Transitional Justice and Rule of Law Reconstruction

A contentious relationship

Pádraig McAuliffe

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Transitional Justice and Rule of Law Reconstruction

This short and accessible book is the first to focus exclusively on the interrelation between transitional justice and rule of law reconstruction in post-conflict and post-authoritarian states. In so doing it provides a provocative reassessment of the various tangled relationships between the two fields, exploring the blind-spots, contradictions and opportunities for mutually-beneficial synergies in practice and scholarship between them. Though it is commonly assumed that transitional justice for past human rights abuses is inherently conducive to restoring the rule of law, differences in how both fields conceptualize the rule of law, the scope of transition and obligations to citizens have resulted in divergent approaches to transitional criminal trial, international criminal law, restorative justice and traditional justice mechanisms. Adopting a critical comparative approach that assesses the experiences of post-authoritarian and post-conflict polities in Latin America, Asia, Europe and Africa undergoing transitional justice and justice sector reform simultaneously, it argues that the potential benefits of transitional justice are exaggerated and urges policy-makers to rebalance the compromises inherent in transitional justice mechanisms against the foundational demands of rule of law reconstruction. This book will be of interest to scholars in the fields of transitional justice, rule of law, legal pluralism and peace-building concerned by the failure of transitional justice to leave a positive legacy to the justice system of the states where it operates.

Pádraig McAuliffe is a lecturer in human rights law at the University of Dundee. His research interests are primarily in the fields of transitional justice, rule of law reconstruction and international criminal tribunals. He has published in a number of journals in the field of international law.

'This is a bold and nuanced scrutiny of the international system's approach to transitional justice and the much vaunted rule of law project. Dr McAuliffe should be congratulated for this well-researched book which should be a must read for not only scholars and researchers in transitional justice and peace and conflict studies, but also policy-makers in the international system.' Dr. Hakeem O. Yusuf, Senior Lecturer, University of Strathclyde and author of *Transitional Justice, Judicial Accountability and the Rule of Law*.

This book is dedicated to Denise, who made every day of writing this a pleasure

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Between ambition and modesty

1.1 The role of ideas in transitional justice

In examining the relationship between transitional justice and rule of law (re) construction,[1] this book proceeds from two premises. One might be characterized as ambitious and the other as modest. The first, more ambitious premise, is that in transitional justice, ideas matter a great deal. To the extent that this book examines why the relationship between rule of law reform and transitional justice is contentious, it is hoped that a better understanding of the strains and complementarities between them can and will inform a better practice. Theory is important in all areas of law and politics because the ideas enunciated filter into the world in all kinds of ways. However, there is reason to believe the impact of ideas is heightened in the field of transitional justice because of the influence of a highly mobile international coterie of practitioners and scholars who deploy to transitional states and can implement ideas circulating because their role in supranational organizations and NGOs gives them influence over governing policy.

> Transitional justice operates through the actions of a series of groups: policy-makers who plan and implement the institutions; victim groups defined by commissions or courts; the larger citizenry implicated, but not named, by a final report or court decision; scholars who write the literature about specific country contexts or the phenomenon in general; and practitioners who work for nongovernmental organizations (NGOs) that consult on the possible manner of transition.[2]

Kritz exaggerates only slightly when he contends that a government's transitional justice policy 'often depends less on well-grounded and proven policy considerations than on whether the junior member of staff writing the policy memo has some experience with the South African TRC or another transitional justice process',[3] but he highlights a salient fact that animates much of this book – how scholars, advocates and practitioners think about and experience transitional justice can have a large impact on how it is practised and its relationship to other socio-political phenomena. The parameters of transitional justice are often defined by what international donors at supranational,

bilateral or international nongovernmental organizations (INGO) levels are willing to pay for.[4]

