., FIONNUALA NÍ AOLÁIN ET AL., THE OXFORD HANDBOOK OF GENDER AND CONFLICT (2018); *From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda*, INT'L CTR. FOR TRANSITIONAL JUST. (Oct. 27, 2015), <https://www.ictj.org/publication/rejection-redress-overcoming-legacies-conflict-sexualviolence-northern-uganda> [<https://perma.cc/Q2YU-WGRT>].

Why is knowledge enhanced by the inclusion of diverse voices? The consequences of being subjected to the same wrong vary in part depending on the identities of the individuals who are victims. Any accurate understanding of the impact of wrongdoing on victims, and the damage which processes of transitional justice must address, requires identifying and understanding these differences.

For example, there is a whole body of research on the gendered dimensions of wrongdoing. Consider forcible disappearance.²² Forcible disappearance can be deeply psychologically traumatizing for those left behind, who face the uncertainty of not knowing whether their spouse is alive or dead. The consequences of such disappearances for wives of men forcibly disappeared are gendered. Legal barriers can also arise due to the ambiguous status of spouses as neither married nor widowed; eligibility for reparations can be negatively impacted by inability to prove the death of a spouse. Women may find themselves for the first time becoming the primary breadwinner for the family, forced to find employment both to support their families and pay for costs associated with locating family members. But entering into the employment market for many women, especially those who were previously not employed outside the home, carries with it increased risks of sexual harassment and exploitation.

Or consider sexual violence and rape. Though sexual violence and rape are deeply traumatizing for both men and women, the physical and psychological consequences of rape for men and women vary.

For men, the consequences may include sexual impotence. In cases of male rape, men may experience sexual violence and rape as a form of emasculation and deeply shaming, and strong taboos against acknowledging the existence of male rape make instances of sexual violence and rape more difficult for men to be willing to acknowledge and discuss. Wives of husbands subjected to sexual violence have left their husbands, viewing their husbands as homosexual or no longer fully men.²³

For women, the social consequences of sexual violence and rape are often different. For women, the consequences may include an inability to bear children, on the one hand, or pregnancy, on the other. A study of those who had been forcibly abducted into sexual slavery and bore children as a result of their captivity points to the broader societal consequences for these women of returning to their community.²⁴ Women were blamed for their captivity, called whores and

22. See *Gender Justice*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (last visited April 22, 2108), <https://www.ictj.org/our-work/transitional-justice-issues/gender-justice> [<https://perma.cc/MCC2-NJ6X>].

23. See, e.g., Heleen Touquet & Ellen Gorris, *Out of The Shadows? The Inclusion of Men and Boys in Conceptualisations of Wartime Sexual Violence*, 7 REPRODUCTIVE HEALTH MATTERS 24, 36–46 (2016); see also Sarah Chynoweth et al., *Sexual Violence Against Men and Boys in Conflict and Forced Displacement: Implications for the Health Sector*, 25 REPRODUCTIVE HEALTH MATTERS 90 (2017); Will Storr, *The Rape of Men: the Darkest Secret of War*, GUARDIAN (July 16, 2012), <https://www.theguardian.com/society/2011/jul/17/the-rape-of-men> [<https://perma.cc/P77U-5R33>]; Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT'L L. 253 (2007).

24. *From Rejection to Redress*, *supra* note 21.

prostitutes, and stigmatized for their violation of strong norms prohibiting sex outside of marriage. This blame and stigma made the prospects for marriage more difficult and increased the vulnerability of those who did marry to domestic violence and abuse. In the context of Uganda, marriage provides the gateway to economic security, as land is largely in the hands of men, and is therefore accessed by women through marriage.²⁵ Thus, the poverty rates among women returning from captivity were disproportionately high.

