

Redressing Social Inequality through Transitional Justice

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**COMPULSORY DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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## **Abstract**

By questioning whether addressing social inequality can be considered a form of transitional justice, this dissertation leads a critical discussion on the assumptions of traditional or narrow understandings of transitional justice, how these obscure the potential for transitional justice to tackle issues of economic and social rights violations, social inequality and other forms of structural violence, and the need for a broad understanding of transitional justice and its key components.

This dissertation addresses the historical and political roots of the field and how these influenced a traditional understanding of transitional justice. Thereafter, it traces broadening understandings of the concept, evident in the changing meanings of ‘justice’ and ‘transition’ and its stated aims. It then considers calls for transitional justice to go beyond its focus on civil and political rights violations and to further address economic and social rights violations and structural violence, and how these challenge the traditional understanding of the concept.

Drawing on the distinction between a concept and a conception, and considering transitional justice as an effectively contestable concept, this dissertation proposes a broad understanding of the concept as the pursuit of justice during a period of social or political transition in order to address past injustices and to work towards certain aspirations for the future, comprising of the key components of justice, transition, and backwards- and forwards-looking considerations.

With a primary focus on criminal and restorative justice, civil and political rights, and trials and truth commissions, the traditional conception of transitional justice is ill-equipped both conceptually and practically to address issues of structural violence. Instead, a conception of transitional justice motivated by social or distributive justice is best suited to address social inequality and other forms of structural violence.

Finally, this dissertation considers revolutionary Nicaragua’s attempts to redress social inequality in the areas of health, education and housing as an example of transitional justice. It is concluded that revolutionary Nicaragua’s concerted effort to address social inequality should be considered as a conception of transitional justice inspired by social and distributive justice. With growing calls for transitional justice to go beyond its traditional focus on criminal and restorative justice, scholars and practitioners stand to learn from previously overlooked examples of societies in transition tackling issues of social inequality and other forms of structural violence as a matter of transitional justice.

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## Chapter One - Introduction

### 1.1 Introduction

The field of transitional justice has been recognised for its rapid growth and establishment over the past 25 years.<sup>1</sup> However, fundamental questions surrounding transitional justice – those of responsibility, the appropriate means to redress wrongs, and rebuilding following conflict – have been addressed throughout history. Quinn draws attention to *The Oresteia* and Aeschylus' debate over what form of punishment was appropriate for Orestes' role in the occurrence of cyclical violence as evidence of this as early as 500 BC.<sup>2</sup> Elster finds questions of transitional justice addressed as early as the transition to democracy in Athens in 411 and 403 BC,<sup>3</sup> and later during the English restoration of the seventeenth century<sup>4</sup> and the French restorations during the early nineteenth century.<sup>5</sup>

The term 'transitional justice' found common use only in the early- to mid-1990s,<sup>6</sup> and established itself as a distinct field after 2000.<sup>7</sup> Many scholars trace the emergence of the field to the context of the 'third wave of democratization,' or the emergence of new democracies in Latin America and Central Europe during the 1980s and 1990s.<sup>8</sup> After these formative years, a 'traditional' transitional justice and mechanisms associated with it was recognised as:

[t]he full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all)

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<sup>1</sup> See for example Catherine Turner, "Transitional justice and critique," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs (Cheltenham: Edward Elgar, 2017), 52; Rosemary Nagy, "Transitional Justice as a Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008), 275; Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the Field or Non-Field," *International Journal of Transitional Justice* 3, no. 1 (2008): 6-9.

<sup>2</sup> Joanna R. Quinn, "The development of transitional justice," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, *Research Handbooks in International Law* (Cheltenham: Edward Elgar, 2017): 12, citing Aeschylus, *The Oresteia*, (Robert Fagles tr, Viking Press 1975).

<sup>3</sup> Jon Esalter, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press (2004): 4-23.

<sup>4</sup> Jon Elster, *Retribution and Reparation in the Transition to Democracy*, ed. Jon Esalter, Cambridge University Press (2006): 318.

<sup>5</sup> Esalter, *Closing the Books*, 24.

<sup>6</sup> Quinn, "The development of transitional justice," 11; Bell, "State of the Field or Non-Field," 7.

<sup>7</sup> Bell, "State of the Field or Non-Field," 7.

<sup>8</sup> Thomas Obel Hansen, "The Time and Space of Transitional Justice," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, *Research Handbooks in International Law* (Cheltenham: Edward Elgar, 2017), 34. The term 'third wave of democratization' is attributed to Samuel Huntington. See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1991.

and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>9</sup>

The field's quick ascension and consolidation was not met with unanimity, however, with 'considerable debates concerning what transitional justice is or should be',<sup>10</sup> an unease among practitioners 'center[ing] on what the field's goals are and should be',<sup>11</sup> and critique of its mechanisms and their effectiveness. At the forefront of this critique, and the subject of this dissertation, is the historic absence and potential role of social justice in transitional justice. The neglect of economic and social rights in transitional justice is widely recognised in academic literature.<sup>12</sup> Conversely, the prioritisation of civil and political rights is also widely recognised.<sup>13</sup> In response, there have been increasing calls for and debate over the potential of transitional justice to address social and economic rights violations, social inequality, and other forms of structural issues.

Within this 'transitional justice and social and economic justice' critique of the field, Catherine Turner identifies a school of thought consisting of a 'push in the literature to use the absence of economic and social rights within transitional justice discourse and practice as an opportunity to challenge the concept of justice that underpins the field.'<sup>14</sup> Turner describes this school of thought as a 'much bigger and more ambitious project, concerned with expanding the conceptual boundaries of "justice" to include social justice and address structural

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<sup>9</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. U.N. Doc. S/2004/616. August 23, 2004.

<sup>10</sup> Cheryl Lawther and Luke Moffett, "Introduction - Researching Transitional Justice: The Highs, the Lows and the Expansion of the Field," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs (Cheltenham: Edward Elgar, 2017), 3.

<sup>11</sup> Bell, "State of the Field or Non-Field," 6. *For further discussion, see* Kirsten Ainley, "Evaluating the Evaluators: Transitional Justice and the Contest of Values," *International Journal of Transitional Justice* 11, no. 3 (2017).

<sup>12</sup> *See for example*, Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21 (2012); Dustin N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal* 26 (2013); Louise Arbour, "Economic and Social Justice for Societies in Transition," *International Journal of Law and Politics* 40, no. 1 (Fall 2007); Zinaida Miller, "Effects of Invisibility: In Search of the Economic in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008); Evelyne Schmid and Aoife Nolan, "Do No Harm? Exploring the Scope of Economic and Social Rights in Transitional Justice," *International Journal of Transitional Justice* 8 (September 14, 2014); Frank Haldemann and Rachele Kouassi, "Transitional Justice Without Economic, Social, and Cultural Rights?" *Economic, Social, and Cultural Rights in International Law*, 2014; Amanda Cahill-Ripley, "Foregrounding Socioeconomic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights," *Netherlands Quarterly of Human Rights* 32, no. 2 (2014).

<sup>13</sup> *See for example* Waldorf, "Anticipating the Past"; Paul Greedy and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice* 8, no. 3 (2014); and Sharp, "Interrogating the Peripheries"; Roger Duthie, "Transitional Justice, Development, and Economic Violence," in *Justice and Economic Violence in Transition*, ed. Dustin N. Sharp (New York: Springer Nature, 2014); Arbour, "Economic and Social Justice"; Miller, "Effects of Invisibility".

<sup>14</sup> Turner, "Transitional justice and critique," 59-60.

inequality.<sup>15</sup> Similarly, Dustin Sharp characterises this as broadening the focus from ‘physical violence’, associated with civil and political rights violations to including ‘economic violence’, associated with economic and social rights violations.<sup>16</sup> Sharp identifies ‘thick’ and ‘thin’ approaches to transitional justice addressing economic violence, with the latter restricting itself to addressing violations of economic and social rights during conflict, and the former additionally addressing structural violence and social inequality that predates conflict.<sup>17</sup>

Scholars have been critical of transitional justice’s failure to address matters of social inequality, marginalization, and other consequences of structural violence.<sup>18</sup> Nevin Aiken, for example, draws on the example of ‘continued post-apartheid presence of deep structural and material inequalities between racial groups’ in South Africa as undermining transitional justice’s goals of truth, justice, and reconciliation.<sup>19</sup> Ismael Muvingi similarly argues that the ‘exclusion of socioeconomic equity calls into question the very objectives of transitional justice.’<sup>20</sup>

This dissertation is necessarily concerned with a ‘thick’ approach to transitional justice, or where transitional justice addresses social inequality and structural violence predating conflict or transition. The reluctance or failure of transitional justice to address socioeconomic issues has prompted scholars to call for discussions on the conceptualisation of the field itself,<sup>21</sup> and others to consider new concepts altogether that may more appropriately address socioeconomic issues.<sup>22</sup> The ‘traditional’ understanding of transitional justice, as provided above, is contested, and the concept of transitional justice itself is the subject of scrutiny and renegotiation.

As will be discussed in this dissertation, political considerations during transitional justice’s formative years were influential in determining how it would be traditionally understood, and in its pre-emptive exclusion of considerations of economic and social rights violations, structural violence, and social inequality. These political considerations similarly excluded

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<sup>15</sup> Turner, “Transitional justice and critique,” 59-60.

<sup>16</sup> Dustin N. Sharp, "Introduction: Addressing Economic Violence in Times of Transition," in *Justice and Economic Violence in Transition*, ed. Dustin N. Sharp (New York: Springer Nature, 2014), 785.

<sup>17</sup> *Ibid.*, 803.

<sup>18</sup> For a full discussion, see Chapter 3.

<sup>19</sup> Nevin T. Aiken, "The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission’s Ability to Advance Interracial Reconciliation in South Africa," *Journal of Contemporary African Studies* 34, no. 2 (2016): 190-202. For further discussion, see Sharp, “Addressing Economic Violence,” 783.

<sup>20</sup> Ismael Muvingi, "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies," *International Journal of Transitional Justice* 3, no. 2 (2009): 165.

<sup>21</sup> *Ibid.*, 164.

<sup>22</sup> For a full discussion on Transformative Justice, see Chapter 2, Section 2.3.2, and Chapter 3, Section 3.3.3.

revolutionary Nicaragua and their efforts to redress social inequality as a case of transitional justice. Where pre-revolutionary Nicaragua was characterised by a state of absolute poverty and inequality, revolutionary Nicaragua saw ‘tremendous progress [...] in meeting the needs of the masses’, with accomplishments in health, education, housing, and welfare specifically recognised.<sup>23</sup> These initiatives were a concerted effort to address the social injustices of the past during the country’s transitional period.

## 1.2 Research Question

In light of the above, this dissertation will inquire into the meaning of transitional justice and its potential to address social inequality by exploring the following research question:

*Could redressing social inequality be considered a form of transitional justice?*

This research question can be usefully divided into two sub-questions, which will be addressed in this dissertation:

Sub-question one: *How can transitional justice be defined as a concept?*

Sub-question two: *Is redressing social inequality a form of transitional justice?*

In order to ground this theoretical discussion with a practical example, an additional sub-question will also be addressed:

Sub-question three: *Could revolutionary Nicaragua’s attempts to redress social inequality be considered a form of transitional justice?*

## 1.3 Methodology

The methodology of this paper draws on the distinction between a *concept* and its varying *conceptions*, and the understanding that a concept may be effectively contestable. This approach has been used by Andrew Schaap in his rebuttal to the objection that reconciliation is too broad or vague to be a distinct concept. Schaap distinguished between a non-controversial *concept* of reconciliation and its many *conceptions*, which ‘emerge in public debates about how it might be achieved, what “real” or “true” reconciliation would require’,<sup>24</sup>

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<sup>23</sup> Harvey Williams, "The Social Impact in Nicaragua," in *Reagan Versus the Sandinistas: The Undeclared War*, ed. Thomas W. Walker (Boulder & London: Westview Press, 1987), 247.

<sup>24</sup> Andrew Schaap, "Reconciliation as Ideology and Politics," *Constellations* 15, no. 2 (2008): 250.

concluding that reconciliation as a political concept is effectively contestable. In a similar vein, this dissertation will approach transitional justice as an effectively contestable *concept* and consider whether addressing social inequality is a form or *conception* of transitional justice.

An understanding of transitional justice as an effectively contestable concept is fundamental to the methodology of this dissertation. A concept is effectively contestable when ‘its contestability is not an essential property of the concept but a property of political discourse’ and that contestability is ‘*effectively ineliminable*’.<sup>25</sup> Michael Freeden provides three arguments for viewing concepts as effectively contestable. Firstly, drawing on the adage ‘history does not repeat itself,’ he argues that the ‘circumstances of non-trivial political choice-making will never be identical and the world of politics does not remain constant.’ Secondly, Freeden applies the above lesson to context, arguing that the context in which a concept finds itself is subject to inevitable and unpredictable change. Accordingly, effective contestability concedes that ‘we cannot conceive [...] of the impossibility of conferring on a political discourse a new reading, or a reading that is not identical to any previous one.’<sup>26</sup> Finally, Freeden recalls that a ‘central feature of political discourse is the construction of ambiguity’.<sup>27</sup>

Viewing a concept as effectively contestable allows for political discourse and challenges a regulated consensus of the concept. In our case, the political discourse around what transitional justice is, what its goals are, and how it should achieve these, manifests as varying *conceptions* of the *concept* of transitional justice.

Before attempting to address a conception of transitional justice, it is necessary to have a clear understanding of a concept of transitional justice, detached from the ongoing political discourse surrounding its meaning. To this end, this dissertation adopts a pragmatic approach to conducting a conceptual analysis of transitional justice as a concept. A conceptual analysis seeks to discover the ‘elements a concept is composed of and how these elements are related.’<sup>28</sup> A pragmatic approach to conceptual analysis ‘would consist in uncovering the most salient features of the concept: those that figure most prominently in an explanation of the kind of thing it is the concept of—that are central to our understanding and appreciation of it’.<sup>29</sup> This

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<sup>25</sup> Michael Freeden, "Editorial: Essential Contestability and Effective Contestability," *Journal of Political Ideologies* 9, no. 1 (2004): 5.

<sup>26</sup> *Ibid.*, 10.

<sup>27</sup> *Ibid.*

<sup>28</sup> Nicholas Bunnin and Jiyuan Yu, *The Blackwell Dictionary of Western Philosophy* (Malden: Wiley-Blackwell, 2009), 127.

<sup>29</sup> Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal*

approach is necessary as it accommodates a concept of transitional justice that is effectively contestable and conducive to political discourse.

This author is aware of Giovanni Sartori's warning over conceptual stretching – the broadening of the meaning of a concept as it is applied to new cases and the resultant 'vague' and 'amorphous' concepts.<sup>30</sup> Writing at a time of expansion of the field of political science and the proliferation of political systems in the mid to late twentieth century,<sup>31</sup> Sartori recognised the need for 'universal' categories or 'concepts which are applicable to any time and place',<sup>32</sup> however was wary of concepts lacking limitations or clear definitions.<sup>33</sup> In his own words: '[i]n order to obtain a world-wide applicability the extension of our concepts has been broadened by obfuscating their connotation' or 'by reducing the number of qualifying attributes'.<sup>34</sup>

Sartori's critique, however, presumes a concept as being 'previously defined and refined'.<sup>35</sup> As discussed above, and as further addressed in this dissertation, there is significant discord, debate, and political discourse in the field of transitional justice, with the concept itself under scrutiny and subject to renegotiation. To presume transitional justice as previously defined and refined would be antithetical to the ongoing political discourse in the field. As Thomas Hansen posits, we 'cannot speak of transitional justice in a static and uniform sense'.<sup>36</sup>

#### 1.4 Chapter Outline

In addition to this introductory Chapter, this dissertation consists of three main chapters and a conclusion.

Chapter Two first provides an overview of the roots and political considerations behind the field of transitional justice and how it is traditionally understood. Thereafter it seeks to gain an understanding of the current state of the field, with a focus on how the 'transition' and 'justice' of transitional justice have come to be understood more broadly. Having provided an overview of both traditional and emerging understandings of the concept, it is argued that transitional

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*Theory* (Oxford University Press, 2001), 179.

<sup>30</sup> See generally, Giovanni Sartori, "Concept Misinformation in Comparative Politics," *The American Political Science Review* 64, no. 4 (December 1970).

<sup>31</sup> *Ibid.*, 1034.

<sup>32</sup> *Ibid.*, 1035.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, 1051, 1053.

<sup>35</sup> *Ibid.*, 1033-34.

<sup>36</sup> Thomas Obel Hansen, "The time and space of transition," 34-51.

justice is best understood as an effectively contestable concept. This in turn informs a pragmatic conceptual analysis of transitional justice which identifies its key components.

Chapter Three first provides a review of select readings in transitional justice literature regarding the inclusion of economic and social rights and issues of structural violence in transitional justice's scope, including the varying degrees to which it is argued these should or should not be included. The Chapter then addresses the continued exclusion of matters of structural violence and social inequality despite calls for the inclusion of economic and social rights, and the causes for this. Finally, with the understanding of transitional justice and its key components as proposed in Chapter 2, this Chapter considers whether addressing social inequality could be considered a form of transitional justice.

Chapter Four considers revolutionary Nicaragua (1979 to 1982) and its attempts to redress social inequality as an effort to advance transitional justice. A brief introduction canvases Nicaragua's brief mention in transitional justice literature and provides the historical background necessary for the inquiry. The Chapter then addresses revolutionary Nicaragua's initiatives in the areas of health, education and housing, and considers how these may be considered a form of transitional justice. The purpose of this chapter is to ground the theoretical inquiries of Chapters Two and Three with a practical example of addressing social inequality as a conception of transitional justice.

Finally, Chapter Five concludes with an overview of key points and final thoughts.

## Chapter Two: Transitional Justice and its Conceptions

### 2.1 Introduction

The lack of consensus on a meaning of transitional justice has proven insurmountable for over a decade.<sup>37</sup> However, between the field's formative years, characterized by hotly contested questions of how to achieve justice during times of transition and its current state of contest over meaning, transitional justice enjoyed a period of marginal consensus. Transitional justice experienced a 'dramatically compressed trajectory of fieldhood', consolidating itself as a distinct field in the early 2000s, and by 2009 becoming 'a broad, multidisciplinary field that subjects its own origins, assumptions and political significance to radical critique.'<sup>38</sup> It is during the field's consolidation in the early 2000s that it experienced a period of marginal consensus, with noteworthy definitions capturing the traditional understanding of transitional justice.

Building off her earlier work, Ruti Teitel proposed a definition of transitional justice in her 2003 article *Transitional Justice Genealogy*,<sup>39</sup> defining transitional justice as: 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.'<sup>40</sup> Following a year later, through the United Nations' official endorsement of the field in 2004, UN Secretary-General Kofi Annan defined transitional justice as: 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'<sup>41</sup> These definitions reflect the

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<sup>37</sup> See for example, Alexander L. Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs* 60, no. 1 (Fall 2006): 17; Bell, "State of the Field or Non-Field," 6; Pablo De Greiff, "Theorizing Transitional Justice," *Transitional Justice* 51 (2012): 32; Lawther and Moffett, "Introduction - Researching Transitional Justice," 3; Alana Tiemessen, "International Justice Scholars and Advocates: One Big Happy Principled Family?" Duck of Minerva (blog), June 6, 2011; Jens D. Ohlin, "On the Very Idea of Transitional Justice," Cornell Law Faculty Publications, Spring 2007, 51; Ainley, "Evaluating the Evaluators," 423; Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 359.

<sup>38</sup> Bell, "State of the Field or Non-Field," 7. Dustin Sharp describes the field's accelerated growth as 'nothing short of remarkable'. Sharp, "Addressing Economic Violence," 2. Fletcher and Weinsten noted the maturation of transitional justice literature in the 2000s, also observing a 'sharp upstick in 2003', see L. E. Fletcher and H. M. Weinsten, "Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals," *Journal of Human Rights Practice* 7, no. 2 (2015): 179.

<sup>39</sup> Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003); Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

<sup>40</sup> Teitel, "Transitional Justice Genealogy," 69.

<sup>41</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. U.N. Doc. S/2004/616. August 23, 2004.

traditional understanding of transitional justice that is the subject of scrutiny by scholars and practitioners today.<sup>42</sup>

With the field finding a brief period of consensus to develop this traditional understanding of transitional justice, it begs the question as to why consensus around these definitions have deteriorated to such an extent. Scholars have cited ‘confusion’<sup>43</sup> and ‘unease’<sup>44</sup> when characterising the state of the field, describing it as a ‘web of tangentially connected practices and philosophies’,<sup>45</sup> at a ‘crossroads’,<sup>46</sup> and the concept itself ‘an enigma’.<sup>47</sup>

A significant challenge to the concept stems from recognition of the field’s prioritization of civil and political rights (CPR) to the neglect of economic and social rights (ESR) and issues of structural violence,<sup>48</sup> calling into question the legitimacy of the practice itself.<sup>49</sup> This state of confusion and disagreement leaves the concept of transitional justice open for renegotiation and reconceptualization.<sup>50</sup> Therefore, prior to considering whether addressing social inequality is a form of transitional justice, it is necessary to establish a clear understanding of transitional justice as a concept in the midst of the confusion.

In order to account for the lack of consensus in the field and to come to an understanding that can be agreed upon, it is necessary to acknowledge the historical and political roots that influenced traditional understandings of transitional justice. Looking at transitional justice’s

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<sup>42</sup> Teitel’s definition has been characterized as ‘narrow’, ‘traditional’, ‘classic’ and ‘legalistic’. See for example, Simon Robins, "Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations.," *Human Rights and International Legal Discourse* 11, no. 1 (2017): 42; Schmid and Nolan, "Do No Harm?" 380; Sharp, "Addressing Economic Violence," 6; *For further discussion on narrow transitional justice*, see Haldemann and Kouassi, "Transitional Justice Without Economic, Social, and Cultural Rights?" 2; Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (December 2007): 164; Cahill-Ripley, "Foregrounding Socioeconomic Rights in Transitional Justice," 187.

<sup>43</sup> Boraie, "Transitional Justice: A Holistic Interpretation," 17.

<sup>44</sup> Bell, "State of the Field or Non-Field," 6.

<sup>45</sup> Quinn, "The development of transitional justice," 15.

<sup>46</sup> Vasuki Nesiah, *Transitional Justice Practice: Looking Back, Moving Forward*, Research Report, Impunity Watch, May 2016, 11.

<sup>47</sup> Ohlin, "On the Very Idea of Transitional Justice," 51.

<sup>48</sup> *See for example*, Waldorf, "Anticipating the Past"; Sharp, "Interrogating the Peripheries"; Arbour, "Economic and Social Justice"; Miller, "Effects of Invisibility"; Schmid and Nolan, "Do No Harm?"; Haldemann and Kouassi, "Transitional Justice Without Economic, Social, and Cultural Rights?"; Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice"; Roger Duthie, "Transitional Justice, Development, and Economic Violence"; Gready and Robins, "From Transitional to Transformative Justice".

<sup>49</sup> *See for example*, Nesiah, *Transitional Justice Practice*, 5.

<sup>50</sup> *See for example*, Sharp, "Addressing Economic Violence," 790; Bell, "State of the Field or Non-Field," 27; Schmid and Nolan, "Do No Harm?" 379; Haldemann and Kouassi, "Transitional Justice Without Economic, Social, and Cultural Rights?" 2; Cahill-Ripley, "Foregoing Socio-Economic Rights in Transitional Justice," 185; Nesiah, *Transitional Justice Practice*, 11-12.

growth from the early years of the Nuremberg Trials through its formative years in the 1980s and 1990s and to its consolidation in the early 2000s reveals the significance of a Western liberal agenda, a growing international criminal justice regime and international institutionalism that shaped how the concept would be traditionally understood. These political roots determined the way in which the transition, justice, and backwards- and forwards-looking components of transitional justice would be defined and are central to the reason behind the field's neglect of ESR and unwillingness to directly address structural violence. By failing to account for these roots, adopting a traditional understanding of transitional justice prevents the consideration of alternative accounts of societies in transition addressing the past as potential examples of transitional justice, including the case of revolutionary Nicaragua in the early 1980s, and the opportunity to learn from such experiences. Accounting for these political roots and coming to a broad understanding of transitional justice is a first step towards considering revolutionary Nicaragua's efforts to address structural violence as an example of transitional justice.

To this end, the following section provides a brief overview of the history of the field of transitional justice and considers how the political considerations of these roots influenced the 'traditional' understanding of the concept. The following section traces the field's broadening from its roots through the changing meanings of 'transition' and 'justice', and addresses how the choice of mechanisms has been resilient to change. Finally, the field's broadening in meaning and scope informs a pragmatic conceptual analysis of transitional justice and the key components that make it a distinct concept. This Chapter answers the question, 'How is transitional justice defined as a concept?'

