

Deeper, broader, longer transitional justice

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Abstract

Transitional justice has an expectation management problem. International law imposes a right to justice and an obligation to defeat impunity from crimes against humanity. Yet there has not been a war where a substantial proportion of criminals against humanity have been convicted. Nor is one likely. The theoretical solution considered in this paper is to broaden, deepen, and lengthen our conception of justice so that more survivors might be vindicated by some kind of justice, even if a partial kind of justice. We broaden justice with a more holistic, yet multidimensional conception of what justice means, so that, for example, restorative justice, Islamic justice and indigenous justice can be embraced among many alternatives to impunity. Deepening justice means deeper survivor and citizen opportunities to shape a more responsive justice and to shape remedies through participation. Lengthening justice means giving less priority to speedy trial and closure as transitional justice values. It might mean a permanent Truth and Reconciliation Commission that keeps its doors open to victims decades on.

Keywords

Expectations, holism, restorative justice, transitional justice

All legal systems fail to meet many of the expectations citizens have of them. The plan of this paper is first to suggest that a wide gap between hopes and expectations is particularly endemic to transitional justice. Then the paper suggests that one step towards narrowing this gap could be to broaden our conception of justice, then deepen it, then lengthen it. The contribution aims simply to show what it might mean to broaden–deepen–lengthen our conception of justice. Its only other contribution is then to argue that a deeper, broader, longer conception of justice could deliver a more meaningful kind of justice in transitions. The hope is that a broad–deep–long conception might be a more

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serviceable foundation for peace with justice, for reconciling past conflicts in a way that prevents new cycles of violence and war. A foundation is all it could be, we argue in the conclusion, because praxis would also need to invent new paradigms of bottom-up expectation transformation as an alternative to extant 'expectation management' by transitional justice practitioners.

Transitional justice's expectation problem

Ray Nickson recently completed research on stakeholder perceptions of the international tribunals established for crimes against humanity during the conflicts in Cambodia and the former Yugoslavia (Nickson, 2013). Although the normative and conceptual analysis of this paper does not depend on the validity of those results, they motivated this analysis and therefore are worth briefly summarizing. In interviews with practitioners who worked within and with the International Criminal Tribunal for the former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia, a topic raised more than any other by respondents was the expectations held of international criminal trials. Respondents were interviewed throughout 2011 in semi-structured, open-ended interviews. They included judges, prosecutors, defence counsel, outreach staff, registry staff, court media officers, and staff from justice-oriented non-governmental organizations (NGOs). For 28 of the 58 respondents, one major challenge facing the court was to manage the unrealistically high expectations ordinary people, especially victims, have of what the court can accomplish. The dilemma was that a campaign to motivate the funding of an international criminal tribunal succeeds partly because it does raise high expectations.

Once established, however, prosecutions of crimes against humanity always prove evidentially difficult and consume vast quantities of legal labour. Over time, consequently, the rationing of cases to trial becomes progressively tighter. With Cambodia, more than 1.7 million were killed in countless separate atrocities (Kiernan, 2002). Yet a Tribunal for Cambodia established in 2006 has so far seen only one conviction and two other defendants on trial (two others were also defendants in the same trial, during which the prosecution of one was suspended owing to their ill health and the other died). Many Cambodian victims were deeply dissatisfied with the prospect of just a few senior convictions when the man they saw slaughter their family members still lives in their village. One reason the expectation gap could be even wider in the former Yugoslavia is that victims universally felt that the prison terms that were handed down were far too short and many victims wanted nothing less than execution of Serbian war criminals (Ivkovic, 2001) – this when there was never any prospect that anyone would be executed by the International Criminal Tribunal. Even in the now rare contexts in the contemporary world where this expectation can be attempted, angry, disempowered victims can still feel angry and disempowered:

A prosecutor in the former Yugoslavia prosecuted a multiple murderer at a time when the death penalty was available. After the conviction of the accused, the prosecutor successfully sought the death penalty. Later, at a conference with the victims' families, the prosecutor stated how he had sought the death penalty to satisfy their expectations of justice. The victims' families were

outraged and responded that they were not satisfied. They wanted the murderer to spend life in prison so that he could really suffer. The prosecutor concluded that no matter the outcome, you would never satisfy victims. (Tribunal media interview #1; Nickson, 2013)

An alternative interpretation could be that the key lies in a more empowering justice process for victims. This is the direction our investigation takes. The starting point in managing a widespread wish for a life for a life is a genuine national conversation among stakeholders on whether the peace that almost everyone wants more than anything else is possible unless people let go of the ‘life for a life’ expectation.

The expectations of international criminal trials that were identified by stakeholders in interviews were varied. One unifying feature of these expectations is that most current manifestations of transitional justice – limited criminal trials employing retributive concepts of justice, or time-limited commissions of inquiry – are unlikely to satisfy them. Expectations that seek truth, healing, reparations and an improvement to qualities of life that were diminished through conflict were mentioned frequently. In fact, expectations that criminal trials would provide answers to profound questions about conflict and atrocities, as well as intimate questions about the fate and location of loved ones, were almost universal, and were discussed in at least 26 interviews. In addition, expectations that prosecutions would include the direct perpetrators of crimes were common. These demonstrated two problems with current transitional justice. The first is a disconnect between citizens and judicial institutions; the second, reliance on one form of justice that is ill equipped to adequately address people’s diverse hopes for justice.

