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Transitional Justice

Setting Aside Rule of Law in Order to Reach the Rule of Law

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Summary

Transitional justice is a term and concept which describes how countries deal with large-scale human rights abuses through different judicial and non-judicial measures in order to achieve reconciliation and hold perpetrators accountable. Transitional justice as a concept was born out of practice as a response to how countries in the 1980–1990s dealt with large-scale abuses committed by the earlier regime in the countries' transition from authoritarian rule towards becoming a democracy.

The purpose of the thesis is to systemise and analyse the term transitional justice using the rule of law as a tool of analysis, since transitional justice is considered to be enhancing the rule of law and democracy based on the rule of law is considered to be on the other end of the transition. This is utilised through the help of the legal dogmatic and legal philosophic methods.

In short, transitional, the first word of the term, can be described as the movement from an authoritarian regime towards a democracy. There is no single definition or opinion for how long a country is in transition, neither for how long a country can use transitional justice measures. The understanding of justice, the second word, encompasses both judicial and non-judicial measures, such as criminal trials and truth commissions. In general, only a fraction of all perpetrators are prosecuted, often due to the strength of the old regime which might refuse to let go of their power in order to avoid prosecutions. In these situations, amnesties are often used, in order for the country to transition.

Lastly, a discussion is held regarding if transitional justice can be considered a legally useful term. It is deemed that transitional justice is not precise enough and too intertwined with the political situation for individuals to be able to correctly interpret it, thus being far too vague to serve as a legally useful term.

Sammanfattning

Övergångsrättvisa (transitional justice) är en term som beskriver hur länder med hjälp av juridiska och icke-juridiska åtgärder hanterar storskaliga övergrepp mot mänskliga rättigheter. Övergångsrättvisa används bland annat för att hålla förövare ansvariga och bringa försoning. Konceptet övergångsrättvisa växte fram som ett gensvar på hur länder under 1980–1990-talet hanterade de storskaliga övergrepp som skett mot befolkningen av den tidigare regimen i landets övergång från en auktoritär stat till en representativ demokrati.

Uppsatsens syfte är att systematisera och analysera övergångsrättvisa med hjälp av rättsstatsprincipen (the rule of law). Rättsstatsprincipen används som ett analysverktyg eftersom övergångsrättvisa anses främja rättsstatsprincipen och en demokratisk rättsstat anses vara slutmålet för övergångsperioden. I uppsatsen används både en rättsdogmatisk och rättsfilosofisk metod.

Ordet övergång (transitional), det första ordet i övergångsrättvisa, kan beskrivas som rörelsen från en auktoritär till en demokratisk stat. Det finns ingen gemensam definition för hur länge stater befinner sig i övergångsperioden, inte heller finns det någon definition för hur länge de olika juridiska och icke-juridiska åtgärderna bör användas. Förståelsen av rättvisa (justice), rör både de juridiska och icke-juridiska åtgärderna, såsom brottmålsprocesser och sanningskommissioner. Generellt sätt så åtalas endast ett fåtal av alla förövare, detta beror ofta på att den gamla regimen, som fortfarande besitter militär styrka, vägrar att ge upp sin makt om de hotas av åtal. I dessa situationer används ofta amnestier för att kunna initiera övergången till etablerandet av en demokratisk rättsstat.

Avslutningsvis diskuteras huruvida övergångsrättvisa kan vara användbar som juridisk term. Övergångsrättvisa bedöms vara för oprecis och sammanflätad med den specifika politiska situationen för att individen ska

kunna tolka övergångsrättvisa korrekt. Med andra ord är övergångsrättvisa alldeles för vag för att kunna vara användbar som en juridisk term.

Preface

I would like to thank my supervisor Karol Nowak for splendidly guiding me through both my very first as well as my very last thesis at the faculty of law. Another thank you goes out to my English squad: Anna, Josh, Sam and Tim. Because of you my English is, if not impeccable, at least understandable. Emelie for proofreading the thesis as a whole.

Lastly, dear Nikodemus, friends and family thank you for your support during these years.

Lund 7th of January 2020
Lisa Nordbring

Abbreviations

AChHPR	African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58
ACHR	American Convention on Human Rights,"Pact of San José", Costa Rica (entered into force 22 November 1969) 1144 UNTS 123
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession 10 December 1984 United Nations General Assembly Resolution 39/46, entered into force 26 June 1987) 1465 UNTS 85 (CAT)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature and ratification or accession United Nations General Assembly Resolution 260 A (III) of 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICPPED	International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 United Nations General Assembly Resolution 2106 (XX) entered into force 4 January 1969) 660 UNTS 195
ICTJ	the International Center for Transitional Justice

UDHR	Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)
UN	United Nations
Venice Commission	The European Commission for Democracy through Law

1 Introduction

1.1 Introduction to the subject

> *So if you maltreat a penguin in the London zoo, you do not escape prosecution because you are the Archbishop of Canterbury.*[1]

At the core of 'the rule of law' is the element that everyone is 'accountable before the law', even the Archbishop of Canterbury. At the core is also that victims who have suffered from governmental abuse should have a possibility to enforce this accountability before a court of law.[2] The criminal trial can serve as a forum of direct accountability, where the victim sees its perpetrator being accountable for his or her actions. A procedure where the victim can gain redress and be restored as a right-holder.[3]

The descriptive term 'transitional justice' was formed during the 1980–1990s.[4] The concept of transitional justice deals with governmental abuses

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[1] Tom Bingham, The Rule of Law (Allen Lane 2010) 4.

[2] Ruti G Teitel, Transitional Justice (Oxford University Press 2000) 216; André Nollkaemper, Jan Wouters, Nicoals Hachez, 'Accountability and the Rule of Law at International Level' (2008) <www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf > accessed 17 December 2019 5; Geert Corstens, Understanding the Rule of Law (Hart Publishing 2017) 31–32; Harish Narasappa Rule of Law in India: A Quest for Reason (Oxford University Press 2018) 23; Brian Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press 2011) 34–36.

[3] United Nations Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616 para 39; Mayesha Alam, Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes (Palgrave Macmillan 2014) 35; United Nations Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice' (7 August 2017) UN Doc A/HRC/36/50/Add.1 (n 3) para 37; International Commission of Jurists, The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide (rev edn) (International Commission of Jurists 2018) 239.