INGOs (within which dedicated transitional justice organizations can be categorized),[5] in particular, are highly influential through the development and transmission of norms, standards and principles through world-wide networks to states, inter-governmental organizations and national bodies, and then entreating these actors to conform to them.[6] Mixing advocacy with operational work, human rights and transitional justice NGOs not only formulate the issues, but also define how those issues are resolved, using their moral appeal, investigative missions and national NGO partners to pressure states to comply with their programmes.[7] The academy and applied interest are equally influential – historically, ideas outlined in papers, conferences or the field about how transitional justice can be practised often amount to self-fulfilling prophecies of what will be done in future, even if the success anticipated does not follow as inevitably. Though legal and human rights theory have traditionally been dominant in the field, newer, more holistic approaches require a refreshed trans-disciplinary mindset.[8] Characterized by some as a rendezvous discipline,[9] transitional justice scholarship draws on anthropological, developmental, economic, feminist and sociological critiques to addresses the fresh dilemmas and opportunities the idiosyncratic ecologies of transition present. One of the criticisms this book makes is that the scholarship has not drawn sufficiently on perspectives from rule of law reconstruction.

The history of transitional justice, therefore, is the history of interactions of scholars, human rights activists and policy-makers who have always asserted the centrality of ideas.[10] What we now know as transitional justice was initially structured as a field at an Aspen Institute conference in 1988 on state crimes, and much of its subsequent development finds its roots in conferences, seminal monographs and special editions of dedicated journals.[11] The prime example of the triumph of ideas is what Lutz, Sikkink and Walling have called 'the justice cascade',[12] where they argue that the endeavours of a transnational transitional justice advocacy network successfully opposed the defiance of recalcitrant governments and stimulated a rapid shift toward effecting compliance with recognized human rights norms.[13] They argue that ongoing norm penetration, public debate and pressure that human rights activists can muster at international and domestic level have mitigated the unwillingness of nascent democracies (who care about what other states are doing and global normative trends) to deal with human rights abuses of the past. The putative justice cascade has been characterized as the work of NGOs acting as activists, advertisers and pressure groups, starting with the efforts of small groups of activists domestically and mushrooming into a transnational network that fundamentally changed the environment in which state actors work.[14] The cascade argument probably claims too much. Statistical analysis conducted in recent years suggests that states are no more likely to conduct trials than they were 30 years ago,[15] that use of truth commissions is declining in relative terms[16] and that amnesty remains the

most popular mechanism applied.[17] Politico-military balances still tend to dictate the parameters of accountability,[18] while civil society will often get involved after pacts are agreed, the *ancien régime* has fled or power is shared, and even then remains weak.[19] Even the strongest forms of both transitional criminal trial (the ad hoc tribunals) and truth commission (the South African Truth and Reconciliation Commission (TRC)) respectively represent glosses for military inactivity[20] and security-based blackmail[21] more so than the triumph of an accountability norm. Instead of a justice cascade, there instead appears to exist a justice balance between sometimes contradictory policies like accountability and amnesty. The greatest impact of norm socialization is observable not in causal terms of whether a given mechanism is pursued or not, but rather in qualitative terms of how those mechanisms operate once established.

The cross-fertilization of ideas between these actors has helped develop ideas of good practice among the proliferating transitional justice mechanisms,[22] while the consolidation of both TRCs and criminal trials as policy tools contributed towards the increased eagerness to consider an adaptable continuum of strategies over the previous binary choice between the two. A noticeably more holistic, multi-mechanism, context-specific approach has become the norm. With the consolidation of transitional justice came an accelerated process of contagion learning, where policy-makers in one context appropriated the knowledge and methodologies accumulated in previous transitions.[23] As transitional justice enters a 'do everything, engage everyone' era,[24] a restorative paradigm of justice concerned with the individual, the family and the local community has shared parity with more statist-legalist approaches.[25] The theory and practice of TRCs has become more sophisticated, requiring victim-centred consultation, detailed terms of reference, qualified staffing, impact assessment and follow-up.[26] Many of the restorative principles these practices flow from were the product of retrospective explanatory theories outlined by scholars to compensate for the trade-offs of realpolitik,[27] who subsequently went on to constructively define the normative expectations of these mechanisms. Similarly, in response to criticisms of the operation of the ad hoc tribunals, victims emerged in transitional criminal trials from their earlier instrumentalization to become one of the main constituencies of prosecution, consultation became the paramount virtue of accountability planning, and outreach has become imperative.[28] Practitioners in all forms of transitional justice employ the enormous body of soft law developed in the last two decades on issues like impunity, indemnification of victims and truth.[29]