The consequences of rape for women can also be viewed as extending to the broader community. Lia Kent writes:

[A]s feminist scholars have observed, rape and sexual violence work as a particularly effective weapon of war because, particularly during nationalist struggles, women tend to be constructed as symbols of purity and upholders of culture, tradition, and home. Even more so than during peace time, women are perceived to hold families and communities together while men are called to take up arms. Rape and sexual violence not only humiliate and demoralize women but also attack men as their perceived “protectors.” That is, violence against women is perceived as male defeat, an attack on a man’s masculinity and, by extension, the “honour” of his community.²⁶

In addition to gender, other identities inform vulnerability to and consequences of victimization. Consider Rwanda. In her examination of interethnic marriage, Anuradha Chakravarty looks at the interaction of race, gender, and the dynamics of the genocide itself in understanding who survived and who perished during the Rwandan genocide.²⁷ She discusses the differential vulnerability of Tutsi women married to Hutu men versus Hutu women married to Tutsi men to explain why Tutsi women married to Hutu men were less likely to be killed. She notes the gendered aspects of the genocide are often not the subject of analysis, despite the fact that men and women were differentially liable to being killed; 75–80% of those killed during the genocide were male and Rwanda is often characterized as a “land of widows.”²⁸ Primarily, though not exclusively, women, especially Tutsi women, were targeted for sexual violence and rape, either being forced to survive as sex slaves or being raped prior to being killed.

A more accurate and nuanced picture of the nature of conflict and repression and the conditions that enable atrocities—including the varying, complicated roles played by members of marginalized and targeted groups—can emerge when diverse voices are included. Rather than just characterizing members of historically marginalized groups as victims, hearing the testimony of members of

25. *Id.*

26. Kent, *supra* note 20, at 298.

27. Anuradha Chakravarty, *Interethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda*, 2 GENOCIDE STUD. & PREVENTION 235–48 (2007).

28. *Id.* at 235.

such groups allows a more complicated picture to emerge. For instance, complicity among members of a targeted group in violations of human rights becomes clearer. In her study of and interviews with East Timorese women subjected to sexual violence by Indonesian military officers, Kent notes the key role often played by family members of the East Timorese women. Some women were given by their family members as “mistresses” in exchange for the security of the other family members.²⁹

The labels of “perpetrator” and “victim” can overlap over extended periods of conflict and repression, often applying to the same individual. Instead of innocent victim, we have imperfect victims: victims who are then also responsible for perpetrating wrongs against others. Perpetrators may be themselves subjected to evil, often in ways that lead them to become perpetrators in the first place. As a case in point, Dominic Ongwen, currently on trial at the International Criminal Court, was abducted by the Lord’s Resistance Army in Uganda when he was 10 years old.³⁰

Moreover, victims are not *only* “victims.” A complete knowledge and understanding of conflict and repression requires recognition of this fact. Women may be victims, and even disproportionately so during conflict, but they are also survivors, occasional perpetrators of wrongdoing, heads of households, community organizers, and negotiators of terms of conflict. Understanding how conflict and repression are sustained requires attending to the complicated ways individuals who suffer and/or inflict atrocity navigate their communities in the aftermath. Letting women speak about and characterize their experiences and their roles can underscore this fact.

Out of a concern for a more nuanced understanding of the dynamics of conflict and repression, an emphasis is often placed on local processes. For example, as Arriaza and Roht-Arriaza write, there are limitations with national level transitional justice processes:

national-level initiatives by themselves are insufficient to capture the meaning of the conflict for people living in specific villages, towns, ‘hills’ or other local spaces, whose experience may vary widely from that of people elsewhere in [Guatemala]. When it comes to post-armed conflict interventions aimed at reconstructing a shattered society, international and national policy makers have treated each country as an undifferentiated whole.”³¹

Finally, by listening to diverse voices we can get a better understanding of what the impediments to participating in transitional justice processes are,

29. Kent, *supra* note 20, at 293.

30. Farouk Chothia, *Profile: Dominic Ongwen of Uganda’s LRA*, BBC NEWS (Jan. 26, 2015), <http://www.bbc.com/news/world-africa-30709581> [<https://perma.cc/U93K-BR9Q>].