[4] See e.g. Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 No. 2 Human Rights Quarterly 321 321; Andrew G Reiter, 'The development of transitional justice' in Olivera Simić (ed), An Introduction to Transitional Justice (Routledge 2017) 30; Samuel P Huntington, The Third Wave:

from authoritarian regimes in countries' transition from an authoritarian regime towards democracy based on the rule of law. Today it is widely considered that the practice of transitional justice is enhancing the rule of law. However, the concept has been born out of practice and it can be considered undertheorised. The understanding of transitional justice must therefore be further explored and systematised, especially in relation to the rule of law.[5]

As a substantive legal term, transitional justice can be deemed as being vague. It provokes questions like: what does one mean by justice and why is it transitional*?* A clearer understanding of the concept of transitional justice as such and how it relates to the rule of law is of uttermost importance. This is especially the case since the concept of transitional justice is widely used to describe how countries should deal with gross violations of human rights committed by the previous regime towards its citizens.[6]

1.2 Purpose and research questions

The purpose of this thesis is to systemise and analyse the term transitional justice and to examine how transitional justice relates to the rule of law, since the founding of a democracy based on the rule of law is on the other side of the transition and it is widely considered that transitional justice can contribute to the strengthening of the rule of law.[7]

Democratization in the Late Twentieth Century (University of Oklahoma Press 1999) 21–26; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 5.

[5] Arthur (n 4) 337; Anja Mihr, 'An Introduction to Transitional Justice' in Olivera Simić (ed), An Introduction to Transitional Justice (Routledge 2017) 20; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 77; United Nations General Assembly, 'Note by the Secretary-General: Promotion of truth, justice, reparation and guarantees of non-recurrence' (13 September 2012) UN Doc A/67/368 6–8.

[6] UNSC (23 August 2004) S/2004/616 (n 3) para 8.

[7] UNGA (13 September 2012) A/67/368 (n 5) 6–8; United Nations Secretary-General, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (March 2010) 3.

Through an analysis of the term transitional justice using the rule of law as a tool of analysis and from the perspective of victims' 'effective access to justice'[8] the following questions are intended to be answered:

- *The term transitional justice includes the word transitional, which implies three questions:*
  - *What is meant by the term transitional?*
  - *For how long is a country in transition?*
  - *For how long can transitional justice measures be utilised?*
  - *In what ways can the term transitional be seen as problematic?*
- *Is the approach to victims' effective access to justice through criminal trials different in transitional justice compared to in a rule of law state?*
- *Can transitional justice be considered to be a legally useful term?*

1.3 Methodology and material

The method that is mainly used in this thesis is the legal dogmatic method. It is used in order to critically analyse the term transitional justice, as in to see if it can be considered a legally useful term. Traditionally the method is defined as describing and defining established law through the use of the established sources of law. The defining of established law means that one determines, interprets and systemises established law. As mentioned previously, the interpretation and systematisation is done through the established sources of law, which are deemed as the following: laws, customary law and legislative history, precedent and doctrine.[9]

The attempt to systemise the understanding of the term transitional justice is central in this thesis. The attempt to clarify the term transitional justice – to

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[8] See definition in section 1.6.
[9] Aleksander Peczenik, *Juridikens Teori och Metod: En Introduktion till Allmän Rättslära* (1st edn, Fritzes Förlag Norstedts Juridik 1995) 33, 35; Claes Sandgren, *Rättsvetenskap för Uppsatsförfattare: Ämne, Material, Metod och Argumentation* (4th edn, Norstedts Juridik 2018) 45, 49.

be able to critically analyse it in order to determine if it can be seen as a legally useful term – is done through the separation of the two words and concepts, 'transitional' and 'justice'. Each of the two words are then described and defined separately. The reason for the separation of the two words is to try to understand the meaning behind the words separately, but also to be able to see if and how the concepts influence each other. The systematisation of the term transitional justice in chapter two as well as the description of the term rule of law in chapter three can be described as having a Lege de lata-perspective.[10]

Nils Jareborg claims that all scientific research involves the striving for better solutions as well as new answers. This means that even though the legal dogmatic method is usually associated with the systematising and reconstituting of established law this does not mean that one cannot broaden the perspective and research and step outside of what is considered to be established law.[11] Jan Kleineman argues that a critical approach is central in the legal dogmatic method and that this is one of the aspects that differentiate the use of the legal dogmatic science from the work of the practitioner. He sees it as an important purpose of the method to demonstrate what the established law is, but argues the method can also be used to criticise established law.[12] However, it ought to be mentioned that other scholars, such as Claes Sandgren, claim that an attempt to analyse established law instead falls outside the scope of the legal dogmatic method.[13]

The legal philosophical method is also utilised in this thesis. The legal philosophic method can be seen as closely related to the legal dogmatic one, and can be understood as a deepening complement to the legal dogmatic

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[10] Jan Kleineman, 'Rättsdogmatisk metod' in Nääv, Maria & Zamboni, Mauro (eds.), Juridisk metodlära, (2nd edn, Studentlitteratur, Lund 2018) 36.
[11] Nils Jareborg, 'Rättsdogmatik som vetenskap' [2004] Svensk Juristtidning 1 4
[12] Kleineman, 'Rättsdogmatisk metod' (n 10) 24, 26, 36.
[13] Sandgren, *Rättsvetenskap för Uppsatsförfattare: Ämne, Material, Metod och Argumentation* (2018) (n 9) 50–52.

method. The method also enables analysis of legal terms, where one analyses the usefulness of the legal term in legal argumentation.[14]

The description of the rule of law and the comparison between transitional justice with the rule of law is carried out in chapters three to four. However, it is considered important to also analyse the term and concept of transitional justice itself as this is also the purpose of the thesis. The analysis in chapter four answers the last of the research questions: *can transitional justice be considered to be a legally useful term?* This question demands a critical approach to the material and falls within the legal philosophic method since the purpose is to analyse if the term can be seen as legally useful.

Regarding the material, it can firstly be noted that there are several different definitions of the concept transitional justice. The concept can be described as very elusive, especially the term transitional. This means that a wide range of material is used in order to be able to try and systematize the term and concept of transitional justice.[15]

Throughout the thesis material by The International Center for Transitional Justice (hereafter ICTJ) is used and referred to. ICTJ is referred to since the organisation can be considered to be an important actor within the transitional justice field. The organisation is seen as the "go-to organisation" when governments and international organisations need help in pursuing transitional justice. It can also be noted that the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff, served as director of research at ICTJ during the years of 2001 to 2014.[16]

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[14] Aleksander Peczenik, 'Juridikens allmänna läror' [2005] Svensk Juristtidning 249 252; Claes Sandgren, Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation, andra upplagan, (2nd edn, Norstedts juridik 2007) 39.

[15] Alam (n 3) 14.