The failure of transitional justice to integrate with rule of law reconstruction this book examines is surprising when one considers how fruitfully it has interacted with other peace-building efforts. For example, much progress has been made in integrating transitional justice with Disarmament, Demobilization and Reintegration (DDR) and Security Sector Reform (now bundled with Justice as SSJR). For many years, these issues were treated

separately as security sector debates became synonymous with military and police, but over time it became apparent that the security issues could not be considered in isolation from matters of accountability. For example, the unchecked power and weight of many militaries complicated efforts at accountability in Latin America, while Liberian soldiers were afraid to demobilize due to rumours that their ID benefit cards might be employed to bring them before the Special Court for Sierra Leone. The realization that transitional justice and DDR/SSJR could be both mutually re-enforcing and mutually destructive spurred institutional and doctrinal innovation coalescing around three common objectives: accountability, building of instructional capacities and non-reoccurrence.[30] By 2005, transitional justice and DDR had become explicitly merged in places like Colombia and a Security Sector Reform and Transitional Justice Unit has been established within UN Department of Peacekeeping. Similarly, research and practice has begun to examine the gender dynamics of transitional justice which long went overlooked.[31] Its re-orientation evolved from a growing realization of the gendered nature of peace agreements negotiated by men after wars conducted by men which disregarded the needs of women. The masculinist emphasis in transitional justice on regime change between male-dominated parties and factions and the emphasis on 'extraordinary' violations of civil and political rights and war crimes obscured victimization that occurred at the intersection of gender and socio-economics. As the inability of trials and TRCs to respond to the different experience of women in war and repression was acknowledged and as cognisance was taken of the notable rise in levels of family violence that occurs after peace negotiation, initiatives began to address these issues. Similarly, the acknowledgment that the existing modalities of transitional justice have failed to address the structural injustices that lie at the root of conflict has prompted searches to make it effective through distributive justice at macro-level and through considering how people seek and experience justice after mass atrocity in the context of everyday life at micro-level. By contrast, thinking on the relationship between the rule of law and transitional justice has attracted less innovative thinking and gone underanalysed, largely because this relationship has always been presumed to be mutually-beneficial. On the other hand, the link between transitional justice and DDR or gender were less intuitively apparent, resulting in conscious efforts to reform theory and practice. To summarize once more, how transitional justice is interpreted at legal and policy levels has a fundamental influence on how it is implemented and what objectives are given priority.

As Chapter 2 examines in great detail, rule of law reconstruction actors have similarly proven responsive to the arguments of scholars and practitioners as they learn from the examples of the Law and Development era of the 1970s, post-Communist reconstruction and failed peace-missions in the 1990s and the Millennial transitional administrations. In short, much of this book is dedicated to examining how scholars, activists and practitioners in both transitional justice and rule of law reconstruction think about these

fields, and does so on the presumption that a transitional justice praxis that operates with a greater awareness of the opportunities and contradictions that flow from their simultaneous operations is a better praxis. That such an inquiry is necessary may seem strange. Transitional justice and rule of law reconstruction have been mainstreamed at the same time and in many of the same contexts. This parallel growth in rule of law reconstruction and transitional justice responds to our intuitions that the processes are related and mutually re-enforcing. De Greiff notes that 'scholars largely agree about both the centrality of the concept and about the usefulness of transitional justice measures in efforts to re-establish the rule of law'.[32] Ndulo and Duthie outline a relationship between transitional justice and judicial reform that operates at three levels – judicial reform can constitute an element of transitional justice, it may facilitate transitional justice, while transitional justice may contribute to judicial reform.[33] The necessity of cooperation between the international justice and development communities was formally recognized at the Kampala Review Conference of the ICC in the summer of 2010 and at a follow-on high-level conference in October of that year where practitioners from both spheres acknowledged a need to co-operate in integrating international criminal justice into traditional rule of law programmes.[34] Examples of mutually-beneficial co-operation are legion. For example, we see how the arrest abroad of General Pinochet stimulated the Chilean courts to reform[35] or where reform of Criminal Division of the Court of Bosnia and Herzegovina enabled widespread transitional trials.[36] At the same time, there are obvious opportunities for co-operation given that both processes generally operate simultaneously. For example, it is not uncommon to see the hope expressed:

> With integration [of justice sector reform and transitional justice], redundancies can be avoided and synergies can be tapped. For example, backing for a witness protection and support system needed for international criminal law trials could also benefit initiatives on domestic abuse, sexual violence, corruption, drug trafficking, or organized crime. Criminal investigators who have undergone specialized training in international criminal justice may also receive advanced training in securing crime scenes, forensics, or taking witness statements – skills that will boost capacity of the criminal justice system across the board.[37]

Furthermore, processes of accountability after war or repression will often highlight deficiencies in the rule of law and can serve as an impetus for rebuilding the judiciary, and vice versa.

However, mutually beneficial symbiosis is more apparent on paper than on the ground. Concern has been expressed that it is often the same 'small pool of talent' that will undertake both tasks[38] and that the burden of external assistance for dealing with past human rights abuses will fall not on the international justice community, but rather the traditional rule of law

development organizations on account of their larger network of international organizations, aid agencies, and other donor and implementing bodies.[39] While transitional justice has sometimes stimulated beneficial reform, it can also have the opposite effect – in Kenya, justice NGOs began to give up on campaigns to use a national tribunal to pursue justice for post-election violence when the use of the International Criminal Court (ICC) appeared more immediately feasible.[40] Fear has been expressed that activities (such as transitional justice) that are popular and well-funded may be 'cherrypicked' to the detriment of strengthening the justice sector as a whole.[41] The conceptual confusion between transitional justice and rule of law reconstruction that Chapter 2 examines presents a significant danger that transitional justice will absorb a significant slice of foreign funding that might otherwise go towards justice sector reform. Observers see costly transitional justice projects being pitched financially against justice sector reform activities such as training of new judicial actors, repair of courthouses or infrastructure and coming out victorious.[42] The most criticized example of this is the International Criminal Tribunal for Rwanda (ICTR) in Rwanda where donor commitments for justice sector reconstruction in the first five years after the genocide was an estimated US$10m per annum, while the ICTR budget was US$90m per year.[43] It has been suggested that the Haitian domestic justice system has suffered because donors refused to fund ordinary trial processes because they had committed to a truth commission,[44] while it is alleged that of the US$140m Guatemala received for transitional justice, roughly 3 per cent went to the criminal courts.[45] A further risk is that transitional justice activities will draw off human and material resources. Even though problems of insecurity and violent crime are generally worse after transition than before,[46] the systemic effect of transitional justice proceedings may be to displace ordinary but urgent legal disputes by relegating them to the back of the court queue.[47] Posner and Vermeule posit a cost-benefit analysis, arguing that the net effect is a loss to the transitional state if the displaced 'ordinary' crime proceedings would have made a greater overall contribution to the new regime's welfare than the transitional justice proceedings.[48] Such calculations have long troubled observers. As van Zyl argued in the South Africa context, '[i]f the police and prosecuting authorities were to devote a significant share of their resources to dealing with human rights violations, many of which happened a decade or more ago, the country would almost certainly lose the current battle against ongoing crime'.[49] These examples of how transitional justice can both augment and detract from rule of law reconstruction are the key theme this book explores.

Notwithstanding the presumed links between the fields, there is an evident lack of cross-fertilization of ideas between the rule of law reconstruction and transitional justice communities. The interaction of scholarship, advocacy and practice in both sectors is subject to a set of assumptions that lack coherence and depth. As Stromseth, Wippman and Brooks suggest, the question of whether and how accountability processes can contribute to the