In interviews with judicial officers, court staff, and prosecutors at the tribunals for the former Yugoslavia and Cambodia, many respondents were aware of community expectations for truth and understood them. Yet their own professional expectations were of due process and fair trials. Indeed, many explicitly stated that an expectation of historical truth was an improper burden for judicial proceedings that could not be fulfilled. Yet the expectation for answers and truth persists, partly because it was part of the rhetoric of the campaign to establish the tribunals. The international community also holds impossible expectations of transitional justice. The limited operation of most international tribunals perhaps best exemplifies an attitude that transitional justice can be achieved in a defined, usually short, period of time that brings closure at moderate cost. Affected communities are expected to heal and reconcile when possibly only a few perpetrators have seen the inside of a courtroom. Extending transitional justice timeframes is one element of the transformation we explore for giving adequate opportunities for healing and reconciliation.

Observations of an ‘expectation problem’ have previously been highlighted in the transitional justice literature. At the very creation of the International Criminal Tribunal for the former Yugoslavia in 1993, the first international court to try war crimes since the Second World War, Theodor Meron (1993: 133), who would later become President of the Tribunal, recognized that there were ‘already fairly high expectations [of what the Tribunal could provide]’. Writing 17 years later, former Tribunal spokesperson Refik Hodzic (2010: 122) found that most victims he had interviewed felt ‘that early expectations of “transformative” justice had been exaggerated’. The disappointment of expectations by international tribunals is not limited to the Tribunal for the former Yugoslavia (Hafner

and King, 2007). Indeed, McEvoy (2008: 30) has observed that the 'overselling' of what legal institutions may provide has encouraged 'unrealisable public expectations and ultimately an unfair assessment that such institutions have failed'. Although a handful of researchers recognize this expectation problem, the literature does not suggest a theory of how to respond to expectation disconnects.

This paper is not about developing a well-rounded understanding of how international justice officials' need to 'manage expectations' comes about, or of how they set about the business of managing it. Nor does it seek to summarize Nickson's (2013) empirical findings about which expectation gaps between transitional justice hopes and realities are widest. Rather, it takes the expectations challenge as a given and advances just one possible approach to a theory of how to manage it. This approach is to deliver more justice by broadening, deepening and lengthening the conception of justice in international criminal law jurisprudence. This response grows from valorizing the idea that international justice should have a more international, less narrowly western, character because it is international. The western criminal law tradition is myopically focused on punishment as hard treatment for culpable individuals delivered in speedy trials.

Some non-western traditions de-centre not only punitive individualism but also the idea that justice delayed is justice denied. Islamic justice, for example, gives victims a presumptive right to punish the guilty and also encourages use of a right to forgive as a gift of community reconciliation and family reconciliation, underwritten by the belief that the sanction that matters will be God's at a much later time. Although we think an interesting case can be made to render international human rights law less European by incorporating a more Islamic vision of the right of victim families to forgive from punishment even their child's murderer, and that this could have a practical relevance to managing expectations for justice after wars in which many thousands of civilians are slaughtered, we do not see law reform as the main game. Indeed, we see extant international criminal law as reasonably well equipped to play its part in a transformed transitional justice that better realizes expectations. What international law needs, on our analysis, is more institutional humility. The hard sell for the myopically legal approach that preceded establishment of the International Criminal Court must now be put in its box.

It follows that one reason it is desirable to broaden, deepen and lengthen our conception of justice is that this allows transitional justice space to deliver non-western as well as western conceptions of virtuous justice. It can render international law a less didactic tradition that does more listening and learning from multiplicity in justice ethics. It also follows from cross-cultural pluralization of transitional justice in the process of broadening-deepening-lengthening that it must be more open to what Cass Sunstein (1996) in his Tanner lectures called incompletely theorized agreement. Courts confront disagreements among people on different sides of wars as to whether alleged criminality was politically evil, politically heroic, politically misguided, politically justified but using unjustified means, and so on. Sunstein argues that, even within a unified, peaceful state, time constraints upon courts, the need for people to be able to live together without ongoing conflict, and, most of all, heterogeneity of values and moral reasoning mean that adjudication must deliver decisions that people can accept for incompatible ethical reasons. Hence, there is often consensus that a court got a decision right, but for theoretically

utterly incompatible reasons among those who agree on the decision. Courts therefore routinely put aside theoretical coherence in favour of bounded rationality towards outcomes that can mostly be accepted as legitimate for contradictory reasons, and can therefore stick. Sunstein argues that it is a good thing that legal agreements are incompletely theorized.¹ We would add that a conscious broadening–deepening–lengthening of the meaning of justice creates a wider contract zone for the discovery of justice outcomes that are widely accepted by folk with opposed rationales for that acceptance. Thereby, transitional justice outcomes that are incompletely theorized can unify the disunited to work together for a better future of peace with justice.