## 2.2 Traditional Transitional Justice and its Historical and Political Roots

### 2.2.1 Brief History of Transitional Justice

Fundamental questions surrounding transitional justice have been addressed as early as 500 BC,<sup>51</sup> and measures currently associated with the practice have been used as far back as 2,000

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<sup>51</sup> Quinn, "The development of transitional justice," 12, citing Aeschylus, *The Oresteia*, (Robert Fagles tr, Viking Press 1975); Elster, *Closing the Books*, 4-24; Elster, *Retribution and Reparation in the Transition to Democracy*, 318; Lauren Marie Balasco, "The Transitions of Transitional Justice: Mapping the Waves From Promise to Practice," *Journal of Human Rights* 12, no. 2 (2013): 199.

years ago.<sup>52</sup> Despite these historic accounts however, scholars locate the origins of the current field in the twentieth century, with the most formative years in the latter two decades.

In her highly influential article, Teitel identified three phases in the history of transitional justice,<sup>53</sup> which have since been expanded and elaborated on.<sup>54</sup> Considered a prelude to the first phase, the post-World War I period saw the ‘origins of modern transitional justice’ as deliberations were held around the appropriate form of administering justice for German aggression.<sup>55</sup> Teitel believes the experiences (or more aptly, failures) of post-World War I attempts to deter the outbreak of conflict through the administration of collective sanctions and punitive justice informed transitional justice efforts after the Second World War.<sup>56</sup> These lessons ushered in the first phase, or the post-Second World War period. In this phase, national trials gave way to international criminal accountability, and collective punishment gave way to ‘individual judgement and responsibility’ for Nazi Germany’s crimes.<sup>57</sup> The primary normative aim of this phase was the establishment of rule of law and accountability, achieved through the administration of international criminal justice,<sup>58</sup> and was characterized by ‘interstate cooperation, war crimes trials, and sanctions’.<sup>59</sup> For Vasuki Nesiah, this phase was characterized as ‘relatively heterogenous and experimental’.<sup>60</sup>

Teitel’s second phase begins with the collapse of the Soviet Union and the ‘veritable wave of political transition’ that followed.<sup>61</sup> These political shifts, understood as transitions to democracy, are noted by Paige Arthur as ‘the crucial new developments of the 1980s’.<sup>62</sup> Indeed, most scholars identify the emergence of new democracies in Latin America and Eastern Europe during the 1980s and 1990s as the formative years of transitional justice.<sup>63</sup> In Latin

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<sup>52</sup> Arthur, "How "Transitions" Reshaped Human Rights," 327, citing Gary Bass, *Stay the Hand of Vengeance* (reviewing the history of war crimes tribunals over the past 200 years) and Jon Elster, *Justice in Historical Perspective* (tracing accounts of trials and purges as far back as 2,000 years ago).

<sup>53</sup> Teitel, "Transitional Justice Genealogy."

<sup>54</sup> See for example Nesiah, *Transitional Justice Practice*; Sharp, "Interrogating the Peripheries".

<sup>55</sup> Teitel, "Transitional Justice Genealogy," 72.

<sup>56</sup> *Ibid.*, 72-73.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 73.

<sup>59</sup> *Ibid.*, 70.

<sup>60</sup> Nesiah, *Transitional Justice Practice*, 7.

<sup>61</sup> Teitel, "Transitional Justice Genealogy," 75-76. See also, Nesiah, *Transitional Justice Practice*, 7.

<sup>62</sup> Arthur, "How "Transitions" Reshaped Human Rights," 336.

<sup>63</sup> *Ibid.*, 324, 326; Hansen, "The Time and Space of Transitional Justice," 34; International Center for Transitional Justice, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017): 5; Sharp, "Interrogating the Peripheries," 153; Balasco, "The Transitions of Transitional Justice," 199-200; Nesiah, *Transitional Justice Practice*, 7.

America, successor regimes were confronted by questions of how to deal with past authoritarian regimes and ‘repressive military juntas’, and dilemmas associated with these – namely, determining to what extent accountability through criminal or retributive justice should be pursued at the risk of jeopardizing the maintenance of peace.<sup>64</sup>

In response to this dilemma, criminal justice and the pursuit of accountability was complimented by restorative justice and the goal of constructing ‘an alternative history of past abuses’,<sup>65</sup> and the restoration of relations between people and communities. The shift to restorative justice, primarily pursued through truth commissions in lieu of trials and prosecutions,<sup>66</sup> demonstrated the second phase’s goal of maintaining peace rather than the pursuit of justice.<sup>67</sup> Similar efforts can be noted in South Africa, where the establishment of the Truth and Reconciliation Commission, the exchange of amnesty for truth, and limited prosecutions were considered viable alternatives to ensure a peaceful transition.

This phase also faced certain conceptual challenges. For Teitel, the incorporation of restorative justice in the transitional justice process generated problematic dichotomies which undermined rule of law standards: regarding the use of truth commissions in lieu of trials and prosecution, a conflict between truth and justice;<sup>68</sup> regarding a ‘jurisprudence of forgiveness and reconciliation’ motivated by the pursuit of peace, a conflict between peace and justice.<sup>69</sup> For Nesiah, transitional justice’s individualistic focus on physical violence failed to address more systemic issues and victims thereof, creating a disconnect between the advancement of international law and human rights activism and victims of systematic abuses.<sup>70</sup> Thus, the second phase was characterized by the field’s formation and rapid growth, but also by challenges to how transitional justice should be put into practice.

Writing at the turn of the century, Teitel characterized the third phase as ‘steady-state transitional justice’,<sup>71</sup> where transitional justice ‘move[d] from the exception to the norm’ and became central in international policymaking during transition, a notion Sharp believes

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<sup>64</sup> Teitel, “Transitional Justice Genealogy,” 75. (‘Peace’ here refers to the conception of peace as ‘negative peace’).

<sup>65</sup> *Ibid.*, 78.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, 79-80.

<sup>68</sup> *Ibid.* 78.

<sup>69</sup> *Ibid.*, 81-82.

<sup>70</sup> Nesiah, *Transitional Justice Practice*, 8-9.

<sup>71</sup> Teitel, “Transitional Justice Genealogy,” 89-90.

confirmed by the UN Secretary General's official endorsement of transitional justice.<sup>72</sup> Indeed, transitional justice would come to be described as a 'global project'<sup>73</sup> and a 'global enterprise'.<sup>74</sup> Nesiah saw the field's consolidation as 'narrow[ing] the field of experimentation and mobiliz[ing] a normative model of transitional justice', and a rallying of scholars and practitioners around the 'pillars of transitional justice', including prosecutions, truth commissions, reparations and institutional reform. It is during this phase that the field found a period of marginal consensus, allowing a traditional understanding of transitional justice to galvanize.

Finally, Nesiah and Sharp fill the gap since Teitel's article by recognising a fourth and current phase of transitional justice. Sharp characterizes the current phase by a growing concern over issues that sit at the 'periphery' of transitional justice, including 'the need to account for the underlying politics of transitional justice work, the need to balance local and international agency, and the need for greater economic justice.'<sup>75</sup> In a similar vein, Nesiah believes the most contentious issue relates to 'whether the field should be defined in terms of institutions [...], or whether those institutions should be situated as avenues to deeper socio-political transformation', including the question of addressing economic crimes and structural violence.<sup>76</sup> Thus, the current phase of transitional justice is characterized by challenges to its traditional understanding, including calls for ESR concerns and structural violence to be addressed.

### 2.2.2 The Political Roots of the Field

While Teitel's genealogy provides a useful overview of the history and progression towards a traditional understanding of the concept, it does not problematize the inherent political nature of transitional justice and the assumptions of its traditional understanding, and does not explain revolutionary Nicaragua's exclusion as an example of transitional justice.

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<sup>72</sup> Sharp, "Interrogating the Peripheries," 156, *citing* UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.

<sup>73</sup> Nagy, "Transitional Justice as a Global Project".

<sup>74</sup> Miller, "Effects of Invisibility," 1.

<sup>75</sup> Sharp, "Interrogating the Peripheries," 157.

<sup>76</sup> Nesiah, *Transitional Justice Practice*, 11-12 (Nesiah does not expressly mention structural violence, however her reference to 'structures that sustain the on-going disempowerment of victims and other marginalized communities' alludes to it).

In her effort to locate the origins of the field, Arthur investigated the emergence and acceptance of the term ‘transitional justice’.<sup>77</sup> While finding earlier mentions and attributing authorship, amongst others, to Teitel, Arthur credits editor Neil Kritz with the widespread transmission and acceptance of the term.<sup>78</sup> Kritz completed the mammoth task of compiling literature on ‘the way that emerging democratic societies address the legacies of their repression of their own people’.<sup>79</sup> Kritz’s work and his understanding of transitional justice was highly influential in how transitional justice would come to be defined. For Arthur, the transmission and acceptance of the term transitional justice is attributable to Kritz given the few instances the term was referenced by scholarly journals in 1994 as opposed to its more frequent reference by 2000, and the acceptance of the ‘utility of the term itself [and] the contents of the term proposed’ by reviewers of his work.<sup>80</sup> Kritz’s influence is similarly recognised by other scholars - Balasco considers Kritz’s work the ‘high point of [the] explorative era’ of transitional justice during the 1980s and 1990s,<sup>81</sup> while Teitel cites his work as a ‘helpful compilation’ of transitional justice while proposing a definition for the term.<sup>82</sup>

Kritz’s work reveals a key political consideration that shaped traditional understandings of transitional justice, namely the goal of promoting Western style democracy in states emerging from authoritarianism. That Kritz envisioned ‘transition’ as a transition to democracy is made clear by the title of his voluminous account of transitional justice – *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* – and is stated in clear terms.<sup>83</sup> Democratic reform was a ‘stated goal of important segments of the population in countries undergoing political change’ during the formative years of transitional justice,<sup>84</sup> and for Kritz, transitional justice could establish democracy and the rule of law - ‘the very principles that [would] hopefully distinguish the new regime from the old’.<sup>85</sup> At the base of these aims is what

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<sup>77</sup> Arthur, "How "Transitions" Reshaped Human Rights," 327-33.

<sup>78</sup> Ibid., 329. (Arthur discusses Timothy Garton Ash as a notable exception to the acceptance of Kritz’s notion of transitional justice. Ash’s critique primarily centered around the narrowness of the proposed notion.)

<sup>79</sup> Charles D. Smith, "Introduction," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I - General Considerations, vol. 1, ,* ed. Neil J. Kritz (United States Institute of Peace, 1995), xviii, [emphasis in original].

<sup>80</sup> Arthur, "How "Transitions" Reshaped Human Rights," 331.

<sup>81</sup> Balasco, "The Transitions of Transitional Justice," 200.

<sup>82</sup> Teitel, "Transitional Justice Genealogy," note no. 3. For further examples, see Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3, no. 1 (2008): Footnote no. 4; Stef Vandeginste, "Transitional Justice for Burundi: A Long and Winding Road," *Building a Future on Peace and Justice*, 2009, Footnote no. 1.

<sup>83</sup> Smith, "Introduction," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, xviii.

<sup>84</sup> Arthur, "How "Transitions" Reshaped Human Rights," 337.

<sup>85</sup> Smith, "Introduction," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, xxi.

Sharp describes as a ‘Western liberal paradigm undergirding the birth of the field of transitional justice’,<sup>86</sup> an observation bolstered when noting that Kritz’s work was only reviewed by Western institutions – the vast majority in the United States, and only one in Europe.<sup>87</sup>

Arthur elaborates on the origins of transitional justice as rooted in a Western paradigm, finding the term ‘transition’ in political discourse originally conceptualized by Marxists to describe social transformations, or ‘changes at the structural level of society and economy’.<sup>88</sup> As a response to a global ideological shift away from the left in the 1970s and 1980s, however, the term was repurposed by political analysts who ‘recast it in terms of political reform, rather than social transformation’.<sup>89</sup> The object of this political reform or transition, and the goal of traditional transitional justice, was the establishment of a Western style democracy. With the role of transitional justice envisioned as promoting political reform, a focus on CPR developed instead of a focus on addressing the ESR necessary for social transformation.<sup>90</sup> Cold War politics prevented addressing such concerns ‘given the high political price of appearing too sympathetic to their communist causes’,<sup>91</sup> and was largely the reason for why revolutionary Nicaragua’s transition from authoritarianism to democratic socialism was not considered to be transitional justice.

In order to advance accountability and establish the rule of law necessary for a Western liberal democracy, transitional justice pursued criminal or retributive forms of justice, or those forms ‘generally associated with legal trials in the Western legal justice system.’<sup>92</sup> These forms of justice, primarily achieved through trials or prosecutions, secured the dominance of legalism over the field,<sup>93</sup> along with a ‘longstanding legalistic bias’<sup>94</sup> for a prioritization of CPR,<sup>95</sup>

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<sup>86</sup> Sharp, “Interrogating the Peripheries,” 149. *See also*, Nagy, “Transitional Justice as Global Project,” 275. (Nagy similarly characterizes transitional justice as a ‘[s]teeped in Western liberalism’.)

<sup>87</sup> *For a full discussion, see* Arthur, “How “Transitions” Reshaped Human Rights,” 330-31.

<sup>88</sup> *Ibid.*, 338.

<sup>89</sup> *Ibid.*, 338-339.

<sup>90</sup> The division of these rights as a consequence of Cold War politics is reflected in the signing of two separate international convention of rights: International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. *See for example*, OHCHR, “Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?”

<sup>91</sup> Lisa J. Laplante, “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2, no. 3 (December 1, 2008): 335, *citing* Richard Asby Wilson, “Is the Legalization of Human Rights Really the Problem? Genocide in the Guatemalan Historical Clarification Commission,” in *The Legalisation of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, ed. Saladin Mechled-Garcia and Basak Cali (New York: Routledge, 2005).

<sup>92</sup> Lambourne, “Transitional Justice and Peacebuilding,” Footnote no. 6

<sup>93</sup> *For full discussion, see* McEvoy, “Beyond Legalism”.

<sup>94</sup> Waldorf, “Anticipating the Past,” 173.

<sup>95</sup> *See* Cahill-Ripley, “Foregoing Socio-Economic Rights in Transitional Justice,” 188.

concerns of violations of physical or bodily integrity (i.e., murder, rape, torture and forced disappearance)<sup>96</sup> and physical violence.<sup>97</sup> As will be discussed in Chapter Three, transitional justice's focus on these forms of justice, the dominance of legalism, and the consequential prioritization of CPR has been to the detriment of ESR concerns, including demands to address structural violence and social inequality.

This traditional understanding of transitional justice was consolidated, institutionalized and internationalized from the early 2000s onwards. Transitional justice and its 'pillars' were increasingly called upon by UN bodies and international NGOs to facilitate transitions,<sup>98</sup> and a focus on criminal justice was secured by the founding of the International Criminal Court and various special tribunals to address past injustices in transitional societies.<sup>99</sup> For many scholars, the field's consolidation distanced transitional justice from the societies it served as it became increasingly internationalised, with Western countries enjoying a monopoly of the field.<sup>100</sup> The narrow or traditional understanding of transitional justice, informed by unique experiences of the 1980s and 1990s in Latin America, was standardized and offered as a solution to societies undergoing transition in different parts of the world without accounting for local context or demands.<sup>101</sup> A focus on addressing issues of physical violence through criminal justice was also consolidated in the traditional understanding of transitional justice, leaving issues of economic and social rights violations (ESRV) and structural violence unaddressed, thereby entrenching past inequality into the future and restricting opportunity for social change during transition.<sup>102</sup>

While the Cold War has ended, political considerations that influenced transitional justice are much alive in how it is traditionally understood today. A Western agenda of establishing liberal democracy in countries emerging from authoritarianism influenced key components of

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<sup>96</sup> Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice* 9, no. 1 (2014): 160.

<sup>97</sup> Sharp, "Addressing Economic Violence," 785.

<sup>98</sup> Nesiah, *Transitional Justice Practice*, 10 (recognises the 'pillars' as prosecutions, truth commissions, reparations and institutional reform); Sharp, "Interrogating the Peripheries," 156; UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.

<sup>99</sup> For further discussion, see for example, McEvoy, "Beyond Legalism," 421; Sharp, "Interrogating the Peripheries," 156; Nesiah, *Transitional Justice Practice*, 10.

<sup>100</sup> Nesiah, *Transitional Justice Practice*, 13-18. See also, McEvoy, "Beyond Legalism," 425, citing Paul Gready, "Analysis: Reconceptualising Transitional Justice: Embedded and Distanced Justice," *Conflict, Security & Development* 5, no. 1 (2005): 2-21.

<sup>101</sup> For further discussion, see Sharp, "Interrogating the Peripheries," 170, citing James Cavallaro and Sebastian Albuja, "The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond," in *Transitional Justice from Below, Grassroots Activism and the Struggle for Change*, eds. Kieran McEvoy and Lorna McGregor, 2008: 122.

<sup>102</sup> For further discussion, see Nesiah, *Transitional Justice Practice*, 10-11.

transitional justice, namely: that the term ‘transition’ entails a transition to democracy; that justice is primarily associated with its criminal or retributive forms, and secondarily with its restorative form; that the normative aims are primarily the establishment of democracy, the rule of law, and the pursuit of accountability, and secondarily, the pursuit of truth and reconciliation; and finally, the understanding that these normative aims and demands for justice are best pursued through a particular set of mechanisms, namely prosecutions or trials, truth commissions or commissions of inquiry, reparations and institutional reform.

As mentioned above, while transitional justice and its traditional understanding managed to find marginal consensus, this narrow understanding is increasingly being challenged. As the following section will show, the ‘transition’ and ‘justice’ components of transitional justice, which past injustices it is called upon to address and which aspirations it is called upon to pursue have come to be understood differently than the traditional understanding reviewed above. That transitional justice is open to multiple understandings suggests it may be understood as a contestable concept, where its key components may be understood or valued differently. The reason for the lack of consensus on transitional justice, then, is due to perpetuating assumptions inherited from the Western liberal agenda during the field’s formative years within the traditional understanding of transitional justice that clash with new demands and expectations. Writing of her account on the emergence of transitional justice, Sharp believes Arthur was ‘exploring the idea that if paradigmatic political transitions of the 1980s and 1990s had been conceived of as transitions to socialism, the scope, focus, and modalities of transitional justice might look quite different today.’<sup>103</sup> If consensus on an understanding of transitional justice is to be found, it should shed the political assumptions of a Western liberal agenda, and rather be defined in a manner open to various understandings.

### 2.3 Broadening of Transition Justice

Many scholars recognise that transitional justice has broadened from the roots of the field.<sup>104</sup> In order to provide an overview of the field’s broadening, the following section looks at the changing meaning of ‘transition’ and ‘justice’ within transitional justice discourse. This approach – ‘unpacking the justice and transition components’ – has been similarly employed

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<sup>103</sup> Sharp, “Interrogating the Peripheries,” Footnote no. 3, *citing* Arthur, “How “Transitions” Reshaped Human Rights,” 325-26.

<sup>104</sup> *See for example*, Arthur, “How “Transitions” Reshaped Human Rights,” 326; Sharp, “Addressing Economic Violence,” 782-783; Arbour, “Economic and Social Justice,” 2, 26-27.

by various scholars working to understand transitional justice,<sup>105</sup> and demonstrates how transitional justice and its key components are flexible and open to varied understandings.

### 2.3.1 Changing Meaning of Transition

As the field has broadened from its roots it has taken on alternative understandings of the meaning of transition. Alexander Boraine offers a broadened understanding of transition as: ‘a country which is emerging from one particular order and is uncertain and unsure as to how to respond to the challenge of the new’.<sup>106</sup> Hansen identifies the growth of transitional justice literature on situations of transition from armed conflict to peace, transitions into authoritarian rule, and transitions into consolidated democracies as evidence of the changing meaning of transition.<sup>107</sup> In an earlier article, Hansen directly contests the traditional understanding of transitional justice as a response to transitions from authoritarianism to democratization,<sup>108</sup> stating that if transitional justice is ‘understood as a set of practices that deal systematically with grave human rights abuses, [it] no longer exclusively concerns societies in transition to a liberal democracy.’<sup>109</sup> Hansen further argued that:

‘[...] relying on a normative framework formed in the early 1990s, which is heavily influenced by conceptions of justice in democratic transitions, may not be sufficient when attempting to understand what purposes contemporary processes of transitional justice actually serve, and it may pose serious challenges to our attempts at appreciating the character of and challenges to these practices.’<sup>110</sup>

However, while Hansen’s broadened understanding of transition accounts for the political roots of the field, he maintains similar backwards-looking considerations of the traditional understanding. By defining transitional justice as dealing with ‘grave human rights abuses’, Hansen perpetuates the field’s focus on civil and political rights violations (CPRV) and issues

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<sup>105</sup> Muvingi, "Sitting on Powder Kegs," 165; Arthur, "How "Transitions" Reshaped Human Rights"; Boraine, "Transitional Justice: A Holistic Interpretation"; Pdraig McAuliffe, "The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice in Postconflict States: A Critical Assessment in Light of Somalias Transition," *Northeast African Studies* 14, no. 2 (Fall 2014); Nicola Henry, "From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies," *International Journal of Transitional Justice* 9, no. 2 (March 22, 2015); Louis Bickford, "Transitional Justice," in *The Encyclopedia of Genocide and Crimes Against Humanity*, (Macmillan Reference, USA 2004) Vol. 3, 1045-1047.

<sup>106</sup> Boraine, "Transitional Justice: A Holistic Interpretation," 17-18.

<sup>107</sup> Hansen, "The Time and Space of Transitional Justice," 41-47.

<sup>108</sup> Thomas Obel Hansen, "Transitional Justice: Toward a Differentiated Theory," *Oregon Review of International Law* 13, no. 1 (2011).

<sup>109</sup> Hansen, "Transitional Justice: Toward a Differentiated Theory," 2.

<sup>110</sup> *Ibid.*, 3.

of physical violence – a symptom of the very political roots or ‘normative framework’ he was trying to overcome.

Other scholars have cast transition in a way that allows for consideration of ESR and issues of structural violence. Sharp proposes a broader transition towards 'positive peace' as opposed to a transition to democracy or rule of law,<sup>111</sup> with positive peace entailing the absence of social inequality.<sup>112</sup> Sharp’s proposed understanding of transition reflects an expansion of both the backwards- and forwards-looking considerations of transitional justice and demonstrates the interdependency between these. By interpreting transition as an aspiration to a society characterized by social equality, Sharp demands that transitional justice address past and ongoing ESRV and structural violence that allow social inequality to perpetuate.

The proliferation of transitional justice practices in consolidated democracies – including in Canada, Australia, and the USA<sup>113</sup> – and during transitions into non-democratic rule – including in Rwanda, Kenya, Uganda, and Chad<sup>114</sup> – further demonstrates the broadening from the traditional understanding of transition and suggests a broad understanding is most appropriate. In her review of the matter, Christine Bell concludes that 'scholars and practitioners show no clarity as to whether there is or needs to be a bounded concept of ‘transition’ during which transitional justice applies',<sup>115</sup> while Joanna Quinn similarly concludes that ‘the strict focus on absolute ‘transition’ appears to be shifting’.<sup>116</sup> Nonetheless, despite a broadened understanding of the meaning of transition, it remains an important and key feature of transitional justice.<sup>117</sup> The transition context and the opportunities and constraints it provides in responding to past injustices is what differentiates transitional justice from the administration of ordinary justice.

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<sup>111</sup> Sharp, “Addressing Economic Violence,” 782-83.

<sup>112</sup> Muvingi, "Sitting on Powder Kegs," 163-64.

<sup>113</sup> *For a discussion on transitional justice practices in consolidated democracies, see J. Balint, J. Evans, and N. Mcmillan, "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach," International Journal of Transitional Justice 8, no. 2 (2014); Courtney Jung, Transitional Justice for Indigenous People in a Non-transitional Society, Research Unit, International Center for Transitional Justice, October 2009; Paige Arthur et al., Strengthening Indigenous Rights through Truth Commissions: A Practitioner’s Resource (International Center for Transitional Justice, 2012; Lisa Magarrell and Blaz Gutierrez, Lessons in Truth-Seeking: International Experiences Informing United States Initiatives, report (International Center for Transitional Justice, 2006).*

<sup>114</sup> Sharp, "Emancipating Transitional Justice," Footnote no. 3.

<sup>115</sup> Bell, “State of the Field or Non-Field,” 23.

<sup>116</sup> Quinn, “The development of transitional justice,” 32.

<sup>117</sup> ICTJ, *Justice Mosaics*, 2.

