

International Criminal Trials and the Circumstances of Justice

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Abstract Transitional justice is broadly understood to refer to formal efforts to deal with past wrongs in the midst of a transition from an extended period of conflict or repression to democracy. In this paper, I consider the role of international criminal trials in transitional justice. I argue that such trials may contribute to transitional justice, but such contributions are conditional on two main factors. The first factor is time. The second factor is what other transitional justice responses are adopted domestically.

Keywords Transitional justice · International criminal trials · Hume · Reconciliation · ICTY

1 Introduction

Transitional justice is broadly understood to refer to formal efforts to deal with past wrongs in the midst of a transition from an extended period of conflict or repression to democracy. In this paper, I consider the role of international criminal trials in transitional justice. I argue that such trials may contribute to transitional justice, but such contributions are conditional on two main factors. The first factor is time. The second factor is what other transitional justice responses are adopted domestically.

The structure of this paper is as follows. In the first section, I discuss the paradigmatic features of transitional societies, what for reasons I discuss below I call “circumstances of transitional justice.” The second section looks at the moral problem with which transitional justice deals, and the corresponding standards of transitional justice that address that question. The third and final section turns to the role of international courts in promoting transitional justice, explaining why the contributions of such courts are always conditional in nature.

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2 Circumstances of Transitional Justice

Principles of justice are context-dependent. As philosopher David Hume brilliantly recognized, principles or standards of justice are always formulated in response to a given problem or question of justice.¹ Questions of justice become salient, or both necessary and possible to address, in specific contexts. To illustrate, for Hume, the basic problem of justice was instability of property. Property becomes unstable, Hume argued, when a specific set of what he called “circumstances of justice” obtain. One such circumstance is limited scarcity of goods. When goods are extremely abundant, Hume argued, stability of property is not a necessary issue for a community to address. That is, it is not necessary to codify and enforce rules governing property if individuals always readily have available a replacement of any good that might go missing. Conversely, justice is not possible in the circumstance of extreme scarcity of goods. In this circumstance, there is little hope or expectation that any principles of justice established to stabilize property will effectively regulate conduct. Justice is not possible in the sense that there is little prospect of principles of justice being practically effective. Only when there is limited scarcity of goods is justice both necessary and possible.²

Given Hume’s insight about the context-dependent nature of principles of justice, it is clear that to understand transitional justice we need first to understand the context of transitions. There are four defining features of transitional societies.³ Such features I label the “circumstances of transitional justice.” In describing these circumstances below, I contrast them with the analogous circumstance characterizing stable democracies.⁴ The features I identify provide a conceptual, analytic framework that can be used to guide the classification of specific actual societies. Thus, one can agree with the four features I identify as paradigmatic of transitional (or stable democratic) societies while disagreeing about the appropriate label to give to a particular country.

The first feature of transitional societies, or circumstance of transitional justice, is *pervasive structural inequality*. “Structural” references the subject matter of this circumstance, namely, the institutional rules and norms that shape and govern interaction among citizens and between citizens and officials in a particular society. Institutions governing interaction are of different kinds, including legal, political, economic, social, and cultural. Norms and rules structure interaction by specifying who is permitted to do what to whom, the processes by which such rules and norms may be altered, and the consequences of violating rules and norms. For example, the rules and norms governing political institutions specify by whom rules may be made and the process by which an official making such rules is selected. Economic institutions specify the rules governing who is eligible to acquire property and what claims property rights entail.

¹ David Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge, 2nd ed. (Oxford: Oxford University Press, 1739/1978); David Hume, *An Enquiry Concerning the Principles of Morals*, ed. Tom L. Beauchamp (Oxford: Oxford University Press, 1751/1998).

² Limited scarcity of goods is not the only circumstance of justice Hume discusses. However, the structure of argumentation for the other circumstances he considers is analogous to the summary above.

³ For an extended discussion of these features, see Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (New York: Cambridge University Press, 2017).

⁴ The argument for these features is that they are widely recognized and discussed as features of transitional societies by scholars of transitional justice. Such scholars do not characterize the features that I discuss as features constitutive of the circumstances of transitional justice; but, rather often, they describe how each of the features I discuss is present in particular cases.

