

Introduction – The Limits of the Law

“Now, for myself, I have these additional things to say: Your definition of Nazi policy as a crime (‘criminal guilt’) strikes me as questionable. The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness [...] [T]his guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.”¹

Like this, Hannah Arendt responded to Karl Jasper’s seminal work “The Question of German Guilt”, in which the German philosopher grappled with the consequences of the Shoah.² While the quote relates to criminal justice, Arendt had similar things to say about the topic of this book – reparative justice after atrocities:

“This was different. [...] Everything else somehow could have been repaired³. [...] Not this. This should never have happened [...] Something happened, with which we all cannot come to terms anymore.”⁴

Karl Jaspers and Hannah Arendt both wrestled with a complicated question, which 50 years later would come to be categorized as transitional justice: How can and must societies deal with systematic human rights violations? Both were uniquely placed to answer that question: They were not only two larger-than-life philosophers and political theorists.⁵ They were also eye-witnesses and survivors of the atrocities committed in the Third Reich. The Nazi regime forced Karl Jaspers to retire from teaching at university

1 Arendt et al., *Hannah Arendt/Karl Jaspers Correspondence, 1926-1969*, 1992, 54.

2 Jaspers, *The Question of German Guilt*, 1961. Jaspers did not restrict the question of guilt to criminal guilt, but placed moral guilt, political guilt and metaphysical guilt alongside it. He assumed that only few Germans were criminally guilty, a conclusion which did not stand the test of time, as recent findings on the criminal guilt of some of the many low-ranking participants in the crimes of the Nazi-era show. On the scandalous and winding road towards criminal accountability in Germany after the Nuremberg trials see Müller, *Furchtbare Juristen - Die Unbewältigte Vergangenheit der Deutschen Justiz*, 2014, 303 ff.

3 Arendt uses the German term “Wiedergutmachung”, which literally translates to “make good again”.

4 ZDF, *Günter Gaus “Zur Person” - Interview With Hannah Arendt*, 1964, minute 40 (translation by the author).

5 Arendt rejected the label philosopher and instead saw herself as a political theorist.

in 1937 and banned him from publishing in 1938.⁶ Hannah Arendt – an atheist Jew – fled to France. There, the Vichy Regime interned her before she found refuge in the United States.⁷ Their difficulties in finding adequate categories to even start comprehending what happened speak volumes about the complexity and inconceivability of mass atrocities. These difficulties persisted when they discussed the law's role in responding to such atrocities: Whereas Jaspers relied on it, Arendt remained skeptical of its utility.⁸

Arendt's doubts are not easily repudiated. Does the law provide adequate categories for what happened in Germany, Rwanda, the former Yugoslavia, or Syria? Or does categorizing these atrocities normalize them, cover their “monstrousness”, as Hannah Arendt suggested? May law even help to sanitize atrocities when it allows societies to talk about “deportation”, “push-backs”, and “their sovereign prerogative to control the border” instead of facing the plain truth that they created the deadliest border in the world?⁹ More practically, how does one even repair eight million registered survivors of atrocities committed in more than five decades of internal conflict in Colombia? How does one even repair a single survivor in Sierra Leone who suffered sexualized violence, forced amputation, was displaced, and lost their¹⁰ family? Is it possible, or is it something “with which we cannot come to terms anymore”?

Many scholars follow Arendt in doubting that law can provide meaningful guidance in response to atrocities. They claim that transitional justice situations¹¹ are too diverse and too complex to be subjected to regulation.¹² Their arguments point to important truths and raise doubts which are difficult

6 Thornhill/Miron, *Karl Jaspers*, in: Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Online Edition 2020.

7 Young-Bruehl, *Hannah Arendt - For Love of the World*, 2nd Revised Edition 2004, 115 ff.

8 Naturally, their positions were more complex than that. See their brilliant discussion of the Eichmann trial in Arendt et al., *Hannah Arendt/Karl Jaspers Correspondence, 1926-1969*, 410 ff.

9 IOM, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe - A Review of the Evidence*, 2017, 1.

10 This book uses the singular they to refer to persons of all genders. On this use of they see Merriam-Webster, *They – Pronoun*, Online Edition 2021; Merriam-Webster, *Words We're Watching - Singular “They”*.