### 2.3.2 Changing Meaning of Justice

The understanding of ‘justice’ in transitional justice has also broadened. While having roots in criminal justice,<sup>118</sup> scholars are increasingly considering other forms of justice as part of transitional justice. By providing a brief overview of the many forms of justice called on to advance transitional justice, this section will demonstrate justice as a highly contestable concept that is open to different and often competing understandings.

The primary focus of traditional transitional justice has been the pursuit of criminal or retributive justice. Used interchangeably by some scholars,<sup>119</sup> these forms of justice are characterized by the punishment of wrongdoers,<sup>120</sup> the establishment of deterrence,<sup>121</sup> the promotion of accountability,<sup>122</sup> and the reestablishment of rule of law.<sup>123</sup> Rama Mani refers instead to ‘rectificatory justice’,<sup>124</sup> or the punishment of those ‘injustices that are direct consequences of conflict’, including ‘abuses committed against civilian non-combatants, gross human rights abuses, war crimes and crimes against humanity.’<sup>125</sup> These forms of justice and their aims are primarily pursued through trials and criminal prosecutions (both national and international) and to a lesser extent lustration policies.<sup>126</sup>

Their nuanced differences notwithstanding, the criminal, retributive, and rectificatory forms of justice share similar backwards- and forwards-looking considerations. In terms of backwards-looking, they seek to address past injustices and administer punishment on wrongdoers, placing an emphasis on individual accountability.<sup>127</sup> In terms forwards-looking, the administration of

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<sup>118</sup> Cahill-Ripley, “Foregoing Socio-Economic Rights in Transitional Justice,” 188.

<sup>119</sup> Boraine, “Transitional Justice: A Holistic Interpretation,” 17-27.

<sup>120</sup> See for example, Lambourne, “Transitional Justice and Peacebuilding,” Table no. 1, 46; Ainley, “Evaluating the Evaluators,” 427; Balasco, “The Transitions of Transitional Justice,” 210.

<sup>121</sup> Teitel, “Transitional Justice Genealogy,” 79.

<sup>122</sup> Boraine, “Transitional Justice: A Holistic Interpretation,” 19.

<sup>123</sup> Balasco, “The Transitions of Transitional Justice,” 210.

<sup>124</sup> Rama Mani, “Balancing Peace with Justice in the Aftermath of Violent Conflict,” *Development* 48, no. 3 (2005): 27.

<sup>125</sup> Mani, “Balancing Peace with Justice,” 25-26.

<sup>126</sup> See Ainley, “Evaluating the Evaluators,” 427 (Identifies trials as a primary means to retributive justice); Balasco, “The Transitions of Transitional Justice,” 210 (Identifies both trials and lustration policies as primary means to retributive justice).

<sup>127</sup> See for example, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2007), 33-34; Ainley, “Evaluating the Evaluators,” 427 (Ainley defines retributive justice as concerned with ‘instances of rule breaking and the subsequent efforts to establish facts about the incidents, determine who is to blame and administer some form of punishment where appropriate.’).

punishment is motivated by the goal of deterrence against future recurrence and creating a society characterized by accountability and the rule of law.<sup>128</sup>

A secondary focus of traditional transitional justice is the pursuit of restorative justice. Defined as ‘justice that restores communities or relationships [...] regarded as an alternative form of justice outside the formal judicial court system, at least according to western legal practice,’<sup>129</sup> restorative justice is often presented in contrast to criminal justice.<sup>130</sup> While the end of the Argentinean military dictatorship in 1983 opened the opportunity for human rights violations to be punished through trials and prosecutions, at the foreground of discussions on how to address the past was the ‘threat to the stability of the new regime that such actions might pose.’<sup>131</sup> Following a series of limited prosecutions and as mounting ‘unrest and instability’ undermined hopes for nonviolent transition, prosecutions were eschewed in favour of amnesties granted between 1986 and 1987.<sup>132</sup> The fear that criminal justice during transitional periods may undermine fragile, short-term peace goals, ushered in restorative justice as an alternative to criminal justice, with trials and prosecutions dismissed in favour of truth commissions and amnesties.<sup>133</sup> The ‘amnesty for truth’ and ‘amnesty for peace’ exchanges prompted concerns that restorative justice initiatives would undermine criminal justice goals,<sup>134</sup> especially the rule of law,<sup>135</sup> however some scholars believe criminal and restorative justice can complement one another when pursued together.<sup>136</sup>

As opposed to criminal justice’s focus on punishment, restorative justice places greater emphasis on harm reparation, the restoration of relationships between people and communities, and victim recognition,<sup>137</sup> and is associated with forgiveness, truth, and reconciliation.<sup>138</sup> Mani prefers the term ‘reparative justice’ as ‘more humble, realistic and appropriate in the traumatic

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<sup>128</sup> See for example, Balasco, "The Transitions of Transitional Justice," 210 (For Balasco, retributive justice serves to punish victims and to ‘symbolically and functionally transition the state to an improved rule of law and promotion of human rights.’).

<sup>129</sup> Lambourne, "Transitional Justice and Peacebuilding," Footnote no. 7.

<sup>130</sup> See also, Sharp, "Interrogating the Peripheries," Footnote no. 36.

<sup>131</sup> Arthur, "How ‘Transitions’ Reshaped Human Rights," 323.

<sup>132</sup> Sharp, "Interrogating the Peripheries," 155, citing Carlos Santiago Nino, *Radical Evil on Trial*, Yale University Press (1996): 90–104; Arthur, "How ‘Transitions’ Reshaped Human Rights," 323.

<sup>133</sup> Teitel, "Transitional Justice Genealogy," 78.

<sup>134</sup> Balasco, "The Transitions of Transitional Justice," 209; Arthur, "How ‘Transitions’ Reshaped Human Rights," 353.

<sup>135</sup> Teitel, "Transitional Justice Genealogy," 82, 90.

<sup>136</sup> See for example, Borraine, "Transitional Justice: A Holistic Interpretation"; Lambourne, "Transitional Justice and Peacebuilding".

<sup>137</sup> Sharp, "Interrogating the Peripheries," Footnote no. 36; Ainley, "Evaluating the Evaluators," 427–428.

<sup>138</sup> Ainley, "Evaluating the Evaluators," 428. See also, Teitel, "Transitional Justice Genealogy," 81.

post-conflict context, where repair may be more feasible a goal than restoration',<sup>139</sup> achieved through reparations<sup>140</sup> and symbolic efforts such as memorialization, commemoration, and public apology.<sup>141</sup> Restorative justice has both backwards- and forwards-looking considerations, aiming to provide truth and acknowledgement of past injustices, the role of perpetrators and their impact on victims, and advancing the forwards-looking goal of reconciliation between victims and perpetrators.

With a focus on criminal and restorative justice, scholars have bemoaned transitional justice's failure to advance social and distributive justice concerns. Through her highly influential article, Louise Arbour called on transitional justice to address previously neglected economic and social justice concerns and to advance social justice, or '[the] minimum legal standards guaranteeing substantive equality [...] in the fulfilment of the idea of freedom from want.'<sup>142</sup> Distributive justice is similar to social justice, with some scholars conflating the two.<sup>143</sup> Recognised by Mani as the most neglected form of justice, distributive justice 'stem[s] from structural and systemic injustices and distributive inequalities that frequently underlie the causes of conflict.'<sup>144</sup> In South Africa, critics of the failure of legal and institutional reforms to restore democratic citizenship and reform an 'abusive state security apparatus' called for distributive justice to 'redistribut[e] [...] wealth that was unjustly accumulated through an inhuman political and economic system.'<sup>145</sup> For these critics, a legalistic, criminal or retributive form of justice failed to directly address the nature of past injustices of Apartheid, where distributive justice could have been more responsive to demands for justice in transition.

The social and distributive forms of justice are often associated with advancing positive or sustainable peace,<sup>146</sup> which, as opposed to negative peace or the absence of physical violence, demands the absence of both physical and structural violence, including social inequality.<sup>147</sup> These forwards-looking ambitions in turn inform backwards-looking considerations: in pursuit

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<sup>139</sup> Mani, "Balancing Peace with Justice," 32.

<sup>140</sup> Elmar Weitekamp, "Reparative Justice," *European Journal on Criminal Policy and Research* 1, no. 1 (1993): 70.

<sup>141</sup> Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford and New York: Oxford University Press, 2006), 453.

<sup>142</sup> Arbour, "Economic and Social Justice," 5.

<sup>143</sup> *Ibid.* 5.

<sup>144</sup> Mani, "Balancing Peace with Justice," 26 (Note, Mani recognises this as a 'dimension' of justice).

<sup>145</sup> Arthur, "How "Transitions" Reshaped Human Rights," 359.

<sup>146</sup> Lambourne, "Transitional Justice and Peacebuilding," 34; Sharp, "Emancipating Transitional Justice," 159.

<sup>147</sup> Sharp, "Emancipating Transitional Justice," Footnote no. 47; Mvingi, "Sitting on Powder Kegs," 166.

of a society characterized by equality, transitional justice conceptualized as advancing social or distributive must address past ESRV and ongoing structural violence.

Contributing to calls for transitional justice to advance distributive or social justice, some scholars believe transitional justice should aim to transform societies in transition. For Gready et al., transformative justice aims to ‘change pre-conflict structures in ways that are more inclusive, less unequal and more fair’ by placing a greater emphasis on the need to address the ‘structural and ‘everyday’ violence(s)’ previously neglected by transitional justice and its traditional mechanisms.<sup>148</sup> Lambourne similarly believes it should aim for the ‘transformation of social, economic and political structures and relationships’<sup>149</sup> through a ‘hybrid’ or holistic approach, incorporating elements of retributive, restorative, socioeconomic, and political justice.<sup>150</sup> While some scholars believe transitional justice has the potential to achieve this transformation,<sup>151</sup> others cast transformative justice as a distinct concept from transitional justice. Evans is critical of transitional justice’s ‘narrow set of tools’, and believes it is ill-suited to address structural violence and ensure socioeconomic rights.<sup>152</sup> Evans proposes transformative justice as a distinct concept that can address the structural violence and socioeconomic injustice issues neglected by the transitional justice’s focus on CPR.<sup>153</sup>

Whether considered to prevent the outbreak of conflict (where structural violence and social inequality may lead to violence)<sup>154</sup> or to create a more equitable society characterized by positive or sustainable peace,<sup>155</sup> the forwards-looking considerations of transformative justice place greater emphasis on ESRV, structural violence, and social inequality as the objects of its backwards-looking considerations. Rooted in calls for transitional justice to address concerns beyond accountability and criminal justice,<sup>156</sup> transformative justice offers a strong challenge to the traditional understanding of the concept.

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<sup>148</sup> Paul Gready et al., "Transformative Justice - A Concept Note," October 2010, 1.

<sup>149</sup> Lambourne, "Transitional Justice and Peacebuilding," 30.

<sup>150</sup> *Ibid.*, 37-45.

<sup>151</sup> Matthew Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," *Journal of Human Rights* 15, no. 1 (2015): 6, citing Elin Skaar, "Transformative Aspects of Formal TJ Initiatives: Opportunities and Limitations," paper presented at "Transformative Justice: Global Perspectives," Worldwide Universities Network International Conference, University of Leeds, Leeds (2011).

<sup>152</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 5.

<sup>153</sup> *Ibid.*, 7, 9.

<sup>154</sup> *Ibid.*, 14.

<sup>155</sup> Gready et al., "Transformative Justice - A Concept Note," 1.

<sup>156</sup> Lambourne, "Transitional Justice and Peacebuilding," 47.

While this overview addressed some of the various forms of justice discussed in transitional justice literature, it is not an exhaustive account. Scholars continue to explore how transitional justice can address different forms of injustices. Transitional justice has been called on to address 'continuing racial inequality' in the United States as a form of racial justice,<sup>157</sup> or to address continuing physical, economic, and social form of gender-based violence in post-conflict societies to advance gender justice.<sup>158</sup> Furthermore, various scholars recommend holistic or integrated approaches to pursuing transitional justice, including through the pursuit of different forms of justice simultaneously.<sup>159</sup> Boraine advocates a holistic approach to transitional justice where criminal justice is complemented by restorative justice,<sup>160</sup> allowing transitional justice to address two imperatives of a country under transition: the need to re-establish the rule of law and hold perpetrators accountable through prosecutions, and the need to re-build societies and achieve reconciliation.<sup>161</sup> The proliferation of calls for transitional justice to pursue additional forms of justice confirms the field's broadening from its roots in the criminal and restorative forms, and suggests the need for a concept of transitional justice that allows a broad understanding of justice.

### 2.3.3 Mechanisms

Despite broadening in terms of its justice and transition components, transitional justice is still 'largely confined [to] a fairly specific set of mechanisms',<sup>162</sup> with traditional transitional justice measures being used in 'very different sorts of political and practical dilemmas.'<sup>163</sup> In calling for transitional justice to go beyond pursuing criminal justice, for example, Arbour considers how existing mechanisms, including truth commissions, prosecutions, judicial enforcement, reparations, and restitution, may advance economic and social justice.<sup>164</sup> Mani similarly

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<sup>157</sup> Andrew Valls, "Racial Justice as Transitional Justice," *Polity* 36, no. 1 (2003): 68. For a further example, see International Center for Transitional Justice, "What Role Can Transitional Justice Play in Confronting Racial Injustice in the United States?" ICTJ, July 13, 2017.

<sup>158</sup> Helen Scanlon and Kelli Muddell, "Gender and Transitional Justice in Africa: Progress and Prospects," *African Journal on Conflict Resolution* 9, no. 2 (2010).

<sup>159</sup> See for example, Boraine, "Transitional Justice: A Holistic Interpretation," 17-27; Makau Mutua, "What Is the Future of Transitional Justice?" *International Journal of Transitional Justice* 9, no. 1 (2015): 5; Lambourne, "Transitional Justice and Peacebuilding"; Mani, "Balancing Peace with Justice"; Sharp, "Emancipating Transitional Justice," 159.

<sup>160</sup> Boraine, "Transitional Justice: A Holistic Interpretation," 17-27.

<sup>161</sup> *Ibid.*, 26.

<sup>162</sup> Nagy, "Transitional Justice as Global Project," 278. See also, Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century - Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 2.

<sup>163</sup> Arthur, "How "Transitions" Reshaped Human Rights," 354-55. For further discussion, see Miller, "Effects of Invisibility," 269.

<sup>164</sup> Arbour, "Economic and Social Justice," 1.

advocates for a broadened framework of reparative justice to be pursued through transitional justice mechanisms.<sup>165</sup> In considering greater inclusion of ESR in transitional justice, the UN limits their discussion to how truth commissions, judicial and quasi-judicial proceedings, reparations, and institutional reform may integrate these rights.<sup>166</sup>

These approaches reflect a trend in which scholars, in response to the field's broadening, have opted to consider how traditional transitional justice mechanisms may be repurposed to better achieve these goals,<sup>167</sup> instead of considering alternative mechanisms. In their generation of a data set of transitional justice from 1970 to 2007, for example, Tricia Olsen et al. adopt a broad conceptualization of transitional justice in order to 'provide scholars with the necessary data to grapple with the complexities surrounding it', and refrain from 'making normative assumptions about the appropriate form of justice' in face of varying understandings of justice.<sup>168</sup> Despite recognising the need to conceptualize transitional justice broadly, they narrowly define transitional justice along the specific mechanisms of trials, truth commissions, amnesties, reparations, and lustrations.<sup>169</sup>

What these scholars fail to realize is that this 'narrow set of tools',<sup>170</sup> making up a toolkit of traditional transitional justice as early as 1994,<sup>171</sup> was primarily implemented in response to specific forms of envisioned transitions (authoritarianism to democratization), wrongdoings (primarily CPRV), and calls for justice (criminal or retributive, and restorative). The resilience of the transitional justice toolkit means mechanisms are employed to tackle problems they may not be equipped for. This puts transitional justice at the risk of becoming a 'one-size-fits-all' approach, where its practices are technocratic and decontextualized,<sup>172</sup> and fail to adequately address broadening demands for justice in transitional societies.

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<sup>165</sup> Rama Mani, "Rebuilding an Inclusive Political Community After War," *Security Dialogue* 36, no. 4 (2005): 524.

<sup>166</sup> UN Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (New York and Geneva: UN Office of the High Commissioner for Human Rights, 2014), 16-59.

<sup>167</sup> See also, Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *International Journal of Transitional Justice* 2, no. 3 (2008): 329-330 (Considering how transitional justice mechanisms can more effectively address economic crimes).

<sup>168</sup> Tricia D. Olsen et al., "Transitional Justice in the World, 1970-2007: Insights from a New Dataset," *Journal of Peace Research* 47, no. 6 (2010): 805.

<sup>169</sup> Ibid.

<sup>170</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 5.

<sup>171</sup> Arthur, "How 'Transitions' Reshaped Human Rights," 330-31.

<sup>172</sup> Nagy, "Transitional Justice as Global Project," 275.

## 2.4. Transitional Justice – A Concept

In the introduction to Kritz's *Transitional Justice*, Charles Smith described transitional justice as 'a defining theme of the second half of the twentieth century [that is] likely to endure well into the new millennium'.<sup>173</sup> While Smith's prediction of transitional justice's endurance was undoubtedly correct - evidenced by its global proliferation and consolidation as a field - it did not endure as envisioned at the time. As demonstrated in this Chapter, the field has broadened from its roots in the transition to democracy paradigm and its focus on criminal and restorative forms of justice, and moved towards a concept of transitional justice viewed more broadly than its traditional counterpart. Nonetheless, the broadening of the field has done little to bring consensus on an understanding of the concept itself.

The persistent lack of consensus on an understanding of transitional justice may be because transitional justice 'is an inherently political practice, ill-suited to technical definitions',<sup>174</sup> a view taken in this dissertation. This inherently political nature suggests transitional justice is best understood as a contestable concept – an observation Sharp, Bell, and Ainley have already made. For these scholars, the inherent politics of transitional justice is best accounted for by identifying the concept and its goals as essentially or effectively contestable.<sup>175</sup> A concept is effectively contestable when its contestability is a property of political discourse. In the present case, transitional justice is an effectively contestable concept due to the varied understandings of transition and justice that emerge from political discourse. While the Western liberal agenda of the formative years of transitional justice understood justice in its criminal form, transitional societies marred by economic or social rights violations, structural violence, or social inequality may demand justice in terms of its social or distributive forms. By understanding transitional justice and its key components as effectively contestable, and by adopting a broad understanding of the concept, it is rendered more useful and accommodating of the needs and demands of diverse transitional contexts.

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<sup>173</sup> Smith, "Introduction," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, xvi.

<sup>174</sup> Ainley, "Evaluating the Evaluators," 424.

<sup>175</sup> Bell, "State of the Field or Non-Field," 27, (Identifying the goals of TJ as essentially contested); Ainley, "Evaluating the Evaluators," 424 (Identifying 'transition' and 'justice' as essentially contested terms); See further, Sharp, "Addressing Economic Violence," 813.

### 2.4.1 Practical Conceptual Analysis

The understanding of transitional justice as contestable informs our pragmatic conceptual analysis of the concept. Given its contestable nature, an understanding of transitional justice that presupposes the pursuit of particular forms of justice or normative goals runs contrary to the inherent politics of the field, and is untenable.<sup>176</sup> Instead, consensus may be found on an understanding of the concept that is not undergirded by political assumptions and allows for debate and disagreements around highly debatable components of the concept. Sharp alludes to a similar approach in arguing for a broader interpretation of transitional justice which incorporates social justice:

The goal is not to conflate transitional justice with social justice writ large [...]. Rather, by carefully considering and deconstructing assumptions implicit in the narratives of the field, both historical and emerging, it may be possible to liberate policy making from narrow pathways and paradigms that may stymie creativity and thinking [...].<sup>177</sup>

While advocating for an understanding of transitional justice that allows for long-term positive peace, Sharp's point of accounting for inherent politics and moving away from preconceived notions undergirding the field is instructive. Thus, a pragmatic conceptual analysis of transitional justice should identify those key components that make it a distinct concept – components which, given the concept's contestable nature, are likely to be the subject of debate and unlikely to find broad consensus. This approach brings transitional justice closer to Dhawan's understanding of the concept as 'a travelling norm which can never be filled with one particular meaning but changes over time and space.'<sup>178</sup>

Informed by this Chapter's overview of the changing meanings of transition and justice, and the past injustices these entail and the aspirations they should pursue, a pragmatic conceptual analysis reveals certain key components of transitional justice. Transitional justice and its key components may be understood as: the pursuit of justice (justice component) during a period of social or political transition (transition component), in order to address past injustices (backwards-looking component) and work towards certain aspirations for the future (forwards-

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<sup>176</sup> For a discussion on the inherent politics of transitional justice, see generally Arthur, "How "Transitions" Reshaped Human Rights"; Sharp, "Addressing Economic Violence," 813.

<sup>177</sup> Sharp, "Emancipating Transitional Justice," 168.

<sup>178</sup> Nikita Dhawan, "Transitions to Justice," in *Gender in Transitional Justice*, eds. Susanne Buckley-Zistel and Ruth Stanley (London: Palgrave Macmillan, 2012).

looking component). A final component is the choice in mechanisms taken to advance transitional justice.

The multiplicity of approaches considered to contribute towards transitional justice incorporate these components, however imbue them with different understandings. These varied understandings of the key components – the result of their inherently political or contestable nature – are the varying conceptions of the concept of transitional justice. Taking the traditional understanding of transitional justice, for example, it is possible to identify a ‘traditional conception’ of transitional justice that understands the justice component as entailing the pursuit of criminal or restorative justice; the transition component as entailing transitions from authoritarianism to democracy; the backwards-looking component as entailing concern over bodily integrity harms, physical violence, or other CPRV; the forwards-looking component as entailing efforts establish democracy and rule of law; and the choice in mechanisms as entailing trials and truth commissions.

These key components are interdependent, with an understanding of one impacting the understanding of the others. Zinaida Miller’s description of transitional justice as a ‘definitional project’, for example, demonstrates the interplay between the justice, backwards- and forwards-looking components. Miller describes the process of transitional justice as ‘explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished and radically differentiating a new regime in relation to what actions were taken by its predecessor.’<sup>179</sup> For Miller, the decision not to address economic concerns as a matter of justice is an act of politics in itself.<sup>180</sup> To put Miller’s observations in terms of the above analysis, we see that the decision to understand justice as excluding its distributive or social forms (justice component) leaves socioeconomic injustices of the past unaddressed (backwards-looking component) and allows these injustices to perpetuate into the future (forwards-looking component).

This leaves the question of whether to prescribe transitional justice with a set of mechanisms. As discussed earlier in this Chapter, transitional justice mechanisms continue to be repurposed to meet new demands placed on them, despite being originally intended to address particular injustices. From the perspective of the above analysis, however, defining transitional justice along a set of specific mechanisms risks prescribing how the different components should be

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<sup>179</sup> Miller, "Effects of Invisibility," 267.

<sup>180</sup> *Ibid.*, 267-268.

understood. As Arthur has observed, the field's preoccupation with a particular set of measures is influenced by the normative aims of providing justice in its criminal or restorative forms and establishing democracy.<sup>181</sup> Taking trials and prosecutions as an example, defining transitional justice as inclusive of these mechanisms risks prescribing an understanding of justice in its criminal form and placing a focus on addressing CPR. This reduces transitional justice to a technocratic, decontextualized, or 'one-size-fits-all' practice,<sup>182</sup> whereby its mechanisms fail to meet demands other than those originally intended for. Therefore, the above proposed understanding of transitional justice intentionally refrains from prescribing the concept with a set of mechanisms.

This is not to say that traditional transitional justice mechanisms cannot advance calls for justice beyond its criminal or restorative forms. There is much discussion of the potential for truth commissions and reparations to pursue demands for economic and social justice.<sup>183</sup> Nor is it suggested that these mechanisms will not play an integral role in pursuing transitional justice. Given that pre-transition periods may be characterized by instances of both physical and structural violence (as in the case of South Africa under Apartheid), it is likely that transitional justice will be called upon to address demands for criminal or restorative justice, in which its traditional mechanisms may be effective, and demands for social or distributive justice, in which it may have to look outside its standard toolkit. Rather, if transitional justice is to respond to various forms of transition and calls for justice, and backwards- and forwards-looking considerations, it should look beyond a restrictive toolkit devised in a particular moment in history.

#### 2.4.2 Addressing Counter-Arguments

Scholars may argue that such an understanding of transitional justice is too broad to be meaningful or realistic. Naomi Roht-Arriaza has cautioned over 'broadening the scope of [...] transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.'<sup>184</sup> Lars Waldorf warns against expanding a field that has 'already inflated expectations' with 'unrealizable expectations',<sup>185</sup> while Mani

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<sup>181</sup> Arthur, "How "Transitions" Reshaped Human Rights," 355. (Arthur identifies as TJ measures: prosecutions, truth-telling, security sector reform, and rehabilitation or compensation for harm).