31. Arriaza, *supra* note 18, at 152–53.

especially when there is significant underrepresentation of certain groups.³²

B. Justice Based Defense of Diversity: Avoidance of Further Injustice

It could be argued in response to the epistemic defenses of diversity that the inclusion of individuals from diverse backgrounds in the design and implementation of processes of transitional justice is not, strictly speaking, necessary. Rather, the knowledge acquired about the differential impacts of conflict, repression, and subsequent human rights violations should be kept in mind by whoever is designing and implementing transitional justice processes. However, the second line of argument in defense of consideration of diversity blocks the moral permissibility of this move. For according to this line of defense, inclusion of individuals from diverse backgrounds in the design, implementation, and evaluation of transitional justice processes is required to prevent transitional justice processes from becoming instruments of injustice.³³

Underpinning this argument is recognition of the dynamics of wrongdoing during conflict and repression. Importantly, normalized collective and political wrongdoing is strategic and occurs against a background of pervasive structural inequality. Wrongdoing is strategic in the sense that it is oriented around a defense or contestation of an institutional order that is unequal and predicated on the marginalization of some group(s) of citizens. Wrongdoing functions to terrorize those targeted into submission, to either to accept the institutional status quo or to support efforts of those challenging it. Furthermore, wrongdoing for which the state is responsible is frequently officially denied, either by outright denial of any knowledge of deaths or other violations that took place, by denial of causal responsibility for such violations, or by re-descriptions of the violations that took place (e.g., they were not really violations of human rights but acts of self-defense).³⁴ In these ways, political wrongdoing has the effect of denying those

32. See, e.g., Kent, *supra* note 20; Katherine Franke, *Gendered Subjects of Transitional Justice*, 15 COLUMBIA J. GEND. & L. 813, 813–18 (2006); Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT'L J. TRANSITIONAL JUST. 114 (2009); Fiona Ross, *Using Rights to Measure Wrongs: A Case Study of Method and Moral in the Work of the South African Truth and Reconciliation Commission*, in HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS (Jon. P. Mitchell & Richard A. Wilson eds., 2003); Fiona Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa* (2003); Katherine Fobear, *Queering Truth Commissions*, 6 J. HUMAN RTS. PRAC. 51 (2014); "We Want to Be Heard": *Obstacles to Women Taking Part in Participatory Mechanisms for Dealing with Victims of the Internal Armed Conflict*, INT'L CNT. FOR TRANSITIONAL JUST. (2016), https://www.ictj.org/sites/default/files/ICTJ_Report_Colombia_Gender_Reparations_2016.pdf [<https://perma.cc/H8RL-N9KJ>]; SUSAN HARRIS RIMMER, GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR (2010).

33. On the general topic of the potential injustice of transitional justice processes, see Sidney Leclercq, *Injustice through Transitional Justice? Subversion Strategies in Burundi's Peace Process and Postconflict Developments*, 11 INT'L J. TRANSITIONAL JUST. 525 (2017); Cyanne Loyle & Christian Davenport, *Transitional Injustice: Subverting Justice in Transition and Postconflict Societies*, 15 J. HUMAN RIGHTS 126 (2016).

34. STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 7–12 (2001).

targeted their status as full and equal political agents, capable of deciding for themselves what courses of political action they will or will not take, and denies them standing to hold the state to account for the actions in which it is implicated. Political wrongdoing also constitutively denies the status of victims as rights bearers, entitled to certain forms of treatment.³⁵

Against this background, failing to give victims a say in the form that processes of transitional justice will take or to play a role in the functioning of transitional justice processes risks wronging them a second time. It risks failing to recognize and acknowledge the status of those who are victims as equal members of the political community and as rights bearers who are entitled to have their suffering recognized, and risks failing to hold accountable those responsible for wrongdoing. To treat victims in a fitting and appropriate manner is in part to give them a voice and say in how their suffering will be addressed by the community, and to not create hierarchies among victims which duplicate the structural inequalities that already exist.

C. Justice Based Defense of Diversity: Promotion of Justice

The final line of justification for consideration of diversity appeals to the impact it will have on societal transformation, and thus on the achievement of transitional justice.