[16] ICTJ, 'About us' <www.ictj.org/about> accessed 30 December 2019; United Nations Human Rights Office of the High Commissioner, 'Biography of the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff'

Since the focal point and purpose of this thesis is to understand and systemise the concept of transitional justice itself it can be seen that the thesis takes a bird's eye view on the matter. Due to this approach, much material is used and referred to in a rather brief manner where no comprehensive detail is given. This includes, for example, the different treaties that are used, e.g. International Covenant on Civil and Political Rights[17] and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[18].

It can also be noted that several doctrinal sources are relatively old, including the work of Ruti G. Teitel as well as Diane Orentlicher. Despite their publication year, the continued use in recent literature indicates their central role in the field and thereby justifies their inclusion. The work of these scholars is considered central in transitional justice, despite their publication year. [19]

1.4 Theory and perspective

The concept of transitional justice is discussed from the perspective of the rule of law and in particular victims' effective access to a criminal trial. This perspective is used since one can question the relevance of human rights if victims of human rights abuses do not have an ability to enforce their rights before an independent and impartial judiciary. It can also be noted that the 'the right to a fair trial', 'access to justice' and 'the right to effective remedy' are all human rights enshrined in several international human rights

<www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/PablodeGreiff.aspx> accessed 30 December 2019.

[17] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[18] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession 10 December 1984 United Nations General Assembly Resolution 39/46, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

[19] See e.g. Arthur (n 4); Alam (n 3); Reiter (n 4).

instruments.[20] It is therefore imperative to discuss the importance of victims' effective access to criminal trials, which can be seen as central to the rule of law.[21] This is most suitably done through a theoretical framework.

The use of the criminal trial falls within the concept of retributive justice. Retributive justice[22] can be described as justice which has a punitive component in its function. It aims at both holding perpetrators legally accountable in a court of law for the alleged crime, and at carrying out a punishment that is appropriate relative to the crime.[23] According to Mayesha Alam, holding the perpetrator accountable through punishment is meant to: (1) reprimand those who have committed the crime, including offender, architect and facilitator of the crime; (2) give the victim some type of redress and (3) be a deterrent in order to hinder future repetition of the crime.[24] Anja Mihr argues that the primary aim of retributive justice is to hold individual perpetrators accountable and to combat impunity.[25] In contrast, the organisation ICTJ claims that if criminal trials are executed in a way that to some extent matches the needs of the victims, then they can be a central

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[20] In this thesis these are together described as the right to effective access to justice see section 1.6. See e.g. Universal Declaration of Human Rights (adopted 10 December 1948 United Nations General Assembly Resolution 217 A(III) (UDHR) art 8, 10; ICCPR (n 17) art 2, 14; CAT (n 18) art 14.

[21] European Commission for Democracy through Law (Venice Commission), 'The Rule of Law Checklist: Adopted by the Venice Commission at its 106th Plenary Session' (Venice) 11–12 March 2016) CDL-AD(2016)007 10–11.

[22] There are several different definitions of retributive justice. Retributive justice is often defined as that it demands punishment only because the perpetrator deserved it and leaves out other aspects such as deterrence and the redress of victims. In some of the transitional justice literature the understanding of retributive justice includes other aspects, such as deterrence and the redress of victims. The use of the term retributive justice in the transitional justice context is used as a way to categorize the use of judicial measures and is used to contrast to non-judicial measures that are categorized as restorative justice measures. This is the understanding of retributive justice that is used in this thesis. See e.g. Kieran McEvoy and Louise Mallinder 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy', (2012) 39 No. 3 Journal of Law and Society 410; Alam (n 3) 34–35.

[23] Alam (n 3) 34–35; Sanam Naraghi Anderlini, Camille Pampell Conway, Lisa Kays, 'Transitional Justice and Reconciliation' in Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action (International Alert, Women Waging Peace 2004) ch 4, 1–2.

[24] Alam (n 3) 35.

[25] Mihr (n 5) 5.

function in order to both deliver justice and restore the dignity of the victims. In general, trials are a key demand of victims.[26]

The criminal trial serves as a forum of direct accountability where the victim is given an opportunity to see its perpetrator made to answer for the crime committed. The criminal trial can have a restorative function if the victim is treated as a subject in the process and is allowed to speak up. As ICTJ has stated it can then restore a sense of dignity for the victim.[27] Martha Minow argues that criminal trials can transfer a victim's personal desire for revenge to be acted out by the state's official bodies. The trial itself, Minow believes, can – through its procedure of cross-examination of both victims and perpetrators, documentation and the presumption of innocence – be used to interrupt a vicious cycle of feud and blame. Minow further claims that the use of trials can have a reconciling effect, since the victim and the rest of the society is able to see that the perpetrator is accountable before the law.[28]

This can be compared with how Torbjörn Andersson discusses how the civil procedure can achieve 'legal peace'.[29] Andersson argues that legal peace can be seen to emerge both externally and internally from the civil procedure. Internally, because the parties' relationship normalises when the issue in question is settled by the court. Externally, at a societal level, since when disputes are dealt with in court this prevents people from feeling they have to take matters into their own hands.[30]

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[26] ICTJ, 'Criminal Justice' <www.ictj.org/our-work/transitional-justice-issues/criminal-justice> accessed 18 December 2019.
[27] UNSC (23 August 2004) S/2004/616 (n 3) para 39; International Commission of Jurists (n 3) 239.
[28] Marta Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence (Beacon Press 1998) 25–26.
[29] Torbjörn Andersson and Bengt Lindell uses the Swedish term 'rättsfrid', which here has been translated to legal peace.
[30] Torbjörn Andersson, Rättsskyddsprincipen: EG-Rätt och Nationell Sanktions- och Processrätt ur ett Svenskt Civilprocessuellt Perpektiv(Iustus 1997) 224–225, 229–230; Bengt Lindell, Partsautonomins gränser: I Dispositiva tvistemål och med särskild inriktning på rättsanvändningen (Iustus, 1988) 94.