development of domestic justice systems and the construction of the rule of law generally is 'surprisingly underanalysed' academically.[50] To date, the two fields have been treated mostly as two separate areas of interest in both academic analysis and in UN peace-keeping practice.[51] Call notes that analysis of post-conflict judicial reform has failed to address the role of those responsible for past human rights abuses while research on the latter has focused more on past atrocities than rebuilding justice systems for the future.[52] In the immediate context, this blind-spot may be a particularized example of the 'familiar but self-deceiving separation of law, human rights, truth commissions and reconciliation from questions of nation-building' that has persisted in transitional justice notwithstanding its accumulation of projects and goals.[53] Both van Zyl and Lambourne note that surprisingly little analysis has been devoted to the interaction of transitional justice and post-conflict peace-building,[54] while Kritz observes 'too much bifurcation between transitional justice and the construction of the rule of law'.[55] This is the product of the widely observed professional balkanization that typically afflicts rule of law reconstruction missions where different experts and agencies with divergent mandates and different institutional dynamics concentrate intensely on their core competencies, producing hyperfocused approaches that fail to add up to an integrated and effective whole.[56] The presumption appears to be that there will be a complementary overlap between the two areas of activity, but given the failure to think through their inter-relation, there is a significant risk of 'underlap' where incoherence results from the cacophony of projects.[57] One of the recurring images referred to in rule of law literature is that of the gleaming, newly-erected courthouse built by justice sector reformers without any trained professionals to work in it or any community consciousness of its purpose.[58] Because issues of post-conflict justice are commonly hived off as a separate and specialized issue,[59] all too often transitional justice resembles that courthouse, an impressive edifice isolated from ongoing development and perhaps even substituting for real reform.

The challenge of co-ordination is a permanent feature of UN peace-building missions as they embrace a plurality of goals through different agencies. For example, the UN entrusts its rule of law work to the United Nations Development Programme (UNDP), United Nations Office on Drugs and Crime (UNODC) and Department of Peacekeeping Operations (DPKO) and gives the lead on transitional justice to the Office of the High Commissioner for Human Rights.[60] This co-ordination problem is exacerbated by simultaneous operations of non-UN agencies. The hasty, ad hoc and reactive manner in which these missions must deploy in practice often operates to preclude reasoned co-ordination between transitional justice practitioners and those engaged in wider rule of law reform. NGO reports note how in the DR Congo, rule of law development officials had no awareness of pledges made in relation to justice on their behalf at the Kampala Review Conference or how justice sector reconstruction officials in Cambodia had no interaction with the

Extraordinary Chambers trials of the Khmer Rouge.[61] Though judicial reform and the Special Court for Sierra Leone started simultaneously, there was little interaction between the Court and broader rule of law reconstruction.[62] These actors, then, are the policy-makers to whom work will be of most utility. I envisage two core audiences for this book. One is made up of scholars, practitioners and observers of transitional justice; the other consists of their counterparts in justice sector reform broadly understood. Though the distinction between the two is crude, as the above examples of dissonance suggest, there are individuals and groups that are identifiable as rule of law practitioners and others that are identifiable as transitional justice actors, even if there is occasional cross-over. These actors are to be found in the forty-plus UN agencies, departments and funds in the wide spectrum of peace-building activities running along the 'Mogadishu line' beyond ceasefire monitoring and full transitional administration of society such the UNDP, DPKO and the Rule of Law Assistance Unit. These activities have been grouped in three baskets – the rule of law at international level, the rule of law in conflict and post-conflict situations, and the rule of law in long-term development.[63] This work may also be of use to the operations of the EU and Council of Europe, multilateral organizations like the Organization for Security and Co-operation in Europe (OSCE) and Bretton Woods institutions, bilateral donors such as the Department for International Development (DFID) and the United States Agency for International Development (USAID), aid agencies and of course national actors working in, or at the intersection of, transitional justice and the wider panoply of rule of law operations at international, national and grassroots levels. However, professional balkanization is only the organizational form of a wider problem, namely that activists and theorists in both communities have fundamentally different conceptions of what the rule of law means and requires in post-conflict and post-authoritarian transitions. As this book examines, neither group may have much knowledge of key debates in the opposite field. This lack of common ground means there is a risk some sections of the book will read either as opaque or excessively introductory for one or other group. I have tried to avoid this, while keeping both readerships in mind.