<sup>182</sup> Nagy, "Transitional Justice as Global Project," 275.

<sup>183</sup> *See for example*, Waldorf, "Anticipating the Past," 175-179.

<sup>184</sup> Roht-Arriaza, "The New Landscape of Transitional Justice," 2. *See also*, Greedy et al., "Transformative Justice - A Concept Note".

<sup>185</sup> Waldorf, "Anticipating the Past," 179.

similarly expresses concern that ‘the mandates of existing TJ mechanisms are already overcharged, their responsibilities too heavy, public expectations too unrealistic and finances already too lean’.<sup>186</sup>

While these concerns are valid, it is important to recall the distinction between a concept and its varying conceptions. While the above proposed understanding of transitional justice is broad and accommodates multiple forms the transition, justice, and backwards- and forwards-looking considerations, it is not suggested that these be addressed simultaneously. Instead, a broad understanding allows for multiple and potentially narrower conceptions. This approach allows the particular conception of transitional justice employed to be determined by local context, victims’ needs, and other relevant considerations, and ensures a conception that is best suited to meet the demands of the situation at hand. How transition and justice are understood, which past injustices should be addressed, and which future aspirations should be pursued should not be determined by a set of specific experiences in the post-Second World War period or during the thaw in the Cold War of the 1980s and 1990s, but rather by the specific experiences of the society demanding justice.

This broadened understanding may also incite referral to Sartori’s concern over conceptual stretching. As discussed in the introduction, conceptual stretching is the broadening of the meaning of a concept to the extent that it lacks clear limitations or definitions.<sup>187</sup> However, Sartori’s concern was over the obfuscation of concepts which had been ‘previously defined and refined [...] by generations of philosophers and political theorists’,<sup>188</sup> a characterization not befitting of transitional justice. Given its brief lifespan, past and current discord in the field, and a recognised lack of consensus on an understanding of the concept, there is little to suggest that there is a well-established, ‘defined and refined’ concept of transitional justice to stretch from. Rather, the opposite concern is more likely – that an adamant defence of a traditional understanding of transitional justice results in a concept that is too specific and prescriptive, potentially rendering it irrelevant and inapplicable in assisting different societies transition out of a troubled past.

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<sup>186</sup> Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development," *International Journal of Transitional Justice* 2, no. 3 (2008): 255.

<sup>187</sup> See generally, Sartori, "Concept Misformation in Comparative Politics".

<sup>188</sup> Ibid., 1033-34.

## 2.5 Chapter Conclusion

In order to find the reason behind the lack of consensus on a meaning of transitional justice, this Chapter addressed the historical and political roots that influenced the traditional conception of transitional justice. These roots show a Western liberal agenda during the formative years of transitional justice which sought to guide societies transitioning from authoritarianism into the direction of a Western style liberal democracy. This agenda and the experiences of Latin American countries in transition influenced transitional justice's focus on the normative aims of securing democracy, accountability, and rule of law through criminal and restorative justice and their accompanying trials and truth commissions. The success of the West in the decades long ideological struggle of the Cold War also secured a focus on CPR to the neglect of ESR, preventing transitional justice from facilitating a social transition or transformation. The Chapter then considered how these roots and their influences were galvanized in the traditional conception of transitional justice held today through a process of consolidation, internationalisation, and standardisation. The field's broadening from its traditional understanding of 'justice' and 'transition' brought new demands that are at odds with the tradition conception of transitional justice, creating a lack of consensus on what transitional justice is and what it should accomplish.

This Chapter concluded that a broad understanding of transitional justice that allows for multiple and potentially competing understandings of its justice, transition, and backwards- and forwards-looking components is the only way to bring consensus to the effectively contestable concept of transitional justice. Transitional justice should be understood broadly as the pursuit of justice during periods of social or political transition, in order to address past injustices and works towards certain aspirations for the future, comprising of the key components of justice, transition, and backwards- and forwards-looking considerations, and the mechanisms that advance these. While seemingly vague or too ambiguous to be meaningful, this proposed understanding is broad enough to accommodate various understandings the hotly contested components of transitional justice, allowing it to be more responsive to the particular circumstances of various transitional contexts and their victims, including demands for ESRV, structural violence, and social inequality to be addressed.

For Nickson and Braithwaite, a broadened understanding of the justice in transitional justice allows ‘space to deliver non-western as well as western conceptions of virtuous justice.’<sup>189</sup> Similarly, by adopting a broad understanding of transitional justice we can begin to differentiate between the traditional conception of transitional justice that is most prevalent today, and other conceptions that address matters of justice during transition differently, including the example of Revolutionary Nicaragua.

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<sup>189</sup> Ray Nickson and John Braithwaite, "Deeper, Broader, Longer Transitional Justice," *European Journal of Criminology* 11, no. 4 (2013): 448.

## Chapter Three: Addressing Economic and Social Rights and Structural Violence as Transitional Justice

### 3.1 Chapter Introduction

Serving in part to define the injustices of the past and to recognise victims in need of justice, transitional justice's prioritization of CPR has excluded persons solely impacted by ESRV and structural violence from being defined as victims or the most 'deserving' of victims.<sup>190</sup> As a result, transitional justice has often advanced justice in communities which have experienced unlawful interferences with their ESR, and have been subject to (and often continue to be subject to) marginalization and difficulty in meeting their most basic needs, without these issues being addressed as a matter of justice.

In South Africa, the system of Apartheid and the social and racial inequality it was characterized by has been considered the 'very embodiment of the concept of structural violence'.<sup>191</sup> Nonetheless, the founding act of the Truth and Reconciliation Commission (TRC) defined 'victim' restrictively, limited to persons impacted by 'gross violations of human rights' and further restricted to 'killing, abduction, torture or severe ill-treatment of any person.'<sup>192</sup> The TRC's restrictive definition of victimhood left hundreds of thousands of marginalized persons outside of its scope, and the structural violence and social and racial inequality of Apartheid unaddressed. Today, not only has inequality increased since the Apartheid-era, South Africa is considered one of the most unequal countries in the world.<sup>193</sup>

Transitional justice's neglect of ESR and structural violence is not exclusive to South Africa. In Nepal, families of disappeared persons prioritized basics needs such as food, health care, and children's education (62 percent) nearly as much as the truth of the fate of the disappeared

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<sup>190</sup> For a critical discussion on deserving and undeserving victims, see Kieran McEvoy and Kirsten McConnachie, "Victims and Transitional Justice: Voice, Agency and Blame," *Social and Legal Studies* 22, no. 4 (December 2013).

<sup>191</sup> Sharp, "Addressing Economic Violence," 11.

<sup>192</sup> Promotion of National Unity and Reconciliation Act 35 of 1995. For further discussion on the failure of the TRC to address structural violence and social inequality, see Nagy, "Transitional Justice as Global Project," 284; Sharp, "Addressing Economic Violence," 11; Pablo De Greiff, "Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford and New York: Oxford University Press, 2006), 8; Miller, "Effects of Invisibility," 280-81; Aiken, "The Distributive Dimension in Transitional Justice," citing Mofokeng, 2008; Mary Burton, 2008; Du Toit, 2008.

<sup>193</sup> Victor Sulla and Precious Zikhali, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities*, Washington, D.C.: World Bank Group, 2018, 42-60.

(64 percent), while demand for prosecution was far lower (29 percent).<sup>194</sup> In Bardiya, a rural district characterized by poverty and inequality and the most affected by disappearances,<sup>195</sup> discovering the truth behind the fate of the disappeared (70 percent) and basic needs (60 percent) were highly prioritized,<sup>196</sup> while demand for prosecution was limited (7 percent). Despite these demands, national and international human rights agencies called for disappearances in Nepal to be met with prosecution, criminalization, and accountability.<sup>197</sup>

Similar results were found in Cambodia, where the Khmer Rouge Tribunal addressed matters of genocide, crimes against humanity, and other grave breaches under the Pol Pot Regime, despite a survey finding respondents prioritized jobs (83 percent) and services to meet basic needs such as health (20 percent), food (17 percent), and education (7 percent) above justice (1 percent).<sup>198</sup> The prioritization of economic and social matters over demand for accountability in Nepal and Cambodia is consistent with findings of similar surveys conducted in northern Uganda, Kenya, and the eastern Democratic Republic of Congo.<sup>199</sup> While the prioritization of these needs and demands may be subject to change, they nonetheless reveal the significance of economic and social matters in transitional contexts.

The failure of transitional justice to give equal consideration to CPR and ESR and to consider the immediate needs of its beneficiaries has led to strong criticism of the practice, and calls for it to go beyond its traditional focus. UN High Commissioner for Human Rights Louise Arbour, whose influential call for economic and social justice to be incorporated into a ‘holistic’ conception of transitional justice is heralded by scholars as an important moment for the transitional justice field.<sup>200</sup> While recognising transitional justice as anchored in the Nuremberg

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<sup>194</sup> Simon Robins, "Transitional Justice as Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-conflict Nepal," *Critical Asian Studies*, January 11, 2012: 15.

<sup>195</sup> Robins, "Transitional Justice as Elite Discourse," 8, 11.

<sup>196</sup> *Ibid.*, 15.

<sup>197</sup> *Ibid.*, 16.

<sup>198</sup> Phuong Pham et al., *So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the court of Cambodia*, report, Human Rights Center, University of California, Berkley (January 2009), 34.

<sup>199</sup> Phuong Pham et al., *Living With Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, report, Human Rights Center, University of California, Berkley and the Payson Center for International Development, Tulane University and the International Center for Transitional Justice (August 2008); Phuong Pham et al., *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda*, report, Human Rights Center, University of California, Berkley and the Payson Center for International Development, Tulane University and the International Center for Transitional Justice (December 2007); Simon Robins, "'To Live as Others Kenyans Do': A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations," International Center for Transitional Justice, July 2011.

<sup>200</sup> See for example, Peter J. Dixon, "Transitional Justice and Development," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, Research Handbooks in International

trials and rooted in criminal justice, Arbour noted that the field has broadened and ‘outgrown its early framework’.<sup>201</sup> Arbour was notably critical of traditional understandings of transitional justice and their prioritization of CPR, including interpreting the meaning of ‘large-scale past abuses’ in the UN definition of transitional justice to be ‘generally limited to CPRV amounting to crimes under international law,’ thereby ‘obscur[ing] the need to address gross violations of economic, social, and cultural rights associated with conflict.’<sup>202</sup> In light of this critique, Arbour believed ‘[t]ransitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.’<sup>203</sup>

Arbour called on transitional justice to address previously neglected economic, social, and cultural rights violations that occurred prior to and during conflict. She proposed a series of measures to be taken to redress ‘deep-seated social and economic inequalities’, including constitutional recognition of rights, examining key legislation and their impact on rights, and adopting, reviewing, and strengthening legislation as part of institutional reform.<sup>204</sup> Arbour believed transitional justice is well poised to ‘anchor’ economic, social, and cultural rights into the political, legal, and social structures of societies in transition. Significantly, Arbour challenged a key underlying assumption of the transitional justice field - the focus on criminal justice - by calling for greater economic and social justice, and not only called for violations of ESR to be addressed, but also structural violence, including social inequality.

While the neglect of socioeconomic issues has been a concern since as early as South Africa’s TRC,<sup>205</sup> much of transitional justice scholarship turned the full weight of its attention to considering the potential inclusion of ESRV and structural violence within transitional justice’s remit after Arbour’s call. The following year, the matter received specific consideration in an issue of the *International Journal of Transitional Justice*, with Mani concluding in its editorial: ‘[transitional justice] cannot divorce itself from the broader concerns of citizens of transitional

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Law (Cheltenham: Edward Elgar, 2017); McAuliffe, "The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice in Postconflict States: A Critical Assessment in Light of Somalias Transition," *Northeast African Studies* 14, no. 2 (2014): 78; Nagy, "Transitional Justice as a Global Project"; Carranza, "Plunder and Pain," 316; Waldorf, "Anticipating the Past," 172.

<sup>201</sup> Arbour, "Economic and Social Justice," 1-2.

<sup>202</sup> *Ibid.*, 5.

<sup>203</sup> *Ibid.*, 3.

<sup>204</sup> Arbour, "Economic and Social Justice," 21-25.

<sup>205</sup> See for example, UWC Community Law Centre et al., "Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social, and Cultural Rights to the Commission’s Mandate," 18 March 1997.

societies or from the patterns of social injustice, violence, and exploitation that will continue to oppress them [...].<sup>206</sup> For many scholars, transitional justice's continued failure to address ESR threatens the legitimacy of the practice itself.

This Chapter considers how transitional justice scholarship has responded to calls for socioeconomic issues to be included within the scope of the field. Firstly, it provides necessary clarification on the differentiation between ESRV and structural violence, including social inequality. Secondly, it reviews the varying degrees to which ESRV and structural violence have been brought within transitional justice's scope through the broad, narrow, and conservative approaches taken by scholars. Thirdly, it identifies and addresses conceptual and practical challenges to the inclusion of structural violence within transitional justice as raised within the literature. Finally, it concludes by finding a way forward for bringing both ESRV and structural violence within the concept of transitional justice. It will be argued that persistent assumptions about the key components of transitional justice (as discussed in Chapter Two) have replaced the field's prioritization of CPR with a prioritization of those rights, including ESR, whose violations are justiciable and most susceptible to judicial or quasi-judicial remedy, leaving matters of structural violence out of the field's purview and traditional transitional justice intact.

### 3.2 Differentiating between ESRV and Structural Violence

Whereas Chapter Two focused on transitional justice's prioritization of CPR to the neglect of ESR and the causes thereof, this Chapter considers emerging calls for ESR and structural violence to be included within transitional justice's scope. Prior to considering this, it is necessary to note the points of convergence and divergence between ESRV and structural violence and its various forms, including social inequality. This understanding is necessary to avoid erroneously conflating the two, as many transitional justice scholars are wont to do,<sup>207</sup> and allows for a better understanding of where and why a line is drawn between the two in calls for their inclusion.

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<sup>206</sup> Mani, "Dilemmas of Expanding Transitional Justice," 265.

<sup>207</sup> For further discussion on this and other misconceptions of ESR in transitional justice discourse, see Schmid and Nolan, "'Do No Harm?'" See also Luke Butterly, "Freedom and Bread: On the Justiciability of Economic and Social Rights," no date.

### 3.2.1 Economic and Social Rights Violations

Economic and social rights are a ‘set of legal obligations’ on the part of States, provided for in various regional and international human rights instruments and domestic legislation.<sup>208</sup> The ‘tripartite typology’ of ‘respect, protect and fulfil’ determines what these obligations entail and which duties they place on States.<sup>209</sup> According to this typology, States have an obligation to respect ESR, or refrain from interfering in their existing enjoyment, to protect ESR, or ensure their enjoyment is not interfered with by non-State actors, and to fulfil ESR, or take immediate and progressive steps to secure their enjoyment.<sup>210</sup> Contrary to the false dichotomy frequently invoked within transitional justice scholarship that views CPRV as direct violations and ESRV as indirect violations, violations of these rights can be both direct and indirect, with all placing positive and negative obligations on the State. Violations of ESR are direct where a State or its actors interfere with these rights (corresponding closely with the obligation to respect, a negative obligation),<sup>211</sup> or indirect where a State fails to take progressive steps to ensure these rights are realized (corresponding closely with the obligation to fulfil, a positive obligation).

### 3.2.2 Structural Violence

The term ‘structural violence’ was first coined by Johan Galtung, who constructed a ‘typology of violence’ consisting of personal, structural, and cultural violence.<sup>212</sup> For the purposes of this discussion, it is important to note Galtung’s differentiation between personal or direct violence, ‘where the actor(s) and object(s) of violence are readily identifiable’,<sup>213</sup> and structural or indirect violence, where ‘there may not be any person who directly harms another person in the structure.’<sup>214</sup>

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<sup>208</sup> Most significantly, the International Covenant on Economic, Social, and Cultural Rights. *See* Schmid and Nolan, “‘Do No Harm’?”, 365. (The most prominent international human rights instrument providing for ESR is the International Covenant on Economic, Social and Cultural Rights.)

<sup>209</sup> Schmid and Nolan, “‘Do No Harm’?”, 366. *See also*, Aruna Kumar Malik, "Issues of Justiciability and Inequality: Rethinking of Human Rights with Special Reference to Right to Health," *The Indian Journal of Political Science* LXXI, no. 4 (October/November 2010): 1095; Sam Szoke-Burke, "Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of ESR," *Texas International Law Journal* 50, no. 3 (2015): 467; Kathleen Ho, "Structural Violence as a Human Rights Violation," *Essex Human Rights Review* 4, no. 2 (September 2007): 11; Duthie, ‘Transitional Justice, Development, and Economic Violence?’, 185.

<sup>210</sup> Schmid and Nolan, “‘Do No Harm’?” 366.

<sup>211</sup> *Ibid.*, 371-374. (As an example of a direct violation, Schmid and Nolan provide the example of “[w]hen armed forces burn houses, destroy crops, loot healthcare infrastructure or poison drinking water”.)

<sup>212</sup> K. Ho, “Structural Violence as HRV,” 3, *citing* Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 167.

<sup>213</sup> K. Ho, “Structural Violence as HRV,” 3.

<sup>214</sup> K. Ho, “Structural Violence as HRV,” 4, *citing* Galtung, "Violence, Peace, and Peace Research," 171.

Within transitional justice literature, structural violence has been defined as ‘a condition in which violence occurs without being precipitated by the direct actions of specific individuals against other specific individuals’, and may be considered similar or synonymous to social injustice.<sup>215</sup> Structural violence exists where State structures support the unequal distribution of power or agency, which is further exacerbated by the unequal distribution of resources.<sup>216</sup> This may manifest in varying forms, including through the ‘three major pillars’ of social marginalization, political exclusion, and economic exploitation,<sup>217</sup> or more broadly poverty, exclusion, and inequality.<sup>218</sup> Social inequality can be considered the consequence of structural violence, with Paul Farmer concluding: ‘[s]ocial inequalities are at the heart of structural violence.’<sup>219</sup> In addition to social inequality, structural can manifest in various forms of inequality, including racial, gender, or economic inequality.

### 3.2.3 Link between ESRV and Structural Violence

There is a strong link between ESRV and structural violence,<sup>220</sup> namely in that structural violence negatively effects these rights and may constitute a failure of the State’s obligation to fulfil them. Where government resources for education or health care facilities are consistently unequally distributed between urban and rural communities to the neglect of the latter (as in the case of Nicaragua discussed in Chapter Four), rural communities are victim to both structural violence and indirect violations of their ESR, namely their rights to health and education. This link is broken, however, where ESR are directly violated or in ways that are unrelated to systems or structures. An arbitrary or unlawful eviction constitutes a direct violation of the right to housing, without necessarily being related to structural violence. As demonstrated by the above examples, the points of convergence and divergence between ESRV and structural violence largely rests on whether the violation is direct or indirect.<sup>221</sup> As this

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<sup>215</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 3. See also Galtung, "Violence, Peace and Peace Research," 171, (Galtung uses the terms structural violence and social injustice interchangeably). *For further discussion on structural violence in transitional justice literature, see for example,* Matthew Mullen, "Reassessing the Focus of Transitional Justice: The Need to Move Structural and Cultural Violence to the Centre," *Cambridge Review of International Affairs* 28, no. 3 (2013): 463-467; Dáire McGill, "Different Violence, Different Justice? Taking Structural Violence Seriously in Post-Conflict and Transitional Justice Processes," *State Crime Journal* 6, no. 1 (2017): 80-83; Gready et al., "Transformative Justice - A Concept Note," 2-3; Miller, "Effects of Invisibility," 267; Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice," 191.

<sup>216</sup> Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice," 191.

<sup>217</sup> Dáire McGill, "Different Violence, Different Justice?" 81.

<sup>218</sup> Laplante, "Transitional Justice and Peacebuilding," 333.

<sup>219</sup> Paul Farmer, "An Anthropology of Structural Violence," *Current Anthropology* 45, no. 3 (June 2004): 317.

<sup>220</sup> Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice," 191.

<sup>221</sup> It should be noted that this assertion is at risk of oversimplifying the complexity of ESRV and structural violence. For example, an unlawful eviction of a member of a minority group by State actors would constitute a

Chapter will show, this distinction is significant in calls for transitional justice to include ESRV only where such violations are justiciable and perpetrators thereof identifiable.

### 3.3 Degrees of Inclusion of ESRV and Structural Violence within Transitional Justice

Transitional justice scholars have advocated for the inclusion of ESRV and structural violence within the field's scope to varying degrees. These degrees may be loosely categorized between those adopting conservative or narrow approaches, where ESR and their violations are included and matters of structural violence are excluded or marginalized, and those adopting a broad approach, where both ESRV and structural violence are included. A review of the narrow approach will demonstrate that persistent assumptions about transitional justice and its key components that led to the field's neglect of ESR are now the cause for the neglect of structural violence by the field. Conversely, the broad approach reveals a departure from traditional understandings of transitional justice and its key components, as scholars reconceptualize the concept towards one which can address structural violence.

#### 3.3.1 Conservative Approaches to the Inclusion of ESRV and Structural Violence

The most pointed and direct rebuttal to calls for transitional justice to address socioeconomic inequalities is offered by Lars Waldorf.<sup>222</sup> Insisting that transitional justice should maintain its focus on redressing CPRV,<sup>223</sup> Waldorf presents a defence of a narrow, traditional understanding of transitional justice, which he views as 'inherently short-term, legalistic and corrective'.<sup>224</sup> Waldorf is not unsympathetic to the importance of ESR concerns during periods of transition, acknowledging that 'everyday injustices rooted in historical inequalities may be as important, if not more important, for many survivors than the extraordinary injustices of gross human rights abuses',<sup>225</sup> and further suggesting that the 'strongest rationale [...] for transitional justice socio-economic wrongs is where that reflects the needs and priorities of

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direct violation of the right to housing, while the systems or structures in place that led to the eviction may be part of larger structural violence against that minority group. However, the purposes of this dissertation and the discussion on social inequality, which is arguable always indirect, the dichotomy of direct and indirect is instructive.

<sup>222</sup> Waldorf, "Anticipating the Past."

<sup>223</sup> Ibid., 179.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid., 175.

victims and survivors'.<sup>226</sup> Instead, the point of contention for Waldorf is 'whether transitional justice mechanisms are practically suited for correcting such wrongs'.<sup>227</sup>

In considering the viability of transitional justice mechanisms tackling socioeconomic wrongs, Waldorf specifically considers truth commissions and reparations. While these mechanisms have made the greatest contribution to this end,<sup>228</sup> Waldorf finds their potential hampered by practical difficulties, including resource constraints, the risk of increasing already inflated expectations, and the short life-span of transitional justice mechanisms.<sup>229</sup> As a result of these difficulties, Waldorf believes the longstanding social inequality is best relegated to a 'post-transitional' period, and more appropriately redressed as a matter development rather than transitional justice.

Another voice against transitional justice taking on structural violence and related matters can be found in Matthew Evans, an advocate for transformative justice and a strong proponent of the need to address structural violence, including in the transitional context. What distinguishes Evans from his transformative justice cohorts is his understanding of transformative justice as separate and distinct from transitional justice.<sup>230</sup> While recognising emerging efforts within transitional justice to address socioeconomic inequality,<sup>231</sup> Evans understands transitional justice as demarcated by the mechanisms it comprises (truth commissions, amnesties, and trials)<sup>232</sup> and the set of injustices it focuses on (direct, interpersonal violence and CPRV),<sup>233</sup> and views the tools of transitional justice as 'ill-suited' and inadequate for addressing socioeconomic inequality and other forms of structural violence.<sup>234</sup> While these mechanisms may have 'peripheral or unintended consequences' for transformative justice,<sup>235</sup> they are not capable of bringing about transformation in socioeconomic structures – the focus of transformative justice.<sup>236</sup> Instead, for structural violence to be effectively addressed and for

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<sup>226</sup> Waldorf, "Anticipating the Past," 175.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*, 175-179.

<sup>229</sup> *Ibid.*, 179.

<sup>230</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 7-10.

<sup>231</sup> *Ibid.*, 4.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, 9.

<sup>234</sup> *Ibid.*, 2-4.

<sup>235</sup> *Ibid.*, 7.

<sup>236</sup> *Ibid.*, 5.

transformative justice goals to be pursued, a set of ‘new, specifically focused, tools’ is necessary.<sup>237</sup>

By strictly adhering to a traditional understanding of transitional justice, Waldorf and Evans represent a conservative approach to the inclusion of ESRV and structural violence within the field’s scope. This approach sees traditional transitional justice, initially intended to address CPRV, as static and incapable of change, and therefore ill-suited to a broadening of its scope.