11 For the definition see below, C. and ch. 3.

12 Falk, *Reparations, International Law, and Global Justice - A New Frontier*, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 478, 486 f.; Carrillo, *Justice in Context - The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 504, 508 f.; de Greiff, *Justice and Reparations*, in: de Greiff (ed.), *Handbook of Reparations*, 2006, 451, 156.

to dissolve. However, the claim that transitional justice situations are too diverse and context-sensitive is not convincing. Human rights regulate the most politically sensitive questions societies ask themselves all over the globe. Answers to immigration, surveillance, abortion, assisted suicide, etc., vary wildly between states, as do the circumstances under which states give them. Still, the same rights apply to all of them. Diversity and complexity are not unique to transitional justice; it is a fundamental reality of human rights in general – which do not cease to apply to a situation because it is complex.¹³ Advocating for the law's retreat also comes with unwanted consequences: It leaves reparation for systematic human rights violations solely to the political process. Survivors usually do not occupy a central place in domestic political discourses. Often, they are marginalized and discriminated against. Their claims can easily be framed to stand in the way of national recovery and economic progress. Leaving the question of reparation to the political discourse thus risks that survivors' legitimate claim is sacrificed on the altar of alleged greater societal goals.¹⁴ While law alone cannot prevent that, it can play an essential role in strengthening survivors' position.

But even if that were unnecessary because of a society's genuine commitment to repair survivors, a lack of legal guidance can lead to frustration nonetheless. Everyone might agree that survivors deserve adequate reparation. Nevertheless, different actors mean different things when referring to adequacy. The state might claim that it provided adequate reparation because

13 This sentiment was echoed by several judges of the ECtHR in, ECtHR, *Georgia v. Russia (II) – Joint partly Dissenting Opinion of Juges Yudkivska, Wojtyczek and Chantura*, 38263/08 (Grand Chamber), 2021, para 9: "In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances.'" With that they answered the questionable majority holding that the ECtHR had no jurisdiction in situations of armed conflict, ECtHR, *Georgia v. Russia (II)*, 38263/08 (Grand Chamber), 2021, para 141 ff. Since the judgment is concerned with the question whether effective control establishing jurisdiction is possible in armed conflict, it does not speak against the applicability of human rights to difficult situations. For a critique of the judgment see Duffy, *Georgia v. Russia – Jurisdiction, Chaos and Conflict at the European Court of Human Rights*, JustSecurity, 2 February 2021. Similar sentiments concerning the role of law and, relatedly, international courts in politically sensitive environments were issued by the ICJ and ICC, ICJ, ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, 226, para 13; ICC, *Situation in the State of Palestine, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine'*, ICC-01/18-143 (PTC I), 2021, para 55 ff.

14 For details see below, ch. 4, B.

allegedly, it did the best it could do in light of society's multiple urgent needs in transitional situations. For survivors, reparation might nevertheless be inadequate because it does not even begin to repair their harm. In the end, this equivocation hinders any agreement on how to repair survivors adequately. Again, the law alone cannot solve this problem. But it can help overcome an equivocation by providing a common language in which claims for more or less or different reparation can be justified, criticized, and scrutinized. Thereby, the law can help to enable rational debate about the adequacy of reparation and, with that, a fruitful political process.

Thus, one should not prematurely abandon the law on reparation in transitional justice situations. But applying it as is to reparation in transitional justice is unfeasible. The international law on reparation is geared towards repairing isolated human rights violations through individual proceedings. It seeks to remedy all harm an individual sustained. As a result, courts frequently award amounts of reparation that, if scaled up to the number of survivors of mass atrocities, would exceed the state's abilities – leading to the absurd scenario that the state could not perform any function but to repair survivors. In addition, the sheer number of survivors would overwhelm the capacity of any ordinary judiciary. Apart from these practical concerns, disaggregating all violations into single torts and dealing with them in isolated court cases would hide the “monstrousness” of systematic human rights violations, namely their systematic and political nature. That is why most states in transitional justice situations opt to create large-scale administrative reparation programs. While much better equipped than the judiciary to handle the situation, states rarely provide sound legal justifications for the many deviations from the international law on reparation they undertake to make these programs work. Often, the perceived arbitrariness of their choices creates frustration and tension among survivors and general society, which can threaten the process of transition.

