

# Process Pluralism in Transitional/Restorative Justice

## Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)\*

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### Abstract

*This article reviews some of the key issues in transitional justice process and institutional design, based on my research and experience working and living in several post-conflict societies, and suggests that cultural and political variations in transitional justice design, practices, and processes are necessary to accomplish plural goals. The idea of process pluralism, derived from the more general fields of conflict resolution and 'alternative dispute resolution' in legal contexts, is an essential part of transitional justice, where multiple processes may occur simultaneously or in sequence over time (e.g. truth and reconciliation processes, with or without amnesty, prosecutions, lustration and/or more local legal and communitarian processes), depending on both individual and collective preferences and resources. Transitional justice is itself 'in transition' as iterative learning has developed from assessment of different processes in different contexts (post-military dictatorships, civil wars, and international and sub-national conflicts). This article draws on examples from Argentina's and Chile's emergence from post-military dictatorships to describe and analyze a plurality of processes, including more formal governmental processes, but also those formed by civil society groups at sub-national levels. This article suggests that 'democracy development' and legalistic 'rule of law' goals and institutional design may not necessarily be the only desiderata in transitional*

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*justice, where more than the 'legal' and 'governmental' is at stake for more peaceful human flourishing. To use an important concept from dispute resolution, the "forum must fit the fuss", and there are many different kinds of 'fusses' to be dealt with in transitional justice, at different levels of society – more than legal and governmental but also social, cultural and reparative.*

**Keywords:** transitional justice, conflict resolution, process pluralism, cultural variation, individual and collective justice.

*The Gulag commissioners had retired long ago, with medals and pensions. Not one had been arraigned. Russia had turned its back on the past. And I, how could I understand? Since the Holocaust, my world had made a duty of remembrance. Russia, like China, had chosen forgetfulness. That, said the writer Shalamov, was how people survived. A nation was not built on truth.*

Thubron (2007: 204-205)

*Achieving such a peace won't require forgetting the past, but it will require putting it aside to craft a more just future for all the region's residents.*

Fettweis (2014)

## 1 Introduction

This article, in the form of a personal reflection essay, based on my experiences researching and living in several different post-conflict societies, suggests that transitional justice theory and practice can, and should, learn from the related, but different, field of conflict and dispute resolution, most often associated with the management of legal and social disputes. My argument here is that, like modern legal processes, transitional justice is itself 'in transition' and needs to take account of more varied (both simultaneous and sequential) processes to achieve a greater diversity of goals. Although transitional justice began as a study and practice of movement from military dictatorships (such as those reviewed here, in Chile and Argentina) to less repressive and more 'democratic' regimes, more varied contexts (from post-apartheid South Africa, post-civil wars, post-colonial disruptions, post-Soviet disengagement, and perhaps, even in ongoing conflict settings, such as Israel and Palestine) suggest that not only will 'one size not fit all'<sup>1</sup> in process and institutional design (e.g. prosecution vs. reconciliation), but that even the goals of transitional justice may be more plural, including not only the political-governmental ('rule of law' and 'democracy development') but also the cultural and social, where both different collectivities, and individuals, have dif-

1 The phrase 'fitting the forum to the fuss' is attributed in the literature to Frank Sander and Stephen Goldberg (1994) but the phrase was actually coined originally by civil procedure professor Maurice Rosenberg at Columbia Law School, long before the ADR movement began in earnest in the United States.

ferent preferences about what to do and what they want in the movement from a violent and unjust past into a more humane and just future. As the song says, “different strokes for different folks”<sup>2</sup> is a challenge for cultural and political variations in transitional justice.

As the child of Holocaust refugees from Germany to the United States, I grew up hearing my surviving grandparents and parents tell stories of atrocities committed in their homeland. Since then I have been obsessed with the relationship of past harms and cruelties, and the memories they sear into psyches of individuals and nations, and the human necessity to move forward and grasp for what is good in humanity. I had nightmares as a child and alternated with strong needs to attach myself to my family’s pain, and at the same time to escape it, by focusing on challenges in my own country and its own wrongs (the enduring legacy of slavery and the civil rights movements for racial, ethnic and gender equality). My mother, who suffered more, was the cheerful one, always telling me to smile and look forward, reading to me, and encouraging me to write novels, teach, play the piano and dance. My father, who had suffered less, was a dark and serious European man who taught me European history and was himself obsessed with the Holocaust and achieving justice. A man who abhorred the death penalty in the United States, he would gladly have “strung them up by the balls” if he had encountered Hitler or any of his compatriots in evil.

By living with these contrasting personalities and their differing reactions to such horrible events and experiences (and who were happily married for over 65 years and fought only when they visited Germany many years later and argued about their respective, and very different, memories), I learned first-hand how different is the human response to the great wrongs we do to one another in the commission of atrocities, murder, genocides, civil wars, and the infliction of pain, of both physical and emotional kinds. And how different is our human need to remember, to forget, to forgive, or to seek punishment, retribution or recompense or to struggle to move on, whether with remembrance or studied forgetting or forbearance. I grew up looking for the ‘and’ in life and law – remembering the past and moving forward; not forgetting, nor necessarily forgiving, but trying to make things better rather than worse (my mother’s legacy).

As a teacher and scholar, I have now lived in and studied the need for transitional, reparative or restorative justice in over 25 countries with ‘transitions’ from the Holocaust (Germany, France, Italy), military dictatorships (Paraguay, Argentina, Chile, Brazil, Spain), ‘occupations’ or ‘civil war-like’ conflicts (Israel–Palestine, Northern Ireland–UK), political transitions from authoritarian regimes (Nicaragua, China, Russia, Singapore, former Yugoslavia) and atrocities committed against indigenous peoples by colonizers and later settlers (Canada, Australia and the United States). I have studied other nations’ atrocities where I have not

2 Sly and the Family Stone (Sylvester Stewart “Sly Stone” Composer), “Everyday People” 1968. (This song was written to encourage peaceful and equal living together for those who were ‘different’ from each other and was a big hit in 1969, rising to the top of the music charts, urging people of different colours and different jobs and hairstyles to appreciate that different ‘folks’ had different ‘strokes’ (of colour and hairstyle) because ‘we got to live together’ even if we look different, do different things or like different things.

lived and met the people as closely (Rwanda, South Africa, E. Timor, Sierra Leone). And I have lived in my own nation that has not yet fully dealt with its own many acts of injustice (slavery, destruction of indigenous communities, racially based internment and ongoing widespread discrimination against minorities), not to mention the injustices done to women all through human history (and continuing).

This essay, reflecting on the individual and collective differences in transitional justice processes, and institutions, is based on my research and personal experiences, which suggest that transitional justice can only be effective with 'process pluralism' – a wide range of different processes for civil society, formal legal systems,<sup>3</sup> national capacity building, governmental transitions and peaceful coexistence, if not total reconciliation. Histories, cultures, atrocities and harms, as well as the stories or 'narratives' told about them, are differentially experienced both within and between cultures and peoples and so transitional justice should be responsive to these differences, even in the pursuit of varied and different goals and outcomes. People seek different forms of 'justice', post-conflict societies have developed different forms of government (some seeking democratic forms; others not), and different parts of a social order will place peace and the absence of violence as a priority over other forms of compensatory or political 'justice'.