When the structure of interaction is unequal, differential genuine opportunities are open to different groups of citizens and officials given the institutionally defined terms of interaction. Moreover, the explanation for why these differences in opportunities exist is not that they are the consequences of free choices citizens made. That is, differences in wealth, and the opportunities wealth enables, are not explained by the fact that one individual freely chose to spend more of his time on leisure activities, while another spent the same time working, and both choices reflected the different preferences of these two individuals. Instead, differential opportunities exist because, for example, of different legal rights groups of citizens are granted by law or see enforced in practice by officials. Inequality is present not only in the terms of interaction, but also in the process by which terms of interaction may be institutionally altered. That is, individuals and groups do not enjoy the same right to change the structure of interaction. Apartheid South Africa is a paradigm instance of pervasive structural inequality. Those legally categorized as black and as white South Africans had as a consequence of their classification differential opportunities for employment, education, mobility, and procuring decent shelter. Moreover, only white South Africans as a group were legally granted rights to participate in elections through which officials setting policies and defining the legal structure of interaction were selected. Pervasive structural inequality can also be less explicit and overt, as when systems of patronage and clientalism lead to the control of resources by a very few, leaving the majority of a population's access to employment, resources, and opportunities for political positions subject to the decisions of, for example, warlords or politicians.

Inequality is pervasive when multiple institutions are characterized by this kind of inequality, and when the inequality permeates multiple aspects of the terms for interaction in a given domain. Inequality that is pervasive is such that it calls into question the legitimacy of the institutional order governing interaction. Revolution, and not simply reform, is warranted.

The contrasting circumstance, which is a feature of stable democracies, is limited structural inequality. In such cases, the inequality present in the terms structuring interaction does not cross a threshold such that the legitimacy of the institutional order can be called into account. Efforts at reform, but not revolution, are warranted and appropriate.

The second feature of transitional societies is *normalized collective and political wrongdoing*. “Wrongdoing” refers to violations of human rights, one widely recognized form of injustice. The scope of wrongs encompasses violations of civil and political rights, as well as economic, social, and cultural rights.⁵ Wrongdoing is political in two senses. First, it is done for the sake of furthering certain political objectives or goals. Wrongdoing thus is instrumental, serving certain political purposes such as demoralizing a political opponent in conflict or terrorizing a population into submission so that a set of policies can be implemented without contestation. Second, wrongdoing is political because it is committed for political reasons and because it is committed by state agents or agents acting with the consent of the state or by agents acting so as to overthrow a state. Wrongdoing is collective in that it targets groups of citizens and is committed by groups. Wrongdoing is normalized in the sense that it becomes something citizens come to expect, and so a basic fact of life around which they must orient their conduct. The normalization of wrongdoing is compatible with individual citizens having varying views regarding the justifiability of

⁵ Which rights are the subject of interest of transitional justice, and, in particular, whether economic and social rights should be included, is the subject of extensive debate in the literature on transitional justice. I argue for an expansive understanding of the range of rights violations that are salient, which includes economic and social rights, in *The Conceptual Foundations of Transitional Justice*.

such wrongdoing. Normalized wrongdoing may be accepted as permissible conduct by some, while being vigorously contested and rejected by others; in both cases the anticipation of wrongdoing is something citizens must take into account when deliberating about how to act. Normalized collective and political wrongdoing takes various forms during conflict. It includes campaigns of rape and sexual slavery, genocide, ethnic cleansing, disappearing of citizens, and land confiscation.

We can contrast normalized collective and political wrongdoing with *deviant individual and personal wrongdoing*, the wrongdoing with which the criminal and tort law in stable democracies is paradigmatically designed to deal. Violations of human rights in such cases are deviant in the sense that they represent an exception to a generally respected rule. Wrongdoing is individual in generally being committed by individuals against individuals. The personal nature of wrongdoing is a function both of the fact that it is committed by a private citizen or an individual acting in a private capacity and it is committed out of personal motivations and to further personal objectives. Trials for the murder of one spouse by another or a civil law suit to recover damages from medical malpractice committed by one doctor against a single patient are examples of such wrongs.