It is essential for a legal system that victims of crimes or unlawful deeds committed by state officials have the possibility to enforce their rights before a legal body. Criminal prosecutions of perpetrators mean that victims are recognised as right-holders. The lack of a system where victims have a possibility to enforce their rights before a court thwarts the entire human rights system since the right has a bearing on all other human rights. Systematic factors that makes it either impossible or difficult for a victim to seek redress at a court means in practice that he or she is not given equal protection by the law.[31] Impunity for the perpetrator is a serious threat against individuals fully enjoying their rights and non-prosecution of perpetrators can have a disastrous impact on the victim and its relatives.[32] The use of criminal trials as a way to establish accountability for the crimes of the perpetrator can be seen as embracing the rule of law. Through the criminal trial one can establish that no one is above the law.[33]

The research question: *is the approach to victims' effective access to justice through criminal trials different in transitional justice compared to in a rule of law state?* mainly analyses some of the material in section 2.3 and in chapter three through what can be described as an individualised and collectivised approach to justice. An individualised approach to justice can be understood as that an individual should have effective access to justice solely based on the fact that the individual's rights has been violated. This can be described along the terms of an understanding that the human being is an autonomous agent with individual rights which must be respected. Both law and society are viewed from an individual-centred perspective.[34] Michal

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[31] Avitus A. Agbor, 'Pursuing the Right to an Effective Remedy for Human Rights Violation(s) in Cameroon: The Need for Legislative Reform' (2017) 20 Potchestroom Electronic Law Journal 1 <https://www.ajol.info/index.php/pelj/article/view/165849 > accessed 18 December 3–4; United Nations Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (27 August 2014) UN Doc A/HRC/27/56 para 22.
[32] International Bar Association and United Nations, Office of the High Commissioner of Human Rights, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (United Nations 2003) 805.
[33] Minow (n 28) 25–26.
[34] Peczenik, *Juridikens Teori och Metod: En Introduktion till Allmän Rättslära* (n 9) 67; Susanna Lindroos-Hovinheimo, 'Private Selves – An Analysis of Legal Individualism' in

Alberstein argues that the modern practice of criminal justice tends to be both liberal and individualised, whereby, for example, the rights of the accused are understood to be paramount.[35]

An individualised approach to justice can be contrasted with what can be described as a collectivised approach. A collectivised approach can be described as a striving for cohesion at any price where the rights of the individual are considered to be subordinate. To put it in other terms, the individual's claims of rights – and by extension the right to effective access to justice when the individual's rights have been violated – are set a side in order to benefit society as a whole. This is due to the prime considerations being the welfare, cohesion and preservation of society as a whole.[36]

The final research question addresses whether transitional justice can be considered a legally useful term. To be able to discuss whether the term can be seen as a legally useful term, an examination of the different criteria for what is required of a legal term is necessary. The scholar Marianne Nordman discusses some different aspects that one should have in mind when creating new legal terms. Among other aspects, Nordman argues the importance of legal terms being neither unmanageable nor possible to misinterpret. Nordman further argues that the purpose of creating legal terms ought to be that the individual citizen is able to understand the term correctly. To put it in other terms, the consequences of a legal term needs to be predictable for the individual.[37] Furthermore, one can discuss whether the term can be seen as useful in a legal argumentation.[38] This can be compared with how the scholar

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Visa A J Kurki and Tomasz Pietrzykowski (eds.), Legal Personhood: Animals, Artificial Intelligence and the Unborn (Springer International Publishing AG 2017) 29.

[35] Michal Alberstein, 'Restorative Justice as Internalization of the Rule of Law: Combining Restoration with Retribution in the Film Festen' (2006) 8 No. 2 Cardozo Journal of Conflict Resolution 405 411–412, 417.

[36] Maurice A Low, 'What Is Socialism?: III. An Explanation of "The Rights" Men Enjoy in a State of Civilized Society' (1913) 197 No. 688 The North American Review 405 406; Alberstein (n 35) 414; *Peczenik, Juridikens Teori och Metod: En Introduktion till Allmän Rättslära* (n 9) 67.

[37] Marianne Nordman, 'Om Juridisk Svenska' [1984] Svensk Juristtidning 955 957

[38] Peczenik, 'Juridikens allmänna läror' (n 14) 252.

Aleksander Peczenik describes how laws should be created. He believes that even though it is not possible to create fully clear and exact laws, all legal rules must be given content that is interpretable.[39]

In sum, the term and concept of transitional justice is analysed with the help of the of rule of law. The concept of justice in transitional justice is further analysed from the perspective of victims' effective access to justice through a criminal trial. This is done because, as stated, the possibility for victims to enforce their rights before a court is essential since the lack of a court of law where victims can enforce their rights thwarts the human rights system as a whole.

1.5 Delimitations

Firstly, it can be mentioned that the concept or term transitional justice deals with situations which stem from either an authoritarian regime, so called post-authoritarian transitions, or the situation after conflicts have ended, so called post-conflict transitions. However, due to the emergence of the transitional justice field, see sections 2.1.1–2.1.2, this thesis's focus is post-authoritarian regimes.[40] It can be noted though that in some cases material is used that address transitional justice from both post-authoritarian as well as post-conflict transitions. The delimitation of the historical context of transitional justice in this particular thesis is presented in section 2.1.2 when the reader has gained knowledge of the history of transitional justice. It can be noted that in some literature the term post-conflict justice is used instead of transitional justice. Considering that the United Nations (hereafter the UN) uses the term transitional justice this is the term that is analysed.[41]

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[39] Aleksander Peczenik, V*ad är rätt?: Om Demokrati, Rättssäkerhet, Etik och Juridisk Argumentation* (Fritzes Förlag Norstedts Juridik 1995) 44.
[40] United Nations Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 August 2012) UN Doc A/HRC/21/46 paras 15–17.
[41] Anja Matwikjiw and Bronik Matwikjiw, 'A modern perspective on international criminal law: accountability as a meta-right' in Leila N. Sadar and Michael P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 65.

It can be noted that this thesis focuses on society's response towards the atrocities that have been committed during the authoritarian regime and not the crimes themselves. Consequently, it is the type of response that states have and how they deal with gross violations of human rights that is the focus of this thesis. Due to this, neither definition or a separation of the crimes is given in this thesis. The crimes which frequently come into question in a post-conflict or a post-authoritarian regime are: war crimes, genocide, crimes against humanity and other gross violations of human rights like slavery, rape, enforced disappearance, torture and extrajudicial or summary killings. No in-depth categorization is done regarding the different possible crimes that can be committed in either a post-conflict or post-authoritarian transition since some transitions from an authoritarian regime also include the initiation of an armed conflict. This is the case in section 2.3.1.1, for example, which focus on the state's duty to prosecute. When perpetrators are discussed in this thesis this only means perpetrators that have acted in their role as public official or a person who has acted in official capacity.[42]

As the criminal trial is the one procedure which deals with the question of if guilt can be established for the accused person or not, it can be argued that it is the main type of legal procedure regarding gross violations of human rights.[43] Thereby, it is victims' effective access to criminal trial that is discussed in this thesis. As the reader is probably aware, different jurisdictions differ procedurally in how and in which kind of process they deal with damages. A distinction between these differences is not made in this thesis, given the fact that the criminal trial is the main trial procedure for gross human rights violations. Considering that national courts both have been and still are the primary sites of prosecutions, there is no discussion regarding the