Neither Jasper's approach to use existing law nor Arendt's stance that the situation is beyond the law's capacity, therefore, provide a satisfying solution to the question of how to repair mass atrocities. So, what else is there? This book attempts to carefully adjust the existing international law on reparation to the exigencies of transitional justice. It will explore the differences between reparation under “normal” circumstances and in transitional justice. It will analyze how the international law on reparation – firmly based on the former situation – can be adapted to the latter. In the process, this study must acknowledge that reparation programs, as any

transitional justice mechanism, navigate two worlds: The legal world of individual reparative justice and the political world of the transition. Since reparation is the only transitional justice mechanism directly catering to survivors, the two worlds often stand in striking contrast, forcefully pulling in opposite directions.¹⁵ Yet, neither world can provide true justice alone, and the law must enable a balance between both.

With that in mind, this book aims to provide viable legal guidance to reparation programs in transitional justice situations. Viability presupposes that legal standards accommodate the transition's political aims, can be adapted to different contexts and can still provide meaningful guidance to achieve reparative justice. This endeavor might be naïvely optimistic. To make it less so, this introduction will continue with some remarks on the risks of relying on the law in transitional justice and the limited role law must play to mitigate those risks (A.). To further manage the reader's expectations, a delimitation of the topic will follow (B.). Lastly, the introduction will clarify the terminology used in this study (C.) and provide an outline (D.) to prepare the reader for what is to come.

A. *The Modesty of the Law*

Legalistic approaches to transitional justice have been rightfully criticized for their narrow focus and blind spots.¹⁶ Often emanating from human rights law, they suffer from the same defects, in that they are decidedly based in Western thought.¹⁷ Accordingly, they tend to hegemonialize Western values and often impose them on societies of the Global South with little regard

15 Exploring these different dimensions of reparation and their relationship, Moffett, *Reparations in Transitional Justice - Justice or Political Compromise?*, 2017 *Hum. Rts. Int'l. Legal Discourse* 11(1), 59.

16 See below, Conclusion, E. Generally on transitional justice, van der Meerwe/Moyo, *Transitional Justice for Colonial Era Abuses and Legacies - African versus European Policy Priorities*, in: Kaleck/Bergsmo/Hlaing (eds.), *Colonial Wrongs and Access to International Law*, 2020, 41, 44 ff.

17 Mutua, *Human Rights - A Political and Cultural Critique*, 2002, 39 ff.; Mutua, *Savages, Victims, and Saviors - The Metaphor of Human Rights*, 2001 *Harvard Hum. Rts. J.* 42(1), 201, 204 ff., 209 ff.; Mutua, *The Ideology of Human Rights*, 1995 *Va. J. Int'l. L.* 36(3), 589, 592 ff., 604 ff.; Chimni, *Third World Approaches to International Law - A Manifesto*, 2006 *Intl. Comm. L. Rev.* 8(1), 3, 11, 16 f.; Rajagopal, *Counter-Hegemonic International Law - Rethinking Human Rights and Development as a Third World Strategy*, 2006 *Third World Q.* 27(5), 767, 769 ff.

for local fit.¹⁸ Transitional justice is especially prone to that risk. It is a transformative project, which aims at reengineering societies towards general respect for human rights. As Mutua put it, transitional justice mechanisms “carry a definite vision of the society they seek to create.”¹⁹ To be sure, this does not render transitional justice an unjust or imperial project per se. Nevertheless, it warrants a cautious approach, reflecting whether the vision transitional justice transports in any concrete situation fits the context. Too often, the “definite vision” focuses strongly on exceptional, visible violence and responds by enforcing individual rights of bodily integrity and freedom. As a result, they snub economic, social, and cultural rights and their more substantial focus on equality and structural violence.²⁰ At its worst, transitional justice can even serve to legitimize structural violence by marking an exact temporal order of a “before”, a “transition”, and the following allegedly just state after it.²¹ These blind spots often translate into a limited role of the Global North as the creator of supposedly universal standards and a financier of their global implementation. Rarely do transitional justice mechanisms examine the Global North or the International Community’s role in the violence they respond to.²² It is even rarer that transitional justice mechanisms are implemented to respond to atrocities committed by or in

18 Mutua, *What is the Future of Transitional Justice?*, 2015 *Intl. J. Transitional Just.* 9(1), 1, 3 ff.; Nagy, *Transitional Justice as Global Project - Critical Reflections*, 2008 *Intl. J. Transitional Just.* 29(2), 275, 275; Jamar, *The Crusade of Transitional Justice - Tracing the Journeys of Hegemonic Claims*, in: The British Academy (ed.), *Violence and Democracy*, 2019, 53, 54 ff.; Lundy/McGovern, *The Role of Community In Participatory Transitional Justice*, in: McEvoy/McGregor (eds.), *Transitional Justice From Below - Grassroots Activism and the Struggle for Change*, 2008, 99, 103.