These first two features of transitional societies are often intimately interconnected in practice. Pervasive structural inequality provides a context in which the human rights claims of subordinate groups are either not recognized in law or not respected nor enforced in practice. Conversely, one of the political functions of normalized collective and political wrongdoing is to maintain a status quo situation of institutionalized inequality. There may also be cases in which the two features overlap. In the case of disappearing of citizens during the Dirty War in Argentina, we could examine it as a case of pervasive structural inequality, insofar as it was a policy systematically enforced that had the effect of undermining the rule of law by violating a basic requirement of congruence between declared rules and their enforcement.⁶ We can also view instances of disappearing as cases of what became normalized collective and political wrongdoing.

The third feature of transitional societies is *serious existential uncertainty*. The subject of this feature is the overall trajectory of a political community. When there is serious existential uncertainty about that trajectory, it is very difficult objectively and subjectively to assign a probability to the future unfolding one way or another. Specifically, it is objectively and subjectively uncertain as to whether a transition to democracy will in fact be achieved. Transitions to democracy frequently falter. Conflict or some form of repressive rule resumes following an attempt to end conflict or repression. For citizens and observers of societies in the midst of a transition, it becomes very difficult to know what narrative is the appropriate one to tell of events. Following the stepping down of Hosni Mubarak as president of Egypt in 2011 in response to mass protests, there was a genuine sense of the possibility that his demise could usher in a period of democracy within Egypt. Mubarak had served as president for more than 30 years after the assassination of then-President Anwar Sadat in 1981, and his reign was as a quasi-military leader tolerating very little dissent. However, that optimism has in the 5 years since turned to pessimism and concern over the increasingly repressive tactics used by the state.⁷

⁶ This perspective I discuss in detail in my “Lon Fuller and the Moral Value of the Rule of Law,” *Law and Philosophy*, 24 (2005), 239–262, and in Chapter 1 Colleen Murphy, *A Moral Theory of Political Reconciliation* (New York: Cambridge University Press, 2010).

⁷ Indeed, the Guardian recently published an article on July 12 written by Ian Black titled “Hundreds ‘disappeared’ by security forces in Egypt, says Amnesty,” <https://www.theguardian.com/world/2016/jul/13/hundreds-disappeared-security-forces-egypt-amnesty-report>.

The contrasting feature of stable democracies is *minor existential uncertainty*. In other words, there is little uncertainty, objectively or subjectively, as to whether elections will be held as scheduled or policies implemented once passed. This is true even in situations in which serious disagreement exists among citizens as to the justifiability of a particular policy or the candidate who ought to be elected.

The fourth and final feature of transitional societies is *fundamental uncertainty about authority*. Transitional justice processes deal with past wrongs. Given the implication of the government in such wrongs, the standing of the state to deal with wrongdoing is subsequently in doubt. Indeed, it is precisely such authority that transitional justice processes aim to rehabilitate. We can contrast fundamental uncertainty about authority with *narrow uncertainty about authority*. In such cases, the authority of one particular official to deal with certain questions or issues is called into question.

3 Transitional Justice

I argued in the previous section that there are four features that characterize transitional societies: pervasive structural inequality, normalized collective and political wrongdoing, serious existential uncertainty, and fundamental uncertainty about authority. In this section, I discuss the problem of justice that arises in these circumstances and the corresponding standards of justice that we should use to adjudicate this problem.

The central question of transitional justice is best put, in my view, as: what constitutes the just pursuit of societal transformation?⁸ The presence of pervasive structural inequality, which both facilitated and was facilitated by normalized collective and political wrongdoing, generates the need for transformation. The salient transformation is in turn best characterized as relational transformation. That is, is it best understood as transformation of the very terms structuring the interaction among citizens and between citizens and officials. For only such an overhauling of terms for interaction will both counter pervasive structural inequality and establish conditions that reduce the likelihood of normalized collective and political wrongdoing. Relational transformation is ultimately tied to an objective frequently cited in the context of transitional justice: political reconciliation. Political reconciliation is the process of repairing damaged political relationships; it is to such damage that processes of relational transformation tend.⁹