[42] UNHRC (27 August) A/HRC/27/56 (n 31) para 33; Siri Friigard, 'Some Introductory remarks' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2nd edn, Torkel Opsahl Academic EPublisher 2010) 1–3.
[43] Karol Nowak, 'Rättegången som en mänsklig rättighet' in Lena Karlbrink (ed), Frihet och Personlig Säkerhet: De Medborgerliga och Politiska Rättigheternas Tillämpning i Sverige (Liber 2011) 143.

possibility to prosecute perpetrators on international level or the question of extraditing perpetrators for prosecution in another state.[44] Furthermore there is also no attention given to the possibility of private prosecution since the decision to prosecute primarily lies within the state's competence. It is also possible to assume that the likelihood for private prosecution is low for victims in a transitional setting where either de facto or de jure impunity is often a reality.[45]

Considering that the purpose of this thesis is to analyse the term transitional justice with help from the rule of law, this thesis requires a bird's eye view on the matter. In order to systematise and analyse the term as such the discussion is kept on a more general level. This implies, that different national, regional or international instruments are many times discussed or used briefly as a way to exemplify the discussion, since they all constitute only small pieces of the whole practice and understanding of transitional justice. Hence, this is not a study of one or several specific instruments, neither is it a study of a single country, even though this is a common approach when transitional justice is analysed. This is important due to the fact that the field of, and arguably the term of, transitional justice emerged at an international level as a response to several different transitions.[46]

Since this thesis takes a bird's eye view and discusses the term transitional justice by itself while focusing on victims' effective access to justice, the aspects of retroactivity and nullum crimen sine lege with regards to punishment for violations of human rights that was in accordance with the national law at the time of the act are not discussed. However the reader

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[44] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 45; United Nations Commission on Human Rights, 'Report of the independent expert to update the Set of principles to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 principle 20.

[45] United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report submitted by Theo van Boven, Special Rapporteur' (2 July 1993) UN Doc E/CN.4/Sub.2/1993/8 para 127.

[46] Arthur (n 4) 321–322.

should however be aware that these discussions exist.[47] Therefore, no discussion regarding whether or not perpetrators had committed international crimes or not will take place. As well as this, there is no discussion of the requirement of formal characteristics of how a law should be constructed discussed – such as clarity and the requirement of publicity.[48]

It ought to be mentioned that it is transitional justice which is central to the thesis while the concept of rule of law is merely used as a tool to analyse transitional justice. This results in the concept of rule of law not being as deeply explored as the term transitional justice. Considering that this thesis is written from the perspective of victims' right to effective access to justice, the focus of the thesis is mainly retributive justice. However, since guarantees of non-recurrence as well as aspects of restorative justice such as truth and reparation are deemed as necessary to the transitional justice process, these are also discussed, albeit briefly. Vetting, a procedure within retributive justice, is not discussed due to that the thesis is focused on the criminal trial.[49]

One could perhaps elaborate on whether the situations often at stake in transitional justice processes can be viewed as a public emergency – meaning that it is possible to derogate from some human rights. To some extent there are some similarities between public emergency and transitional justice which could have formed an interesting aspect of the thesis. However, this aspect is not discussed in order to enable a more thorough analysis of the term transitional justice itself.[50]

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[47] The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo De Grieff, has discussed – in UNGA (13 September 2012) A/67/368 (n 5) para 69 – this problem and means that history shows that the question of retroactivity can be addressed through *jus cogens,* which are considered to be peremptory norms. Countries have also found ways to let the courts of the successor regimes repeal procedural and substantive laws and amnesty laws that the former regime has founded. Predecessing regimes have also tried to find loopholes in those laws the former regime has used in order to authorize violations.

[48] The Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Rule of Law: A Guide for Politicians* (The Raoul Wallenberg Institute of Human Rights 2012) 10.

[49] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) paras 25, 70.

[50] See e.g. Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 No. 8 Symposium: International Law The Yale Law Journal 2537.

1.6 Definitions

Considering that transitional justice is a relatively wide concept which includes many different aspects, this section provides definitions on some of the more central terms and concepts used in the thesis in order to ease the reading for the reader.[51]

Amnesty – When states use their sovereign right to give mercy and deny the possibility to prosecute the assumed perpetrators. It is usually granted before a trial or conviction has taken place. In this thesis the word amnesty only relates amnesty for perpetrators that have committed crimes according to international human rights law or international humanitarian law.[52]

Authoritarian regime – A political system where the power is concentrated around a small group of leaders or one single leader which are not constitutionally accountable to the population. Legal protection for individual rights and procedures for popular consent are often absent. During the Cold War some Western political theorists made a differentiation between totalitarianism and authoritarianism. They considered authoritarian regimes to be less durable and less severe than the totalitarian regimes. For example, the Union of Soviet Socialist Republic was considered to be totalitarian. When it comes to transitional justice the UN calls all countries authoritarian, also the countries of the former Union of Soviet Socialist Republic. Therefore, no distinction is made between totalitarian and authoritarian regimes, and they are instead both labelled as authoritarian.[53]

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[51] UNSG ‘Guidance Note of the Secretary-General: UN Approach to Transitional Justice’ (n 7) 2–3.
[52] ‘amnesty’, The New Oxford Companion to Law (Oxford University Press 2009) <https://www-oxfordreference-com.ludwig.lub.lu.se/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-65?rskey=b3aonL&result=3> accessed 19 December 2019.
[53] ‘authoritarianism’, *Dictionary of the Social Sciences* (Oxford University Press 2002) <www.oxfordreference.com/view/10.1093/acref/9780195123715.001.0001/acref-9780195123715-e-100?rskey=kfIILm&result=2> accessed 18 December 2019; ‘authoritarianism’, *World Encyclopedia* (Oxford University Press 2004) <www.oxfordreference.com/view/10.1093/acref/9780199546091.001.0001/acref-

Effective access to justice – Since the access to justice, the right to effective remedy and the right to a fair trial can be considered to be concepts that both enforce and to some extent cover each other, the term effective access to justice is used. The rights together hold the understanding that individuals should have the possibility and the procedural right to effective access to a hearing which is fair. Through the hearing the individual's right to an adequate redress is established.[54]

Impunity – The term impunity refers to the de facto or de jure impossibility of bringing a perpetrator to account in a disciplinary, civil or criminal proceeding. The perpetrator is neither accused, tried or if he or she would have been judged, guilty sentenced to penalties.[55]

Reconciliation – There are many different understandings of the concept of reconciliation. The understanding of reconciliation used in this thesis can be traced back to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. Reconciliation is described as individuals being able to trust each other again or for the first time as being equal right-holders. Reconciliation can be further described as society's reckoning with an unjust and violent history to enable the whole population to peacefully exist together as well as adhere to and trust the same political institutions.[56]

9780199546091-e-839?rskey=kfIILm&result=1> accessed 18 December 2019; UNHRC (9 August) A/HRC/21/46 (n 40) para 15.