Let us make this practical with an example. The work of John Braithwaite in Muslim Indonesia (Braithwaite et al., 2010a) and of Ray Nickson in Buddhist Cambodia (Nickson, 2013) finds that Muslims in the former case and Buddhists in the latter can see deep justice relevance when enemies who have murdered villagers build, or help rebuild, a mosque or a stupa in the village of the victims. No international law reform is needed to allow the International Criminal Court, particularly its prosecutors, to listen to local victim communities who say that, because these perpetrators have built this mosque or stupa as an act of reconciliation and honour to our fallen, we forgive them; therefore we would wish you to concentrate your scarce prosecutorial resources on perpetrators who have not sought our forgiveness in a way that has meaning for us. No law reform is needed, but a transformed transitional justice mentality is needed to see such a way of thinking about the response of the International Criminal Court as the court playing a more humble part in broader, deeper justice. Sunstein's point here would be that some lawyers might justify taking account of the mosque or stupa in legal pluralist theoretical terms, others in terms of an international criminal law jurisprudence that considers reconciliation an important legal principle, others in terms of a theory of balance between international law principles and international peacebuilding policy. Then Sunstein argues that, so long as officers of the International Court (for these theoretically contradictory reasons) converge on the practical response of empowering the voice of the victims who value the justice of the mosque or stupa, that is what matters. It matters because theoretical humility is more important in international criminal law than in national law.

Broadening justice

Broadening justice means openness to a more holistic, yet multidimensional, conception of what justice means. The great South African criminologist Clifford Shearing concludes from his post-apartheid research that the justice most ordinary South Africans want is 'justice as a better future' (Shearing and Froestad, 2007). This sense of justice was also prominent in both the South African and the Timor-Leste Truth and Reconciliation Commissions (TRCs) when they recommended that large corporations that benefited from apartheid or from the exploitation of Timor should pay some kind of special tax for the benefit of the victims of crimes against humanity. The world's first bilateral Truth Commission, between Indonesia and Timor-Leste, was fairly criticized for its many limitations (Braithwaite et al., 2012). Yet one of the interesting things it prioritized was the concept of institutional as opposed to individual responsibility, particularly of the armed forces and intelligence agencies of Indonesia, and a justice imperative for institutional

transformation.² The Commission's conclusion was reached in circumstances where the citizens of both Timor-Leste and Indonesia continued to live in fear of these security institutions, in circumstances where their terror and torture are only partially reformed (Hernawan, 2008). Hence, the institutional transformation the Commission proposed was a particular kind of 'justice as a better future'. The idea of broadened justice is openness to listening to citizens about which of many kinds of better futures would allow them to feel that they live in a more just society. Would that better future be that Indonesian society eliminates torture as a threat to their children? Would it be that South African society allows their children freedom of movement rather than pass laws? Would it be radical redistribution of wealth or just equal educational opportunities for their children?

Justice, we will argue, is immanently holistic (Luna, 2003). The holism of justice is a theme of the world's most populous religions – Christianity, Islam, Hinduism and Buddhism. Judaism and Christianity have a Hebrew word for holistic peace with justice – *shalom* (Zehr, 1995). Jennifer Llewellyn and Daniel Philpott argue that the Arabic word *salam* has a similar meaning in the Quran and that, in the historical roots of Islam, Judaism and Christianity, reconciliation and mercy are part of the essence of what holistic justice means (Llewellyn and Philpott, 2012). This brings in the restorative idea that, because crime hurts, justice should heal, and a justice that leaves wounds open will not seem like justice at all. There are resonances with *shalom* in the Zulu, Xhosa and now pan-African concept of *ubuntu* as motivating a holistic, relational justice in the post-conflict speeches of Nelson Mandela and in the South African TRC report. Justice Colin Lamont found no fewer than 12 legally relevant dimensions of *ubuntu*'s holism in his ruling in the hate speech trial of Julius Malema (*Afri-Forum and Another vs. Malema and Others*, 2011):

Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which:

1. is to be contrasted with vengeance;
2. dictates that a high value be placed on the life of a human being;
3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
4. dictates a shift from confrontation to mediation and conciliation;
5. dictates good attitudes and shared concern;
6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
7. favours restorative rather than retributive justice;
8. operates in a direction favouring reconciliation rather than estrangement of disputants;
9. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant;
10. promotes mutual understanding rather than punishment;
11. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
12. favours civility and civilised dialogue premised on mutual tolerance.

Justice is only immanently holistic (Luna, 2003), not totally holistic; otherwise there would be no point in distinguishing procedural justice from the justice of outcomes. Procedural justice has been conceived in the literature as having a number of facets – including consistency, correctability, decision accuracy, impartiality, ethicality and process control – but these facets tend to be moderately highly intercorrelated (Leventhal, 1980; Lind and Tyler, 1988). Measures of citizen perceptions of procedural and distributive justice also tend to be positively correlated and both are positively correlated with restorative justice (Braithwaite, 2002: 54–130). For example, Colquitt et al. (2001) conducted a meta-analysis of 45 studies and found an uncorrected population correlation between distributive and procedural justice. One of the empirical claims of restorative justice theorists has been that restorative justice, compared with existing justice practices, contributes to procedural justice, perceived fairness of outcomes (distributive justice) and indeed social justice (Braithwaite, 2002: 54–130).