Transformation of the terms of interaction among citizens and between citizens and officials is pressing not only in transitional societies. It is needed in societies in the midst of war and in the grips of repression as well. However, transformation becomes not only necessary but also possible to pursue given the presence of serious existential uncertainty. Such uncertainty represents a disruption of the status quo, a period of flux in which the direction of a community is unclear. It becomes no longer certain that repression and conflict will define interaction, though at the same time it is not certain that repression and conflict will in fact be overcome. Serious existential uncertainty thus provides a window of

⁸ For an extended discussion of why this is the best way to frame the question of transitional justice, as opposed to the questions that retributive, corrective, or distributive theories of justice take up, see Chapter 2 of *The Conceptual Foundations of Transitional Justice*.

⁹ On this as one of the many meanings you could give to “reconciliation,” see Linda Radzik and Colleen Murphy, “Reconciliation,” *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/sum2015/entries/reconciliation/>.

opportunity in which a community can pursue what may otherwise be needed but not feasible to pursue.

For political relationships to be transformed, there must be fundamental change both institutionally and in the interpersonal character of interaction. Institutionally, the terms for interaction among citizens and between citizens and officials, as defined by institutional rules and norms, must be changed such that institutions are (again or for the first time) legitimate. At a minimum, this entails satisfying the requirements of the rule of law in practice.¹⁰ The rule of law requires that officials pass laws that can figure in the practical deliberation of citizens. For declared rules to be able to figure in the practical deliberation of citizens, they must be clear, constant, require what is possible for citizens to do, non-contradictory, prospectively articulate general standards, and be promulgated. The rule of law also requires officials to enforce those declared rules they promulgate. Citizens for their part must generally obey the law. Systematic or widespread disobedience renders futile the activities of officials. One condition for obedience to be required is that officials themselves reciprocally adhere to the rule of law requirements.

Societal transformation goes beyond the cultivation of the rule of law. It also requires broader changes in the attitudes of citizens and officials towards each other, or the view of one another that officials and citizens take. It is important for citizens and officials to be in a position where they can reasonably trust one another—in a very minimal sense—as a default. Trust refers to a hopeful attitude with respect to the competence and will of the trusted, as well as to an expectation that those one trusts will prove reliable by responding to our trust when it is placed in them.¹¹ To view fellow citizens and officials as competent is to view them as capable of following the norms and rules structuring interaction and, in the case of officials, as capable of recognizing that they act in a public capacity. To view fellow citizens and official as lacking ill will is to see them as being willing to abide by rules and processes structuring interaction and as lacking any desire or intention to harm other citizens or officials. To be trust-responsive is to be aware of and receptive to the expectations that the individual who trusts makes of oneself. Trust and trust-responsiveness in this minimal sense matter because they represent ways in which we can express and demonstrate respect and reciprocity towards fellow citizens and officials. To trust as a default is to presume that fellow citizens and officials are decent, committed to fair play, and capable agents. Though trust is desirable, it is not always reasonable. In fact, during war and conflict, and even in the midst of transitions, trusting as a default can make one vulnerable to harm. Moreover, attitudes like trust are not something that processes of transitional justice can, or should, demand. Instead of aiming at trust directly, processes can—and should—rather foster the conditions that would make a trusting default attitude reasonable. In fact, one such condition is the rule of law.¹²

There are further conditions that need to be promoted by processes that aim to transform the basic terms of interaction among citizens if they are to sufficiently mitigate pervasive structural inequality. One condition is ensuring that there is a genuine opportunity for citizens to avoid poverty, and so to have other valuable opportunities to pursue and a

¹⁰ This understanding of the rule of law is based on Lon Fuller, *The Morality of Law*, rev. ed., (New Haven: Yale University Press, 1969). For its salience as an objective of relational repair in transitional contexts, see Chapter 1 of *A Moral Theory of Political Reconciliation*.

¹¹ On this basic definition of trust, see Karen Jones, “Trust as a Reactive Attitude,” *Ethics* 101(1) (1996), 4–25.