19 Mutua, *What is the Future of Transitional Justice?*, 3.

20 Nagy, *Transitional Justice as Global Project*, 278; Arbour, *Economic and Social Justice for Societies in Transition*, 2007 *N.Y.U. J. Intl. L. Pol.* 40(1), 1, 2 ff.; van der Meerwe/Moyo, *Transitional Justice for Colonial Era Abuses and Legacies*, 52 ff. On this study’s approach to economic, social and cultural rights see below, ch. 4, C.I, E.II.4.c.

21 Nagy, *Transitional Justice as Global Project*, 280; Similarly Orford, *Commissioning the Truth*, 2006 *Colum. J. Gender & L.* 15(3), 851, 862 f.

22 Nagy, *Transitional Justice as Global Project*, 280; Hayner, *Unspeakable Truths - Transitional Justice and the Challenge of Truth Commissions*, 2nd Edition 2011, 78 f. Similarly, Orford, *Commissioning the Truth*, 862 f. The EU transitional justice framework is a striking example, as it is understood exclusively as a foreign policy instrument, CEU, *The EU’s Policy Framework on Support to Transitional Justice*, 13576/15 Annex to Annex, 2015, 10; CEU, *Council Conclusions on EU’s Support to Transitional Justice*, 13576/15 Annex, 2015, para 8; van der Meerwe/Moyo, *Transitional Justice for Colonial Era Abuses and Legacies*, 59 f., 64.

the Global North, such as slavery, colonialism, or more recent aggressions.²³ Despite all these risks, the current book adopts a strictly legal approach to transitional justice nonetheless. That is mainly because it is the only thing the author feels (somewhat) qualified to write about, but also because their shortcomings do not render legalistic approaches to transitional justice useless. Acknowledging what they can and cannot do is, however, crucial to making them useful.

Correctly understood, the law itself demands the illumination of some of transitional justice's blind spots. This study will be based on the human right to reparation. This right pertains to any survivor of any violation, anywhere at any time. It pertains to violations of economic, social, and cultural rights through structural violence.²⁴ It also demands redress for violations committed by the Global North or the International Community through their involvement in systematic human rights violations in the Global South or atrocities committed on their territory. Fortunately, some transitional justice measures make first attempts to honor this true universality of the standards underlying transitional justice.²⁵

Still, any legalistic approach to reparation would be ill-founded if it failed to account for its severe limitations. First, it presents only one of many obligations a state must fulfill towards the persons under its jurisdiction.

23 This fact is impressively visualized by Jamar, *The Crusade of Transitional Justice*, 55; Nagy, *Transitional Justice as Global Project*, 281f.; Orford, *Commissioning the Truth*, 863. For reasons laid out below, B., this study is not concerned with the debate whether there is an obligation to repair and a corresponding right to receive reparation. The author is of the conviction though that even should there be no such obligation or right, transitional justice mechanisms can serve valuable purposes in addressing historical injustices.

24 See below, ch. 4, C.I.

25 Sierra Leone's Truth and Reconciliation Commission dealt in great length with the country's colonial past and the involvement of external actors in the conflict, SLTRC, *Witness to Truth - Final Report of the Truth and Reconciliation Commission*, 2004, vol. 3a, 5 ff.; vol. 3b, 57 ff. Mechanisms that dealt with atrocities committed by or in the Global North are for example, Mauritius Truth and Justice Commission, *Report of the Truth and Justice Commission Vol. 1*, 2011; CARICOM Reparations Commission, *10-Point Reparation Plan*, 2014; Canada, *Honouring the Truth, Reconciling the Future - Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015; Magarrell/Wesley, *Learning from Greensboro - Truth and Reconciliation in the United States*, 2008, 121 ff. It is telling that the Greensboro TRC originated from civil society and was not state-sponsored. For a critical appraisal of the broader context of Canada's transitional justice policy see Kiyani, *Avoidance Techniques – Accounting for Canada's Colonial Crimes*, in: Kaleck/Bergsmo/Hlaing (eds.), *Colonial Wrongs and Access to International Law*, 2020, 501, 510 ff.