Though many transitional justice scholars see democracy and 'the rule of law' as the desired end-state of a successful transitional process, I do not (necessarily). Here I make the argument that transitional justice is perhaps even more diverse and still evolving as we respond to extremely complicated 'complexes' of different political histories; territorial fights; religious, ethnic and cultural differences; different levels of violence; and political dictatorship or totalitarian regimes, and new forms of governmental-religious entities that are both supranational and sub-national at the same time. Most 'transitional justice' practice and scholarship still assumes the Westphalian nation-state as the relevant political level of analysis for 'post-transition' governance, while conditions on the ground suggest that new formations, sub- and transnational or drawn on other collective lines, may more accurately reflect reality.

This essay also argues that even in national, religious, ethnic or cultural groups that seem 'cohesive' in some way, there will be great variations among individuals in what they might desire from transitional justice (revenge? retribution? recompense? reconciliation? respect? restoration of rights, property, personhood?). This essay argues for a plurality of transitional justice processes and institutions, even within a single nation or with a set of particular harms and wrongs committed against a discrete 'people'. As 'process pluralism' has taught us

3 Studies of modern international law and the institutions it has spawned have been analogized by some to scientific 'complexity' theory, suggesting that the plurality of forces, institutions and actors cannot be explained by a single 'system' of analysis. Chronicling the growth of diverse formal international judicial bodies (now over 25 different multinational, regional and international courts), political scientist Karen Alter suggests an evolutionary approach to international formal justice where the relationship of different courts (dealing with political, economic, environmental, human rights and other conflicts) to each other is not clear, even as they influence each other, see Alter (2011).

in conflict resolution research and practice, a full 'menu' of process choices may be necessary to achieve different individual and collective goals and preferences, and those too may change with them, as the case studies explored here, Argentina and Chile, reveal.

Transitional justice addresses itself to both social-cultural (existential) states and separately to political (structures for existential survival) states. This may be another way to frame the 'peace' versus 'justice' conundrum in our field, but I view peace or the absence of killing and violence as a 'necessary', if not sufficient, condition for human flourishing and survival. 'Justice' is, for me, more a secondary and less universal 'concern'. We need to structure group living so it fairly distributes life's goods (and ills), but there are still many competing visions of what justice entails for those of us alive to experience its absence or presence. Law may be, and has been, used to legitimate human ills (apartheid, slavery and genocides [of indigenous groups, Jews, religious minorities] have all been 'legal regimes' at one time or another), and so the modern distinction between "rule of law" from "rule by law".<sup>4</sup> And while "democracy", as Winston Churchill is said to have said, "is flawed, but better than all the alternative forms of government", it is not necessarily the only or best end-state of all transitional political processes (in my view).<sup>5</sup>

While many scholars and practitioners now focus on the different forms of 'transitional', 'reparative', 'restitutionary', or 'restorative' processes (official governmental, truth-telling or compensatory, reconciliation, social and private peace-keeping), I suggest here that the 'justice' part of 'transitional justice' is just as variable and problematic as the 'transitional', and must be interrogated for different political, social, cultural and individual senses of what it means.<sup>6</sup> No one legal or extralegal system or process can answer to all the complexities and needs of those who have been wronged by others. As the modern "a" (appropriate or alternative) dispute resolution movement has questioned the efficacy of a unitary judicial/trial/legal form of justice, in the face of complex backward and forward facing human problems, a pluralistic conception of transitional justice may better serve different layers of human needs – for apologies, restitution, repair, existential respect, and economic well-being, as well as political organization for the future. Individual, group and national or even regional and transnational needs may require more than one form of 'transition' for the different spheres of human life.<sup>7</sup> More importantly, as our new field now focuses on deep and rich case stud-

4 See, e.g., Dyenhaus (2006).

5 Recent work in 'adjectival constitutionalism' suggests that some variable forms of constitutionalism, not fully 'democratic' in a multiple political party, majority voting and representative system, as we frame 'democracy', such as 'authoritarian constitutionalism' (Singapore), (see Tushnet, 2014) or 'presidential/executive' constitutionalism, may not be fully 'democratic' but might satisfy a variety of other important political goals – peace, ethnic diversity, command economies, organized economic development, etc. So for me, the jury is still out on what 'transitional justice' must transition to.

6 This is related to, but broader than, the 'individual' versus 'group' rights issues also implicated in any deep discussion of transitional justice, see, e.g., Barkan (2000).

7 This harkens back to the philosopher Michael (see Walzer, 1984).

ies of the last 50 years of post-conflict societies, most of us have learned that 'one size will not fit all'. More hopefully, I think, we have also learned that 'transitional justice' itself is 'transitional' and iterative – we are learning much from each new varied process or institution (international, domestic, hybrid, public and governmental, private and civil society), and different 'solutions' to the problems of injustice and great human harm can themselves be modified and changed as we learn more from each new instance of harm and attempts at healing and repair.

This essay will use the examples of post-military dictatorships in Argentina and Chile to illustrate how transitional justice itself must be sensitive to change, cultural, historical, political and local differences, and the social and political learning that has come from the observations of our field – by scholars, practitioners and the civil society in which such processes are embedded. As I will conclude at the end of this essay, we need process pluralism and variations in different contexts to respond to the differences of circumstances, but most importantly, we need layers of social-cultural, as well as legal, pluralism (courts, truth tribunals, testimonies, compensation, memorials and museums, governmental and interpersonal training, mediation, cultural activities, therapy and use of local and indigenous practices) in the design and practice of those processes. However named, transitional justice processes will not ultimately succeed unless the 'acted upon' (the civil or not-so-civil society<sup>8</sup>) are a part of the construction and implementation (and legitimacy) of any particular transitional justice structure. As some critics of transitional justice have pointed out, the human atrocities and violations that cause the conditions that require 'transitional' justice do not leave a level playing field of equals – 'transitions' are often constructed in continuing conditions of unequal political, economic and social power, with disparate abilities and conditions for participation in that construction of the 'transition'.<sup>9</sup> Transitional justice is not only governmental and legal; it is social and cultural as well, and different processes and institutions may be necessary, even within single societies, to interweave the elements of a flourishing or at least peaceful social order.

8 Timothy Waters eloquently points out that our assumptions about and definitions of 'civil society' in our field tend to assume a core set of 'apolitical' values of 'peace', 'non-violence', 'justice', 'truth', or 'repair' advocated by non-state 'members of a group', when in empirical fact 'civil' society also includes groups who seek other goals, including violence (even if justified by other 'progressive' values, like 'justice', or 'equality') and less than 'civil' (meaning peaceful?) activity, see Waters (2014). For similar reasons, I prefer to avoid the claims for the development of 'the rule of law' as a necessary goal of transitional justice. Law has served to legitimize and 'legalize' slavery, apartheid, the Holocaust, internments, occupations and many other atrocities and wrongs. 'The Rule of Law' is no more universal and apolitical a concept than 'civil society' or 'transitional justice' (which similarly seems to assume a unilinear and one directional progression from one bad state (authoritarianism, dictatorship, violence, genocide, civil war) to a 'universal' good state of democracy, rule of law and justice, equality and political participation for all citizens. I see transitional justice as a movement and practice (now being theorized as well, Teitel, 2000) away from human (both state and non-state) bad acts, but what emerges 'after' we account for those bad acts is less clear to me than any universal state, other than the search for the elimination of man's inhumanity to man (and women, of course!).