The intuition about the immanent holism of the *shalom* or *ubuntu* way of thinking about justice is that a restorative justice process that seeks to empower stakeholders to repair the harm of an injustice will produce outcomes that are more distributively satisfying to stakeholders than a process that seeks to deliver equal punishments for equal wrongs. Heather Strang's writing suggests one reason is that the narrower just deserts objective allows less leeway for a wider contract zone in which a win–win outcome can be crafted. This is why broadened justice produces outcomes that are more generally conceived as fair (Strang, 2001). The greater control of process in the hands of stakeholders as opposed to justice professionals might also explain why restorative justice is perceived as more procedurally fair. We can also intuit why justice may be immanently holistic by going in the opposite direction in ways suggested by the writings of John Rawls (1971) and indeed most other writers on justice. An unjust procedure will be more open to domination by the person with the most power, rather than the person with the best case, and so will lead both to less fair outcomes and to social injustice by virtue of domination of the powerful.

The fact that justice is not fully holistic – that procedural and distributive justice often conflict, for example – means that it is rewarding and important to study the tensions among different versions of justice. Extant formal law does this admirably in many ways. Transitional justice can take advantage of the degree of pluralism that does exist in formal law; the fact that it is differentiated into procedures that allow compensation, punishment, truth-telling of a kind narrowed to individual guilt or innocence in criminal trials but opened to a wider vision of truth-telling in an inquest, for example. Because justice is immanently holistic, a victim of crime whose perpetrator is never found might be disappointed by that impunity yet, when formal law pays them compensation, victims can feel that, in the circumstances, they have been vindicated and their justice claims have been acknowledged.

Innovation with broadened justice takes a different tack from exploring the tensions among different forms of justice, however. It says that, because there appears to be an immanent holism of justice, why not search for institutional ideas that maximize the synergy of holistic justice? Restorative justice and *ubuntu* are just examples of such an institutional idea. Searching for institutions that maximize the synergy of holistic justice is not a bad tack for transitional justice to consider, if the tradition aspires to be more permeable to plural legal traditions.

If this distinction between broader (like restorative justice) and narrower (like common law) conceptions of justice does not seem practically meaningful, consider a Nazi criminal who is apprehended for the first time in his old age. Restorative justice advocates are opposed to doing nothing about the case because the man is so old. They want a restorative justice process to consider the just claims of all stakeholders. For example, they want a process in which families of Holocaust victims have a voice in shaping what kind of justice should be delivered. Certainly we expect restorative justice advocates to argue against starting a trial that might lead to imprisonment that would have no incapacitative value in light of the man's advanced years, and in circumstances where the odds of the defendant dying before the trial is completed are high. But restorative justice advocates should push harder (than prosecutors imbued with a western criminal law tradition) for truth, apology, compensation, reforms that reverse and repair pan-European traditions of discrimination against Roma communities, information about where bones of survivors might be found and much more because they have a broader view of the justice that is at stake than simply a good prosecutorial decision on whether to push for imprisonment.

The literature on the comprehensive justice movement (Daicoff, 2000), especially on the jurisprudence of restorative justice (Braithwaite, 2002), problem-solving courts (see, for instance, Berman and Feinblatt, 2001; Winick, 2002–2003), and therapeutic jurisprudence (see Wexler, 1993, 2000; Winick, 1997), is vast. We do not intend to say anything new about the jurisprudence of these alternative traditions in this paper. Rather, our aim is to make a novel meta-jurisprudential point about international law acknowledging plural jurisprudential traditions in a way that can help transitional justice escape the rather narrow jurisprudential hole into which it has dug itself.

In sum, broader justice:

1. acknowledges immanent holism, yet multidimensionality, in its conception of justice;
2. acknowledges legal, religious and cultural pluralism in what is accepted as contributing to justice;
3. is forward as well backward looking, refusing to be narrowed to punishing past crimes, and open to the possibility of 'justice as a better future';
4. takes restorative justice seriously, while not seeing it as master narrative that displaces extant legal narratives of what justice is;
5. allows incompletely theorized agreement on what makes for justice in a particular context.

Deepening justice

Deepening justice means deeper survivor and citizen opportunities to shape justice and shape remedies through participation. It means justice that is more deeply responsive. Deepening justice is a complementary ideal to broadening to a more holistic conception of justice. A problem with broadening justice is that, although it provides more options for giving survivors of injustice some sense of getting some kinds of justice, it also expands the list of ways people can feel dissatisfied at missing out on dimensions of

justice that matter to them. A solution to this problem can be to deepen participation in justice, whereby survivors participate directly in justice conversations about their case to which authorities listen. Deep engagement, for example in a restorative justice circle, allows stakeholders to discover sources of satisfaction from different kinds of justice that they may not have realized could be satisfying to them (Strang, 2001). No, says the engaged citizen in the circle, we cannot have an eye for our daughter's eye, lest all our daughters be blind, but what if the new clinic in our village is named after our daughter? Empowerment of stakeholders gives them permission to craft proactively a justice outcome tailored as a remedy to what matters to them.