Even though reparation can and must address structural violence, it does so in a particular form, always mediated through individually experienced harm. Its fulfillment thus does not make a just society. Accordingly, one should not burden reparation with such expectations.²⁶ More importantly, the nature of states' legal obligations must be correctly understood. They provide a baseline below which the state must not fall. This baseline does not prescribe the best, maybe not even a good reparation effort; it prescribes a legal reparation effort. Relatedly, the law can provide nothing more than a framework. Transitional justice situations present themselves in all shapes and forms. They range from Sierra Leone's recovery from a decade-long civil war with limited resources and a lack of vital infrastructure to Canada's response to its Indian Residential Schools.²⁷ There is no one-size-fits-all reparation scheme that adequately addresses legacies of all types of systematic human rights violations from the United States through Spain and Syria to Myanmar. Reparation efforts are only successful if they are tailored to the contexts they operate in.²⁸ Legal standards covering these vastly different situations must allow for discretion to enable viable, effective solutions. Therefore, they cannot serve as a blueprint, precisely laying out who must receive what in which way. To a degree, reparation will always remain a matter to be resolved through the political process. To paraphrase Méndez, the law must provide a framework for that process, not a straightjacket.²⁹ Other actors must fill this framework with creativity and ingenuity to make meaningful and effective reparation a reality in transitional justice. Law cannot prescribe these qualities. It can only open a space for other actors to develop them. Local actors, including survivors, best take up this role. They know how to address their situation best.³⁰

With all that in mind, this book will yield a modest but important result: A legal baseline, below which states must not fall, which creates a space for the

26 This stands in contrast to many eminent scholars of reparation. For their proposal of so-called "transformative reparation" and this author's repudiation of their proposal see below, ch. 4, E.I.

27 Scholars debate whether Canada truly is an example of transitional justice. It will be argued below, ch. 3, A., why the author thinks that it is.

28 Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice – A Historical Perspective*, 2009 *Hum. Rts. Q.* 31(1), 163, 208 f.; AU, *Transitional Justice Policy*, 2019, para 35 ff.

29 Méndez, *Peace, Justice and Prevention - Dilemmas and False Dilemmas*, in: Bleeker (ed.), *Dealing with the Past and Transitional Justice - Creating Conditions for Peace, Human Rights and the Rule of Law*, 2006, 15, 17.

30 See also below, Conclusion, F.

creativity and ingenuity needed to make reparation work in a wide variety of challenging circumstances.

B. Delimitation of the Topic

Naturally, one book cannot cover every aspect of such a broad topic. Delimiting the inquiry into a fascinating subject is painful but necessary; doing it explicitly is crucial. To quote Said, “there is no such thing as a merely given, or simply available, starting point: beginnings have to be made”, and the act of choosing a beginning “necessarily involves an act of delimitation.”³¹ This choice results in aspects of the studied object remaining in the dark. This sad fact easily reproduces hegemonic narratives and research agendas.

Four limitations narrow down the focus of the present endeavor. The first was already mentioned: It employs a strictly legalistic approach, focusing on the legal baseline and nothing more. Second, the book takes a human rights approach and therefore excludes inter-state reparation.³² Third, the book deals exclusively with state responsibility for human rights violations. It does not cover reparation for violations committed by non-state actors and, more generally, how non-state actors can be held liable. Lastly, the book focuses on what makes reparation programs adequate. It largely ignores questions about when the obligation to repair arises. The analysis hence only starts after state responsibility for human rights violations is established. That the state bears such responsibility in situations the present study could apply to is presumed. Sadly, that assumption is reasonable. Many, if not most human rights violations happening in times of conflict can be attributed to the state because state agents committed them or because the state failed to protect or fulfill the human rights of persons on its territory or under its jurisdiction.

These delimitations – legalistic approach, human rights and state focus, and presumption of an obligation to repair – reproduce a dominant transitional justice narrative. As will be further elaborated on below, transitional justice focuses on state-sponsored bodily integrity violations in the recent past.³³ This focus is a natural consequence of uncritically applied legalistic approaches to transitional justice. To take reparation as an example, surviv-

31 Said, *Orientalism*, 2019, 16.

32 For that see Günnewig, *Schadensersatz Wegen der Verletzung des Gewaltverbotes als Element Eines Ius Post Bellum*, 2019.