9 See, e.g., Afana (2014); Young (2000).

## 2 The Thesis: Process Pluralism and Cultural Imperatives

Different histories, cultural formations, group and national memberships and identities, and individual human variations will not allow a single conception of 'transitional', 'restorative' or 'reparative' justice to function adequately in the many ways we need to move from the past of mass harm to a future of greater well-being or healing.<sup>10</sup> In the words of the American novelist William Faulkner (1951), "the past is never dead; it's not even past". How we deal with the past varies with human experience. Among the challenges of any regime of transitional justice is how to reconcile the "pain of past suffering" (prosecution, punishment, deterrence, and recompense) with the "present and future needs" (peaceful coexistence, new governmental structures, political and economic equity, reconciliation) of any post-conflict/atrocity society (Elster, 2004: 78), where different societies and cultures may have different hierarchies of values, preferences and desires (Elster, 2004: 82).

Whatever the goals of formal governmental transitional justice design, actual transitional justice will be performed, enacted and delivered by members of civil society, unless state control is totalistic. In Habermassian political terms, the "acted upon" must have a say in the rules and processes that are intended to govern them (Habermas, 1984-1987); in realist-sociological terms, they will 'perform' transitional justice as cultural and social, as well as political and legal, forces elucidate and constrain those values and practices.<sup>11</sup>

The first 'Truth and Reconciliation' commission (TRC) was not the now famous and most public process in South Africa, inspired by Desmond Tutu's particularly 'religious' (both Christian and indigenous values) conceptions (Tutu, 1999) – but in Central America, followed by South America (Hayner, 2011). TRCs

- 10 Many scholars of transitional justice now seek to typologize or taxonomize a variety of both criminal (prosecution) or more civil (reparative and some forms of restorative) or hybrid (some truth commissions) forms of post-conflict processes. There are multiple goals and root disciplinary frames, including criminal punishment and deterrence, civil restitution or reparation, human rights violation documentation and redress at the individual level. At the national level there are hopes for historical narrative 'truth' and 'correction', civil society development and capacity building, and social, as well as emotional, psychological and governmental reconciliation and reconstruction to form a more peaceful coexisting society. For many (not me, see below), these goals also include 'rule of law' or democracy building. See, e.g., Teitel (2014); Laplante (forthcoming). The term 'justice' has never been uniform in philosophic or practical understandings, so different processes in post-conflict settings are also enactments of our continuing variation in distributive, substantive, equitable, reparative, retributive and other forms of justice. I do not formally take on these issues here, but I want to highlight that as long as we do not have a universal conception of 'justice' in ordinary legal terms, whether criminal or civil, it should not be surprising that we will not have a single, uniform or even 'template'-like form of 'transitional' justice. The transitional justice field is also marked by the complexity of somewhat competing goals of 'justice' (the human rights and international criminal law approach) and 'peace' (the conflict resolution and peace-building approaches, see, e.g., Chayes and Minow (2003); Rotberg and Thompson (2000); Zelizer and Rubinstein (2009)).
- 11 Within the relatively new transitional justice literature there is increasing critique and sensitivity to the 'colonizing' 'imperialist' and 'western or northern' 'templates' of exogenously developed transitional justice processes and institutions, see, e.g., Dolitdze (2014); Vielle (2012).

have become the most common 'face' of involving the larger society in transitional justice, which may also include the prosecution of harm doers; lustration or purges of former officials; development of new governmental and civil society institutions; compensation for injuries and lost property; rebuilding of infrastructure, homes, schools and other major institutions; as well as the more subtle and difficult task of 'reintegrating' a nation torn apart by civil war, atrocities, genocides, and other grievous wrongs. For those of us who study transitional justice the basic questions remain difficult, both in theory and in institutional design and practice:

- 1 How much 'truth' and accountability is necessary to move forward for a new legitimate regime to be born?
- 2 What should be the consequences of past wrongdoing (prosecution and punishment, compensation, confession, apology, narrative, amnesty, lustration, forgiveness)?
- 3 What should be the relation of a new state to the old? (How much dismemberment of old institutions and removal of officials? How much continuity is required, for social functioning, with often competing claims for legitimacy?)
- 4 How does a civil society 'reconceive' (or 'reintegrate' or 'reimagine') itself? (Formal institutions, memorials, museums, media, cultural activities and exchanges,<sup>12</sup> economic development projects, etc.)
- 5 What processes/institutions are best used to accomplish the above (should they be ad hoc/temporary or permanent)?
- 6 How are legal/governmental/political processes deployed within societies or communities with varying emotional, religious, ethical and cultural cohesion and commitments?<sup>13</sup>
- 7 What is or should be the role of non-governmental processes or institutions in reconciliation/peacebuilding?

Most discussions of transitional justice focus on the international, governmental and institutional processes often developed from the 'top-down' (whether internationally developed or domestic). More recently, we have focused on the role of 'civil society' – the people who live in and constitute society, whether or not they are engaged in formal governmental positions (and whatever their roles in the relevant conflict, harms or atrocities). As in all discussions of transitional justice, one of the most difficult questions is what should be the proper 'recipe' for the relation of peace (the civil society's probable current desire) to justice (Menkel-Meadow, 2012-2013) (the need for rectification of past harms to the development and establishment of important and future-guiding standards of wrongdo-

12 So much of the 'peace movements' in so many conflict sites include civil society cultural, arts, educational, food and sports exchanges, see, e.g., the work of The Parent's Circle, Seeds of Peace, Promises (film) (Shapiro et al., 1998) and so many others.

13 The relationship of the 'rational' or 'principled' to human instrumental 'interests' and more emotional, ethical/moral or religious 'needs' in the design and implementation of any legal or political process is the intellectual conundrum currently facing not only transitional justice but the design of any deliberative democratic process, see Elster (1999); Menkel-Meadow (2004-2005: 366); Minow (1998).

ing and rectification in order to ensure political and social legitimacy of authority, among other goals).