¹² For more on trust, see Chapter 3 of *A Moral Theory of Political Reconciliation*.

genuine opportunity to shape the terms of interaction among citizens and officials rather than have those terms dictated by others. Similarly important are ensuring that the terms for interaction are such that they are predicated on recognizing that members of all groups are citizens—and equal citizens—within a community and that they are respectful of citizens. One basic way to demonstrate respect for citizens is to respect their human rights, and so codification and enforcement of human rights protections for all citizens matters.

Societal transformation is the overarching objective for the sake of which transitional justice processes are undertaken. However, processes of transitional justice deal with past wrongs. Such wrongs were committed by concrete perpetrators and against concrete victims. To justly pursue societal transformation, the moral claims of victims and moral demands on perpetrators of wrongdoing must be respected. We can characterize at a certain level of abstraction these claims. For victims, it is widely recognized that there should be acknowledgement of the wrong done, recognition of the status of the victim as a rights bearer and as an equal member of the political community, and reparation for the harm suffered through and by wrongdoing.¹³ For perpetrators, the aim is to condemn the wrong done and hold perpetrators accountable for their actions. In both cases, there is in addition a concern with non-repetition; by dealing with a past wrong, the aim is to ensure it does not happen again.

Specification of what, for example, acknowledgement requires in a specific case will be influenced by a number of factors, including the relationship between the respondent and the subject of a response (i.e., whether the respondent is the victim, the state, or a third-party civilian and whether the respondent is responding to the victim or perpetrator), the nature of the wrong (e.g., whether it is political or not), and culture. These factors matter for two general reasons. First, any just response to wrongdoing must be made by someone with standing, that is, by someone who is authorized to respond in certain ways to wrongdoing. For example, as discussions of reactive attitudes widely recognize, victims have the standing to feel resentment towards perpetrators, while third parties appropriately express indignation towards perpetrators. Thus, what kind of acknowledgement is appropriate for a particular individual or institution to make will be shaped by what kind of acknowledgement such individual or institution has the standing to make. Second, many of the aims of responses to wrongdoing are expressive in nature. Acknowledgement of the status of a victim as a rights bearer is fundamentally expressive, as is condemnation. What counts as successful communication of condemnation or acknowledgement will be influenced in part by the nature of the wrong done and by culture. Responses can misfire by acknowledging wrongdoing inaccurately; for example, acknowledgement fails to be just if it treats wrongdoing as an instance of ordinary criminality instead of as an instance of wrongdoing that was fundamentally political in nature.

To summarize this section, I have outlined what I take to be the core question of transitional justice: what constitutes the just pursuit of societal transformation? Societal transformation is the overarching objective for the sake of which transitional justice processes are pursued. However, this pursuit must be conditioned on respect for the moral claims of victims and moral demands on perpetrators. Respect for such claims and

¹³ Theorists who cite these conditions include Christopher Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008). On repudiation as important, see R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001); R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998); Linda Radzik, *Making Amends* (New York: Oxford University Press, 2010); Margaret Urban Walker, *Moral Repair* (New York: Cambridge University Press, 2010).

demands is necessary for the pursuit of transitional justice to be just. Transitional justice processes can thus fail to be just in two ways. They can fail to contribute to societal transformation. Or they can fail to pursue societal transformation in a manner that respects the claims and demands to which wrongdoing gives rise.

4 Contribution of International Courts to Such Problems

In part 3, I outlined what I take to be the central question of transitional justice, as well as the broad parameters of what the answer to that question is. I consider in this section the contributions of international criminal trials to transitional justice so defined. My main claim is that any positive contribution of international criminal trials to transitional justice will be conditional on two general factors: time and the domestic transitional processes adopted. In my discussion, I focus on the contribution of such trials specifically to societal transformation. Thus, in this section, I leave aside the question of whether such trials adequately satisfy the demands of perpetrators and claims of victims.

Time matters because time—and specifically the passage of time—impacts the overarching moral purpose of responding to wrongdoing. Specifically, with time, responses may no longer have as their overarching purpose fostering societal transformation conceived of as relational repair. Instead, the overarching purpose may simply be satisfying the claims of victims and meeting the moral demands of perpetrators.