1.2 The failure to integrate transitional justice with rule of law reconstruction

Beyond professional Balkanisation, the failure to integrate perspectives from rule of law reconstruction and transitional justice might equally flow from the frequent assumption in academic literature that accountability for wrongdoers from the prior regime or conflict automatically contributes to building the rule of law in formerly lawless or repressive states.[64] As Chapter 3 examines in detail, rule of law reconstructors have long been aware that international actors instinctively attach the concept of the rule of law to other concepts such as democracy, justice, equality and human rights, with the consequence that form

becomes secondary to generalized and politicized notions of good.[65] Transitional justice undoubtedly tends to judicialize politics,[66] but one sees in the literature a presumption that this automatically conduces to constructing a sustainable domestic rule of law. Transitional justice occurs most often in states transitioning to Western-style 'rule of law' democracies, or purporting to do so. The teleological impetus of transitional justice has led theorists and practitioners in the field to conflate the rule of law and mechanisms to facilitate transition to a liberal polity, viewing them in some cases as virtually synonymous when in reality they are two very different concepts. It has above all led to some regrettable anomalies and the marginalization of the bread-and-butter rule of law issues which in the long term do as much, if not more, to advance peace-building as truth, accountability or restorative justice. For example, while we readily accept the potency of successor trials to communicate political messages about human rights to divided communities and reorient court processes to this task, we ignore the more obvious potency of such trials to communicate how criminal procedure is supposed to work. While it is presumed that trials of war crimes or genocide will help ground the rule of law, we forget that these crimes have little or no relation to the ordinary crimes that ordinary citizens will now rely on the courts to resolve after the conflict. Both international criminal law and localized, grass-roots processes are valorized by their respective enthusiasts for their distance from the state justice system and manifest ambivalence about whether the state justice system should have a leading role in reckoning with the past. It is imperative that these blind-spots be brought to light by questioning the presuppositions and omissions in the literature.

Diagnosing a gap in the literature is not the same as filling it, but progress has been made. The UN Secretary General's seminal *Rule of Law and Transitional Justice Reports* in 2004 and 2011, as the name would suggest, identified the interdependence and potentially mutually-reinforcing nature of the two fields, making clear that development of domestic judicial capacity is every bit as essential to peace-building as transitional justice.[67] While the UN has developed its own literature in the area,[68] the academic response to its commendable but broad-brush recommendations has either been sluggish or non-existent, with notable exceptions. Stromseth, Wippman and Brooks have addressed the position of transitional justice within broader rule of law efforts.[69] A diverse edited volume by Call examines the interaction of the two areas, though it failed to establish a robust, empirical connection between justice for past abuses and the quality and accessibility of justice in the future.[70] Kerr and Mobekk urge the integration of transitional justice with rule of law reform[71] while Bassiouni has called for a guiding principle based on 'sustainable justice', defined as a level of domestic justice compatible with the building and maintenance of a viable state legal system.[72] Post and Hesse argue that efforts to enforce international law should be subordinate to promoting the rule of law itself,[73] but dedicated treatment of the relationship between transitional justice and justice sector reform in journals is limited.[74] Pertinent studies of how justice system actors view the impact of transitional

justice on domestic systems are rare, and most actually precede the first *Rule of Law and Transitional Report*.[75] More detailed examination of the interaction of judicial reconstruction with transitional processes can be found in discrete works on hybrid courts, complementarity and to a lesser extent traditional/local justice mechanisms, all of which will be examined in later chapters. What is striking about even these is the failure to examine in depth the rich literature on rule of law theory in the context of post-conflict reconstruction. Observations and recommendations still tend towards the superficial. This book is a conscious attempt to bridge what Stromseth identifies as the gap between transitional justice and rule of law reform by answering her call to 'explore systematically how accountability processes might, concretely, contribute to forward-looking rule of law reforms'.[76]