### 3.3.2 Narrow Approaches to the Inclusion of ESRV and Structural Violence

As opposed to the conservative approach, the narrow approach sees transitional justice as capable of addressing ESRV, while having marginal effect on structural violence. However, this broadening of transitional justice’s scope does not necessarily suggest a broadening from its traditional understanding. As this section will demonstrate, the narrow approach maintains a traditional understanding of transitional justice as primarily motivated by criminal justice and demand for individual accountability through trials and prosecutions. Consequently, a line is drawn between those ESRV which are justiciable and can be addressed through criminal justice and therefore transitional justice, and those violations, including structural violence, which can at best only be marginally addressed.

At the foundation of the narrow approach is the distinction between the direct and indirect nature of ESRV and structural violence. Sam Szoke-Burke uses this distinction to identify which ESR should be included in transitional justice, and which violations thereof should be prioritized.<sup>238</sup> Drawing on the tripartite typology, Szoke-Burke differentiates between ‘State failures to respect and protect ESRs’ which are ‘generally discrete enough to be effectively included in transitional justice mandate’, violations of the obligation to fulfil ESR, whose inclusion is a ‘more complicated question’, and ‘[n]ationwide failure to fulfil ESR’, whose remedy is ‘less suited to transitional justice responses’.<sup>239</sup> This distinction is similarly used by other scholars adopting the narrow approach. Evelyn Schmid’s discussion of the potential for ESRV to be addressed by international criminal law focuses primarily on examples of States’ failure to respect and protect these rights,<sup>240</sup> while Mark Drumbl focuses on how these can be

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<sup>237</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 7.

<sup>238</sup> Sam Szoke-Burke, "Not Only ‘Context’," 463.

<sup>239</sup> Ibid., 467.

<sup>240</sup> Evelyn Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge: Cambridge University Press, 2016), 51-52.

addressed through criminal prosecution and civil litigation.<sup>241</sup> Amanda Cahill-Ripley captures the distinction quite aptly in her observation: ‘[w]hilst in some cases it will be easy to identify specific acts of violence against individuals and communities that constitute grave violations of ESR, in other cases these violations will be a result of structural and endemic violence and repression by the State [...]’.<sup>242</sup>

This distinction is further evident in discussions on transitional justice tackling ‘economic violence’. Economic violence ‘involves the economic and social aspects of injustice caused by human rights violations’,<sup>243</sup> and is ‘broader than [...] violations of ESR’, further including corruption, plunder of natural resources, and other economic crimes.<sup>244</sup> Duthie differentiates between broad and narrow approaches to addressing economic violence, with the former also ‘addressing structural problems such as poverty and inequality’, and the latter ‘focusing only on economic violence perpetrated by individuals and in direct connection to civil and political rights violations.’<sup>245</sup> While both involve ESR, the narrow approach is concerned with their direct violation, or those where a perpetrator is clearly identifiable, whereas the broad approach is additionally concerned with their violation in a complex or structural manner, or where the perpetrator is not clearly identifiable.<sup>246</sup>

This distinction as a means of determining which violations should be addressed by transitional justice is also evident in Diana Sankey’s proposed concept of ‘subsistence harms’. While believing the focus on CPR should be contested, Sankey argues it is necessary to have a clear understanding of which harms should be addressed, offering such an understanding in the concept of ‘subsistence harms’ or ‘deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or populations in situations of armed conflict or as an act of political repression, where the perpetrator acts with intent or with knowledge of the inevitable consequences of such deprivations’.<sup>247</sup> For Sankey, this concept

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<sup>241</sup> Mark Drumbl, “Accountability for Property Crimes and Environmental War Crimes: Prosecution, Litigation, and Development,” International Center for Transitional Justice, November 2009 (Drumbl specifically discusses matters of environmental crimes, property crimes, and expropriation. Drumbl departs from the focus of prosecution on individual responsibility when considering the potential for international criminal law to address questions of collective and state responsibility, however only discusses this in connection with mass atrocity. See, Mark Drumbl, "Accountability for System Criminality," *Santa Clara Journal of International Law* 8 (2010)).

<sup>242</sup> Cahill-Ripley, “Foregrounding Socio-Economic Rights in Transitional Justice,” 191.

<sup>243</sup> Duthie, “Transitional Justice, Development, and Economic Violence,” 166.

<sup>244</sup> Sharp, “Addressing Economic Violence”, 5. See also, Sharp, “Interrogating the Peripheries,” 169.

<sup>245</sup> Duthie, “Transitional Justice, Development, and Economic Violence,” 181.

<sup>246</sup> For further discussion on ‘direct versus structural’, see Schmid and Nolan, “Do No Harm?”.

<sup>247</sup> Diana Sankey, "Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice," *International Journal of Transitional Justice* 8, no. 1 (March 2014): 122.

‘distinguishes between those harms linked to socioeconomic issues that can be systematically addressed by transitional justice mechanisms and those, particularly issues of structural violence, that require longer-term approaches’.<sup>248</sup> It should be noted that Sankey erroneously characterizes ESR as those which ‘remain focused on issues of fulfilment, rather than direct deprivation’.<sup>249</sup> Recalling the tripartite typology of State obligations, it is clear that subsistence harms as defined by Sankey would constitute violations of the obligations to respect and protect ESR.<sup>250</sup> Regardless, it is important to note the role of criminal justice in drawing a divisive line between the ‘subsistence harms’ transitional justice should address, and the ESRV and structural violence it should not.

Further drawing a line between justiciable ESRV and non-justiciable ESRV and structural violence is the argument that the former are best addressed by transitional justice, while the latter should be addressed through development. Roger Duthie draws on the distinction between transitional justice and development ‘as the basis for advocating a narrow conception of transitional justice’.<sup>251</sup> At the core of this distinction is Duthie’s view of transitional justice as being associated with corrective or criminal justice, which works towards the ‘repair of harms to individuals or groups’, while development is associated with distributive justice<sup>252</sup> and works towards ‘the distribution of goods and opportunities and to equitable outcomes’.<sup>253</sup>

Duthie argues that despite their equal importance, violations of CPR and ESR may not be most effectively addressed by the same set of measures. He recalls that transitional justice measures were ‘initially conceived as responses to the most widespread and serious violations of CPR and to international crimes perpetrated by authoritarian regimes’,<sup>254</sup> and therefore transitional justice should include ESRV only insofar as its existing mechanisms can be repurposed to ‘pursue accountability and redress for the most serious violations of ESR and the international crimes that constitute economic violence’,<sup>255</sup> and where they are closely related to physical violence and serious violations of CPR.<sup>256</sup> On this basis, Duthie argues against a broad

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<sup>248</sup> Ibid., 140.

<sup>249</sup> Ibid., 123.

<sup>250</sup> This characterization has been the subject of previous critique. See Schmid and Nolan, “‘Do No Harm’?”

<sup>251</sup> Duthie, “Transitional Justice, Development, and Economic Violence,” 171

<sup>252</sup> Ibid., 170-173, citing Pablo De Greiff, “Articulating the Links Between Transitional Justice and Development,” *International Center for Transitional Justice*, July 2009: 63 (Note: Duthie uses ‘corrective justice’). See also, Waldorf, “Anticipating the Past,” 180.

<sup>253</sup> Duthie, “Transitional Justice, Development, and Economic Violence,” 171.

<sup>254</sup> Ibid., 181.

<sup>255</sup> Duthie, “Transitional Justice, Development, and Economic Violence,” 182.

<sup>256</sup> Ibid., 183.

approach to including economic violence in transitional justice that addresses structural problems, including poverty and inequality, citing as barriers the difficulty in identifying victims in need of redress, the lack of specifiable perpetrators, and poverty as anchored in the structure of society. Instead, transitional justice should limit itself to ‘facilitate or catalyse other interventions and broader reform, including those more squarely in the field of development, by among other things highlighting the relevance of past economic and social injustice.’<sup>257</sup> This argument is not far removed from the distinction between direct and indirect violations of ESR as a basis for the exclusion of structural violence, which similarly sees indirect violations as too complex to be addressed through transitional justice and its mechanisms.

Finally, Pdraig McAuliffe believes calls for transitional justice to address structural violence fail to account for *realpolitik*.<sup>258</sup> The potential for transitional justice to address structural violence and social inequality is hampered by mechanisms which are ill-suited to resolve such issues, and the risk opposition from or alienating the political elite.<sup>259</sup> McAuliffe came to such a conclusion when considering the potential for transitional justice to redress inequality in Somalia,<sup>260</sup> finding that the political elite whose interests would be undermined by redressing inequality would oppose such efforts.<sup>261</sup> Similar to Duthie, McAuliffe relegates issues of structural violence as long term issues, arguing that stability is a prerequisite for economic growth which may allow for subsequent ‘construction of roads, schools, or health clinics’ and to ‘generate welfare improvements’.<sup>262</sup> Rather, it is ‘wiser to postpone highly contentious, *potentially* transformative transitional justice policies lest they undermine the delicate balance of power and compromise that [a] transition represents.’<sup>263</sup>

While the narrow approach and a focus on criminal justice leave issues of structural violence out of the center of transitional justice’s scope, *marginal* attention may be given to such issues under this approach. Szoke-Burke considers how transitional justice mechanisms may have nominal effect to this end, suggesting that truth commissions can acknowledge State failure to

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<sup>257</sup> Duthie, "Transitional Justice, Development, and Economic Violence," 192.

<sup>258</sup> Pdraig McAuliffe, "Rhetoric and Realpolitik: Interrogating the Relationship Between Transitional Justice and Socio-Economic Justice," *Finnish Yearbook of International Law* 24, no. 1 (2014).

<sup>259</sup> McAuliffe, "Rhetoric and Realpolitik," 243.

<sup>260</sup> McAuliffe, "The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice". While the role of transitional justice in Somalia has been considered elsewhere, consideration was not given to its potential for distributive or social justice, see Margherita Zuin, "A Model of Transitional Justice for Somalia," in *The Fletcher Journal of Human Security* XXIII (2008): 89.

<sup>261</sup> McAuliffe, "The Prospects for Transitional Justice in Catalyzing Socioeconomic Justice," 86.

<sup>262</sup> *Ibid.*, 100.

<sup>263</sup> *Ibid.*, 99.

fulfil ESR and make necessary policy recommendations,<sup>264</sup> that collective reparations and decentralized governance can empower communities to actively participate in their development and the remedying of historically marginalized ESR,<sup>265</sup> and that vetting processes can target public or private actors whose practices contributed to inequality.<sup>266</sup> Duthie believes transitional justice can help change narratives about structural violence issues, and therefore contribute to their remedy in the long-term through development.<sup>267</sup> Well-intentioned as these suggestions may be, the limited potential for efficacy of these initiatives are often recognised by the same scholars suggesting them, and leave structural violence issues at the periphery of transitional justice.

Through a maintained focus on criminal justice, the narrow approach to the inclusion of ESR in transitional justice excludes matters of structural violence and social inequality. This approach distinguishes between the violations of those rights which should and should not be addressed based on whether they are direct or indirect, simple or complex, or short-term or long-term issues, and whether perpetrators thereof are easily identifiable or hidden in broad structures of society.<sup>268</sup> The reason for this differentiation is primarily to identify which violations are justiciable for the purposes of prosecution through trial or identification and naming-and-shaming through truth commissions. Sankey's proposed concept of subsistence harms, for example, uses the language of *perpetrator* and *intent* to tailor a concept that 'adheres to the requirements of international criminal law',<sup>269</sup> and is ripe for adjudication as a matter of transitional justice.

The exclusion of structural violence as the object of criminal justice is not the point of contention, with the inadequacy of criminal justice to address structural violence through trials and prosecutions widely recognised by those adopting conservative, narrow and broad approaches alike.<sup>270</sup> Instead, the error of the narrow approach is the presumption that transitional justice should primarily be administered through criminal justice and trials, prosecutions, or truth commissions, thereby leaving matters of structural violence out of its purview. This insistence prevents the possibility that structural violence may be addressed, as

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<sup>264</sup> Sam Szoke-Burke, "Not Only 'Context'," 477-482.

<sup>265</sup> *Ibid.*, 486-488.

<sup>266</sup> *Ibid.*, 489-493.

<sup>267</sup> Duthie, "Transitional Justice, Development, and Economic Violence," 198-200.

<sup>268</sup> *For further discussion, see* Schmid and Nolan, "Do No Harm?"

<sup>269</sup> Sankey, "Towards Recognition of Subsistence Harms," 122.

<sup>270</sup> Lisa Hecht and Sabine Michalowski, "The Economic and Social Dimensions of Transitional Justice," no date, 5; Mullen, "Reassessing the Focus of Transitional Justice," 469-471.

a matter of transitional justice, through social or distributive justice, and by mechanisms or initiatives other than those traditionally associated with transitional justice. Thus, many of the key components of transitional justice are left unchanged: justice is understood in its criminal form, direct ESRV are addressed in addition to CPRV as a backwards-looking consideration, the rule of law and perpetrator accountability are the focus of forwards-looking considerations, and trials and truth commissions are the mechanisms of choice in advancing these.

While early calls for transitional justice to address ESR may have been considered a challenge to the traditional conception of transitional justice, their inclusion has been accomplished with the traditional focus largely intact, much to the neglect of structural violence issues. It is no coincidence, then, that the rationale for the exclusion of structural violence is similar to earlier arguments for the exclusion of ESR, as captured in Chendra Sriram's statement that '[w]hile specific violations of CPR such as torture or disappearance make clear targets, economic inequalities may be far more difficult to pin down.'<sup>271</sup> The inclusion of ESRV into transitional justice's scope through the narrow approach is in fact a false broadening that does little to challenge the traditional conception of transitional justice.

### 3.3.3 Broad Approach

Broad approaches to the inclusion of ESR within transitional justice see equal consideration of structural violence as both possible and necessary. As opposed to the absent or marginal consideration proposed under the narrow approach, the broad approach sees transitional justice take full consideration of and directly address structural violence and social inequality as a matter of truth and reconciliation, victim-centrism, negative and positive peace, or transformative justice. This approach is largely motivated by the pursuit of social or distributive justice, thus challenging the traditional focus on criminal justice.

The failure of transitional justice to address matters of structural violence has been considered a threat to the goals of promoting truth and reconciliation. Drawing on the potential for transitional justice to define injustices of the past, Miller argues that the exclusion of structural violence from this definitional project risks portraying 'inequality [as] a question of time or development rather than the entrenched ideology of elites'.<sup>272</sup> This may well have been the case in South Africa, where the TRC's focus on physical harms 'obscured the "truth" about the

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<sup>271</sup> Chendra Lekha Sriram, "Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21, no. 4 (October 8, 2007): citing Miller, "The Effects of Invisibility," 277.

<sup>272</sup> Miller, "Effects of Invisibility," 268.

much more pervasive daily suffering of victims caused by the institutionalized repression and socioeconomic inequalities between racial groups'.<sup>273</sup> This distortion of a legacy of injustice further serves to threaten reconciliation. Aiken observes that the TRC's failure to address structural violence as an injustice of Apartheid undermined the recognition of shared responsibility by white South Africans for continued racial inequality, resulting in a 'very real barrier for interracial reconciliation'.<sup>274</sup> Aiken's observation notably draws attention to the fact that while physical violence may have ended, societies in transition may suffer continued violence in the form of structural violence and social inequality.

The demand for transitional justice to address structural violence has also been framed as a move towards victim-centrism. Citing empirical research showing that demands for security and basic needs are highly articulated by victims in post-conflict areas, Simon Robins identifies a gap between the stated needs of victims and what transitional justice actually delivers.<sup>275</sup> Robins believes the cause of this is a dominance of legalism over the transitional justice field which disconnects victim demands and transitional justice deliverables.<sup>276</sup> This leaves transitional justice 'violation and perpetrator' centred, while a rhetoric of being 'victim and need' centred is used to generate moral legitimacy for the practices of the field.<sup>277</sup> Robins suggests the focus of accountability in transitional justice should shift from accountability to law to accountability to victims.<sup>278</sup> Matthew Mullen is similarly critical of the perpetrator-centrism of traditional transitional justice, believing 'perpetrators receive more headlines and protection than victims [and] courts and commissions receive more consideration than efforts to change the socioeconomic and political infrastructure.'<sup>279</sup> This disconnect stands in sharp contrast to assurances of 'the centrality of victims in the design and implementation of transitional justice processes and mechanism',<sup>280</sup> and echoes Mani's concerns of transitional justice being divorced from the concerns of its victims.<sup>281</sup>

Scholars have also argued that structural violence should be addressed as a matter of conflict prevention and ensuring negative peace, viewing it as a potential root cause of conflict.

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<sup>273</sup> Aiken, "The Distributive Dimension in Transitional Justice," 195.

<sup>274</sup> *Ibid.*

<sup>275</sup> Robins, "Failing Victims," 43.

<sup>276</sup> *Ibid.*, 50-52.

<sup>277</sup> *Ibid.*, 43, 47.

<sup>278</sup> *Ibid.*, 53.

<sup>279</sup> Mullen, "Reassessing the Focus of Transitional Justice," 469.

<sup>280</sup> UN, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (2010), *quoted by* Robins, "Failing victims?", 43.

<sup>281</sup> Mani, "Dilemmas of Expanding Transitional Justice," 265.

Drawing on Archbishop Desmond Tutu's observations on the threatening potential of unaddressed economic and social concerns in South Africa, Muvingi believes transitional societies are 'sitting on powder kegs' if structural violence is left unaddressed.<sup>282</sup> Mullen believes '[s]tructural and cultural violence makes mass atrocities possible', and therefore transitional justice should focus the 'bulk of attention and resources on more expansive efforts to directly address vulnerabilities and dehumanization'.<sup>283</sup> Such approaches view the potential for structural violence to lead to a recurrent outbreak of violence as a threat to the goal of non-repetition.<sup>284</sup>

Going beyond negative peace, structural violence can also be addressed in the pursuit of positive peace. Sharp envisions transitional justice as a transition towards 'positive peace', defined to include not only 'negative peace' or the absence of direct violence, but also the 'absence of more indirect forms of violence, including forms of structural violence'.<sup>285</sup> Sharp believes the field's traditionally narrow conception of violence – physical violence, including murder, rape, torture, and disappearances and other CPRV – leaves matters of economic violence unaddressed and perpetrators thereof enjoying impunity.<sup>286</sup> Broadening from a narrow and legalistic focus on physical violence and CPRV, matters of economic violence, structural violence, and social inequality are addressed as threats to positive peace.<sup>287</sup>

Included in the broad approach is a set of scholars advocating for transitional justice to take advantage of its transformative potential, or transformative justice, which has been described as sitting 'at the radical end of a transitional justice continuum.'<sup>288</sup> Despite a lack of agreement on its definition or components,<sup>289</sup> proponents of transformative justice have a common aim of expanding the scope of transitional justice and placing greater focus on structural violence.<sup>290</sup> As opposed to Evans' proposed transformative justice discussed above, these scholars believe the traditional conception of transitional justice should be challenged and reconceptualized to be more transformative.

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<sup>282</sup> Muvingi, "Sitting on Powder Kegs." [?]

<sup>283</sup> Mullen, "Reassessing the Focus of Transitional Justice," 463.

<sup>284</sup> *See also*, Laplante, "Transitional Justice and Peacebuilding," 333.

<sup>285</sup> Sharp, "Addressing Economic Violence," 21, *citing* Galtung, "Violence, Peace, and Peace Research," 167.

<sup>286</sup> *Ibid.*, 10-13.

<sup>287</sup> Muvingi, "Sitting on Powder Kegs," 163-64. The aspiration for transitional justice to aim for positive peace has been considered to advance sustainable peacebuilding and demonstrating an intersection between the fields. *See for example*, Lambourne, "Transitional Justice and Peacebuilding," 34.

<sup>288</sup> McGill, "Different Violence, Different Justice?," 80.

<sup>289</sup> *Ibid.*, 89.

<sup>290</sup> Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice," 5.

Calls for transitional justice to exhaust its transformative potential emerges from a critique of the field's failure to address structural and 'everyday' forms of violence. Situating transitional justice in terms of advancing sustainable peacebuilding in post-conflict societies, Wendy Lambourne calls on transitional justice to address concerns beyond accountability and legal justice through transformative justice,<sup>291</sup> which aims for the 'transformation of social, economic and political structures and relationships.'<sup>292</sup> Placing greater emphasis on structural violence, Paul Gready et al. believe transformative justice should aim to 'change pre-conflict structures in ways that are more inclusive, less unequal and more fair',<sup>293</sup> and in the pursuit of sustainable peace for all.<sup>294</sup> McGill similarly situates transformative justice as a challenge to the individualism and legalism of transitional justice processes as it shifts attention to matters of structural violence.<sup>295</sup> By placing structural violence at the forefront of the focus of transitional justice, the 'transformative conception' of transitional justice is a stark challenge to the traditional conception of transitional justice and its focus on physical violence.

Bringing structural violence and social equality into the focus of transitional justice demands a reconceptualization from its traditional conception and has several implications for its key components. The most important consequence is the broadening from the focus on criminal justice, with structural violence addressed as a matter of social and distributive justice.<sup>296</sup> The proposal for transitional justice to adopt a 'positive-peace paradigm', for example, shifts the focus from criminal justice to further include social and distributive justice,<sup>297</sup> with positive peace equated with the presence of social justice.<sup>298</sup> This shift in focus in turn effects which injustices are addressed, or the backwards-looking component. Through social and distributive justice, transitional justice is called on to go beyond looking at CPRV and direct violations of ESR, and to further address indirect violations thereof, including the failure to fulfil these rights, structural violence, mass poverty, and social inequality as matters of justice. In terms of the forwards-looking component, the aspirations of transitional justice change from establishing democracy or the rule of law to pursuing positive peace or ending structural

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<sup>291</sup> Lambourne, "Transitional Justice and Peacebuilding," 47.

<sup>292</sup> *Ibid.*, 30.

<sup>293</sup> Gready et al., "Transformative Justice - A Concept Note," 1.

<sup>294</sup> *Ibid.*, 4.

<sup>295</sup> McGill, "Different Violence, Different Justice?," 85. Looking to bring transformative justice out of the abstract and into practice, McGill developed a Structural Violence Reduction Matrix serving to guide diagnosis, processes, and outcome objectives in transitional contexts, *see* p.91

<sup>296</sup> *See for example*, Mvingi, "Sitting on Powder Kegs," 163-169; Mullen, "Reassessing the Focus of Transitional Justice"; Miller, "Effects of Invisibility," 288; Lambourne, "Transitional Justice and Peacebuilding," 41.

<sup>297</sup> Sharp, "Addressing Economic Violence".

<sup>298</sup> Lambourne, "Transitional Justice and Peacebuilding," 34.

violence and social inequality. Addressing structural violence in a transitional society also demonstrates the close relationship between the backwards- and forwards-looking components. Gready et al. highlight the importance of addressing the ‘past-present interface’ by identifying the link between challenges of the present (structural and ‘everyday’ violence) to structural issues that continue from the past.<sup>299</sup> By addressing it in a transitional period, this approach serves to break the continuity of structural violence as an injustice of the past that may continue into the future.

While there is a definite change in the justice, transition, and backwards- and forwards-looking components, there is limited change in the choice of mechanisms tasked with tackling transitional justice’s broadened scope. Scholars frequently call on existing mechanisms to ‘develop to have deeper social impact’.<sup>300</sup> While it is generally agreed that trials and prosecutions are ill-equipped to address structural violence, many scholars adopting even a broad approach believe truth commissions, individual or collective reparations, and institutional reform can be repurposed to address such issues,<sup>301</sup> a notable exception being Sharp’s view that the choice in mechanisms should be determined by needs and local context, rather than selected from a predetermined toolbox.<sup>302</sup> Similar to the finding in Chapter Two, the persistence of traditional transitional justice mechanisms endure despite a broadening of the field through calls for it to address ESRV and structural violence.

### 3.4 Conceptual Challenges to the Inclusion of ESRV and Structural Violence within Transitional Justice

The broad, narrow, and conservative approaches to the inclusion of socioeconomic issues within transitional justice creates a conflict as to how justice is understood in transitional justice. While initially the cause of neglect of ESR, the persistent focus on criminal justice has been able to accommodate direct violations of these rights, however now excludes the potential for transitional justice to address structural violence. This gives rise to several conceptual challenges in attempting to reconcile transitional justice’s traditional focus on criminal justice with demands for structural violence to be addressed as a matter of social or distributive justice.

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<sup>299</sup> Gready et al., "Transformative Justice - A Concept Note," 3.

<sup>300</sup> McGill, "Different Violence, Different Justice?" 88.

<sup>301</sup> See for example, Lambourne, "Transitional Justice and Peacebuilding," 41 (reparations and institutional reform); McGill, "Different Violence, Different Justice?" 88.