The inclusion of members of previously marginalized groups in the design and implementation of transitional justice processes can itself model the kind of interaction that transitional justice processes aim to promote. In my conception of transitional justice, the overarching purpose of processes like truth commissions and reparations is to contribute to relational transformation. That is, the goal is to fundamentally alter the terms on the basis of which citizens interact with one another and with officials. There are three ways, in my view, in which attention to diversity can enhance the contribution of transitional justice processes to relational transformation.

First, transformation requires establishing conditions for interaction to be among equals, based on a commitment to reciprocity and mutual respect for agency. One component of such interaction is a threshold capability—or genuine opportunity—to participate in the institutions that structure civic and political life. These include political, legal, economic, social, and cultural institutions. Thus, ensuring that all citizens have a genuine opportunity to participate in processes of transitional justice is modeling the participatory opportunity that transitional justice ultimately aims to foster. It models an institutionalized process in which historically marginalized groups are no longer marginalized by having their rights respected, voices heard, and rights violations acknowledged. In this way, as Chris Chapman argues in his transitional justice research brief, “[e]mploying an MIP [Minority and Indigenous Peoples] rights framework in transitional justice

35. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

efforts may promote objectives of transitional justice, such as creating a more just and inclusive society.”³⁶

Second, while modeling a process in which interaction is based on mutual respect for agency and reciprocity is important for its own sake, it can also be important instrumentally, signaling a break from the dynamics structuring interaction during conflict and repression. This signaling role of attention to diversity can lay the foundation for other conditions of relational transformation—such as trust—that transitional justice processes aim to cultivate. In his discussion of MIP rights, Chapman argues: “[s]eeing that a state body is inviting them to participate, taking steps to accommodate their cultural specificities, such as language, and listening to their testimony can, for members of marginalized communities, be a powerful force for the re-establishment of bonds of trust between the state and its citizens.”³⁷ Citizens can begin to develop grounds to view officials as lacking ill-will towards them, a key component of the attitude of political trust.³⁸ Officials, for their part, can in turn come to recognize the agency of members of historically marginalized groups, and, in time, recognize these groups’ competence to be entrusted with the rights and responsibilities associated with democratic citizenship.

Finally, attention to the importance of diversity can also bolster the perceived legitimacy of transitional justice processes, which in turn can impact the effectiveness of such processes.³⁹ For a process of transitional justice to have an impact on political relationships and contribute to their transformation, it must be seen as a process of justice by participants. This is often a significant challenge. Criminal trials risk being viewed as meting out victors’ justice, reparations as not offering compensation for harm but money to silence victims, and truth commissions risk being viewed as mere words without leading to any tangible reform or subsequent accountability for perpetrators.⁴⁰ These perceptions, moreover, can be justified in certain cases. Serious attention to the inclusion of those not previously represented can bolster the perception that the goal of a process—like a truth commission—is a goal of justice. It can counter the perception that processes are oriented around protecting certain elites or entrenching the status quo by demonstrating in its operation an intentional break from status quo practices.

36. Chris Chapman, *Transitional Justice and the Rights of Minorities and Indigenous Peoples*, INT’L CTR. FOR TRANSITIONAL JUST. (Oct. 2009), <https://www.ictj.org/publication/transitional-justice-and-rights-minorities-and-indigenous-peoples> [<https://perma.cc/7UJL-JRLB>].

37. *Id.* at 3.

38. See COLLEEN MURPHY, A MORAL THEORY OF POLITICAL RECONCILIATION 71–93 (2010).

39. See MURPHY, *supra* note 3, at 160–92.

40. See Pablo de Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE: NOMOS LI 31–77 (Melissa S. Williams, Rosemary Nagy & Jon Elster eds., 2012).

CONCLUSION

Transitional justice is the process of dealing with wrongdoing in the midst of a transition away from extended periods of conflict and/or repression. This paper has provided an overview of the role of diversity in transitional justice processes. Defined to some extent in a context-specific manner, the inclusion of diverse voices in the design, implementation, and evaluation of processes of transitional justice is taken to have epistemic benefits and to contribute to the avoidance of injustice and the promotion of transitional justice itself.