The second premise of this work is that even if the links are better understood, a hitherto unprecedented modesty about the importance of transitional justice to the rule of law is most apt for constructive reform. Even greatly improved interaction of transitional justice and rule of law reconstruction will have a relatively minor impact on the emerging processes of peace and democratization. Over time, there has been a slow but far from universal acceptance that transitional justice 'claims too much', creating panacean expectations that dissolve into inevitable disappointment.[77] Rule of law reconstruction was similarly held out in the past as a solution to almost every international policy problem from democratization to development to stabilization,[78] but appears to have gone much further in tempering this initial hubris with more realistic expectations of what can be achieved in post-conflict/authoritarian ecologies that are even more inhospitable than those of generic developing states.[79] Within the universe of peace-building, rule of law reconstruction is a necessary but far from sufficient component of a successful transition to a functioning polity, while transitional justice is but one of many considerations in rebuilding the rule of law. Success in any field will largely depend on starting conditions, history and more recent economic, social and political legacies peculiar to each transition.

In the international human rights community, the assumption that transitional justice is critical to restoring legality has long been an article of faith.[80] However, while most scholars and advocates of transitional justice assume that the question of transitional justice 'presents the very first test for the establishment of the rule of law',[81] peace-builders and rule of law practitioners are considerably more circumspect. Though they generally accept that ending impunity is desirable in grounding the rule of law,[82] the use of trials, truth commissions, lustration or restoration can only ever amount to merely one element of a wider rule of law reconstruction programme, and far from the most essential. The contention that transitional justice can help ground the rule of law has generally been well-argued, but rarely put into the broader context of other factors that can promote and nurture the rule of law. Rule of law reconstruction is something of an umbrella term incorporating a wide range of essential tasks like writing or re-writing national constitutions,

restructuring the organizational framework of the courts, re-imposing law and order, drafting laws, improving institutional facilities for justice, human rights and anti-corruption mechanisms, creating procedures for training, selecting and disciplining judges, lawyers and police and improving links with subnational and traditional legal processes. One sees in Security Council Resolutions five basic clusters of meanings attributed to the rule of law, namely law and order, ending impunity, resolving the meta-conflict through law, protecting human rights and establishing principled governance.[83] Transitional justice may in some circumstances complement or help achieve these rule of law ends, but equally may be of only tangential importance to others and may even hinder, obstruct or contradict some of them. Transitional justice may affirm the rule of law or strengthen it but will not create it.

To simplify grossly by adopting Berlin's fox-hedgehog metaphor, transitional justice practitioners and scholars tend to view the rule of law through the lens of a single defining idea (an almost exclusive focus on legal and non-legal responses to human rights abuses, albeit broadly understood), while rule of law practitioners are foxes who, of necessity, must know many things.[84] While the transitional justice literature has viewed its mechanisms as fundamental to the prospects for the rule of law since the divisive peace versus justice debates that characterized the field in its early days,[85] it is often treated parenthetically (or not at all) in some of the main works on peace-building and rule of law reconstruction[86] or confined to conspicuously isolated chapters of edited volumes.[87] The relatively rare peace-building or rule of law reconstruction scholars who devote serious attention to transitional justice adopt an explicitly agnostic position on the prospects for positive spill-over effect from transitional justice to domestic rule of law.[88] Rule of law reconstructors must balance a holistic approach with the imperative of prioritizing that which is fundamental over that which is desirable. Transitional states are not faced with an oversimplified dilemma of 'no rule of law without transitional justice', but instead must cope with smaller, more discrete and complex choices about whether and how the often exceptionalist, ad hoc and localized/internationalized bodies of transitional justice can interact with more permanent, sustainable and nationalized processes of reform in the justice sector. In transitional societies with a handful of justice sector personnel, widespread public hostility to the idea of law and rampant crime or disorder, a concern with selectively accounting for the crimes of an already discredited and powerless regime may in rule of law terms seem like treating a nasty knee wound while the patient suffers major organ failure. As a recent study concluded, most policy-makers and rule of law development professionals have scant awareness of international justice issues, and even many of those most aware of its presumed urgency 'question the value of devoting significant resources to integrating international justice into their work, which is already replete with its own challenges and competing priorities'.[89] Only if scholars and practitioners of transitional justice can cast off their belief in its determinative importance to the rule of law can fruitful interaction begin.