Modern transitions from military dictatorships, civil wars, genocides, and post-Communist, post-military dictatorships, or other post-authoritarian regimes have varied in the last 50 years, as cultures, polities and people vary in what they value and who grabs control of the 'transitional narrative'. Even given our hope for some more 'universal' understandings of basic human rights and notions about what is required for human flourishing (Hunt, 2007), I think a close study of successful (or fragile, but peaceful transitions, such as current Northern Ireland<sup>14</sup>) recent transitions demonstrates that we must describe, account for and allow 'plural transitional' strategies, at both the national and the individual levels. We need, in transitional justice, what has been argued for in some forms of domestic and international procedural law (Menkel-Meadow, 2012; Menkel-Meadow et al., 2012) - 'process pluralism' - different kinds of disputes and different kinds of parties may require different kinds of processes. How we design and choose among them for what purposes in which kinds of political and social environments is a difficult and complex issue of modern jurisprudence (Menkel-Meadow, 2009). Just as formal court adjudication has been supplemented or supplanted by mediation and arbitration, and hybrids of these processes, in both court-annexed public settings and in choices to resolve some disputes in private and legal settings, some transitional societies move from prosecution to reconciliation, and others add layers at the same time (TRCs plus prosecutions for some) or change over time (Argentina alternated from prosecutions to amnesties and then back to prosecutions over time). And transitional justice regimes of any kind must be studied, monitored and observed over time for calibration, 'correction' and change as they may themselves create new issues of conflict, human rights violations and violence.<sup>15</sup>

In recent human history, transitional justice, including TRCs, special criminal courts, hybrid courts, local courts, and indigenous peace and adjudication processes (Stromseth, 2003; Stromseth et al., 2006) (such as gacaca [Bolocan, 2004] and ubuntu [Himonga et al., 2013]), has been incremental and iterative - we need to learn something, but not too much,<sup>16</sup> from each one that has gone before. The nature of divisions within societies (religious, political, class, whether sharing

14 Potentially troublesome again soon, see Cadwallader (2014); "Sinn Fein's Leader Held in IRA Killing" (2014); Mitchell (2001). See the contrast of Mitchell's role as mediator in Northern Ireland to Richard Holbrooke in Balkan conflict in Curran et al. (2004).

15 As the International Criminal Tribunals for the Former Yugoslavia and Rwanda begin their process of closing down and their impacts are measured, we know that ongoing political rivalries and lack of acceptance or legitimacy of these tribunals by some sectors of the relevant societies can and has led to claims of election fraud, ongoing human rights violations and even new violent acts. See, e.g., Broome (2014). Cambodia's extraordinary court also suffers from lack of funds, delayed justice, corruption and continuing political and other rivalries that have not served to 'reconcile' a badly damaged post-Khmer Rouge regime. See, e.g., Mallinder (2014).

16 I am fond of saying, "not every conflict is Munich or Viet-Nam" (one a reference to perceived too easy collaboration and compromise, the other to unnecessary war), see Menkel-Meadow (2010).

land or competing for it,<sup>17</sup> degree of integration [Daly and Sarkin, 2009]) varies too much to allow a single design or order of process for transition from danger to relative safety. Noted political scientist and historian and theorist of transitional justice, Jon Elster (2004), has said, “I have found the context-dependence of the phenomena [of transitional justice] to be an insuperable obstacle to generalizations.” In addition, transitions themselves are incremental and iterative – Chile and other Latin American nations have recently gone from immunity-granting processes to some prosecutions of those formerly granted amnesty (Huneeus, 2010; Roht-Arriaza, 2015), and Spain is currently re-examining its own post-Fascist past (Yardley, 2014). Transitional justice, within particular post-conflict sites, may evolve as people (and generations) change with the transition itself and what they learn from watching others grapple with similar, but also different, dilemmas.<sup>18</sup> In short, transitional justice is itself transitional and should be flexible and capacious enough to include pluralistic forms of process and institutions.

### **3 Illustrations from Chile and Argentina: Variable Transitions within the Transitions**

On 11 September 1973 a coup, led by Augusto Pinochet (and other military leaders), against the elected socialist leader, Dr. Salvador Allende, in Chile, led to a dictatorship lasting more than 15 years in which thousands were ‘disappeared’, murdered, tortured, brutally treated, threatened, surveilled, detained and attacked, both physically and emotionally. Estimates of those killed (about 3,000) and tortured still vary, although the Jesuit brothers at Universidad Alberto Hurtado kept the best records they could. Of those who were not killed or detained, many exiles fled the country to agitate for justice from other ports in South America (ironically, including Argentina, with its own military dictatorship), Europe and the United States (whose government was fully implicated in Pinochet’s coup) (Kornbluh, 2013). Unlike many dictators, Pinochet eventually sought the legitimacy of election-plebiscite, which, to his surprise, he lost!<sup>19</sup> In 1988 Patricio Alywin was elected President, and a truth and reconciliation process was begun with a human rights investigation that included human rights activists and Chilean exiles, including Jose Zalaquett, now a professor of law and human rights at the Universidad de Chile.<sup>20</sup> The jurisdiction of the commission in Chile only

17 Imagine how the Israeli–Palestinian land claims would fare in modern Canada, US and Australia – if the ‘we were here first’ argument would prevail, indigenous communities could demand withdrawal of most, if not all, of the colonial ‘settlers’ (see, e.g., *Mabo v. Queensland* (1992), holding that the doctrine of *terra nullius* does not apply to Australian land ownership); Menkel-Meadow (2014).

18 In particular, see the move away from amnesties to prosecution in Chile and Argentina, Roht-Arriaza (2010).

19 For some reviews of this history, see Constable and Valenzuela (1991); Dorfman (1999); Larraín (2013) (movie chronicling the election campaign against Pinochet); Stern (2006).

20 With issues of peace versus justice and the limited scope of investigation depicted in the ‘fictionalized’ treatment in Ariel Dorfman’s play *Death and the Maiden* (1991, movie 1994). See Ferrara (2015); Zalaquett (1991–1992).

extended to cases of “torture resulting in death”, and was criticized for failing to treat the cases of the up to 200,000 (a significant percentage of Chile’s population) who were allegedly tortured and then released.<sup>21</sup> The report of this commission was completed in 1991 (1,800 pages, with few copies initially printed, of proceedings that had been held mostly in private, with relatively little public comment at the time). In 1978 an amnesty law was passed granting amnesty to those who participated in these acts (‘in defence of the state’), and Pinochet became a ‘senator for life’, even as he ‘voluntarily’ stepped down from his country’s leadership.

Ten years later, in a period characterized by many of us in the transitional justice field as the ‘peace versus justice’ dilemma, Chile provided a ‘classic’ example of the bargain made for ‘peace’ as the transition to a more democratic state allowed many former office holders and military officers to remain in place, with relative impunity (at least until much later). As is now well known, in 1998 Pinochet, en route to London for medical treatment, was indicted in Spain for human rights violations of those with Spanish citizenship (and on the basis of some universal jurisdiction legal principles) for human rights crimes committed in Chile. After groundbreaking litigation in the British courts, Pinochet was allowed to return (without extradition to Spain for trial) to Chile, where despite efforts to indict him for tax claims and other legal wrongs, he died without coming to trial. Soon thereafter, amnesty laws were repealed (mostly through judicial interpretation), and some prosecutions (most notably of Catholic priests complicit in the regime) began and are ongoing. The Inter-American court of Human Rights, which had pioneered the recognition of the human rights violation of state-enforced ‘disappearances’ and the state’s duty to investigate all such claims in *Velásquez Rodríguez v. Honduras* (1988), found that the amnesty laws passed in Chile could not override the state’s duty to investigate, prosecute and punish those responsible for such wrongful acts (see *Luis Alfredo Almonacid Arellano et al. v. Chile* [2006]) (forced disappearances by the state now being a violation of the International Convention on the Protection of All Persons from Enforced Disappearance [2006]). Over one thousand have now been tried, and about 250 found guilty, but only of the worst ‘crimes’ of torture and death and not for more common forced ‘detentions’ (Roht-Arriaza, 2015).