33 van der Meerwe/Moyo, *Transitional Justice for Colonial Era Abuses and Legacies*, 44 f.

ors' right to reparation relies on a primary violation of a human right. This fact alone lets colonial wrongs fade from view. The principle of intertemporality and other doctrines establish barriers to claim reparation that are difficult (albeit not impossible) to surmount.³⁴ Attention to single violations of primary rights shifts attention away from larger unjust structures as the violations' conditions of possibility. Reparation's basis in state responsibility moves attention away from the role of private actors. Although many private acts come into the purview of that basis because they are attributable to the state, it leaves uncovered private acts less directly causing human rights violations, such as economic profiteering and their interplay with the previously mentioned unjust structures.

All this is not to say that the concept of reparation should be discarded. Attention to its defects should not serve to discredit its merits. Instead, critical attention can illuminate new, constructive ways to overcome deficiencies. This study will attempt to do so where pertinent.

34 On the principle of intertemporality in colonial contexts, Kämmerer, *Colonialism*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2018, para 27 f. On reparation for colonial wrongs, du Plessis, *Historical Injustice and International Law - An Exploratory Discussion of Reparation for Slavery*, 2003 Hum. Rts. Q. 25(3), 624; UNGA, *Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance - Note by the Secretary-General*, A/74/321, 2019, 45 ff.; Theurer/Kaleck, *Dekolonialisierung des Rechts - Ambivalenzen und Potenzial*, in: Theurer/Kaleck (eds.), *Dekoloniale Rechtskritik und Rechtspraxis*, 2020, II, 39 ff. For an interesting proposal to loosen the principle of intertemporality in cases of historical injustices see von Arnauld, *How to Illegalize Past Injustice – Reinterpreting the Rules of Intertemporality*, 2021 Eur. J. Intl. L. 32(2), 401. For early examples of individual reparation see Musa, *Victim Reparation Under the Ius Post Bellum - An Historical and Normative Perspective*, 2018. The successor regime problem, which takes a prominent place in many debates about historic reparation, poses a surmountable problem from a legal perspective. Continuity is the norm in international law. A mere regime change, however dramatic it plays out in practice, usually does not change the state's responsibility. For a discussion of the problem see Gray, *Extraordinary Justice*, 2010 Ala. L. Rev. 62, 55, 60. On succession generally see Crawford, *Brownlie's Principles of Public International Law*, 9th Edition 2019, 409 ff. This study's findings might also be applicable to historic injustices, if the responsible states find the courage to redress them. That this book is by no means necessary to devise promising reparation proposals for historical injustices is aptly demonstrated, e.g., by the CARICOM Reparations Commission, *10-Point Reparation Plan* or NAARC, *Preliminary Reparations Program – A Document for Review, Revision and Adoption as a Platform to Guide the Struggle for Reparations for People of African Descent in the U.S.*, 2015, 3 ff.

C. Terminology

Before starting the actual inquiry, a few words on terminology and some preliminary definitions shall help orient the reader in what is to come. The international law on reparation as well as transitional justice suffer from inconsistent use of terminology. This often creates misunderstandings, lets differences appear more significant than they are and obfuscates the law's content.³⁵ To prevent this book from contributing to that confusion, it will clearly define its usage of terms and mention alternative terms where pertinent.

Of course, the notion of reparation is central to this book. While seldom defined explicitly, international practice and scholarship agree on its central elements. Reparation is a benefit a survivor receives from a person or entity responsible for a human rights violation. It is supposed to erase the harm the survivor incurred because of that violation and comes with an acknowledgment of responsibility of the responsible entity or person.³⁶ In line with these attributes and the state-centered, legalistic approach taken in this study, reparation is defined as:

*Any benefit the state gives to a survivor to remedy the harm it caused by violating their human rights in acknowledgment of its responsibility for said violation.*³⁷

35 Haasdijk, *The Lack of Uniformity in the Terminology of the International Law of Remedies*, 1992 Leiden J. Intl. L. 5(2), 245; Wood, *The Rights of Victims to Reparation - The Importance of Clear Thinking*, 2018 Heidelberg J. Intl. L. 78(3), 541, 541.