<sup>302</sup> Sharp, "Addressing Economic Violence," 24.

A significant challenge is the primary focus on criminal justice by those adopting a traditional understanding of transitional justice, leaving little room for social or distributive justice to be given equal consideration. This focus on criminal justice and dominance of legalism largely favours the use of trials, prosecutions, and truth commissions as the primary mechanisms of the field, while it is widely recognised that these mechanisms are unable to address structural violence issues. Some scholars insist that these issues can be addressed through other mechanisms associated with traditional transitional justice. Despite recognition of their shortcomings, truth commissions and reparations or collective reparations are consistently offered for their potential to address these issues.<sup>303</sup> While these may make marginal contribution at best, they are ill-equipped to give equal consideration to matters of structural violence within transitional justice.

The error in repurposing traditional transitional justice mechanisms is recognising the constraints of traditional transitional justice due to the historical and political context it originated, demanding it broaden from these constraints, while simultaneously utilizing a set of mechanisms that perpetuate the constraints. If structural violence is to be addressed as a form of transitional justice, its traditional mechanisms should be supplemented by alternative mechanisms or initiatives better suited to the task. Trials and truth commissions may have met the justice demands in Latin American transitions from authoritarianism to democracy in the 1980s and 1990s, however they were ill-equipped to address the structural violence and social inequality of Apartheid in South Africa. While this may also be considered a practical challenge, the conceptual challenge emerges where scholars adopting a narrow approach argue that structural violence should not be included because it cannot be adequately addressed by these mechanisms, without considering that alternative mechanisms may be possible. Transitional justice has become so defined by its mechanisms, that for some, it would not be transitional justice without trials and truth commissions.

A similar conceptual challenge is the concern over the convergence and divergence of transitional justice and development. Many scholars have recognised certain overlap between the two fields and the potential for transitional justice to contribute to development. Concerns have been raised, however, over transitional justice taking on development responsibilities through a broadened focus on social or distributive justice. Central to this argument is the view of transitional justice as short-term and criminal justice oriented, while development is long-

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<sup>303</sup> See for example, Waldorf, "Anticipating the Past," 175-179.

term and social or distributive justice oriented. Regarding the short- versus long-term concern, various scholars have argued that it is erroneous to assume that addressing ESR concerns is inherently long-term, whereas addressing their civil and political counterparts can be addressed in the short-term. Securing democracy and the rule of law (stated goals of traditional transitional justice) are hardly short-term projects, but rather depend on small steps taken during a transitional period with the intention of these being secured in the long-term. Furthermore, as will be discussed in the following chapter, the distribution of much-needed food or health services can address social justice issues in the short-term, suggesting that issues of structural violence can be addressed within transitional justice's time constraints, even if these overlap with long-term development issues. While not suggesting that transitional justice should address ESR to the degree of development, it is unclear why a clear separation between the two fields should be made with the effect of excluding social or distributive justice issues from transitional justice. Instead, social or distributive justice issues can be addressed in the short-term as a matter of transitional justice, especially where such issues are part of a legacy of injustice.

Finally, the inability to reconcile different justice demands within the concept of transitional justice creates a crisis of legitimacy. Scholars within the broad approach argue that the failure to address structural violence obscures the truth of past injustices, threatens the potential for reconciliation, and undermines the promise of victim-centrism and non-repetition – stated aims and values of the field. Muvingi calls into question the 'justness' and the 'very objectives' of a transitional justice that prosecutes wrongdoers but does not address social inequality.<sup>304</sup> If transitional justice fails to reconcile demands for social and distributive justice, it risks repeating its already recognised failures, as in the case of South Africa. While the traditional conception of transitional justice may adequately address the justice demands of societies marred by direct and physical violence, it will fail to meet the justice demands of societies that have seen both physical and structural violence at the risk of its own legitimacy.

### 3.5 Towards a Broad Understanding of Transitional Justice

As long as a traditional understanding of transitional justice persists, it will be ill-equipped both conceptually and practically to address structural violence, even where context demands it. As a solution to the conceptual challenges of reconciling the field's traditional focus on

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<sup>304</sup> Muvingi, "Sitting on Powder Kegs," 165.

criminal justice with demands for social and distributive justice, it is necessary to recognise transitional justice as an effectively contestable concept. As discussed in Chapter Two, this allows for a broad understanding that gives room for debate around the concept's key components, without undermining the concept itself. This ensures that the question of whether transitional justice should address criminal, social, distributive, or other forms of justice is not predetermined but rather left open as a subject of debate.

Such a broad understanding is also important in answering the sub-question: *Is redressing social inequality a conception of transitional justice?* As long as transitional justice and its key components are defined by a narrow understanding of the concept that places a focus on criminal and restorative justice, CPRV, and trials and truth commissions, redressing social inequality cannot be considered a form of transitional justice. On the other hand, if a broad understanding is taken, the justice, transition, backwards- and forwards-looking components of transitional justice are flexible enough to be responsive to different demands for justice, including demands for social or distributive justice. This 'social justice conception' of transitional justice places a focus on social or distributive justice, envisions a transition to social equality or positive peace, and addresses past and ongoing ESRV, social inequality, and other forms of structural violence.

If transitional justice aims to address the injustices of the past so that the future may be characterized by their absence, it should be conceptually flexible enough to consider the demands of the community in which it serves. Where past injustices include social inequality, mass poverty or other forms of structural violence, these must be addressed by transitional justice lest they continue into the future. With a broad understanding, the extent to which these and other injustices are addressed or excluded by transitional justice is determined by the context, including demands therefor and constraints preventing these demands be met.

### 3.6 Chapter Conclusion

This Chapter looked at calls within transitional justice literature for ESR to be included, to varying degrees, within the remit of the field, and considered how these challenged or reinforced traditional understandings of transitional justice. It found that a narrow approach that differentiates between justiciable and non-justiciable violations of these rights as a means of determining their inclusion simply perpetuates the field's traditional focus on criminal justice, leaving structural violence out of the field's scope. On the other hand, a broad approach

to the inclusion of these rights, including matters of structural violence, challenges the traditional conception of transitional justice to go beyond a focus on criminal justice by giving equal consideration to structural violence as a matter of social and distributive justice, reorienting the field around victims and their demands, and pursuing negative and positive peace. It concluded that in order to reconcile the traditional focus on criminal justice with demands for greater social and distributive justice, and to consider redressing social inequality as a form of transitional justice, it is necessary to adopt a broad understanding of transitional justice.

While a broad understanding of transitional justice may resolve the conceptual challenge of reconciling the narrow and broad approaches, this does not address the practical viability of including structural violence and social inequality. Several scholars have criticized discussions of ESR and structural violence for living in the abstract,<sup>305</sup> and have called for practical examples to be considered to support such discussion.<sup>306</sup> Various practical challenges have been raised to the inclusion of structural violence within transitional justice. These practical challenges include: time constraints, where transitional justice is a short-term affair while remedying structural violence, poverty and social inequality require long-term commitment; resource constraints, where insufficient financial and human resources are said to be barriers to transitional justice addressing these injustices; the role of political elite, specifically their potential to act as spoilers of attempts to challenge the socioeconomic status quo; and overburdening, which views the broadening of transitional justice as aggravating an already wide mandate and inflated expectations. These practical challenges prompt the question: *what would transitional justice addressing structural violence look like in practice?* In the following Chapter, the case of revolutionary Nicaragua and their efforts to deal with the injustices of the past will be considered as a form of transitional justice. Their example sheds light on both conceptual and practical matters of transitional justice addressing structural violence, including how many of the practical challenges identified above may be overcome.

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<sup>305</sup> See for example, Haldemann and Kouassi, “Transitional Justice Without Economic, Social and Cultural Rights?” 10.

<sup>306</sup> Cahill-Ripley, “Foregrounding Socio-Economic Rights in Transitional Justice,” 212-13.

## Chapter Four: Addressing Social Inequality as Transitional Justice in Revolutionary Nicaragua

### 4.1 Introduction

Chapter Three addressed the conceptual challenges to the inclusion of economic and social rights and structural violence within the scope of transitional justice and proposed a broad understanding of the concept that allows its key components to be determined by the demands placed on it. However, while a broad understanding may resolve conceptual challenges, it remains to be shown how transitional justice can practically address issues of structural violence and social inequality. As Haldemann and Kouassi wrote, if the inclusion of these rights is ‘not to be merely an abstract ideal without practical import, it must provide a realistic view of how to make it “work” in the world as it is.’<sup>307</sup> This Chapter aims to meet this demand by presenting revolutionary Nicaragua as a case for further study that can ground current debates on the inclusion of ESR, structural violence, and social inequality within the transitional justice field with a practical example, and demonstrate how this could be made to ‘work’.

Revolutionary Nicaragua is a particularly interesting case for the purposes of the current discussion, however has received little attention within transitional justice discourse. From a conceptual perspective, the exclusion of revolutionary Nicaragua as a possible example of transitional justice is a direct result of the inherent politics of the field. With transitional justice initially defined along the paradigm of transition from authoritarianism to democracy in the context of Cold War politics, Nicaragua’s transition from authoritarianism to democratic socialism was unpalatable and readily dismissed as a transitional justice project. Even after this paradigm changed, revolutionary Nicaragua’s focus on advancing ESR and redressing social inequality did not find welcome accommodation among transitional justice’s focus on CPR. Because of this neglect, and because ‘in the case of Nicaragua, external actors did not promote [transitional justice] in 1979’,<sup>308</sup> revolutionary Nicaragua has valuable lessons to offer as traditional understandings of transitional justice are being challenged. Beyond questions of a conceptual nature, the case of revolutionary Nicaragua may also shed light on questions regarding practical challenges of transitional justice’s potential to address structural violence

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<sup>307</sup> Holdemann and Kouassi, “Transitional Justice Without Economic, Social and Cultural Rights?” 10.

<sup>308</sup> Astrid Bothmann, *Transitional Justice in Nicaragua 1990-2012: Drawing a Line under the past* (Wiesbaden: Springer VS, 2015), 121.

and social inequality. Through a concerted effort, the revolutionary government addressed the most severe symptoms of these injustices through short-term projects and in the face of severe resources constraints – challenging the practical difficulties raised by sceptics.

In her analysis of the political roots of transitional justice, Arthur may well have been ‘exploring the idea that if paradigmatic political transitions of the 1980s and 1990s had been conceived of as transitions to socialism, the scope, focus, and modalities of transitional justice might look quite different today.’<sup>309</sup> In response to this line of inquiry, where Sharp believes we may only ‘speculate’,<sup>310</sup> revolutionary Nicaragua can give valuable and practical insight into an understanding of transitional justice developed outside of its traditional roots. This insight will show how redressing social inequality may be considered a form of transitional justice in practice.

#### 4.1.1 Transitional Justice Literature and Revolutionary Nicaragua

Astrid Bothmann identified a ‘severe scholarly neglect throughout the past two decades’ of Nicaragua, including in the transitional justice field.<sup>311</sup> In transitional justice literature, Nicaragua has appeared ‘only in a handful of articles, most of which provide a short comparative overview of TJ policies in Central American states.’<sup>312</sup> Before considering Bothmann’s own contribution to the topic, it is helpful to briefly address Nicaragua’s scarce mention in transitional justice literature to understand the reason for its neglect.

Kritz’s voluminous work on transitional justice notably excludes revolutionary Nicaragua as a case of an ‘emerging *democratic* societ[y] address[ing] the legacies of their repression of their own people.’<sup>313</sup> At this time, Kritz’s understanding of ‘transition’ as transition from authoritarianism to Western liberal democracy could not reconcile revolutionary Nicaragua’s transition from authoritarianism under Somoza to democratic socialism under the Sandinistas as a case of transitional justice. Revolutionary Nicaragua’s mention in Kritz’s work is brief but instructive, elucidating the case’s early exclusion from traditional understandings of

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<sup>309</sup> Sharp, “Interrogating the Peripheries,” Footnote no. 3, *citing* Arthur, “How Transitions Reshaped Human Rights,” 325-26.

<sup>310</sup> Sharp, “Addressing Economic Violence,” 801.

<sup>311</sup> Bothmann, *Transitional Justice in Nicaragua*, 100.

<sup>312</sup> *Ibid.*, *citing* Moore, 1991, and Kurtenbach, 1996, and Brahm, 2006, and Oettler, 2008.

<sup>313</sup> Smith, “Introduction,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, xvi (emphasis in original).

transitional justice, beginning with the transition from authoritarianism to democracy paradigm in the 1990s.<sup>314</sup>

While transitional justice outgrew the transition from authoritarianism to democracy paradigm, this did not bring Nicaragua into the field's purview. Critical of 'relying on a normative framework formed in the early 1990s'<sup>315</sup> and believing it to be insufficient for understanding contemporary transitional justice, Hansen directly challenged the transition from authoritarianism to democracy paradigm. With this conceptual barrier out of the way, Hansen considered revolutionary Nicaragua an example of a 'non-liberal transition.'<sup>316</sup> In his analysis, Hansen acknowledges the revolutionary government's improved human rights record in some areas, however is critical of the trials of Somoza supporters by 'popular tribunals' and politically appointed and unqualified judges, the declaration of a state of emergency in 1982 and subsequent restrictions on the rights to assembly, freedom of speech and *habeus corpus*, and finally that the government 'did not sit on a democratic mandate until 1984.'<sup>317</sup> Hansen concludes that Nicaragua's obvious deviation from the conception of transitional justice as a response to transitions from authoritarian to democratizing states accounts for the rare analysis of transitional justice in the field.<sup>318</sup>

Hansen's consideration of revolutionary Nicaragua as a possible exercise in transitional justice is an important break from the case's previous exclusion. However, his analysis is limited to consideration of CPR to the neglect of considering revolutionary Nicaragua's initiatives to advance ESR and redress structural violence and social inequality as a form of transitional justice. As a result, Hansen's success in overturning an early paradigm of transitional justice is disappointed by his adherence to a different obstacle – the focus on CPR.

Finally, the most comprehensive work on Nicaragua in transitional justice literature may well be Bothmann's *Transitional Justice in Nicaragua, 1990-2012: Drawing a Line in the Past*. While the purpose of her work was to explore the causes behind the lack of transitional justice in Nicaragua from 1990 to 2012, the period from 1979 to 1990 also receives attention. Using a definition of transitional justice as 'a set of judicial and non-judicial measures to redress the

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<sup>314</sup> Waldorf, "Anticipating the Past," 173-174.

<sup>315</sup> Hansen, "Transitional Justice: Toward a Differentiated Theory," 3.

<sup>316</sup> *Ibid.*, 11.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

legacies of authoritarian rule and past human rights violations’,<sup>319</sup> comprised of judicial prosecutions, amnesties, truth commissions, lustration, and reparations, Bothmann considered whether revolutionary Nicaragua pursued transitional justice. While considering that judicial prosecutions of National Guardsmen and Somoza supporters could constitute transitional justice measures, Bothmann dismissed these as ‘political trials and not human rights trials for their disregard for due process principles’, and therefore ‘highly problematic to treat them as TJ instruments’.<sup>320</sup> Therefore, aside from engaging in ‘victor’s justice’ and revenge killings, Bothmann concluded that there were no attempts to deal with the past through transitional justice in revolutionary Nicaragua.<sup>321</sup>

Bothmann briefly engages with the topic of social inequality in the context of revolutionary Nicaragua. While recognising the ‘promise of raising the standard of living of the broad masses’ and ‘serious efforts to reduce existing socio-economic inequalities’, and related successes in literacy, education, and health, these are only discussed as a matter of historical context.<sup>322</sup> Bothmann fails to consider revolutionary Nicaragua’s initiatives to address social inequality as a form of transitional justice, likely because of a narrow or traditional understanding of the concept and the mechanisms that advance it.

Notably absent from her overview of the transitional justice field is any acknowledgment of the ongoing debate regarding the field’s prioritization of CPR and the demand for the inclusion of ESR.<sup>323</sup> This confirms Bothmann’s adherence to a traditional understanding of transitional justice whose prioritization of CPR over ESR does not allow for the consideration of revolutionary Nicaragua’s efforts to redress social inequality as a case of transitional justice. While conceding that ‘between 1979 and 1990 Nicaragua fundamentally changed’, Bothmann stops short of considering this fundamental change as the result of attempts to deal with the past through transitional justice.<sup>324</sup>

As demonstrated in Chapters Two and Three, despite a broadening of the field of transitional justice field, attempts to include ESR have been limited by persistent traditional understandings of transitional justice that exclude consideration of structural violence and social inequality as

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<sup>319</sup> Bothmann, *Transitional Justice in Nicaragua*, 33.

<sup>320</sup> For full discussion, see Bothmann, *Transitional Justice in Nicaragua*, 118 – 121.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid., 77, 115.

<sup>323</sup> Ibid., 51-54

<sup>324</sup> Ibid., 115.

transitional justice issues. The scholars discussed above adopt such traditional understandings, and as a result have failed to recognise revolutionary Nicaragua's efforts to redress structural violence and social inequality as a practice of transitional justice, thereby missing an important learning opportunity. This missed opportunity is an error this Chapter hopes to rectify.

#### 4.1.2 Background

To best appreciate revolutionary Nicaragua's transitional justice project it is necessary to understand what Nicaragua was transitioning from. Utilizing the World Bank's definition of absolute poverty as 'a condition of life so limited by malnutrition, disease, illiteracy, low life expectancy, and high infant mortality rate as to be beneath any rational definition of human decency',<sup>325</sup> a 1981 report by the Inter-American Commission on Human Rights concluded that approximately half the population in pre-revolutionary Nicaragua lived in absolute poverty.<sup>326</sup> An earlier study conducted in 1970 indicated that 5 percent of the population received 28 percent of the national income, while 50 percent of the population received only 15 percent of the income.<sup>327</sup>

The cause behind this dire state of poverty was the Somoza family – 'the greatest obstacle to improving the quality of life of most of the Nicaraguan population'<sup>328</sup> – who ruled over Nicaragua between father Anastasio Somoza García and sons Luis Anastasio Somoza Debayle and Anastasio Somoza Debayle from 1936 to 1979.<sup>329</sup> During their rule, the Somoza family and close associates amassed considerable personal wealth at the expense of the rest of the country.<sup>330</sup> Central to their power was the Somoza family's control over the National Guard, a national military force, who served as a *de facto* private security force for the Somozas and their interests, and has been described as 'key to maintaining [the] system of exaggerated social and economic inequality'.<sup>331</sup> The National Guard has been attributed with several human rights

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<sup>325</sup> Paul Streeten et al., *Poverty and Basic Needs*, report, World Bank (Washington DC, 1980), 3.

<sup>326</sup> Inter-American Commission on Human Rights (IACHR), "Chapter IX – Economic and Social Rights," in *Report on the Situation of Human Rights in the Republic of Nicaragua*, doc. No. 25, OEA/Ser.L/V/II.53, June 30, 1981, 2.

<sup>327</sup> *Ibid.*, 1.

<sup>328</sup> *Ibid.*, 3. *See also*, David Close, *Nicaragua: Politics, Economics and Society* (London: Pinter Publisher Ltd., 1989), 149.

<sup>329</sup> *For a full discussion on the Somoza Era, see* Thomas W. Walker and Christine J. Wade, *Nicaragua: Living in the Shadow of the Eagle* (Boulder, CO: Westview Press, 2011), 25-35.

<sup>330</sup> Suzanne Baker, "Aiming for Social Justice: Transforming Gender Ideologies in Revolutionary Nicaragua," September 1998, 4.

<sup>331</sup> Richard Millett, *Guardians of the Dynasty* (Maryknoll, NY: Orbis Books, 1978), 253.

violations under Somoza rule, with torture and murder widely practiced in rural communities.<sup>332</sup>

Largely a response to the poor conditions suffered by Nicaraguans, the Frente Sandinista de Liberación Nacional (Sandinista National Liberation Front or FSLN) was founded in 1961 in opposition to Somocist rule. Their significant role in the Nicaraguan Revolution, which saw the deposition of President Anastasio Somoza and the end of Somoza rule in July 1979, was followed by their control over the government until their formal election in 1984. The Nicaraguan Revolution or the ‘War of Liberation’ of 1978 to 1979 was the ‘product of systemic socioeconomic factors [and] intense political opposition to a particularly venal dictator.’<sup>333</sup> In the first few months of conflict, the National Guard was attributed with the indiscriminate use of artillery bombardment resulting in deaths and injuries among the civilian population,<sup>334</sup> military operations resulting in summary execution of civilians on the basis of living in areas where the FSLN was active,<sup>335</sup> and the disappearance of hundreds among the rural peasantry.<sup>336</sup>

As the revolutionary government came into power, Nicaragua entered a period of transition where the injustices of Somocist rule and the National Guard could be redressed, and a different path for the country could be embarked on. The successful revolution ushered in a period where ‘[m]ost Nicaraguans saw [...] an opportunity to create a system free of the political, social, and economic inequalities of the almost universally hated Somoza regime.’<sup>337</sup>

The optimism that followed the Sandinista Revolution was not shared by all, including a powerful and influential actor in the region. Remarking on the situation in Latin America, President Ronald Reagan described the region as divided between ‘the positive opportunity [...] illustrated by the two-thirds of the nations in the area which have democratic governments’, and the ‘dark future [...] foreshadowed by the [...] tightening grip of the totalitarian left’, including in revolutionary Nicaragua.<sup>338</sup> For the United States of America, a successful socialist revolution in Central America with ties to Cuba and the Soviet Union posed

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<sup>332</sup> Clifford L. Staten, *The History of Nicaragua* (Santa Barbara, CA: Greenwood, 2010), 79.

<sup>333</sup> Thomas W. Walker, *Nicaragua: The Land of Sandino* (Westview Press, 1992), 66.

<sup>334</sup> IACHR, “Chapter II – The Right to Life,” in *Report on the Situation of Human Rights in Nicaragua*, doc no. 18 rev. 1, OEA/Ser.L/V/II.45, November 17, 1978, 1, 2.

<sup>335</sup> *Ibid.*, 9.

<sup>336</sup> *Ibid.*

<sup>337</sup> US Library of Congress, “The Sandinista Years, 1979-90,” in *Nicaragua: A Country Study*, ed. Tim Merrill, Washington: GPO for the Library of Congress, 1993.

<sup>338</sup> Ronald Reagan, “Remarks on the Caribbean Basin Initiative to the Permanent Council of the Organization of American States,” speech, February 24, 1982.

a threat to stability in the region, to national security, and to their ideological interests during the Cold War.<sup>339</sup> In response, the United States staged a campaign of economic strain, support for counterrevolutionary covert operations, and propaganda in order to undermine and discredit the revolutionary government.<sup>340</sup>

For the purposes of this discussion, it is prudent to distinguish between two distinct time periods: pre-revolutionary Nicaragua from 1967 to July 1979 and revolutionary Nicaragua from July 1979 to the end of 1982. Between 1967 to July 1979, Anastasio Somoza Debayle began his first term as President and dictator until his flight from Nicaragua following the successful revolution. The July 1979 to end of 1982 period begins with the coming to power of the revolutionary government. While the revolutionary government maintained power until 1990, the outbreak of the US-sponsored Contra-Revolutionary War ‘effectively [brought] all social programs under siege’, as ‘the full development of the Reagan administration’s policy of low-intensity conflict’ came to fruition by the end of 1982.<sup>341</sup> One scholar described the situation rather bleakly:

The period from 1983 to 1987 involved a deteriorating economy, mobilization for defense, and massive destruction wrought by the contra, especially in the rural areas. With defense needs consuming up to 50% of the national budget, and financial hardship induced by an economic blockade as well as the decrease in international aid, many of the institutional changes initiated in the previous years had to be scaled back, or stalled completely.<sup>342</sup>

It is important to emphasize the disruption caused by the renewed outbreak of conflict in order to recognise a limitation of revolutionary Nicaragua as a potential case study. The Contra-Revolutionary War and the wartime economy that was developed in response, economic sanctions from the United States, and an already poor economy recently aggravated by the revolution had a profoundly negative impact on the country’s economy and social programs in particular, including the programs in health, housing, and educational services discussed

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<sup>339</sup> See generally, Wassim Dagher, "American Foreign Policy Fiascos: US Policy in Nicaragua as a Case Study," *Advances in Social Sciences Research Journal* 4, no. 8 (April 25, 2017). In 1981, Ronald Reagan wrote in his personal diary: "Nicaragua is an armed camp supplied by Cuba and threatening a communist takeover of all of Central America." See Ronald Reagan, *The Reagan Diaries*, ed. Douglas Brinkley (New York: HarperCollins, 2007), 44.