[54] ACTIONES project, 'Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter: Module 3 The Right to an Effective Remedy' <www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.c-Module-3.pdf> accessed 14 December 2019 3.

[55] UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) 6.

[56] UNHRC (9 August) A/HRC/21/46 (n 40) para 38; 'Reconciliation', Oxford Companion to Australian Politics (Oxford University Press 2008) <www.oxfordreference.com/view/10.1093/acref/9780195555431.001.0001/acref-9780195555431-e-308> accessed 17 December 2019.

Restorative justice – Restorative justice aims at the restoration of humanity and the social bonds in societies which are suffering from large-scale violence. It includes a process where both perpetrators, victims and a society as a whole deal with the past. Central to restorative justice is not punishment for the crimes that have been done, instead, the primary aim with restorative justice is to offer restitution as well as healing in cases of atrocities. Truth-telling and reparation are two elements of restorative justice.[57]

Victims – Individuals who have suffered harm either as a collective or individually. The harm can include emotional pain, economic damage, mental or physical harm and an impairment of one's fundamental rights. The harm has arisen due to the omissions or acts that constitute serious violations of international humanitarian law or gross violations of international human rights law.[58]

1.7 Review of current research status

Important to keep in mind is the fact that the transitional justice field was born out of practice and not through the unfolding of a theory on how authoritarian regimes best transition to democracy. The research field started and was developed in response to the democratic transitions in Eastern and Central Europe and Latin America that took place during the 1980–1990s. Thus, the transitional justice field has pragmatic origins which have shaped the understanding of transitional justice and what a transitional justice process should contain. Overall the transitional justice field still remains undertheorised and there is no unanimous theory on transitional justice.

[57]Anderlini S N, Pampell Conway C and Kays L (n 23) ch 4 2; Council of Europe: Committee of Ministers, 'Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters' (3 October 2018) CM/Rec(2018)8 3–4; Cath Collins, *Post-transitional Justice: Human Rights Trials in Chile and El* Salvador (Pennsylvania State University Press 2010) 12.

[58] United Nations General Assembly, Resolution 60/147 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the General Assembly' (21 March 2006) UN Doc A/RES/60/147 para 8.

Moreover, transitional justice lacks a singular, coherent practice as well as a specific international treaty on transitional justice itself.[59]

There are many different – and sometimes contradictive – opinions on the use of the different transitional justice measures and their influences. It can also be noted that there does not seem to exist a single definition on how long a transitional period lasts. Instead, some claim that one can only determine the length of a transitional period from the specific transitional justice process at hand.[60] This naturally makes it harder to theorise the subject, while attempts to theorise the subject can perhaps evoke more questions than there are answers.

One could contend that the understanding of transitional justice is somewhat outdated. As argued previously, the research field of transitional understanding of transitional justice emerged from democratisation processes in Eastern and Central Europe and the Southern Cone of Latin America. These were countries which at the time had relatively functioning institutions, where the human rights violations happened mainly due to authoritarian regimes' brutal exercise of state power towards its citizens. However, neither of these components – relatively strong institutions or one main actor committing gross human rights violations – is present in many of the countries in current transition phases. Likewise, neither of these components are present in the countries that are likely to go through a transition phase in the future.[61] The post-authoritarian model of transitional justice has been adopted to post-conflict settings without any functional analysis.[62] It is clear that more

[59] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 77; Mihr (n 5) 20; Reiter (n 4) 32–34.
[60] Section 2.2.
[61] United Nations Human Rights Council, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-recurrence' (21 August 2017) UN Doc A/HRC/36/50 paras 34–43; Arthur (n 4) 355; ICTJ, 'Justice in Context: Paradigms of State and Conflict' <www.ictj.org/our-work/research/justice-context-paradigms-state-and-conflict> accessed 18 December 2019.
[62] United Nations Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (7 September 2015) UN Doc A/HRC/30/42 paras 28–29.

research is needed on how transitional justice can be carried out in countries which lack stable institutions and where there are many different groups of perpetrators.

1.8 Outline

The outline of this thesis is concentrated around the two terms and concepts transitional justice and the rule of law. There is also a separation in the outline between the two words transitional and justice in order to be able to systematize and analyse the concepts separately. In addition to this first chapter, this thesis consists of three additional chapters.

In chapter two the term transitional justice is described and systematised. The chapter begins with a definition of the term itself, and is followed by a description of the history of transitional justice. After the historical background is a section on the current context of transitional justice. The history of transitional justice is described because it influences today's understanding of transitional justice. Providing the historical background is deemed as central in order for the reader to understand transitional justice. Thereafter, the concept of transitional and the concept of justice are systematised and analysed separately in two different sections. The purpose of this separation is to help the reader to more easily understand the concepts. The chapter ends with some concluding remarks where the research questions: *what is meant by the term transitional?* and *for how long can transitional justice measures be utilised?* are elaborated on. These questions are answered in chapter two since they only elaborate on transitional justice, it is therefore suitable to discuss these directly after transitional justice has been described.

Chapter three provides a description of the term and concept of the rule of law. The chapter begins with a section which provides a general description of the term rule of law. The general description is followed by an in-depth section with those aspects of the term rule of law which are deemed as essential for a comparison with transitional justice. Those aspects are

accountability before the law and effective access to justice. Rule of law is described since it is considered to be on the other end of the country's transition and because transitional justice is seen as enhancing the rule of law. Transitional justice is dealt with before the rule of law due to that transitional justice can be considered to be the starting point of the country's transition from an authoritarian regime towards a democracy while rule of law is the endpoint. Taking the concepts in this order helps the reader to more easily understand how the two concepts are connected. Descriptions of accountability before the law and effective access to justice are provided considering that they are essential to the rule of law and that the question of how to deal with these aspects are intertwined with the transitional justice process. The chapter ends with an analysis of the question: *is the approach to victims' effective access to justice through criminal trials different in transitional justice compared to in a rule of law state?* This question is dealt with in chapter three since it concerns both transitional justice and the rule of law.