36 UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 2005, para 15 ff.; HRC, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, A/HRC/42/45, 2019, para 29 f.; HRC, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Pablo de Greiff, A/69/518, 2014, para 11; Shelton, *Remedies in International Human Rights Law*, 3rd Edition 2015, 16 ff.; Moffett, *Justice for Victims Before the International Criminal Court*, 2014, 145; de Greiff, *Justice and Reparations*, 453; Roht-Arriaza/Orlovsky, *A Complementary Relationship - Reparations and Development*, in: de Greiff/Duthie (eds.), *Transitional Justice and Development - Making Connections*, 2009, 170, 172; Shelton, *Reparations*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Online Edition 2009, para 1; IACtHR, *Compendium – Truth, Justice and Reparation in Transitional Context: Inter-American Standards*, OEA/Ser.L/V/II.Doc. 121, 2021, para 165. Acknowledgment is not part of all definitions, yet it is needed to clearly distinguish reparation from other benefits a state might give individuals, see below, ch. 4, E.II.2.

37 The definition will receive further explanation and concretization in ch. 1.

The book employs the term “reparation”, not “reparations”, as the latter often denotes inter-state payments after an armed conflict.³⁸ The singular shall also draw attention to the fact that reparation is a holistic concept, not a random aggregate of reparation measures.

In contrast to reparation, there are almost as many definitions of transitional justice as scholars dedicated to the topic. For that reason, this study cannot rely on a commonly accepted definition of the term. Instead, in chapter three, the author will develop his definition of transitional justice, which relies heavily on the work of Pablo de Greiff, former Special Rapporteur of the United Nations (UN) on the topic. The definition will be derived from the consensual assumption that transitional justice addresses a legacy of systematic human rights violations. Since such systematic violations erode society’s trust in a shared normative commitment to human rights, the violations question the validity of human rights as such. Transitional justice should address these consequences by aiming to restore respect for human rights and generalized trust in a shared normative commitment to human rights in society. Based on this, transitional justice is defined as:

A state’s attempt to address a legacy of systematic human rights violations, which aims to transform society towards strengthened respect for human rights and generalized trust. The latter is defined as the expectation that other members of society and state institutions adhere to and support human rights.

The definition will receive more clarification and further specification later. For now, it shall only give the reader a rough idea of what the following chapters mean using the term “transitional justice”. Based on the definition, the study will often use the terms “transitional justice environment”, “transitional justice situation”, “transitional situation”, “transitional justice context”, “transitional context”, and “transitional society” interchangeably for:

A situation in the aftermath of systematic human rights violations, which calls for transitional justice measures that enhance respect for human rights and generalized trust.

38 Wood, *The Rights of Victims to Reparation*, 541 f. Others equate reparations with compensation, using reparation for a more holistic approach, Torpey, *Victims and Citizens – The Discourse of Reparation(s) at the Dawn of the New Millennium*, in: de Feyter et al. (eds.), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations*, 35, 38 ff.

Since an entire chapter will be dedicated to the development and justification of these definitions, they will not receive any more explanation at this point. Interested – as well as bewildered or disgruntled – readers are invited to skip to chapter three. The definition must be followed, however, with a note of caution. The transitional justice situation will be juxtaposed frequently to the “stable situation” or “stable circumstances” – defined negatively as situations that do not fall under the abovementioned definition of transitional justice. This dichotomy underlies the project to adapt legal standards based on the “stable situation” to the transitional justice situation. Of course, though, the two situations cannot be neatly separated. Many developments in the international law on reparation – which this study treats as pertaining to the “stable situation” – even originated in transitional justice contexts. The reader is invited to regard that rough juxtaposition as a mental guide rail the author lamentably needs to develop his thoughts; a useful tool, which should guide thinking, but not blind it to the messiness of reality, which rarely corresponds to academic categories.

Lastly, instead of “victim”, the book employs the term “survivor”. Survivor is a more empowering term, emphasizing a survivor’s journey instead of reducing them to a passive subject of a violation. The term corresponds better to the values embodied in human rights law and the vital role survivors play in transitional justice processes and other human rights mechanisms worldwide. Furthermore, the term somewhat evades a binary categorization of persons as “victims” and “perpetrators”, which cannot capture the complex biographies conflicts create, in which many persons become both.³⁹ Since it is semantically difficult to be a survivor of a fatal human rights violation, the study still uses “victim” when referring to persons who died because of a human rights violation. For reasons of simplicity, it still uses “survivors” when referring to a group of people who suffered a human rights violation, within which only some died because of a violation.