<sup>340</sup> Cheryl A. Rubenberg, "US Policy toward Nicaragua and Iran and the Iran-Contra Affair: Reflections on the Continuity of American Foreign Policy," *Third World Quarterly* 19, (1988), 1499. See also, William M. Leogrande, "Making the Economy Scream: Us Economic Sanctions against Sandinista Nicaragua," *Third World Quarterly* 17, no. 2 (1996).

<sup>341</sup> Harvey Williams, "The Social Impact in Nicaragua," 254.

<sup>342</sup> Baker, "Aiming for Social Justice," 13.

below.<sup>343</sup> The negative impact of Structural Adjustment Programs from the 1990s onwards further distance the situation in Nicaragua from the programs instituted during Revolutionary period.<sup>344</sup> Aside from being outside of the scope of this dissertation, determining the efficacy and long-term impact of the revolutionary government's initiatives in redressing in social inequality would be challenging, if not impossible. Nonetheless, as the following sections will demonstrate, by comparing social conditions prior to and after the revolution it is possible to determine the short-term success of these programs and their potential for redressing the most severe forms of absolute poverty and social inequality as a matter of transitional justice.

Recalling the political roots of transitional justice in a Western agenda of promoting liberal democracies, it is clear that the reason behind revolutionary Nicaragua's initial exclusion as an example of transitional justice is the same reason for which it was subjected to an aggressive campaign by the US: the aspirations of the Sandinista Revolution were antithetical to these Western goals. As Carlos Chamorro, former editor of the Sandinista newspaper *La Barricada*, commented on Sandinista rule: '[d]emocracy was important but more important than democracy was social justice.'<sup>345</sup> Having recognised these political roots and with a broadened understanding of transitional justice in mind, this Chapter will show that revolutionary Nicaragua's attempts to address a legacy of injustice including structural violence, social inequality, and direct violence should be considered a form of transitional justice.

#### 4.1.3 Basic Needs and Structural Violence

As will be shown, revolutionary Nicaragua's efforts to redress the injustices of the past were motivated in large part by social and distributive justice. This is most evident through their programs aimed at securing the basic needs of Nicaraguan people. Securing basic needs or basic social rights is widely discussed in transitional justice literature, including as a matter of securing human development or freedoms,<sup>346</sup> promoting substantive social justice,<sup>347</sup> redressing structural violence,<sup>348</sup> and as a necessary and fundamental step to the transitional

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<sup>343</sup> For further discussion on the effects of the Contra-Revolutionary War, see also Richard M. Garfield and E. Taboada, "Health Services Reforms in Revolutionary Nicaragua," *American Journal of Public Health* 74, no. 10 (October 1984): 1143-44 (health).

<sup>344</sup> Marie Hamlyn Zuniga, Carmel Borg, and Peter Mayo, "Nicaragua: Past and Present," *Public Intellectuals, Radical Democracy and Social Movements A Book of Interviews* 276 (2007): 17.

<sup>345</sup> Chamorro, Carlos. Interview by Brian Gruber. The Digital Home of Brian Gruber. October 8, 2014.

<sup>346</sup> McEvoy, "Beyond Legalism," 429, citing Amartya Sen, *Development as Freedom*, 2001.

<sup>347</sup> Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice," 189.

<sup>348</sup> See for example, McGill, "Different Violence, Different Justice?," 81-82.

justice project itself.<sup>349</sup> Central to this are issues of securing water, food, health, decent housing, education, and social security. Securing basic needs are a direct intervention towards redressing structural violence, and in the case of uneven distribution between communities, social inequality. In his discussion on structural violence, Galtung specifically discusses the uneven distribution of health services, education and literacy, and housing conditions as examples of such violence.<sup>350</sup>

For the purposes of the current discussion, focusing attention on the poor conditions of health, education, and housing in pre-revolutionary Nicaragua allows certain characteristics to become apparent, namely that there existed a state of absolute poverty and that the distribution of wealth and social services specifically disadvantaged the 55 percent of Nicaraguans who lived in rural areas.<sup>351</sup> Nicaraguans that suffered under this absolute poverty fell victim to systemic and structural violence which further translated into social inequality, as rural communities and the urban poor suffered the most from the uneven distribution of services and resources. It should be noted that these weren't the only efforts to address social inequality, however, as the revolutionary government addressed the effects of social inequality in other areas as well. In addition to these initiatives, similar efforts were made in the areas of gender equality, food distribution, land redistribution, and social security – areas for improvement also identified in their 1969 Historic Program.<sup>352</sup> While not addressed in this discussion, these experiences also stand to benefit from further study if transitional justice is to address structural violence and social inequality. Nonetheless, the steps taken in the areas of health, education and housing

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<sup>349</sup> See for example, Haldemann and Kouassi, "Transitional Justice Without Economic, Social, and Cultural Rights?," 14; Robins, "Failing Victims?," 44.

<sup>350</sup> Galtung, "Violence, Peace, and Peace Research," 171, 186.

<sup>351</sup> IACHR, "Chapter IX – Economic and Social Rights," Note no. 3. ('In 1977, 55% of the population (1,278,750 people) lived in rural areas.')

<sup>352</sup> Sandinista National Liberation Front (FSLN), "The Historic Program of the FSLN," in *Sandinistas Speak: Speeches, Writings, and Interviews with Leaders of Nicaragua's Revolution*, ed. Bruce Marcus, New York: Pathfinder Press, 1982, 14-17, 22. For discussion on gender justice in Revolutionary Nicaragua, see for example Rosario Montoya, "House, Street, Collective: Revolutionary Geographies and Gender Transformation in Nicaragua, 1979-99," *Latin American Research Review* 38, no. 2 (2003); Nuria Pena, Mar Maiques, and Gina E. Castillo, "Using Rights-based and Gender-analysis Arguments for Land Rights for Women: Some Initial Reflections from Nicaragua," *Gender & Development* 16, no. 1 (2008); Beatriz Gonzalez Manchón and Morna Macleod, "Challenging Gender Inequality in Farmers Organisations in Nicaragua," *Gender & Development* 18, no. 3 (2010); Mary Louisa Cappelli, "Women of the Revolution: Gendered Politics of Resistance and Agency in the Cultural Production of Margaret Randall," *Cogent Arts & Humanities* 4, no. 1 (2017); Close *Nicaragua: Politics, Economics and Society*, 160-61. For land redistribution and agrarian reform in Revolutionary Nicaragua, see for example Rikke J. Broegaard, "Land Tenure Insecurity and Inequality in Nicaragua," *Development and Change* 36, no. 5 (2005); Silvia L. Saravia-Matus and Jimmy Saravia-Matus, "Agrarian Reform: Theory & Practice. The Nicaraguan Experience," *Encuentro* 41, no. 84 (2010).

will demonstrate revolutionary Nicaragua's initiative to redress the structural violence and inequality.

## 4.2 Structural Violence and Social Inequality in Nicaragua (1969 to 1979)

### 4.2.1 Health

The health system under Somoza has been characterized as 'disorganized [and] inefficient', and accessible primarily to urban elites.<sup>353</sup> With health facilities and personnel concentrated in urban areas, health care was not readily accessible to rural communities.<sup>354</sup> Furthermore, matters of public health and sanitation were left unattended, including limited access to potable water in urban (41.8 percent) and rural (10.9 percent) areas, limited access to sewage or septic tanks in urban areas (29.4 percent), and over three quarters of a million people in rural areas without latrines.<sup>355</sup> In 1970, gastroenteritis and other diarrhoea diseases were the leading cause of death, constituting 23.6 percent of all deaths.<sup>356</sup> The social costs of the poor health, public health, and sanitation system under Somoza was apparent in Nicaragua's strikingly low life expectancy of an estimated 53 years and high infant mortality rate of 120 to 146 per 1,000 live births, compared to neighbouring Costa Rica's 70 years and 29 per 1,000, respectively.<sup>357</sup> Despite poor health conditions, military spending surpassed health three-fold in 1976.<sup>358</sup>

### 4.2.2 Education/Literacy

Anastasio Somoza, the father, is infamously quoted for saying: 'I don't want educated people. I want oxen.'<sup>359</sup> This sentiment was clearly put into practice during the rule of father and sons, with education in pre-revolutionary Nicaragua characterized as 'poor'<sup>360</sup> and a non-priority under the Somozas.<sup>361</sup> The consequences were apparent in the distribution and accessibility of schools, school attendance and dropout rates, and high levels of illiteracy. Schools were

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<sup>353</sup> Williams, "The Social Impact in Nicaragua," 247.

<sup>354</sup> Close, *Nicaragua: Politics, Economics and Society*, 150-51.

<sup>355</sup> Ibid., 150. (Close attributes, at least in part, the poor public health and sanitation situation to the spread of enteritis, 'the leading cause of death in the country,' p. 150).

<sup>356</sup> Millett, *Guardians of the Dynasty*, 253.

<sup>357</sup> Close, *Nicaragua: Politics, Economics and Society*, 150,

<sup>358</sup> IACHR, "Chapter IX – ESR," 2, *citing* United States, Arms Control and Disarmament Agency, *World Military Expenditures and Arms Transfers, 1969-78*, Publication no. 108, Washington D.C., 1980, 61.

<sup>359</sup> Penny Lernoux, *Cry of the People: The Struggle for Human Rights in Latin America--the Catholic Church in Conflict with U.S. Policy* (New York, N.Y: Penguin Books, 1991), 85.

<sup>360</sup> Williams, "The Social Impact in Nicaragua," 249.

<sup>361</sup> Close, *Nicaragua: Politics, Economics and Society*, 154.

concentrated in urban areas, restricting access primarily to the middle and upper classes,<sup>362</sup> with children of wealthy families enjoying access to better schools through exclusive private schools.<sup>363</sup> Of the high school age group only 17.5 percent enrolled in secondary school, and of the university age group only 8.4 percent attended post-secondary institutions.<sup>364</sup> Comparing the dropout rates of primary school goers further exposes a divide between urban and rural areas: only 5 percent of rural primary school goers finished primary once started, compared to 44 percent of urban children.<sup>365</sup> While pre-revolutionary Nicaragua had high rates of 50<sup>366</sup> to 52 percent<sup>367</sup> illiteracy, these rates belie the true consequences of unequal distribution of schools between urban and rural areas. Illiteracy reached approximately 70 percent in rural areas, compared to 20.4 percent in urban areas.<sup>368</sup>

#### 4.2.3 Housing

The housing situation in Managua has been characterized as ‘serious’<sup>369</sup> and ‘disastrous’<sup>370</sup> even prior to a 1972 earthquake, which left in its wake 10,000 dead, 20,000 injured, and three-quarters of residents homeless.<sup>371</sup> A 1972 study concluded that 73.7 percent of housing was ‘inadequate’,<sup>372</sup> with reconstruction efforts after the earthquake doing little to alleviate the situation, and most housing built for middle- and upper-class families.<sup>373</sup> Despite the disaster caused by the earthquake, Somoza and other government elites allegedly seized the opportunity for self-enrichment, using half of 32 million dollars of disaster relief sent by the US for personal gain.<sup>374</sup> The already poor housing situation was further exasperated by the revolutionary war, which the Ministry of Housing and Human Settlements estimated caused a total of 38 million

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<sup>362</sup> See IACHR, “Chapter IX – ESR, 2”; Williams, “The Social Impact in Nicaragua,” 249.

<sup>363</sup> Williams, “The Social Impact in Nicaragua,” 249.

<sup>364</sup> Close, *Nicaragua: Politics, Economics and Society*, 154.

<sup>365</sup> *Ibid.*

<sup>366</sup> Williams, “The Social Impact in Nicaragua,” 249.

<sup>367</sup> IACHR, “Chapter IX – ESR,” 2.

<sup>368</sup> See IACHR, “Chapter IX – ESR,” 2; Close, *Nicaragua: Politics, Economics and Society*, 154. (Close provides figures of 70 percent literacy in and around Managua, and 70 percent illiteracy in departs of Matagalpa, Boaco, Rio san Juan, and Selaya.)

<sup>369</sup> Williams, “The Social Impact in Nicaragua,” 250-51.

<sup>370</sup> IACHR, ‘Chapter IX – ESR, 4.

<sup>371</sup> Kenneth E. Morris, *Unfinished Revolution: Daniel Ortega and Nicaragua's Struggle for Liberation* (Chicago: Chicago Review Press, 2016), citing Clifford Krauss, *Inside Central America: Its People, Politics, and History*, New York: Simon & Schuster, 1992, 127.

<sup>372</sup> *Ibid.*

<sup>373</sup> Williams, “The Social Impact in Nicaragua,” 250-51.

<sup>374</sup> Morris, *Unfinished Revolution*, 65. Curiously enough, Johan Galtung broaches the topic of earthquakes in his discussion of structural violence, raising the question: ‘what if a social order is such that some people live well in solid, concrete houses and others in shacks that crumble under the first quake, killing the inhabitants?’, see Galtung, “Violence, Peace, and Peace Research,” Footnote No. 3.

dollars-worth of damage to housing.<sup>375</sup> At the time of their taking the reins of power in Nicaragua, the revolutionary government inherited a shortage of between 250,000 and 500,000 units of housing.<sup>376</sup>

#### 4.3 Redressing Structural Violence and Social Inequality in Revolutionary Nicaragua (1979 to 1982)

Where pre-revolutionary Nicaragua was characterized by a state of absolute poverty and social inequality, revolutionary Nicaragua saw ‘tremendous progress [...] in meeting the needs of the masses’, with accomplishments in health, education, housing, and welfare specifically recognised.<sup>377</sup> These improvements were not a product of chance, but rather the product of ‘conscious, flexible, and pragmatic planning on the part of the government and of mobilization involvement and commitment on the part of the people.’<sup>378</sup> The Historic Program of the FSLN, originally printed in 1969 and reprinted June 1981, affirmed the party’s goal of ‘establishing a social system that wipes out the exploitation and poverty that [Nicaraguan] people have been subjected to’.<sup>379</sup> Furthermore, in the ‘first public document of the revolutionary government’, the government pledged to develop policies that would improve quality of life for all Nicaraguans, including in the areas of health, education, welfare, and housing conditions.<sup>380</sup>

Whereas the previous section looked at poor conditions of health, education, and housing in pre-revolutionary Nicaragua as indicators of structural violence and social inequality that disadvantaged rural communities, this section turns to revolutionary Nicaragua’s initiatives aimed at improving those conditions. During this section, two characteristics of revolutionary Nicaragua will be made apparent: firstly, their programs and campaigns specifically sought to alleviate absolute poverty and secondly, resources and services were increasingly distributed towards previously underserved rural areas. While this overview primarily covers the period from the beginning of revolutionary Nicaragua in July 1979 to the end of 1982, a few

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<sup>375</sup> Morris, *Unfinished Revolution*, 65-66.

<sup>376</sup> Morris, *Unfinished Revolution*, 65 (500,000 homes); Kosta Mathéy, "Housing Policies in Nicaragua," *Ekistics* 58, no. 346/347 (January/February 1991): 28.

<sup>377</sup> Williams, "The Social Impact in Nicaragua," 247.

<sup>378</sup> *Ibid.*

<sup>379</sup> FSLN, "Historic Program," 13.

<sup>380</sup> Williams, "The Social Impact in Nicaragua," 247. *See also*, Daniel Ortega Saavedra, Victor M. Lopez, and Humberto Ortega Saavedra, "Why the FSLN Struggles in Unity with the People," *Latin American Perspectives* 6, no. 1 (Winter 1979) (In this 1978 document, the FSLN undertakes to improve working conditions, education, cost of living, transportation, housing, health, welfare, and gender equality).

exceptions will be made to compare between conditions prior to and after the revolution, and to demonstrate the success of these programs.<sup>381</sup>

#### 4.3.1 Health

The first efforts of the revolutionary government in the area of health were put towards creating a National Unified Health System and the restoration of pre-war health facilities. While an improvement, an initial significant increase in available health facilities and trained health personnel of all levels in urban areas left the imbalance of services between urban and rural areas unchanged.<sup>382</sup> Government health care was made accessible to all Nicaraguans, which increased utilization of health facilities by the masses, and ‘greatly increased expectations in underserved areas.’<sup>383</sup>

From 1981 to the end of 1982, the Ministry of Health ‘received top priority among the social sector ministries.’<sup>384</sup> Construction of four new regional hospitals began, and the number of health posts increased by over 25 percent, primarily in rural or underserved urban areas. There was an additional increase in medical personnel, and a 20 percent increase in the number of consultations. This period has been characterized as a ‘shift from a concentration of resources and services in urban areas to a dispersion toward underserved (primarily rural areas).’<sup>385</sup> By 1984, ten new hospitals and 300 health centres had been constructed, and in that year six million consultations had been conducted, a staggering increase from 200,000 in 1977.<sup>386</sup>

Aside from improvements in the number of health personnel and health facilities, the revolutionary government also initiated a series of health campaigns. National inoculation campaigns were responsible for effective elimination of polio and diphtheria,<sup>387</sup> and the reduction of measles, tetanus, tuberculosis, and whooping cough.<sup>388</sup> These campaigns were made possible through ‘massive short-term training courses and a heavy dose of public health education’, and depended on the mobilization of up to 10 percent of population as health

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<sup>381</sup> Williams, “The Social Impact in Nicaragua,” 254.

<sup>382</sup> *Ibid.*, 248-249.

<sup>383</sup> *Ibid.*, 249.

<sup>384</sup> *Ibid.*, 252.

<sup>385</sup> *Ibid.*

<sup>386</sup> Close, *Nicaragua: Politics, Economics and Society*, 151.

<sup>387</sup> World Health Organization, *WHO Vaccine-Preventable Diseases: Monitoring System (2017 global summary) – Incidence Time Series for Nicaragua*, July 15, 2018. (In Nicaragua, the last cases of Polio and Diphtheria were reported in 1981 and 1983, respectively.)

<sup>388</sup> Williams, “The Social Impact in Nicaragua,” 252. *For further discussion on the success of these inoculation campaigns, see Garfield and Taboada, "Health Services Reforms in Revolutionary Nicaragua,"* 1142.

volunteers.<sup>389</sup> These campaigns also had positive long-term effects in promoting the formation of community health councils at the local, regional, and national level.<sup>390</sup> Other initiatives included the expansion of an oral rehydration program and the opening of 300 centres, a ‘major factor in the significant (30 percent) reduction of infant mortality’,<sup>391</sup> sanitation initiatives involving garbage removal and latrine construction, and a 1981 anti-malaria campaign involving 73,000 health brigadistas.<sup>392</sup>

The success of the revolutionary Government’s initiatives in improving health conditions was evident as early as 1984:

It is estimated that, between 1978 and 1983, infant mortality decreased from 121 to 80.2 per 1,000 live births, life expectancy at birth rose from 52 to 59 years. The number of reported malaria cases has decreased by 50 per cent, polio cases have not been reported for two years, no measles cases were reported in the first half of 1984, and most other immunization preventable diseases are considerably reduced. Diarrhoea has fallen from the first to the fourth most common cause of hospital mortality.<sup>393</sup>

#### 4.3.2 Education / Literacy

Immediately following the revolution, the first steps taken in the area of education were repairs to war-damaged schools (47 of 128 war damaged schools were repaired) and the construction of new schools. Community projects accounted for the majority of new schools built (85 percent of 739 schools in the first two years), with most located in rural areas.<sup>394</sup> From 1981 onwards, the Ministry of Education expanded both physical structures and student enrolment, building three times as many schools in the 1981 to 1982 period than the July 1979 to 1981 period, with a focus on underserved rural areas and areas of the interior.<sup>395</sup> By 1982, the number of teachers grew from 12,975 under Somoza to over 40,000.<sup>396</sup>

The Ministry of Education’s ‘most ambitious and well-known effort’ and recipient of a UNESCO award for its contribution to literacy was the Literacy Crusade.<sup>397</sup> Motivated by a sense of ‘justice and moral obligation of the revolution towards the population’ and considered

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<sup>389</sup> Garfield and Taboada, "Health Services Reforms in Revolutionary Nicaragua," 1142, *citing* Richard M. Garfield and Sten Vermund, "Changes in Malaria Incidence After Mass Drug Administration In Nicaragua," *The Lancet* 322, no. 8348 (1983): 500-503.

<sup>390</sup> Garfield and Taboada, "Health Services Reforms in Revolutionary Nicaragua," 1142.

<sup>391</sup> Williams, "The Social Impact in Nicaragua," 252.

<sup>392</sup> Close, *Nicaragua: Politics, Economics and Society*, 151.

<sup>393</sup> Garfield and Taboada, "Health Services Reforms in Revolutionary Nicaragua," 1143.

<sup>394</sup> Williams, "The Social Impact in Nicaragua," 249.

<sup>395</sup> *Ibid.*, 253.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*, 250.

necessary for forthcoming national reconstruction,<sup>398</sup> the Literacy Crusade saw the mobilization of 80,000 to 100,000 volunteers over five months in a nationwide adult literacy campaign.<sup>399</sup> The efforts of the Crusade were met with great success, reporting a reduction in illiteracy to less than 13 percent compared to pre-revolutionary rates of 50 to 52 percent.<sup>400</sup> The Crusade was especially effective in rural communities, with an 87 percent reduction in illiteracy reported in some areas.<sup>401</sup> Expanding on the success of the Crusade, over 150,000 adults participated in adult education programs through Basic Popular Education Centres thereafter.<sup>402</sup>

Nicaragua's Literacy Campaign offers important lessons for the transitional justice field. Not only did it contribute to a 'social transformation process aiming at the redistribution of power and wealth'<sup>403</sup> by advancing the right to education and redressing social inequality through advancing literacy in previously marginalized areas, it further demonstrates a possible means of promoting reconciliation through constructive engagement between previously disconnected communities. Beyond its ambition for eradicating illiteracy, the literacy campaign was also motivated by other goals, including encouraging 'integration and understanding between Nicaraguans of different classes and backgrounds' and 'support[ing] national cohesion and consensus'.<sup>404</sup> The campaign served to bridge a gap between urban and rural areas and demonstrated to marginalized Nicaraguans that they would begin to be included in the distribution of wealth and services.<sup>405</sup>

### 4.3.3 Housing

To rectify the housing situation, the revolutionary Government instituted several direct intervention programs, including mass housing projects or housing estates, self-help programs and building materials banks, progressive urbanization programmes, and settlement upgrading.<sup>406</sup>

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<sup>398</sup> Ulrike Hanemann, *Nicaragua's Literacy Campaign*, report no. 2006/ED/EFA/MRT/PI/43, UNESCO Institute for Education, United Nations Educational, Scientific and Cultural Organization (Hamburg, 2005).

<sup>399</sup> See Williams, "The Social Impact in Nicaragua," 250, (80,000 volunteers); Close, *Nicaragua: Politics, Economics and Society*, 154 (100,000 volunteers).

<sup>400</sup> IACHR, "Chapter IX – ESR," 10. *For further discussion, see Close, Nicaragua: Politics, Economics and Society*, 154-55; Williams, "The Social Impact in Nicaragua," 250; Hanemann, *Nicaragua's Literacy Campaign*.

<sup>401</sup> IACHR, "Chapter IX – ESR," 10.

<sup>402</sup> Williams, "The Social Impact in Nicaragua," 253.

<sup>403</sup> Hanemann, *Nicaragua's Literacy Campaign*, 8.

<sup>404</sup> *Ibid.*, 3.

<sup>405</sup> *Ibid.*, 8,

<sup>406</sup> Mathéy, "Housing Policies in Nicaragua," 33.

Through housing projects and housing estates programs, the government facilitated the construction of 9,536 homes between 1980 and 1986 through direct labour until the program's termination as a result of the war economy.<sup>407</sup> While most of the initial construction occurred in Managua, from 1981 'a shift began toward underserved areas of the interior.'<sup>408</sup> From a short-term perspective, the period from July 1979 to the end of 1980 saw the construction of 1,146 new houses and repairs to 4,676 war-damaged houses, and a five-fold increase from 1981 to 1982 with 5,726 new homes built.<sup>409</sup>

While there was a shift towards facilitating housing for the poor, the newly established Ministry of Housing and Human Settlements (MINVAH) faced financial constraints and was unable to provide even low-cost housing for all those that needed it. As a solution to these constraints, the MINVAH implemented a Materials Bank program, which produced and distributed housing materials for purchase at low cost and with low-interest financing.<sup>410</sup> The Materials Bank program addressed housing needs in rural communities in particular, with 95 percent of its resources distributed to the benefit of the rural population.<sup>411</sup> The capacity of the program was reduced following the destruction of an important saw mill during the Contra-revolutionary war, and the quality of services provided were similarly reduced to meet urgent wartime needs.<sup>412</sup> Another solution was the progressive urbanizations programme, 'a sites and services program provid[ing] low-cost controlled development (primarily in the urban centres).'<sup>413</sup> This program was introduced following a flood in 1982, and provided basic infrastructure to the recently homeless.