Chapter four contains the concluding analysis where the research questions: *for how long is a country in transition?* and *in what ways can the term transitional be seen as problematic?* are answered. The chapter also answers the research question: *can transitional justice be considered to be a legally useful term?* These research questions are dealt with in chapter four since they build on each other and deal with both transitional justice and the rule of law. The last of these two questions can be seen as a final elaboration of the thesis as a whole, since the question brings together the two terms transitional and justice and elaborates on if they together can be seen as a legally useful term.

2 Transitional justice

This second chapter describes the term transitional justice and its history. It looks into what is meant by transitional, the temporal aspect of transitional justice, and what is meant by justice. This chapter is needed in order to understand where the transition from the authoritarian rule to reach a democratic state based on the rule of law begins and how the term transitional justice is defined. Chapter three then explains the concept of rule of law, which can be described as being on the other end of the transition.[63] The following section, section 2.1, has a short introduction of transitional justice and provides three different definitions on transitional justice.

2.1 What is transitional justice?

Firstly, it can be noted that transitional justice has no single and universal definition.[64] Therefore, definitions from three prominent actors in the field are presented below.

The UN defines transitional justice as

> *[…] comprises 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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*[65]

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[63] Arthur (n 4) 337; Mihr (n 5) 20.
[64] Alam (n 3) 14.
[65] UNSC (23 August 2004) S/2004/616 (n 3) para 8.

The UN considers the process of transitional justice to be a key component in the organisation's framework of strengthening the rule of law when countries transition from authoritarian rule towards democracy.[66]

The organisation ICTJ, presented in section 1.3, describes transitional justice as the following

> *Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.*[67]

Lastly, a definition by the scholar Ruti G. Teitel can be presented. Ruti G. Teitel is a scholar who has written several books and articles on transitional justice and is often referred to by other scholars in the transitional justice literature.[68] Ruti G. Teitel defines transitional justice as the following

> *Transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.*[69]

In conclusion, transitional justice can be described as a society's striving to find legitimate responses or measures to counteract with the big amount of atrocities of the past in order to serve both justice, reconciliation and democracy. The process can include several different cultural, political and judicial instruments in order to both influence a regime change and come to

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[66] UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (n 7) 2; UNSC (23 August 2004) S/2004/616 (n 3) paras 5–8.
[67] ICTJ, 'What is Transitional Justice?' <www.ictj.org/about/transitional-justice> accessed 17 December 2019.
[68] New York Law School, 'Ruti G. Teitel' <www.nyls.edu/faculty/faculty-profiles/faculty_profiles/ruti_g_teitel/> accessed 27 December 2019; See e.g. Alam (n 3); Arthur (n 4).
[69] Ruti G. Teitel 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69 69; Guillermo A O'Donnell and Philippe C Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies (1st edn, John Hopkins University Press 1986) 6.

terms with a society's violent past. Important to note is that the actual measures used and which type of justice the state pursues in the specific transitional justice process depends on the actors' political ambitions and will.[70]

The following section, 2.1.1, provides the history of transitional justice and how the term was established. This is essential since the understanding of transitional justice was born out of practice and transitional justice still appears to be connected to how transitional justice was understood by scholars in the 1980–1990s. It can also be deemed as important since it does not exist an international treaty on transitional justice itself.[71]

2.1.1 The history of transitional justice

Transitional justice has ancient roots but is also a modern phenomenon that is influenced by more recent events and political transformations. In the aftermath of World War II transitional justice changed its focus from responsibilities on national level to policies that focused on individual victims and perpetrators. Before the end of World War II, transitional justice attempts took two different forms. They largely focused on extensive amnesty policies to empower societies to move on from past atrocities, but also on immediate retribution through exiles and executions.[72]

The modern concept of transitional justice was founded in the aftermath of World War II. The allies decided to – through the International Military Tribunal at Nuremberg – hold individuals criminally liable for their participation in gross human rights violations. This was done in order to manifest the democratic view of justice to the world. The shift from collective repercussions to individual responsibility is likely to have been due to the fatal consequences of forcing Germany to collectively pay for the reparations

[70] Mihr (n 5) 1, 22; ICTJ, 'What is Transitional Justice?' (n 67); Teitel, 'Transitional Justice Genealogy' (n 69) 69; O'Donnell and Schmitter (n 69) 6.
[71] Section 1.7.
[72] Reiter (n 4) 29–31.

caused by their involvement in World War I. The International Military Tribunal at Nuremberg established the juridical concept of crimes against humanity which became the foundation of todays' international criminal law. The shift from collective guilt to individual criminal responsibility was again brought up in the international arena after the end of the Cold War.[73]

The descriptive term transitional justice was developed somewhere in the late 1980s to the beginning of the 1990s. The term was a description of the different ways countries in Latin America, the Balkans, Eastern Europe and sub-Saharan Africa dealt with their large-scale gross human rights violations committed by their predecessors in their transition from being under authoritarian rule to becoming a representative democracy. More recently the term has also been extended to post-conflict situations. During the 1970s-1990s over 50 countries started transitioning from authoritarian rule to democracy. These transitions are generally referred to as the 'third wave'[74] of democratisation.[75]

From 1994, transitional justice appeares to have a fully formed set of practices – including prosecutions, reparation programmes, truth-seeking bodies and reform initiatives.[76] The measures emerged from the transitions that took place during the 1980–1990s. In the new democracies where the old regime had either been defeated or significantly weakened there was, in general, a more ambitious attempt to come to terms with the past atrocities through criminal proceedings. In other countries were the old regime was still strong the old regimes negotiated their shift from power which resulted in amnesty laws. Due to this and the notion that amnesties were necessary for

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[73] Reiter (n 4) 31–32.

[74] The term 'third wave' was established by Samuel P. Huntington, see Huntington (n 4) 21–26.

[75] Charles T Call, 'Is Transitional Justice Really Just?' (2004) XI No. 1 Brown Journal of World Affairs 101 103; Arthur (n 4) 324; ICTJ, 'What is Transitional Justice?' (n 67); UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 82; Reiter (n 4) 32–35.

[76] Arthur (n 4) 331; Arthur bases her argument on how Neil J Kritz structured his four volume compendium *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace 1995).

democratisation and stability, many countries started to use other mechanisms, instead of criminal trials. The mechanisms were used in order to both address the needs of the victims and at the same time achieve a lower level of accountability for the victimisers. During these decades the overall focus of the transitional justice processes were the victims, since the countries feared that holding perpetrators accountable could lead to instability.[77]

After the Cold War and in the processes of dealing with the horrors that took place in former Yugoslavia and in Rwanda, a new approach to international justice was formed, or rather, the old view of international justice from the International Military Tribunal at Nuremberg was once again topical. Two international tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were created. In conflicts where there was some sort of international intervention due to different violations, the UN started to provide hybrid-tribunals which consisted of domestic and international judges in order to enforce the rule of law at a national level. In 1998 the Rome Statute of the International Criminal Court[78] was adopted, creating a permanent court with jurisdiction over genocide, crimes against humanity and war crimes. The creation of the court was a consequence of a global normative shift towards criminal accountability for human rights violations.[79]

There are several different historical contexts and time periods one can look at when discussing transitional justice. The understanding and definition of transitional justice also varies. Therefore, the following section, section 2.1.2, deals with the time period and context the survey of transitional justice is set in this thesis.