In 1976 a military coup in Argentina, including Jorge Videla and others, used several alleged left-wing bombings to seize power from Isabel Peron (the widow of Juan Peron), and proceeded to engage in forced disappearances, murders, torture, detentions, surveillance and other human rights violations, now labeled ‘the Dirty War’. Estimates of those murdered now exceed 30,000 (comparable as a percentage of the population to Chile).<sup>22</sup> After losing the Falklands/Malvinas War

21 The current President of Chile, Michele Bachelet, is the daughter of one of the murdered victims. Her recent opponent for the presidency was the daughter of a member of the military regime. Some of Pinochet’s children have been active in current politics as well, with his daughter running for Senate a few years ago.

22 A dramatic, if fictionalized treatment of the disappearances can be found in the novel *The Ministry of Special Cases* (2007), written by Nathan Englander, ironically written from Argentine files archived in Israel. See also, Graham-Yool (1986; 2009).

against the United Kingdom in 1983, the military dictatorship fell, and Raul Alfonsin assumed the presidency. Like Alywin in Chile, he announced the formation of a Truth and Reconciliation Commission (CONADEP), which researched, investigated and reported on (in the now readily available report *Nunca Mas!* now in multiple printings) the forced disappearances and other acts of detention and torture. Carlos Nino (in exile in the United States), a distinguished philosopher of law and one of the intellectual fathers of transitional justice (Nino, 1990-1991; Nino, 1996), became advisor to Alfonsin to assist in the development of a new democratic state. Unlike Chile, Argentina began compensating some victims, especially given the persistent activism of the Madres de Plaza de Mayo (a human rights group of mothers and grandmothers of the disappeared who continued to march in front of the Casa Rosada during and after the military dictatorship to demand accountability and information on their disappeared children).<sup>23</sup> Videla was eventually prosecuted (and died under house arrest), as were other military officials, until both Alfonsin's and, later, Carlos Menem's regime issued new pardon (amnesty or 'Full Stop') laws. In 2003, under President Nestor Kirchner, the Argentine Congress revoked the pardon laws, while the Argentine Supreme Court declared them unconstitutional. The new Argentine Constitution in 1994 incorporated several international human rights treaties as part of its law (making it a 'monist' regime of international law), making legal action possible in national courts for international legal claims. Argentina is actively prosecuting some surviving perpetrators, not only through official state prosecutors, but also with the representation of victims by the civil law procedure of 'victim's counsel' or private prosecutors, including law clinics in some of Argentina's law schools.<sup>24</sup>

So with this very brief summary of the history of military dictatorships in neighboring countries in a similar era, seemingly following similar paths (gross human rights violations, democratic regime change, truth and reconciliation commissions, some prosecutions, legal changes and judicial and legislative personnel changes, commitment to the use of international legal standards in domestic settings), what are/were the 'cultural variations' in this seemingly similar trajectory from human abuse to (somewhat) reconciled societies?

In 2007 I studied transitional justice (as a Fulbright scholar) in Chile and Argentina, while teaching in both countries. Interviews (over 50 in each country) from a variety of walks of life demonstrated great differences in reactions to the two military dictatorships. As has been documented in many more formal studies, many Chileans, while denouncing the dictatorship of 'the past', were much more concerned with talking about their economic progress – Pinochet may have been a human rights problem, but his 'neo-liberal' economic reforms were largely successful in improving economic conditions. While I was living in Chile, the World Bank removed Chile from the international 'poverty list', despite the fact that

23 The additional horrors of the Dirty War included the abduction and illegal adoption of babies born to detained women (the mothers were later killed), dramatized in the Academy Award-winning film *The Official Story* (1985).

24 Other human rights activists (outside of Argentina and Chile) have long argued for prosecutions and have been critical of the amnesties originally passed in Chile and Argentina, see, e.g., Orentlicher (1990-1991).

another World Bank study named Chile (along with the US and Brazil) as having one of the highest rates of disparity between the richest and the poorest of its citizens. In almost every Chilean family I visited we were warned not to talk too much about politics because in every family (both in the capital city of Santiago and in the time I spent in Temuco, in the south, and in more rural and smaller cities) there were people 'on both sides' and it would cause enormous disruption 'so many years later' to revisit the old wounds. Priscilla Hayner (2011) had similar experiences when she was told in 1996 that it was "in bad taste" to talk about Pinochet abuses in social settings. (I have been told similar things in Spain.) Among upper-middle class professionals, including many of my colleagues at several universities, 'mixed marriages' (not religious but political!) were not uncommon. In one case a strong Pinochet-supporting and wealthy family had paid for the safe passage out of the country of their leftist relatives who decamped for Europe for the duration of the Pinochet regime. Others have described this as 'collective amnesia' – the desire to forget about painful pasts by a group to avoid dealing with hard truths in order to live more comfortably in the present and plan for the future. Without wanting to characterize a whole society, it was remarkable to see so many, despite world-leading human rights courses and legal activism by some in the Chilean universities, prefer to avoid such conversations (except on the annual day of protest commemorating a single act of Pinochet-era violence. In 2007 there was a brief and violent skirmish with the local police and students [I was rushed home by my colleagues in a feared national emergency that received no international attention] – and then all was calm the next day).

In contrast, in Argentina in 2007, despite the focus on the ever unstable economy (following the 2000 economic crisis and ongoing amparo actions in the courts by the thousands to recover lost funds), Nunca Mas! remained visible in every bookstore and in many street kiosks. Virtually everyone was still talking about the Dirty War, and families were more 'unified' in where they had stood in the troubled times. Many of my Argentinean students had 'disappeared' relatives and were quite willing to talk about it in class. I worked with some of the human rights lawyers who had created the key human rights organizations in Argentina and who bravely and courageously founded law clinics in the private law schools (as well as at Universidad de Buenos Aires, the leading public law school). Prosecutions were ongoing and discussed, and the Argentine Supreme Court was proudly declaring its 'separation of powers' review of governmental actions and private claims. A procedure for reparations was in place. Most dramatically, a short public service film aired on TV asking anyone who had any doubts about their parentage (possible 'baby-stealing' victims) should contact a special social service agency to discuss DNA testing and the possible psychological effects of learning who your real and adoptive parents really were.<sup>25</sup> Many movies were produced focusing on the Dirty War era, and novels and other artistic representa-

25 See, e.g., Bravo (2008); Svatek (2008).

tions took on the thorny question of whether human atrocities could actually be represented in the arts.<sup>26</sup>

Side by side, two Spanish-speaking post-military dictatorship countries separated by the Cordillera de los Andes seemed worlds apart in their post-conflict reactions to somewhat similarly suffering regimes (fighting 'communism and left-wing politics' with US-supported repressive tactics).<sup>27</sup> Why? Although many were to observe the 'cultural' features described in the Colin Thubron quote that opens this paper (a 'European' [Argentinean historical identification with Europe]) focus on the past in Argentina (with the highest per capita representation of psychiatrists in the world!) as a cultural difference in the two nations' demographic and psychic make-up, with Chileans more focused on 'the future' (both economic and nation 'rebuilding'), there are structural differences as well. Ironically, for Chile the military dictatorship was somewhat of a 'one-off', if longer, aberration in an otherwise more democratic and judicially passive state (Cousu, 2010; Dezelay and Garth, 2002). The Truth and Reconciliation process and investigation was less transparent, restricted in jurisdiction and not fully circulated to the public when completed.