The ways in which time influences this shift in moral purpose can vary. In some cases, some threshold level of societal transformation may have been promoted so that such transformation is no longer pressing a moral objective in the way it was during the period of transition. We can see this in many contemporary cases of trials of Nazi guards of concentration camps during the Nazi reign.¹⁴ While the Nuremberg trials in the immediate aftermath of World War II explicitly focused on the importance of overhauling Nazi society in a way that dismantled the institutional and social structures responsible for widespread destruction, this emphasis is not present in the same way in contemporary trials and verdicts.¹⁵ Reactions to the conviction of a 94-year-old former Auschwitz death camp guard, Reinhold Hanning, centered on the justice achieved for victims who had their suffering acknowledged, the justice of finally holding Hanning to account, and the contribution this acknowledgement would have towards ensuring non-recurrence.

Time may also be salient because there is no longer existential uncertainty, which as a consequence means the absence of an opportunity to pursue transformation and change. The recent trial of Hissène Habré illustrates this aspect of the context-sensitivity of moral purpose. Habré was dictator of Chad from 1982 to 1990. His brutal reign was characterized

¹⁴ See, for instance, Kate Connolly, “Auschwitz guard jailed for 5 years in Holocaust murder trial,” <https://www.theguardian.com/world/2016/jun/17/auschwitz-guard-reinhold-hanning-jailed-holocaust-auschwitz>.

¹⁵ For a debate about how societal transformation should be pursued via trials, see discussions of the trials of grudge informers. See, for example, Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” *Harvard Law Review*, 71(4) (1958), 630–672; H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review*, 71(4) (1958), 593–629; David Dyzenhaus, “The Grudge Informer Case Revisited,” *New York University Law Review*, 83(4) (2008), 1000–1034; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Hart Publishing, 2012); Colleen Murphy, “Political Reconciliation, Punishment and Grudge Informers,” in Alice MacLachlan and Allen Speight (eds.), *In the Wake of Conflict: Justice, Responsibility and Reconciliation*, (New York: Springer, 2013), 117–132.

by widespread arbitrary arrest, detention, and torture of civilians. Forty thousand people are estimated to have been killed during his reign. Habré was deeply involved in these processes; indeed he “personally oversaw the secret police that meted out punishment, giving many orders and even raping a woman himself four times.”¹⁶

In May 2016, Habré was convicted of crimes against humanity; war crimes; and torture, including sexual violence and rape by the Extraordinary African Chambers in the Senegalese court system.¹⁷ He was sentenced to life in prison. Discussion of reactions to the trial and verdict focused very little on its implications for Chadian society, and the broader transformation it might facilitate. Instead, reactions to the verdict framed it as a victory for the victims of Habré’s crimes, especially the group of individuals who had spent over 25 years trying to bring Habré to justice. As Reed Brody of Human Rights Watch, who worked with the survivors pressing to see Habré put on trial and held to account for his abuses, put the verdict: “Today, though, will be carved into history as the day that a band of unrelenting survivors brought their despot to justice.”¹⁸

This almost exclusive emphasis on victims is not a function of the absence of a successful process of societal transformation following Habré’s overthrowing. Pervasive structural inequality continues to characterize Chad; for example, Chad’s Gini coefficient puts it in the top third of countries.¹⁹ Chad remains very poor, ranking 185 on the United Nations Human Development Index. Nor is there much uncertainty as to whether this trajectory will continue. President Idriss Deby, who overthrew Habré prior to assuming power, has ruled Chad since 1990. Deby has been elected five times, this number made possible by a removal of term limits after the conclusion of his second term in office.