One of the most common personalized needs that survivor families have after crimes against humanity is to know particular things about the fate of their loved one, for example where her bones are buried. Perpetrators or their associates often have that information. Some survivors want apology; some do not. Some want to tell perpetrators home truths; some do not. Some want to hear a solemn judicial denunciation of the crime; others would rather do without that extra bit of process. Some want an Islamic, Christian or Buddhist gift of forgiveness; others want to keep religion out of justice. Some want symbolic recognition of their loved one, such as naming a school or park after them; some do not. Some want to push forward reforms that will prevent future generations from ever suffering similar crimes, and participate in their design. For others, this is too political for something so personal.

Responsiveness to the needs of stakeholders is a first step in deepening justice. Whereas broadening justice is simply about broadening what counts as justice, deepening justice is about responsiveness to stakeholder participation in deciding what counts as justice. In a recent interview conducted by Ray Nickson in Cambodia (Nickson, 2013) with a person working in victim support, the interviewee explained that identifying why witnesses came to testify is central to assisting them with their participation. The respondent noted four broad motivations for testifying: to speak for the dead; to inform the world of the truth; to seek a legal remedy that was just; and the hope that testimony will in some way help prevent future atrocities. Identification of these motivations, which may not be exhaustive, meant that more focused support and assistance could be provided, particularly to manage witnesses' expectations that were unlikely to be satisfied by the court process. For instance, the respondent had concluded that victim witnesses motivated by informing the world of the truth were quite unlikely to find that deep personal participation in the discovery of truth was possible in a trial. The first step towards deepening justice is to incorporate and listen to the views and desires of affected communities in shaping transitional justice. This is needed at all stages, not simply as a remedial strategy once institutions have been imposed on local populaces.

Deeper justice means proactive engagement that enriches stakeholders' understanding of the options available to them and gives them a genuine say in their design. In restorative justice processes, survivor families often receive briefings from experts on options they might consider in a restorative agreement. Then the experts leave the room to allow the family to write out a list of demands to put to perpetrators or to the state. The idea is that justice has deeper meaning for citizens when their needs are articulated in their own voice to reflect the uniqueness of their needs rather than processed in standardized ways through the voice of a legal mouthpiece.

The empirical literature on the psychology of procedural justice is a strong clue to how deeper participation in justice can deliver a sense of having got justice even if citizens have not won their preferred outcomes. In fact, that literature suggests that satisfaction with justice is much more strongly driven by perceptions of procedural justice, particularly the opportunity to shape justice through being listened to, than by perceptions of having secured preferred outcomes in a legal matter (Tyler, 1990; Tyler and Blader, 2000; Tyler and Dawes, 1993; Tyler and Huo, 2001). It follows that, when survivors perceive themselves as enjoying deep procedural opportunities to influence justice, even if they miss out on most of the justice outcomes they would like, they can experience fairness and move on. We do not have the same quality of evidence for justice after a war. Yet it seems a good hypothesis here as well that, where citizens have opportunities for deep procedural justice through voice (even if only at one point in time), they may be more willing to commit to a peace in which they miss out on most of the outcomes they pursued in their war.

Lengthening justice

Lengthening justice means transitional justice that is no longer transitional because the justice institutions created in the aftermath of the conflict survive all victims of the conflict. Lengthening justice means problematizing closure and speedy trial as justice virtues. Speedy trial is a generally accepted justice virtue in the western legal tradition. Truth Commissions are often established with a requirement to report within two or three years.³ A problem with speedy reporting by Truth Commissions or speedy trials is that the most traumatized victims often take longest to be ready to participate in transitional justice.⁴ The experience of the civil war in Bougainville, Papua New Guinea, demonstrates that it often takes many years of traditional reconciliation work before the perpetrators of the worst atrocities acquire the confidence that they can confess their crimes without fear of revenge (Braithwaite et al., 2010b). Collective confessions (by military units) often preceded individual confessions of war crimes in Bougainville. The individual confessions were many more years in coming because the perpetrators wanted to see if the response to the collective confession was reconciliation or revenge attacks. There is a case for TRCs that are permanent institutions,⁵ keeping their doors open to assist with truth, reconciliation and justice at whatever point in time victims and perpetrators are emotionally ready. By the time all survivors have died, the TRC may function as no more than a museum that stores their testimony and the artefacts of suffering, transmitting memories of tyranny and reconciliation to the next generation.

A rather long lengthening is envisioned if it stretches beyond the lives of all survivors and perpetrators. One might then ask how much use is justice to the dead? Quite a lot if, when they are alive, they grow to understand that their society has a long-term commitment to preserving the collective memory of their suffering, of lessons from the nation's past, and to honouring the sacrifices of those who made them. For some survivors and their families, an important part of what 'justice as a better future' means is a future where collective memory is honoured.

A permanent TRC could have the task of acting as a catalyst of the village-level traditional reconciliation that was led more spontaneously from below in Bougainville. Some informants for our research in South Africa in 2012⁶ thought that a permanent Commission might have better served the vast needs that the brief spectacle of the South African TRC exposed but did not have time to meet. Others felt that the local peace committee architecture of the 1991 National Peace Accord that was shut down after the 1994 election of the Mandela government might more usefully have been made permanent. This was because of their view that peace committees had more than a reconciliation function during the transition. They also doused sparks of future emerging conflicts and created very local spaces with settled local mediators who could reconcile old enemies at the point when they were ready to be reconciled. One respondent mentioned how the permanent National Peace Committee in Ghana had defused emerging conflict during a close national election, persuading both national leaders contesting the election to announce publicly in advance that they would abide by the Election Commission's call of the result. Again, there can be complementarity among such options, with the Truth Commission catalysing and coordinating local peace committees and village-level reconciliations, rather as the Timor-Leste Commission did.