In contrast, when organized by internationally renowned legal theorists, the Argentine TRC was more public and observed by thousands as *Nunca Mas!* became a domestic and then international bestseller. Argentina's human rights community was supported and activated by international networks (Vecchioli, 2011), and when exiles returned with European and North American rights consciousness, despite the back and forth of amnesty laws, both the courts and the legislature actively revamped the pardon laws. In Chile, the amnesty laws were more 'circumvented' than overruled, until more recently (Huneeus, 2010; Roht-Arriaza, 2015). The interaction of the larger social and political 'culture' (perhaps more 'diverse' in European origin) in Argentina, and legal culture in these two nations thus produced, at least in the first decade after the military dictatorships, quite different social, if not, legal, post-conflict societies. The Kirchners (first Nestor, now Christina) used their connections with human rights groups to fuel their political successes,<sup>28</sup> and although Michele Bachelet is herself a closer victim (both in the death of her father and in her own detention), now in her second presidency, she does not dwell on the past, but is focused on social, economic and political reforms for the present and future. (There are fewer museums or national monuments to the victims of the dictatorship in Chile (being currently discussed<sup>29</sup>) as there now are in Argentina (at ESMA – Escuela de Mechanica de la

- 26 Perhaps one of the most compelling academic conferences I ever attended was one in the 1980s at UCLA about whether the Holocaust or similar 'unspeakable' mass atrocities could ever be represented 'truly' in the arts. We all know the answer to that question now. See, LaCapra (1996); See e.g., Jolie (2011); Spielberg (1993).
- 27 Of course, Bolivia, Peru, Brazil, Uruguay and Paraguay, among others, also had military or other dictatorships in the same era.
- 28 Now quite controversially as divisions among factions of the Madres are involved in claims of corruption and political favors to and from the Christina Kirchner regime or Kirchinistas.
- 29 Guillermo Calderon, Villa (2011) (play dramatizing controversies surrounding establishment of a memorial to Pinochet regime victims). See also, Buckley-Zistel and Schäfer (2014).

Armada), “a museum of human rights,” the place of torture and detention of over 5,000, at the site of the naval mechanics training school, on a major thoroughfare in Buenos Aires.<sup>30</sup> See pictures below.)

Others suggest that the “Pinochet effect” (Roht-Arriaza, 2005) (Pinochet’s public and international indictment) has somewhat transformed reticence to speak in Chile, and that Chile’s and Argentina’s revocation of their amnesty laws are demonstrations of how ‘transitional justice’ evolves within post-atrocity–post-conflict regimes over time. Thus, cultural, social and political differences in approach may come to converge (especially with publicity and transparency and international influence). An argument could be made that ‘transnational’, ‘international’ or ‘hybrid’ influences in transitional justice may ultimately ‘even out’ or smooth out cultural differences, as in the current prosecutions in both Chile and Argentina. I am not so sure that it does or will happen or that it is necessarily a totally advantageous development. ‘Convergence’ or a move towards more uniform or regular practices can also stultify creative and adaptive devices for transitional or transformative justice practices and institutions. Argentina, for example, has creatively pioneered ‘mega-trials’, with multiple defendants being tried with tens of victims and witnesses (with their own private lawyers) in specially organized criminal proceedings (Roht-Arriaza, 2015). On the other hand, with one-party domination (Concertación (de Partidos por la Democracia) in Chile, Peronism in Argentina) strong in both countries, Chile and Argentina are experiencing different post-dictatorship electoral politics (with more rotation in the leadership in Chile, as Argentina appears to be moving in the direction of ‘executive or presidential’ constitutionalism [like other South American countries in the shadow of Chavez-styled super-Presidentialism]).<sup>31</sup> Thus, in different ways, Argentina and Chile demonstrate some examples of process pluralism – as different processes (Truth, not Reconciliation, Commissions and different concepts of amnesty, prosecutions and some financial reparations) were created immediately

- 30 The role of these monuments to preserve the memory of human atrocities is an important part of both childhood and adult education in many countries (e.g. Dachau, Auschwitz, Argentina, Rwanda, “the Troubles Terror Tours” in N. Ireland, Yad Vashem, The Holocaust Museum in Washington, DC, Berlin, etc.) creating a new field of education and museum management. I serve on the Board of the American Friends of the Auschwitz-Birkenau Foundation which seeks funds to preserve both the concentration camp and educational programmes in perpetuity in Poland, with an international source of funding and visitors. Among the difficult questions in this new field: At what age should children be exposed to these horrors? How much collective guilt should there be in the present for past harms? What is, as some scholars have called it, “The Ethics of Memory”? (Margalit, 2004).
- 31 As with Bolivia’s Evo Morales and Ecuador’s Correa. While South America, in general, moved away from military dictatorships in the 1990s, more modern electoral politics form a hybrid, if somewhat flawed, version of democracy with ‘hyper-Presidentialism’, executive power and frequent constitutional amendments to legitimize strong executives, many without term limits or terms that are changed by Constitutional amendment. Note that I have not argued in this essay that ‘transitional justice’ always leads to democracy, or at least democracy as defined in the ‘Western’ and ‘Northern’ ambit. Many post-conflict societies may turn to democratic-seeming elections, but this is often accompanied by strong executives, corruption, weak judiciaries or other variations from ‘conventional’ constitutional democracies, see, e.g., Gargarella (2013); Tushnet (2014).



ESMA, Buenos Aires, June 2012

after the collapse of the military dictatorships, and then later (now, over two decades later) prosecutions continue and historical excavation of the 'truth' (in both legal and other forms, e.g. movies, novels, art forms, museums) continues to be differentially experienced by survivors, victims and bystanders of the events themselves.



ESMA, Buenos Aires, June 2012

Ironically, the transitional processes in Chile and Argentina, operating on national and political scales, also spawned quite interesting local sub-national examples of other forms of 'transitional justice', demonstrating that even repressive regimes can offer other models of more plural 'justice.' As Pinochet's neo-liberalism-sponsored capitalism granted indigenous Mapuche peoples privatized



Buenos Aires, Parque de Memoria (Park Commemorating the Disappeared), January 2015

hectares of land (contrasted with the Northern American concepts of tribal 'reserves') to cultivate, the government also established a mediation agency through CONADI (corporacion national de desarollo de indigena) to peacefully mediate land claims among and between indigenous families, permitting a certain amount of autonomy within an otherwise repressive regime (see picture on next page) (which may also be considered a 'pacification' plan as more activist



CONADI Mediation Session on Mapuche Lands, Southern Chile 2007 (Lohengrin Ascensio, Mediator [and Lawyer], CONADI)

Mapuche contested government land grabs and were later prosecuted as 'terrorists').