In the current context, there is little prospect of the conviction of Habré having an impact on the pursuit of broader transformation within Chad. Such transformation is necessary given the existence of pervasive structural inequality, but not feasible as reflected in the absence of serious existential uncertainty. Interestingly, but unsurprisingly, while there was some discussion of what the conviction could mean for the prosecution of other human rights abuses committed in countries in Africa, there was not discussion of what his conviction meant for Chadian society.²⁰

The trial of Radovan Karadžić offers another illustration of why the moral purpose and impact of international criminal trials is conditional on time. It also illustrates the influence of domestic transitional justice processes on the impact that international trials ultimately have upon a domestic society. Karadžić was president of the Serbian Democratic Party and of the Serbian Republic of Bosnia and Herzegovina (called Republika Srpska) during the Bosnian War from 1992 to 1995.²¹ He evaded arrest for 11 years, before finally being arrested in 2008. In March 2016, the International Criminal Tribunal for the former Yugoslavia (ICTY) found Karadžić guilty on 10 of 11 charges, including genocide, crimes

¹⁶ Ruth Maclean, “Hissène Habré ordered to pay millions for crimes against humanity in Chad,” https://www.theguardian.com/global-development/2016/jul/29/hissene-habre-compensation-90m-crimes-against-humanity-chad?CMP=share_btn_tw.

¹⁷ <https://justicehub.org/article/ex-chadian-dictator-hissene-habre-ordered-pay-millions-victims>.

¹⁸ Reed Brody, “Dispatches: Hissène Habré Sentenced to Life for Atrocities,” May 30, 2016, <https://www.hrw.org/news/2016/05/30/dispatches-hissene-habre-sentenced-life-atrocities>.

¹⁹ Citing the World Bank data for this figure. <http://hdr.undp.org/en/content/income-gini-coefficient>.

²⁰ Elise Keppler, “This Is What the Conviction of Chad’s Former Dictator Means for African Human Rights,” <https://www.hrw.org/news/2016/06/10/what-conviction-chads-former-dictator-means-african-human-rights>.

²¹ International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf.

against humanity, and violations of the laws or customs of war.²² These charges covered the siege of Sarajevo, the Srebrenica massacre, and the taking as hostages of UN peacekeepers.²³ He was acquitted on one count of genocide for massacres in other areas of Bosnia widely taken to have initiated the Bosnian War.²⁴

A commonly shared view of the reactions to the Karadžić trial and verdict is that they reflect “the same ideas pervading local politics.”²⁵ Among prominent Bosnian Serbs, reactions to the conviction cast doubt on the justice of the verdict, by calling into question the impartiality and competence of the ICTY, characterizing Karadžić as a hero unjustly targeted and victimized by such proceedings, and focusing on crimes against the Serbs that have so far gone unpunished.²⁶ In the words of president of the War Veterans Association of Republika Srpska, Milomir Savicic, “I am disappointed with the justification of the verdict. That draconian punishment is based on very weak evidence.”²⁷ Mladen Bosić, head of the Serb Democratic Party, stated “The Hague tribunal has once again shown that it is a political court, the politically based verdicts were handed down to all Serb leaders from Serbia, [Bosnia’s autonomous] Republika Srpska and Croatia.”²⁸

Such reactions compounded the already deep skepticism among Bosnian Muslim victims and members of their families about the possibility of ever witnessing proper acknowledgement of the wrongs committed. For many Bosnian Muslims, reactions have reflected consternation about the genocide count on which Karadžić was acquitted and the message which that acquittal sent, objection to the limited duration of the sentence, and worries about the trial ultimately being interpreted as vindicating or justifying the actions of Serbs. A mother and widow from Srebrenica, Hatidza Mehmedovic, complained, “This judgment is a reward for Karadžić.”²⁹ Saja Coric from the town of Mostar reacted, “The whole of Republika Srpska is like a mass grave ... we are still searching for our kids ... and they claim this is not genocide.”³⁰ Prior to the verdict, Mirsad Duratovic, who survived the Omarska concentration camp, stated, “If the judges fail to convict Karadžić for genocide in 1992 in Prijedor, it will be a slap in the face of the victims. Everything else will be a reward for Karadzic and Republika Srpska.”³¹ Underlying such reactions is the

²² http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf.

²³ Marko Milanovic, “ICTY Convicts Radovan Karadzic,” Blog of the European Journal of International Law, <http://www.ejiltalk.org/icty-convicts-radovan-karadzic/>.