If truth is an expected basis for post-conflict justice and reconciliation, Susanne Karstedt's (2008) research should be noted. In the 1940s and 1950s, reconciliation in Europe was based on the German people believing that atrocities were the responsibility of only a small inner circle around Hitler (Karstedt, 2008). This lie, which was part of the legacy of the Nuremberg trials, was corrected after war crimes trials from the 1960s gave direct voice to the victims of concentration camps for the first time. If truth-telling is part of the justice people expect, criminal trials that settle for answering only guilty/not-guilty questions may not deliver much of it. On the other hand, the promising thing is that, although the Nuremberg trials did not persuade the German people to acknowledge a truth that the rest of the world expected them to acknowledge, a sequence of trials over a period of a decade and a half did deliver this.

Keeping a flickering flame of reconciliation conversation going might be the basis for a new philosophy of permanent TRCs comforting survivors with a societal commitment to never give up on truth, memory and justice as a project for the 'longue durée' (Karstedt, 2008). The Bougainville civil war experience of enduring reconciliation shows that most of the perpetrators and survivors of the worst atrocities were not ready for meaningful reconciliation in the first few years after the peace. They were not emotionally ready. More than that, after a civil war, people are too busy with rebuilding their homes, their churches and their schools and replanting devastated fields.

A permanent TRC that keeps its doors open for a century has the option of educating survivors that truth, justice and reconciliation are partial accomplishments of the *longue durée*. They can never be quick and easy is the educational message. The other message is that, whenever survivors are ready, they can walk through the TRC's doors to record their story, to request that perpetrators step forward for reconciliation or justice, or both. The ethos of the educative appeals to victims of a permanent Commission is that survivors can put their trust in their children and grandchildren to preserve the memory of their suffering and never close the door on truth, justice and reconciliation. This is part

of why using the archives and artefacts of a permanent TRC for a museum is important. It becomes a focus for educating future generations of schoolchildren about the sacrifices of their forebears.⁷ Indeed, as the Institute for Justice and Reconciliation has done in South Africa, children can be enrolled to the project of recording memories by filming the stories of their parents and grandparents who missed the opportunity to testify at the TRC, stories of suffering and resilience. Particularly in poor countries where capital city tourist attractions tend to be few, museums that commemorate recent wars often become drawcards that can charge tourists admission fees that offset costs.⁸ International peacekeepers and their families are often deeply interested later in life to visit such war museums in the countries where they served. A permanent Commission might also educate perpetrators who crave immediate forgiveness and closure that part of the suffering that it is their responsibility to bear is patience until their victims are ready for reconciliation, if ever.

A permanent Commission could monitor the accomplishment of 'justice as a better future' in a way a bounded Commission could not. One method for a transitional constitutional moment could be to establish an interim TRC with the mandate both to collect testimony towards an Interim Report and to build consensus towards a mandate for the permanent Commission, which might be enshrined in the Constitution. Under this vision, the permanent Commission could become an integral part of the separation of powers, an extra check and balance in the polity. Hence, if the interim Commission in a case such as post-apartheid South Africa decided that 'justice as a better future' was fundamental to transitional justice, it might recommend to the drafters of the new Constitution that the permanent Commission be mandated to produce five-yearly comprehensive reports evaluating the successes and failures of national institutions in reducing racial inequality, eliminating poverty, creating educational equality and producing less brutal security forces.

Regardless of how deepened participation decides to time different transitional justice institutions, it must solve what our data (Braithwaite et al., 2010b, 2010c, 2011; Nickson, 2013) suggest might be the biggest single challenge. This is the survivor who says, although it is good that a few big fish were prosecuted, although it is good a TRC revealed hidden truths, neither heard my story and I suffer from seeing my perpetrator free to enjoy impunity in my village every day. Lengthened justice is the key to that challenge because it means that one day a victim advocate can get behind the cause of that neglected survivor in that remote place and insist that her justice demands must finally be heard in a way that makes some sense to her, whether it is through traditional justice, a trial under state law, an international Tribunal, or restorative justice that settles only a symbolic form of acknowledgment, reparation and truth-telling. This is critical because the most profound way that broad-deep-long justice can make things worse is when that neglected survivor sees so many different (broadened) ways that other survivors get justice, none of which apply to her. She sees so many ways that people in the city have been allowed to participate in deciding how post-conflict justice can be deepened, while none of those participation opportunities ever arrived in her village. She sees that there has been a *longue durée* of post-conflict justice that at every stage has turned away from the terrible crime she suffered. No transitional justice of any kind might be better than a broad-deep-long post-conflict justice that still averts its eyes from large numbers of people like her.