In Argentina, the local prison in the city of Buenos Aires (Devoto) developed a fully autonomous and self-governing wing of inmates being educated by the Universidad de Buenos Aires for degrees in law, sociology, economics, psychology and humanities, while granting leaves for internships outside of the prison to ease the 'transition' to civil life in one of the more progressive prisons I have witnessed in decades of prison observation in the US. Thus, different conceptions of 'transitional' justice operate at different levels of societies, within both repressive and democratic regimes, and serve as a reminder that different problems may require different levels, layers and structures of process.

#### 4 Implications and Lessons for Cultural Variations and Process Pluralism in Transitional Justice

As the Truth and Reconciliation processes in different countries in Latin America were taken up in other post-conflict or transitional regimes, a greater variety of processes have been used. Most dramatically, the South African TRC, building on Desmond Tutu's use of Christian and indigenous religious values of forgiveness,

also used amnesty to shield many wrongdoers from legal action,<sup>32</sup> but also used television to educate not only victims, perpetrators and bystanders, but the more general public, a practice which was demonstrated to have increased “human rights consciousness” in the general population (Gibson, 2004). Newer TRCs have used multiple locations to reach members of diasporas; they include the Liberian TRC, which operated branches in various locations in the US (Hayner, 2011: 67). Others have used multiple processes, as the often extolled ‘indigenous’ practices of gacaca in Rwanda combined local mediative practices with westernized adjudicative practices, concurrently with both national and international prosecutions for genocide and less serious crimes (Bornemann, 2012; Strain and Keyes, 2003), or ubuntu (humanity) practices in much of Southern Africa.

At the same time, critics of transitional justice practices, both of TRCs and courts, have suggested that the definitions of wrongs have often excluded those perpetrated against women or children or ethnic or religious minorities, and that even seemingly ‘human rights-sensitive’ organizations and processes re-perpetuate existing (national? gender? class? religious?) hierarchies by harm definition<sup>33</sup> and official actors within the processes of transition (Fineman and Zinsstag, 2013). And, as noted by Colin Thubron above, some societies, like China, have not even acknowledged their genocides or mass atrocities, such as the Cultural Revolution or the Great Leap Forward, which may turn out to have killed the most human beings in actions taken by a government in the twentieth century. And among those many unacknowledged modern atrocities, there is Japan’s refusal to apologize for their use of Korean “comfort women”.<sup>34</sup> New critics of some transitional justice processes have argued for less “westernized” legalistic categories, suggesting that even the most truth-seeking TRCs still individualize presentations of harm and narrative, rather than allowing another form of “collective memory” to be developed, used or created in such settings – the telling of and acknowledgment of “collective memories of wrongfulness” or group harms and group narratives.<sup>35</sup>

There will be many opportunities for transitional justice institutional design as more and more nations begin to acknowledge their wrongdoing under civil

32 Now most controversially criticized on this and other grounds, see, e.g., Dyzanhaus (1998). Critics of TRC processes have suggested that ‘reconciliation’ through forgiveness and amnesty can be in a ‘zero-sum’ relationship to the experience of ‘justice’ by those wronged in some, if not most, post-conflict settings. Economic and political inequalities may not be solved by ‘social exchanges’ or narrative talk therapy, see, e.g., Afana 2014. Others have suggested more ‘universal’ standards for procedural fairness in truth commissions, see Freeman (2006).

33 The Rome Treaty creating the International Criminal Court has been among the first international agreements to recognize rape and sexual assaults as crimes against humanity, but not human trafficking (yet!).

34 Soh (2009). Some of these cases raise the important issues of retroactivity – sexual crimes against women are now international human rights and war crimes, but were they in earlier periods? Increasingly, many regimes have chosen to ‘apologize’ or make amends for ‘crimes’ and atrocities that were considered ‘legal’, if not moral, at the time of their commission, see Barkan (2000).

35 See Lopez (2014). This claim for “collective memory” in transitional justice can be thought of as the transitional justice or ‘informal’ justice version of the litigated class action.

society and international pressure (or after the effective date (2002) of the Rome Treaty makes signatories responsible for enforcing international criminal laws in their national courts).

As post-conflict-atrocity societies attempt to transition to a new society, the challenge is to compensate, remember and correct for the past, with an eye towards what might be created for the future. This too may be culturally varied – are human/political rights enough? What of economic opportunity or justice? Land allocations?<sup>36</sup> Property return or compensation?<sup>37</sup> Fear of revenge and retribution? Cultural values certainly vary in tolerance of difference and “living together” or preferred separation?<sup>38</sup> Many designs of transitional justice presume that the individuals constituting a particular society can be encouraged to share enough common ‘values’ (peace, coexistence, human well-being) to create and sustain a new society after great harm has produced hostile separation. But just consider where this article was first presented<sup>39</sup> – Jerusalem – with conflicts among those who claim to have been here ‘before’ the ‘others’, and worshippers and believers in totally different value systems are unlikely to transition to a shared understanding of their joint ‘narrative’. In my work here with the Parents’ Circle we have learned that trying to encourage empathy by exploring presumed empathetically ‘shared’ human loss is not reciprocal or equal. Palestinians see Yad Vashem and say, “What does European Jewish suffering have to do with us? We are not the Germans, and you took our land.” How can there be ‘reintegration or reconciliation’ if there never was ‘integration’ or conciliation to begin with?<sup>40</sup>

- 36 Hopes for more shared land reassignment in South Africa have not materialized (Atuahene 2014). In many post-conflict settings, Germany, and most of the post-Communist transitions, some monetary payments have substituted for actual land return in quite varied and complex legal arrangements. See Elster (2004: 33); Barkan (2000). Of course, national land boundaries (a large part of the Israeli–Palestinian dispute) are often different from individual or group claims, see, e.g., indigenous land claims in many post-colonial societies.
- 37 See, e.g., Landler (2007) (settlement for approximately \$117 million, representing a one-third discount on present-day value for valuable property confiscated by Nazis in Berlin and subject of litigation begun in the United States by heirs and relatives of victims with changing property claims as borders of West and East Berlin changed during and after the Cold War).
- 38 At the moment of this writing, civil wars and separatist struggles in South Sudan-Sudan, Ukraine, Crimea, Syria, Iraq and other locations seem to be threatening a new era of sub-nationalism or return to ‘perceived’ ethnic or religious homogeneity (with attendant discriminatory and genocidal practices).
- 39 During the Third International Conference on Transitional Justice at Hebrew University, 19-20 May 2014, there were participants from Jews and Arabs in Israel–Palestine, as we peacefully continued to discuss possible peace-seeking and reconciliatory activities. Two months after our academic conference on Transitional Justice: Lessons from international Experiences, violence broke out again in Gaza after three Israeli teenagers were murdered, a Palestinian was murdered in revenge and rockets from Gaza and incursions into Gaza by the IDF seeking to disrupt Hamas’ rockets and tunnels. The death toll at this writing is over 2,500. We often tend to forget that violence, terrorism, kidnapping, etc. are also seen as ‘transitional justice’. See Waters 2014.
- 40 Stories of ‘peace in the desert’ of historical friendly relations vie with counterstories of early and continuing conflict between Arabs and Jews, see, e.g., Shavit (2013). For an important blueprint for beginning a reconciliation process, even before there is peace ‘on the ground’, see Kahnanoff et al. (2014).