Initiatives to improve the housing situation went beyond direct intervention in the form of housing production. The revolutionary government also took steps to expropriate land containing shanty towns and vacant urban land. Land containing 420 shanty towns was expropriated and placed under the ownership of MINVAH, who in turn reinvested income from rent into necessary services and infrastructure before ceding ownership to its occupants.<sup>414</sup> Vacant urban land, previously protected by private ownership rights, was expropriated for the

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<sup>407</sup> Mathéy, "Housing Policies in Nicaragua," 33.

<sup>408</sup> Williams, "The Social Impact in Nicaragua," 254.

<sup>409</sup> *Ibid.*, 251 – 254.

<sup>410</sup> Williams, "The Social Impact in Nicaragua," 254.

<sup>411</sup> Mathéy, "Housing Policies in Nicaragua," 34.

<sup>412</sup> *Ibid.*

<sup>413</sup> Williams, "The Social Impact in Nicaragua," 254.

<sup>414</sup> Mathéy, "Housing Policies in Nicaragua," 32-33.

purposes of public interest development, including housing.<sup>415</sup> Other indirect intervention methods included the reduction of rent by 40 to 50 percent to the benefit of nearly 72,000 poor families, and legal provision for the right of rental tenants to claim ownership of properties after a maximum period of 20 years.<sup>416</sup>

#### 4.4 Accountability for Human Rights Violations Perpetrated by the National Guard

Revolutionary Nicaragua's initiatives to redress poverty and social inequality were not the sole focus of their justice efforts during the transition. As previously mentioned, the National Guard perpetrated various human rights violations during the revolutionary war and under Somoza rule. Following the success of the revolution and with around 7,000 Guardsmen in custody, there was 'widespread desire among the Nicaraguan people to castigate [the] detested [National Guard].'<sup>417</sup> Demands for justice took an ugly turn with over a hundred National Guardsmen summarily executed in the first few days of the successful revolution, albeit without government sanction and drawing strong condemnation from the newly appointed Minister of Interior.<sup>418</sup> While not a formal act of the revolutionary government, their failure to prevent such atrocity is a testament to the importance of rule of law standards during transitional periods.

Formal prosecutions took place thereafter in the form of Special Tribunals and Appellate Courts, whose jurisdiction extended over members of the National Guard, public officials, and other civilians associated with the Somocist regime.<sup>419</sup> However, the revolutionary government's attempt at meting out criminal justice was marred by concerns over lack of fair trials, scope of jurisdiction, restricted access to legal assistance, poor appeal proceedings, poor standards regarding evidence, political imprisonment, and arbitrary detention.<sup>420</sup> These concerns led Bothmann to observe that prosecutions under the Special Tribunals were 'political

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<sup>415</sup> Mathéy, "Housing Policies in Nicaragua," 32-33.

<sup>416</sup> Ibid.

<sup>417</sup> Bothmann, *Transitional Justice in Nicaragua*, 118.

<sup>418</sup> Research Directorate, Immigration and Refugee Board, Canada, *Nicaragua: Documentation on human rights abuses directed against former members of Somoza's National Guard by Nicaraguan authorities; any information on the forced repatriation of such persons back to Nicaragua from other countries?*, report no. NIC1957, September 1, 1989, citing Amnesty International, "Report of the Amnesty International Missions to the Republic of Nicaragua", January 1980.

<sup>419</sup> Bothmann, *Transitional Justice in Nicaragua*, 118.

<sup>420</sup> For a full critique, see Bothmann, *Transitional Justice in Nicaragua*, 115-121; Hansen, "Transitional Justice: Toward a Differentiated Theory"; Mayra Gómez, *Human Rights in Cuba, El Salvador, and Nicaragua: A Sociological Perspective on Human Rights Abuse* (New York: Routledge, 2003), 133-135; Amnesty International, "Amnesty International Report 1981," London: Amnesty International Publications, 1981, 170 – 175; W. Gordon West, "The Sandinista Record on Human Rights in Nicaragua," *Droit Et Société* 22, no. 1 (1992).

trials and not human rights trials due to their disregard for due process principles', and to conclude this as an exercise of victor's justice.<sup>421</sup>

While not constituting the primary focus of their justice project, the revolutionary government's attempt at criminal justice was undoubtedly problematic from a legal and human rights perspective. It should be recalled, however, that the fledgling government did not benefit from the resources, experience, and expertise offered by the international community as was the case in other countries undertaking transitional justice projects. Despite its failure, the attempt to hold National Guardsmen and others associated with the Somoza regime to account demonstrated a desire to address the injustices of the past through criminal justice, and should be considered, albeit a problematic one, a part of Nicaragua's transitional justice project.

#### 4.5 Lessons Learnt – Transitional Justice in Revolutionary Nicaragua

Revolutionary Nicaragua's efforts to redress the injustices of its past should be considered against the understanding of transitional justice and its key components as identified in Chapter Two. Furthermore, it is also important to consider how revolutionary Nicaragua was able to overcome practical challenges to addressing structural violence during a time of transition.

##### 4.5.1 Transitional Justice and Revolutionary Nicaragua's Justice Efforts

In Chapter Two, it was proposed that transitional justice as a concept can broadly be understood as the pursuit of justice during a period of social or political transition in order to address past injustices and to work towards certain aspirations for the future. This understanding allows consideration of the transitional justice potential of revolutionary Nicaragua's experiences from a depoliticised understanding of the concept. As addressed above, if a traditional understanding is taken or if the case of revolutionary Nicaragua's justice efforts is weighed against a traditional conception of transitional justice, their experiences would be quickly dismissed, along with valuable lessons on how transitional justice can address different justice demands.

In order to consider their experiences as transitional justice, this section will consider revolutionary Nicaragua's initiatives to address the past against the key components of the concept. While these key components are not easily separable and have a dynamic relationship and influence over one another, by identifying their backwards- and forwards-looking

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<sup>421</sup> Bothmann, *Transitional Justice in Nicaragua*, 119.

considerations, their understanding of justice, and the mechanisms used, it is possible to develop an understanding of the conception of transitional justice held by the revolutionary government.

### *Justice*

Comparing the pre-revolutionary and revolutionary periods, Suzanne Baker characterized the former as ‘one of great disparities and inequalities, or one of great social *injustice*’, and the latter as ‘attempting to promote, and even achieve, social justice.’<sup>422</sup> Motivated by a sense of social justice, the revolutionary government quickly took steps to secure the basic needs of the population. However, their efforts went beyond simply redressing conditions of absolute poverty as a matter of social justice. Emphasis was placed on providing resources and services to previously marginalized communities in an attempt to promote substantive equality between the rural and urban communities. This suggests the revolutionary government was motivated by a sense of distributive justice in addition to social justice.

Finally, while the social and distributive forms of justice constitute the main focus of this paper’s attention, it is important to recognise revolutionary Nicaragua’s attempts to address the past through criminal justice and trials and prosecutions of National Guardsmen and Somocists. Serious flaws rendered these attempts akin to Bothmann’s conclusion that they were an exercise of ‘victor’s justice’, not transitional justice. Nonetheless, these attempts at criminal justice demonstrated a concerted effort of the revolutionary government to address the injustices of the past and were part and parcel of steps taken to secure justice during transition. A thorough consideration of revolutionary Nicaragua’s attempts to address the past as a potential example of transitional justice should address both their successes in advancing social and distributive justice, and their failures in criminal justice.

The focus on social, distributive, and criminal justice demonstrates the prevalence and interrelated nature of direct and structural violence under Somoza. The National Guard was instrumental in maintaining an unjust structure in Nicaraguan society and was heavy-handed in their conduct. Nicaraguan Minister of Interior Tomás Borge expressed this duality quite concisely in describing the National Guardsmen: ‘besides being murderers they were thieves. Besides being robbers, they were brutal. They killed a lot of Nicaraguans, and they stole the

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<sup>422</sup> Baker, “Aiming for Social Justice,” 5, 10.

property of others.’<sup>423</sup> From a justice perspective, both CPR and ESR violations, including structural violence, had to be addressed as a matter of social, distributive, and criminal justice.

### *Backwards- and Forwards-Looking Considerations*

The focus on social justice, distributive justice, and criminal justice in turn informed the backwards- and forwards-looking considerations of Nicaragua’s transitional justice project, or those injustices that were addressed during the transition. Through programs aimed at improving conditions in health, education, and housing for the urban and rural poor, the revolutionary government tackled the injustice of structural violence, namely poverty and social inequality. These considerations were identified earlier in the Historic Program of FSLN. In the program, the FSLN clearly outlined their mandate as the establishment of a ‘social system that wipes out the exploitation and poverty that [Nicaraguans] have been subjected to in past history’. In this way, the backwards- and forwards-looking considerations work together. Broadly speaking, revolutionary Nicaragua’s transitional justice project was aimed at addressing past issues of social *injustice* in order to ensure the future of the country would be characterized by its absence, or social justice.

### *Mechanisms*

Finally, revolutionary Nicaragua depended on certain mechanisms to advance social, distributive and criminal justice, to address past injustices of direct and structural violence, and to advance a society characterized by social justice and equality. Similar to traditional conceptions of transitional justice, demands for criminal justice and accountability for the wrongdoings of Somocists and National Guardsmen were pursued through trials and prosecution through the Special Tribunals and Appellate Courts. On the other hand, with demands for redressing a legacy of structural violence and social inequality as matters of social and distributive justice, the choice in mechanisms diverged greatly from traditional transitional justice and hardly resembled the toolkit associated with it. Some mechanisms employed in revolutionary Nicaragua have already been proposed by transitional justice scholars for their

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<sup>423</sup> Tomás Borge, " On human rights in Nicaragua," in *Sandinistas Speak: Speeches, Writings, and Interviews with Leaders of Nicaragua's Revolution*, ed. Bruce Marcus, New York: Pathfinder Press, 1982, 87.

potential for redressing ESRV, structural violence, and social inequality, including the redistribution of land and provision for social justice through constitutional and civil law.<sup>424</sup>

Aside from these initiatives, however, the revolutionary government depended on mechanisms that do not appear in any proposed transitional justice toolkits, relying instead on short-term campaigns facilitated by the mass mobilization of public participants to improve literacy, education, and health. Many of these programs did more than address issues of poverty and inequality, also serving to bridge gaps between previously distanced communities, demonstrating a potential to advance the goal of reconciliation.

Having identified these key components, it is clear that revolutionary Nicaragua justice efforts can be considered a conception of transitional justice that was motivated by social and distributive justice, and addressed past and ongoing poverty and social inequality through short-term campaigns facilitated by mass mobilization of public participants in order to secure social equality and adequate standard of living. While distinctly different from its traditional conception, revolutionary Nicaragua tackled the injustices of their past in a manner no less a form transitional justice.

#### 4.5.2 In the Face of Practical Challenges

The case of revolutionary Nicaragua also offers valuable lessons regarding the practical challenges raised regarding the potential for transitional justice to redress structural violence, namely that transitional justice is ill-suited for such long-term projects, and that severe resource constraints will limit such potential.

As discussed in Chapter Two, addressing CPR and ESR concerns are not exclusively short-term or long-term matters. Securing social equality and eradicating structural violence through transitional justice will not be accomplished in the short-term, but, as in the case of revolutionary Nicaragua, can lay a foundation through small, symbolic, and real advances. Through their programs in health, housing and education the revolutionary government did not rid Nicaragua of all forms of structural violence outright. Rather, through short-term projects with success in securing basic needs in previously marginalized areas, they laid a foundation

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<sup>424</sup> See for example, Evans, “Structural Violence, Socioeconomic Rights, and Transformative Justice,” 10-13 (Evans discusses the potential for land redistribution to redress historic inequality as a matter of transformative justice.); Arbour, “Economic and Social Justice,” 24-26 (Arbour discusses the need to address key legislation that may strengthen economic, social and cultural rights.)

for long-term development, and signalled to previously marginalized communities their inclusion in the future of the country and the government's intention to rectify the structural violence and social inequality of the past.

The revolutionary government's initiatives were also able to achieve success in the face of severe resource constraints. In response to such constraints, the revolutionary government depended on the mass mobilization of public participants to make substantial advances in the areas of health and education. The success of the Literacy Campaign, for example, was heavily dependent on volunteer educators and private and international donors and was intentionally run as a short-term project to be economically feasible.<sup>425</sup> The revolutionary government also focused on the most severe conditions of absolute poverty and social inequality. In addressing poor housing conditions, for example, sites and services programs focused on providing basic infrastructure for the homeless, foregoing attempts at providing better and costlier infrastructure. The Materials Banks program was another creative response to resource constraints. By providing building materials at subsidized cost and with low-interest loans, the revolutionary government was able to empower its citizens to better their housing conditions despite resource constraints.

Overall, an emphasis on securing basic needs and meeting the most fundamental ESR allowed revolutionary Nicaragua to address structural violence despite resource constraints. This approach is discussed by Szoke-Burke, who states that in the face of resource constraints, '[g]overnments can strategically sequence different processes aimed at remedying ESR violations so that they occur at a time where such redress or fulfilment is plausible'.<sup>426</sup> The case of revolutionary Nicaragua provides a rebuttal to opponents of the inclusion of structural violence within transitional justice's remit on the basis of resource constraints. It also sheds light on the differentiation between transitional justice and development, and how these may work together. By trying to secure the most basic needs of its citizens and by addressing structural violence and inequality as a matter of transitional justice, revolutionary Nicaragua demonstrated a clear break between the injustices of the past and goals for the future of the country. This first step of transitional justice, however, should be built upon in the long-term and as a matter of development to ensure these goals materialize.

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<sup>425</sup> See Hanemann, *Nicaragua's Literacy Campaign*.

<sup>426</sup> Sam Szoke-Burke, "Not Only 'Context'," 476.

#### 4.6 Chapter Conclusion

As this Chapter demonstrated, traditional understandings of transitional justice have failed to consider revolutionary Nicaragua's initiatives to redress structural violence and inequality as a case of transitional justice. This was largely due to a now outdated paradigm of transition from authoritarianism to democracy and the field's subsequent focus on CPRV. While transitional justice discourse is moving towards greater inclusion of ESR within the field's scope, persistent assumptions regarding transitional justice bar the inclusion of structural violence and are likely to further exclude revolutionary Nicaragua as a potential case.

Civil and political rights were undermined during the Somoza family reign, and the National Guard was responsible for perpetrating physical violence against many Nicaraguans. While these injustices were addressed as a matter of criminal justice through the flawed Special Tribunals, this did not constitute the primary focus of revolutionary Nicaragua's transitional justice project. Instead, the system of structural violence and social inequality that was created under 46 years of Somoza rule was the subject of their attention. Through programs and initiatives aimed at improving distribution of food, health, education, adequate housing, redistributing land and security gender equality, the revolutionary government addressed structural violence and social inequality as a form of transitional justice. Through these efforts, it is evident that revolutionary Nicaragua was working towards a transformation of Nicaraguan society that aimed at dismantling a system of structural violence, absolute poverty and social inequality.

Considering whether this attempt at transformation is a form of transitional justice depends on how transitional justice and its key components are understood. If understood traditionally and narrowly and with a focus on criminal justice, revolutionary Nicaragua's transitional justice potential would be dismissed as victor's justice along with its flawed trials and prosecutions. If understood broadly, however, with social and distributive justice given equal importance alongside criminal justice, revolutionary Nicaragua's attempt at transformation can be recognised as an important example of transitional justice that stands in sharp contrast to the traditional examples frequently relied upon in the discourse.

## Chapter Five - Conclusion

The emergence of Latin American and Eastern European countries from authoritarianism, and a Western agenda of promoting liberal democracy was influential in shaping the field of transitional justice.<sup>427</sup> These historical and political roots determined transitional justice's normative aims of promoting democracy, accountability and the rule of law, its focus on criminal and restorative justice and on civil and political rights, and the favoured mechanisms of trials, truth commissions, reparations and institutional reform. The influence of these roots was then consolidated as transitional justice was taken up by the highest international institutions and as it became a 'global project'.<sup>428</sup> However, the field's rapid growth and consolidation also saw scholars and practitioners questioning the narrow or traditional understanding of transitional justice, challenging the concept itself and leaving it open to reconceptualization.

Accounting for the influence of these historical and political roots and recognising transitional justice as an effectively contestable concept explains the lack of consensus on the concept. The traditional understanding of transitional justice and its assumptions about how societies in transition should address the past is in fact the consequence of inherent politics, namely, a Western liberal agenda. With growing calls for transitional justice to broaden from its traditional mandate and to further address issues of economic and social rights, social inequality, and other forms of structural violence, the concept of transitional justice finds itself the object of political discourse.

It is helpful, then, to distinguish between the concept of transitional justice and its varying conceptions. Transitional justice as a *concept* can be broadly understood as the pursuit of justice during a period of social or political transition in order to address past injustices and to work towards certain aspirations for the future. Transitional justice's varying *conceptions* distinguish themselves based on how they define the concept's key components of justice, transition, and backwards- and forwards-looking considerations. By distinguishing between the concept and its conceptions, it is clear that the experiences of the field's formative years

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<sup>427</sup> Arthur, "How "Transitions" Reshaped Human Rights," 324, 326; Hansen, "The Time and Space of Transitional Justice," 34; International Center for Transitional Justice, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017): 5; Sharp, "Interrogating the Peripheries," 153; Balasco, "The Transitions of Transitional Justice," 199-200; Nesiiah, *Transitional Justice Practice*, 7.

<sup>428</sup> Miller, "Effects of Invisibility," 1.

did not define the concept of transitional justice and how societies in transition should contend with the past, but rather shaped a *traditional conception* of transitional justice.

While this traditional conception may have been adequate for the purposes of societies transitioning from a history of physical violence and civil and political rights violation, it is inadequate for meeting the demands of societies transitioning from social inequality and other forms of structural violence. In countries like South Africa or Nicaragua, social inequality and other forms of structural violence were injustices that characterized society before transition, and transitional justice's failure to adequately address these injustices calls into question the 'justness' and the 'very objectives' of the concept,<sup>429</sup> undermines its aspirations for truth and reconciliation,<sup>430</sup> and leaves it perpetrator instead of victim-centred.<sup>431</sup> However, this failure is not attributable to the concept of transitional justice itself, but rather to the prevalence and use of its traditional conception in scholarship and practice.

Distinguishing between the transitional justice concept and its conceptions is fundamental in answering the question that drove this dissertation: *Could addressing social inequality be considered a form of transitional justice?* On the one hand, adherence to the traditional conception means that 'in any particular time and place discussion of transitional justice is constrained by the already existing set of tools established in other (possibly unrelated) transitional contexts'.<sup>432</sup> Consequently, as long as the traditional conception is mistaken for the concept itself and transitional justice is persistently defined by a focus on criminal and restorative justice, the primary normative aims of establishing rule of law, democracy, and accountability, and a set of favoured mechanisms, it will be both conceptually and practically ill-equipped to address social inequality and other forms of structural violence. On the other hand, if the traditional conception is recognised as one of potentially many conceptions of transitional justice, then social inequality and structural violence can be addressed through a conception of transitional justice that places a primary focus on social or distributive justice and turns to alternative mechanisms to redress such issues.

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<sup>429</sup> Muvingi, "Sitting on Powder Kegs," 165.

<sup>430</sup> Aiken, "The Distributive Dimension in Transitional Justice," 195; Miller, "Effects of Invisibility," 268; *See also*, Chapter 3, Section 3.3.3.

<sup>431</sup> Robins, "Failing Victims?" 44. *See also*, Chapter 3, Section 3.3.3.

<sup>432</sup> *Ibid.*, 46.

Recognising the potential for social inequality to be addressed as a form or conception of transitional justice does not demand that these issues always be addressed. To borrow Sharp's words, including structural violence within transitional justice 'might not always be necessary, or even desirable.'<sup>433</sup> In transitional contexts characterized by a history of physical violence, criminal or restorative justice initiatives may be better suited to address demands for justice. However, where such contexts are characterized by a history of social inequality or other forms of structural violence, transitional justice should be conceptually flexible enough to allow these injustices to be addressed as a matter of social or distributive justice, and through alternative and better suited mechanisms. By distinguishing between the transitional justice concept and its varying conceptions, the question of how transitional societies define justice and transition, what past injustices should be addressed and what aspirations for the future should be pursued is left open to determination by context specific needs and demands.

This understanding also allows historical examples of societies in transition to be revisited and considered as potential examples of transitional justice, especially where they were previously dismissed by assumptions of the traditional conception. In Nicaragua, the Sandinistas were part of a 'groundswell of forces seeking social justice [that] inspired the 1978–1979 War of Liberation, toppling the Somoza Regime'.<sup>434</sup> The revolutionary government committed themselves to addressing economic and social concerns during transition,<sup>435</sup> including securing basic needs such as health, education, and housing, and further aiming to secure social services, land redistribution, and gender equality.<sup>436</sup> Historian Harvey Williams specifically recognised accomplishments in health, education, housing, and welfare, finding that achievements in these areas 'were the result of a combination of conscious, flexible, and pragmatic planning on the part of the government and of mobilization involvement and commitment on the part of the people', and with these efforts 'reach[ing] and involve[ing] the vast majority of the previously underserved poor'.<sup>437</sup> These accomplishments were achieved despite several practical challenges, including the resource constraints of an already poor economy aggravated by malicious US intervention.<sup>438</sup>

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<sup>433</sup> Sharp, "Addressing Economic Violence," 24 (Referring to transitional justice addressing economic violence).

<sup>434</sup> Cappelli, "Women of the Revolution," 3.

<sup>435</sup> Saavedra et al., "Why The FSLN Struggles in Unity with the People".

<sup>436</sup> *For a full discussion, see Williams, "The Social Impact in Nicaragua"; Close, Nicaragua: Politics, Economics and Society, 149 -162. See also, Chapter 4 Section 4.1.3; Footnote no. 352.*

<sup>437</sup> Williams, "The Social Impact in Nicaragua," 247, 263-264

<sup>438</sup> *See generally, Leogrande, "Making the Economy Scream". See also, Williams, "The Social Impact in Nicaragua," 263-264. (Williams writes, 'It was notable that a government with such limited resources could*

While not cast in such terms at the time, and while starkly different from the traditional conception, revolutionary Nicaragua's efforts to address a history of structural violence and the most severe forms of social inequality should be considered a conception of transitional justice primarily motivated by social and distributive justice. Had a traditional understanding of transitional justice been taken, thereby closing the door for political discourse on the highly debatable and effectively contestable concept, revolutionary Nicaragua's experiences and potential lessons for the field would be too readily dismissed.

At the time of writing, Nicaragua is experiencing protests and crackdowns by pro-government groups and security forces that has resulted in hundreds of deaths and thousands of injuries.<sup>439</sup> A recently established Truth, Justice, and Peace Commission has a mandate to investigate the violence and deaths that resulted from clashes between the protesters and security forces.<sup>440</sup> At the helm of the repressive government crackdown sits the FSLN – the very subject of this discussion's praise for their earlier efforts in addressing structural violence. While tracing the events from the early 1980s to the present day is beyond the scope of this dissertation, an important observation should be made: as the newly established commission addresses the direct violence, what consideration will be given to the concerns that sparked the protests?

On April 16, 2018, university students in Nicaragua's capital of Managua demonstrated against the government's inadequate response to forest fires in a protected reserve. Demonstrations escalated two days later following the introduction of social security reforms that decreased pensions and social security while increasing incomes and payroll taxes, paving the way for the government crackdown that followed.<sup>441</sup> Will the newly established Truth, Justice and Peace Commission maintain the traditional focus on direct violence, or will it also address the economic and social concerns at the root of the demonstrations?

If transitional justice is to adequately address the concerns and demands of the different societies it hopes to benefit, it should shed the leftover political assumptions that are imbedded in the traditional conception of transitional justice. Only then can the justice, transition,

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make as much progress in so many areas within the first seven years after coming to power. It was remarkable that Nicaragua achieved these accomplishments while defending against the aggression of one of the most powerful nations on earth.').

<sup>439</sup> British Broadcasting Corporation, "Downward Spiral: Nicaragua's Worsening Crisis," BBC News, July 16, 2018.

<sup>440</sup> International Center for Transitional Justice, "Nicaragua Creates Truth, Justice and Peace Commission," October 5, 2018.

<sup>441</sup> Oswaldo Rivas, "Nicaraguans Take to Streets in Protest over Social Security Changes," Reuters, April 20, 2018.

backwards- and forwards-looking considerations and choice in mechanisms of transitional justice be appropriately defined by context specifics. Whether addressing civil and political rights violations through criminal or restorative justice, or addressing economic and social rights violations, social inequality or other forms of structural violence through social or distributive justice, the concept of transitional justice should be understood broadly enough so as not to close the door on societies who may employ it differently.

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