Democracy's work to be done

We have presented the outline of a theory of justice radically reconfigured. More detailed, contextual and critical work is needed to fill that outline. The outline is of a conception of justice that broadens–deepens–lengthens the choices available to stakeholders in transitional justice. We have attempted to show that broadening, deepening and lengthening ideas are commonly implicit in the utterances of victims and other commentators. Our contribution has been to elevate these scattered thoughts into a more holistic vision of justice. When choices are broadened–deepened–lengthened, survivors who do not want to meet their perpetrator face to face will be taken seriously when they demand that she be prosecuted, or vice versa; survivors who want the deeper justice of participating in a root cause analysis of the culture of torture in a police agency are given voice for the possibility of a remedy crafted to include, for example, deep political engagement with police reform; survivors who were too traumatized to meet with their perpetrator when they were young can get support to do so if, in their old age, they then wish to meet their perpetrator. Depth of justice is the key dimension for enabling this ambition. If there is a level of support for survivors (and recovering perpetrators) that empowers them, not with a veto (except over their own participation) but with an influential voice in the crafting of remedies that might meet their unique needs, then justice choices might be more justice enhancing.

This deepening of justice also involves a deepening of democracy. Even in the most successful post-conflict democratizations, by the time citizens move into their second and third post-conflict elections, hype about how democracy will transform their lives seems hollow. Their political leaders seem jaded compared with the heroic leaders of the struggle for democracy. They are seen as vote-grabbers and power-grabbers who listen to the wealthy elites who fund their campaigns, leaving ordinary folk with little voice. It has been part of the vision of restorative justice that it is in the judicial branch of governance, rather than in the legislature or the executive, that there are richer opportunities to return substance to democracy in a world where state and business bureaucracies put such a large distance between citizens and decision-making (Braithwaite, 2002: 130–5). A large number of empirical studies from many countries show that victims, perpetrators and community stakeholders all come away from restorative circles with high levels of satisfaction (often over 90 percent) with the justice and democratic participation they have enjoyed, levels of satisfaction never encountered for elected governments (Braithwaite, 2002: 45–72).

Not just adult voters but child stakeholders, child soldiers and child survivors can participate in broadened–deepened–lengthened transitional justice (Gal, 2011). We are not born democratic. We learn to be democratic to the degree we enjoy deep participation in democratic processes. Democracy will have deeper roots when we learn this as children. Our expanded conception of transitional justice extends embrace of children in a deepened form of justice. One of the responsibilities of TRCs under this widened conception of justice should be school programs that engage the opinions of children about terrible truths, welcome submissions from children on what should be done about certain things, publish their poems and paintings in Commission reports, foster reconciliation encounters in schools between children from groups that have been killing one another,

foster gifts of kindness between children of the two groups in the course of the education experience, and so on.

Modest hopes for small spoonfuls of justice

Deepening of justice to include enriched opportunities for participation is the key to resolving the dilemma that, with so many dimensions of justice being enabled under our proposal, people will be dissatisfied that they miss out on most of them. There will just be more things that are talked up, more that they miss out on. This undoubtedly is a downside. Nevertheless, our hypothesis is that the worst outcome is where survivors experience no kind of justice. They regularly see the man who raped and tortured them at the market wearing a watch he stole from them. There has been no calling him to account. Unfortunately, this worst-case outcome is widespread in post-conflict societies. Punitive criminal justice touches very few perpetrators because of the magnitude of the enforcement swamping problem, which is worst in the worst cases such as Cambodia and the Congo where there are millions of victims and but a few symbolic prosecutions. The crucial challenge is to expand the number of survivors who benefit from some kind of vindication of their suffering, some kind of opportunity to voice their condemnation and tell their truth and to get something back, which is a something that they have some participation rights in designing as a remedy tailored to the needs they articulate. When survivors are given participation rights alongside other survivors, they can be helped to transcend their own loss by seeing the greater suffering of others. Often they learn that a good way to heal themselves is to help others. There is criminological evidence that this is true for perpetrators as well; ex-offenders are more successful at 'going straight' when they give something of themselves to help other criminals find a better path in their lives (Maruna, 2001).

More importantly, through transitional justice experiences that expose participants to the vastness of the unmet needs of so many survivors, people can become more realistic in what they can hope for themselves. They might be brought to say to themselves something like the following:

'With so many crimes and only six prosecutors, I can see that most of us are not going to see our perpetrators in the dock. But at least I can see that they are carefully recording my story for posterity, alongside all the others, to make sure their report tells a fuller truth. They have agreed to put in one of their reports that there is a need for rape trauma counselling. They have agreed to monitor the improved equality of access to education for our children that I and other victims from poor families have demanded. And, while I see that a court case is never likely to happen, I can see that a traditional justice hearing is a possibility in which I can decide the terms of my participation or non-participation in village justice.'⁹

Village by village, suburb by suburb, conversations convened by a permanent TRC that embrace many in listening to one another's stories have the potential to bring that kind of personalized but tiny spoonful of justice to all. It can be crafted in an engagement that educates about the impossibility of all survivors getting the bucketloads of justice or compensation they would ideally like. They get only a spoonful, but at least in the ritual

of delivering that spoonful of justice, they and their victimization can also be vindicated by appropriate representatives of the society who apologize that it is only a spoonful. One South African victim advocate in our Peacebuilding Compared research argued that, if it is impossible to give all victims a prosecution of those who victimized them, might it at least be possible to guarantee delivery of a memo to all victims that explains what the state has managed to find in relation to their case, what it has managed to do in investigating it and assessing whether it is a case that can be prosecuted or dealt with in some other way. Our qualification would be that it would be good to guarantee this for those who want it, but, for victims who do not want this but want something else, that would be an even better thing to be able to guarantee.