It may be easier to attempt reconciliation and reintegration of a presumed 'homogeneous' polity (like a nation-state [Germany?]), if there is such a thing (I doubt it, as I live in a sharply demarcated 'red' [Republican] and 'blue' [Democrat] society), than widely diverse political units made of people with widely disparate values.<sup>41</sup> So with the harsh cynicism of some, but the optimism my parents gave me, I think the only answer is 'different strokes for different folks (and purposes)'. Transitions to peaceful human flourishing (both in process and in outcome) will have to vary with the conditions on the ground. We are best served by 'process pluralism' that seeks to provide different and simultaneous models of transitional justice, where some prosecutions for leaders and evil planners to punish, deter and purge, but more gentle processes of truth-full narrative or civil society economic and cultural collaborations and exchanges (such as those somewhat successfully explored in post-genocide Rwanda and pre-peace agreement Palestine-Israel<sup>42</sup>) exist concurrently.

The desired 'end-states' of transitional justice processes must also be plural (as parties in a legal system might choose to settle a case for a future flexible deal that a court would not be authorized to award). Capacity building for important justice institutions, like courts and tribunals, is important for economic and human rights stability, but democracy and rule of law come in many forms, as post-military dictatorships in South America demonstrate. Pinochet made himself a life senator after he lost his election for legitimacy as President, but since that time Chile has had more real circulation of leadership than many other South American countries. 'Rule of law' American style has not translated into independent judiciaries or lack of corruption either in many post-conflict societies. Many regimes have 'transitioned' out of military dictatorship and torture to executive or 'presidential' Constitutionalism with overly strong executives and not much transparency or accountability (witness recent human rights and investigation issues in Argentina ('Nisman' affair)). So, in my view, 'transitional justice' is best served with the 'thick description' of political anthropology and cultural variations in process and outcomes. Particular political systemic structures may be more variable in situations that still prevent undue harm and violence to members of society when it emerges from great physical violence, and 'rule of law' legal systems vary in their institutional designs and substantive commitments – what is 'free speech' in the United States may be punished as 'hate speech' elsewhere (e.g. Germany). We are observing many 'transitional' societies that are 'transitioning' out of some bad ways (many societies seem to be transitioning into worse ways, e.g. ISIS and Syria) into better ways – less violence, more accountability, more citizen participation, but 'transition' is not an end-state. Our field should observe and study how different societies emerge from these bad states or behaviours, as we work, simultaneously with those who live in such societies, on what a desirable legal and political regime might look like. Some forms of self-determina-

41 And of what relatively 'peaceful' Belgium with total political gridlock in a linguistically, religiously and otherwise bifurcated nation, see Mnookin and Verbeke (2009).

42 See the work of many peace-seeking NGOs in Israel–Palestine, such as Parents Circle–Families Forum and others, e.g. Ben-Mayor (2012).

tion are essential prerequisites in my book, but as a child of Holocaust survivors, democracy and 'rule of law' are not the only end-states. The Nuremberg laws were 'law', and Hitler was first elected democratically. Transitional 'process' can move us out of past harms, but what constitutes real peace and justice is still a work in progress – in political philosophy as well as on the ground.

In my own research and political work I have come to believe that 'bottom-up' civil society interactions, education and joint labours must provide the ground and context for 'higher up' diplomatic and political institutions and processes so that somehow individual and cultural differences can inform and correct the dangers of universal, internationally 'imposed' (and ineffective) templates. The challenge of transitional justice is to find a way for particular civil societies' (or 'bottom-up') efforts to inform and participate in 'higher up' leader-led diplomatic and peace negotiations, as well as the new forms of governance that must be constituted after ceasefires and peace agreements are achieved, however fragile. Over the years, there have been many efforts at such 'mid-level' mediation of conflict resolution (e.g. social-psychologist Herbert Kelman's "problem solving workshops" in the Israel–Palestine disputes (Kelman, 2005), through combined uses of psychology, group decision making, political strategies, and mid-level thought and government leaders, in meetings most often hosted away from conflict zones). The tensions between the conflict resolution-peace seekers, human rights and international criminal law activists and actors on the ground (including leaders, 'freedom fighters' and civil societies) remain great and complex in almost every conflict region in the world, each with its own mix of common and disparate human elements.

Most importantly, as the experiences and history of Chile and Argentina have taught me, even seemingly 'similar' cultures are in fact different, and may deal with their past evils and blueprints for the future differently. I continue to hope that those engaged in the process of emerging from or seeking to end conflict and human atrocities are capable of learning from each other and themselves, transitioning within their transitions (e.g. from amnesty to prosecution, from dictatorship to very precariously different democracies,<sup>43</sup> from civil wars to fragile peace, to hopeful reconciliation in joint economic development).<sup>44</sup> But we cannot learn too much – emergence from the military dictatorships of Chile, Argentina and other South American countries may tell us little about how Israelis and Palestinians may make a two-state peace with tense coexistence, or even how African and

43 Many are currently worried about the 'executive presidentialism' of Christina Fernandez Kirchner as she clings to power and 'uses' connections to human rights groups for, as some allege, corrupt purposes.

44 Is Rwanda at least one still-fragile success? Is South Africa still a possibility (with a less violent but still grossly unjust economic regime)? Is Post-Holocaust Europe (even on the verge of new economic and migration issues) still a possible regional model? Do the failing states of Syria, Ukraine and Sudan offer counter-tales of dissolution rather than 'peaceful, flourishing' transitions? I am doubtful any one model can fit our current crises, but there are elements of learning in each as we tackle ever new problems of seeking peace and justice.

Eastern European civil wars can be ‘managed’.<sup>45</sup> As cultures and nations differ, so do individuals in what they want – some will want punishment, retribution and compensation; others will want a safe world that permits children to grow up peacefully with the possibility of human flourishing. We will have to try all the different measures and tools at our disposal for the enormous challenges ahead in so many different contexts. Chile is not Argentina, and Northern Ireland is not Israel–Palestine. Although analogies may be useful for analysis and teaching of conflict resolution, it is rare that strategies for one major conflict have actually been used effectively elsewhere.<sup>46</sup> Economic and political justice and aspirations for real equality of opportunity and achievement must be included in any reconciliation measures that begin in hopeful dialogue and narrative strategies within and across cultural divides. Transitions and reconciliation efforts work best when we are optimistic, not pessimistic, about our futures, as individuals and as collectivities. We are all human beings, and I hope we will find more than one way to peacefully coexist, by creating hope that we can transition to something better than senseless conflict, even if our understandings of what the end product of ‘justice’ might be are culturally and personally variable.

45 See Menkel-Meadow (2015) (reviewing the transitional justice issues in the war crimes of the war in Bosnia-Herzegovina 1992–1995 as portrayed in film).

46 Even using the ‘same’ techniques for the same conflict often does not work; contrast Wright (2014), with Swisher (2004).

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