²⁴ The next two paragraphs were first published in a blog post I wrote for RECOM titled “What is Political Reconciliation? Reflections on Reconciliation after the Karadzic Trial,” <http://www.recom.link/political-reconciliation-reflections-reconciliation-karadzic-trial/>.

²⁵ Nidzara Ahmetasevic, “The Radovan Karadzic verdict will change nothing,” *Al Jazeera*, March 26, 2016, <http://www.aljazeera.com/indepth/opinion/2016/03/radovan-karadzic-verdict-change-bosnia-serbia-160327093504907.html>.

²⁶ Julian Borger, “Radovan Karadžić’s sentence for Bosnia genocide exposes continuing divisions,” March 24, 2016, <https://www.theguardian.com/world/2016/mar/24/radovan-karadzics-sentence-for-bosnia-genocide-exposes-continuing-divisions>.

²⁷ Denis Dzidic, “Karadzic Verdict: Mixed Reactions Reflect Divided Bosnia,” *Balkan Insight*, March 24, 2016, <http://www.balkaninsight.com/en/article/karadzic-verdict-mixed-reactions-reflect-divided-society-03-24-2016>.

²⁸ Julian Borger and Owen Bowcott, “‘Is the tribunal not ashamed?’ Karadžić sentence angers victims,” *the Guardian*, March 24, 2016, <https://www.theguardian.com/world/2016/mar/24/radovan-karadzic-hague-tribunal-sentence-survivors-victims-reaction>.

²⁹ Borger, “Radovan Karadžić’s sentence.”

³⁰ Dzidic, “Karadzic Verdict.”

³¹ Borger and Bowcott, “Is the tribunal not ashamed?.”

anticipation of disappointment and the expectation of continuing denial with respect to the wrongs done and the causes of such wrongdoing.

The divided reactions point to the failures of reconciliation, and so of societal transformation, in the years following the Bosnian war. Rather than influencing change, the Karadžić trial is taken to provide evidence of the absence of change and further entrench divided viewpoints about the war itself. Part of the reason for interpreting the Karadžić trial reactions in this way stems from the length of time between the atrocities for which Karadžić was on trial and the trial itself and subsequent verdict. The significant distance in time from the ending of the war hints at the diminished presence of existential uncertainty, and so the availability of an opportunity to shape the future trajectory of a community that is itself uncertain.

But the Karadžić trial also raises questions about why views have been entrenched and hardened in this way. It was not inevitable that divisions would remain. What reactions to the Karadžić trial suggest is that efforts at societal transformation that took place prior to and perhaps during the Karadžić trial were ultimately unsuccessful. This failure points to the second factor that influences the contribution of international criminal trials to transitional justice: domestic transitional justice processes. For the necessity of pursuing societal transformation to be recognized, denial of wrongdoing must be overcome.³² For trials to contribute to the process of countering denial and engendering acknowledgement, the audience towards whom trials are directed must be receptive to the information and evidence presented at such trials. But that receptiveness is not something within the power of the criminal justice system to fully control. This is especially true in the case of international courts, where questions about the standing of such courts to deal with atrocities can be especially pronounced. Domestic transitional justice processes can influence the ultimate impact of international criminal trials on transitional justice, by contributing to the countering of denial individually and by shaping views and attitudes towards the legitimacy of such international proceedings. Evidence in the case of Bosnia points to the failure of domestic processes to counter denial about past atrocities or counter recognition of the need to alter the ideologies that facilitated atrocities in the first place.

5 Conclusion

In this paper, I have examined the meaning of transitional justice and have considered the role of international criminal trials in facilitating transitional justice. Transitional justice, I argued, is at its core about the just pursuit of societal transformation. International criminal trials stand to make contributions to such transformation, provided they are timed to take place when the circumstances of transitional justice, including importantly serious existential uncertainty, obtain and provided domestic transitional justice processes are successful in countering denial and creating an environment where the standing of international criminal courts will be recognized domestically.

³² On this point, see Chapter 4 of *A Moral Theory of Political Reconciliation* and Chapter 3 of *The Conceptual Foundations of Transitional Justice*.