Conclusion

There is a profound sense in which extant transitional justice works in quite the opposite way to what we have just described. There is no collective conversation about the difficulties of managing enforcement swamping problems after mass atrocity. Instead, political leaders and transitional justice advocates build support for donor funding to end impunity by talking up the possibility of ending impunity. In a press release at the time of the destruction of East Timor on 10 September 1999, UN Secretary-General Kofi Annan said ‘crimes against humanity’ would be punished. Very few of them were. There was never a hope this would happen. It was doubtless well-intended rhetoric. In the event, it was damaging for hundreds of thousands of victims who saw nothing happen to their perpetrators.

Today it is time for a new political maturity about the expectations that leaders project for transitional justice. That involves acknowledging that, although the leaders and masterminds of the worst crimes will be prosecuted, the practice of international law in every country’s recovery from conflict (whatever the letter of international law says) is that there are never the justice system resources to prosecute every criminal against humanity. All survivors, however, can be given an opportunity in their local area to tell their truth, which the society promises to record for posterity. All can get the opportunity to contribute their opinions on what the sentences of the lead perpetrators should contain, to contribute their wisdom on how the country should move forward to a more just future. They can get a chance to request a meeting with perpetrators that gives them an opportunity to say what they want to say to them and to make demands they want to discuss with them. Most importantly, they can be given an opportunity to express their views to an interim TRC as to how a permanent TRC should be institutionalized. Along these roads we can begin to see a way to transform expectations of transitional justice from below as an alternative to ‘managing expectations’ top-down (from the International Criminal Court, the Security Council, heads of states) (Nickson, 2013).

This is a tall order. But at least it is not an impossible expectation to deliver. Although this broadening, deepening and lengthening of justice involves fewer legal resources than a policy of prosecution of all criminals against humanity in accordance with international law, this alternative would still involve a much larger investment in transitional justice, including in lawyers’ salaries, over a longer transition than we currently manage. For that increased investment, more shattered people might be made whole; democracy

might be given greater participatory meaning; utter impunity would end; survivors would directly participate in crafting some gesture of justice that would have some meaning for them; they would receive public vindication of their suffering through the ritual of delivering that restorative justice; justice could gain more legitimacy because citizen satisfaction with justice would increase and the symbolic value of the criminal law in egregious cases would be reinforced. It is a tall order with big benefits if we could be transformative enough in how we expand our vision of justice. The benefits could still be worthwhile if all the aspirations on this list were only very partially and falteringly accomplished and if the broadening–deepening–lengthening of justice were only gradually opened up.

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Notes

1. However, we recognize that, in transitional justice endeavours, including trials, it may often be necessary and desirable to, in the language of Sunstein, ‘introduce theory’ and revert to ‘high-level views’. One example could be the introduction of human rights theory when deciding an apartheid case. Sunstein (1995) does allow space for this in his theory of incompletely theorized agreements.
2. On transformation, see Balint (2012).
3. The recent Solomon Islands Truth and Reconciliation Commission was required to report in one year, extendable to two (Braithwaite et al., 2010c: 86–91). Hayner (1994: 604) states that a defining feature of Truth Commissions is their temporary nature, usually being required to operate in a ‘pre-defined period of time’.
4. This is a general issue with all forms of restorative justice and therapeutic jurisprudence (see Braithwaite, 2002: 45–53).
5. This argument should be distinguished from that of Scharf (1997: 380), who argues in favour of a permanent international Truth Commission, as an adjunct to the permanent International Criminal Court. Scharf’s arguments in favour of a permanent international Truth Commission are that there would be: ‘(1) superior sufficiency in funding; (2) a greater perception of neutrality; (3) less susceptibility to domestic influences; and (4) greater speed in launching investigations.’
6. See John Braithwaite’s website: <http://www.anu.edu.au/fellows/jbraithwaite/>.
7. This would be in addition to the potential educative effects that time-limited Truth Commissions already possess (Landsman, 1996). For a discussion of the importance of history education in transitional justice more generally, see Cole (2007).
8. Often referred to as ‘dark tourism’, a fascinating literature exists on this emerging field (see, generally, Causevic and Lynch, 2011; Lennon and Foley, 2002; Stone, 2006; Stone and Sharpley, 2008, 2009; Williams, 2004).

9. In this hypothetical scenario, the semi-formal alternative to the available full criminal process is imagined as something like the traditional justice process used in tens of thousands of cases after the Rwanda genocide, the *gacaca*. Rwanda is an incipient illustration of how a formal approach to justice that fails for most victims and most perpetrators can be flipped in the longue durée into a broader and deeper justice that offers some, admittedly flawed, process to millions of stakeholders.

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