39 Caswell, *Toward a Survivor-Centered Approach to Records Documenting Human Rights Abuse - Lessons From Community Archives*, 2014 *Archival Sci.* 14(3), 307, 308; UN Division for the Advancement of Women, *Good practices in Combating and Eliminating Violence Against Women - Report of the Expert Group Meeting*, 2005, fn. 1; UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons - Guidelines for Prevention and Response*, 2003, 6; Lewis, *Systemic Silencing - Addressing Sexual Violence Against Men and Boys in Armed Conflict and its Aftermath*, in: Heathcote/Otto (eds.), *Rethinking Peacekeeping, Gender Equality and Collective Security*, 2014, 203, fn. 2; Assmann, *Der Lange Schatten der Vergangenheit - Erinnerungskultur und Geschichtspolitik*, 4th Edition 2021, 72 ff.

D. Outline

With the basic notions and some of the author's peculiar terminology explained, the inquiry will proceed as follows: Chapter one will systematize existing legal standards on reparation. Drawing from a broad range of international practice – mostly international judgments and soft law documents – the notion of full reparation emerges as a universally accepted standard for reparation under stable circumstances. All harm a human rights violation caused must be repaired through restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, to put the survivor in the position they would be in had the violation not occurred. With that, the chapter establishes a baseline, which the last chapter will adjust to the transitional justice context.

That adjustment cannot occur without a thorough understanding of what reparation in transitional justice is and what difficulties it faces – a task taken up by chapters two and three. Chapter two contains three in-depth case studies of six reparation programs: Sierra Leone, Colombia, and the reparation programs of the International Criminal Court (ICC) in the Lubanga, Katanga, Al Mahdi, and Ntaganda cases. The case studies are based on research and interviews conducted in Sierra Leone, Colombia, and at the ICC between 2018 and 2020. They identify points at which the exigencies of the transitional justice situation warrant deviations from the legal standards established in chapter 1. The case studies were chosen according to the logic of maximum variety sampling to reduce the risks associated with drawing general conclusions from few cases only.⁴⁰ Sierra Leone and Colombia lie at opposite ends of many relevant indicators: Colombia runs the most comprehensive reparation program in the world to date and has considerable resources to do so. Sierra Leone, in contrast, battled with resource constraints and only managed to repair survivors with minimal benefits. The study of the ICC serves a control purpose. Even though reparation at the court is not based on state responsibility and not primarily on human rights, its reparation efforts can still be compared to those of Sierra Leone and Colombia. All three take place in transitional justice settings and are therefore confronted with similar challenges. The definite differences between them can be accounted for in the analysis. Studying reparation efforts in a completely different institutional and legal context allows for weeding out deviations from the international law on reparation that are not rooted in the exigencies of

⁴⁰ Patton, *Qualitative Research and Evaluation Methods*, 2015, 283.

the transitional justice situation. To further reduce the risk associated with drawing conclusions from few cases, these conclusions will be tied back to assumptions about the transitional justice situation. A cursory look at a broader range of state practices complements the in-depth studies and supports the final findings.

Chapter three provides the theoretical background to the notion of transitional justice and the role of reparation in it. It develops the definition above of transitional justice. It argues for two different roles reparation must fulfill in transitional contexts; a deontological role in providing survivors with corrective justice and an instrumental role in furthering transitional justice aims. It concludes with an account of how reparation can accomplish the latter.

Chapter four is the heart of the book, attempting to adapt the international law on reparation to the transitional justice situation. For that, it relies on established techniques of legal interpretation, directed along two guide rails. On the one hand, the legal standards for reparation in stable situations established in chapter one anchor the analysis in existing international law. On the other hand, the empirical and theoretical findings of chapters two and three guide the analysis towards the issues in transitional justice, for which the existing legal standards prove inadequate. The chapter analyses every stage of a reparation program, from determining eligibility to the intake procedure, the program's scope, content, and structure, all the way to how – and if – a reparation program can end.

With that, this book provides a viable legal baseline, below which states must not fall and which opens the space for the creativity and ingenuity necessary to make reparation work under challenging circumstances. Thereby, the book shows that reparation in transitional justice does not “explode the limits of the law”, although, admittedly, it does test them.