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[77] Reiter (n 4) 32–35.
[78] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).
[79] Reiter (n 4) 35–37, 39; Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2002) 2 No. 1 Chicago Journal of International Law 1 4.

2.1.2 The current context of transitional justice

As has been noted in section 2.1.1, transitional justice measures have been used for a long time. Ruti G. Teitel describes transitional justice as having went through three different phases and how Teitel describes phase II and III can presumably be seen as a description for how transitional justice is generally understood today. It is also in this context that transitional justice is examined in this thesis.[80] Phase II is the way transitional justice developed after Cold War, post-Cold War transitional justice, also known as the third wave of democratisation.[81] In Phase II multiple perceptions of what is considered to be justice emerged and the discourse moved beyond the understanding of merely holding the perpetrators of the past regime accountable. In other words, it moved beyond retributive justice.[82]

Instead, the process of transitional justice started to include the striving for the healing of a whole society as well as reconciliation and peace; aspects that earlier had been seen as external to the process. Transitional justice became overall more connected to nation-building. According to Teitel, Phase II was influenced by restorative justice and moved from individual accountability towards favouring a communitarian approach.[83]

The reason for this change is that, according to Teitel, during Phase II criminal trials were seen as equally important as the promotion of the rule of law and modernisation in the striving for both building up the nation again and legitimising the new government. Since the aim was to promote the new regime as legitimate, the considerations of justice were shaped by both

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[80] Phase I circulates around how justice and transitional justice was viewed in the immediate aftermath of World War II. For further explanation, see Teitel, 'Transitional Justice Genealogy' (n 69) 72–74. To further explore the ancient roots of transitional justice see e.g. M. Cherif Bassiouni, 'Perspectives on International Criminal Justice' (2009) Virginia Journal of International Law 50 No. 2 269; Reiter (n 4) 29.

[81] Huntington (n 4) 21–26; Teitel, 'Transitional Justice Genealogy' (n 69) 75, footnote 41.

[82] Teitel, 'Transitional Justice Genealogy' (n 66) 76–77; Teitel, *Transitional Justice* (n 2) 224.

[83] Teitel, 'Transitional Justice Genealogy' (n 69) 77, 80.

pragmatism and political flux, as well as the scale of the predecessor regimes' crimes.[84]

Phase III, Teitel describes as the steady-state phase which starts around the year 2000. This phase is characterized by the normalisation of transitional justice at the international level. Transitional justice – and its measures – has become a permanent component of the global society's response to human rights violations. This can also be seen through how significantly the UN has started to perceive transitional justice. Transitional justice is now regarded as a key component in the UN's work with strengthening the rule of law. Teitel states that transitional justice has been normalized due to the contemporary political conditions, such as weak states. The most famous symbol of this normalisation is the establishment of the International Criminal Court.[85]

This understanding of transitional justice also coheres with how the ICTJ, as well as the scholars Paige Arthur and Andrew G. Reiter, view the matter. ICTJ claims that during the past 20–30 years a paradigm of transitional justice has been developed. This paradigm includes a specific set of measures – even though one can question whether this should be the case[86] – such as truth-seeking, reparations, reform of institutions (guarantees of non-recurrence) as well as prosecutions. ICTJ claims that this paradigm has emerged from and has been influenced by the processes that took place in the Southern Cone of Latin America, South Africa, as well as Eastern and Central Europe.[87]

In conclusion, transitional justice can be described as the paradigm that has been developed during the last 20–30 years after the end of the Cold War. A paradigm primarily based on the understanding of the processes that took place during the 1980–1990s.

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[84] Teitel, 'Transitional Justice Genealogy' (n 69) 76.
[85] Teitel, 'Transitional Justice Genealogy' (n 69) 89–92; UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (n 7) 2.
[86] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) paras 81–84.
[87] Arthur (n 4) 321–322; Reiter (n 4) 41–44; ICTJ, 'Justice in Context: Paradigms of State and Conflict' (n 61).

2.2 Transitional – the temporal aspect of transitional justice

The two words which make up the term transitional justice are here separately explored to increase the understanding of them. This section examines the word transitional, whereas section 2.3 considers the meaning of justice. Since the endeavour for justice takes place in a transitional setting shaped by the political conditions of such a context, it is deemed as important to understand what one means with the term transitional.[88] Transitional or transition means the interval, political passage and movement between one type of political regime towards another. This normative shift is the defining aspect of transitions.[89]

The considered starting point or sign that a transition has started is when the authoritarian regime starts to adjust its rules in order to ensure guarantees for individual rights.[90] In the other end of the movement lies the possibility of, among others, founding a democracy or the return to some type of authoritarian rule. The movement is however intended to be politically liberalising and most countries which initiate a transitional justice process aim to achieve the establishment of democracy. This aim was also the cornerstone for how transitional justice was conceptualised in the 1980–1990s since democracy was the dominant normative view through how scholars understood the political change that took place in the authoritarian regimes. Others argue that the transition between the two regimes ends when the latter regime's most politically important groups all accept the rule of law. Furthermore, the execution of transitional justice can be seen as taking place on a continuum of rule of law established democracies.[91]

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[88] Teitel, *Transitional Justice* (n 2) 224.
[89] O'Donnell and Schmitter (n 69) 6; Mihr (n 5) 19, 21–22; Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 No. 1 Journal of Democracy 5 6; Teitel, *Transitional Justice* (n 2) 215, 223.
[90] O'Donnell and Schmitter (n 69) 6.
[91] Teitel, *Transitional Justice* (n 2) 5, 223; Teitel 'Transitional Justice Genealogy' (n 69) 93; Arthur (n 4) 325–326, 337; Mihr (n 5) 20.

Assuming that the transitions' ultimate objective is to reach democracy based on the rule of law[92] this evokes two questions. Firstly, what does the transitional process from an authoritarian regime towards a democracy look like? And, for how long can transitional justice measures be utilised?

The first question can be answered with the help of the scholar Thomas Carothers. He argues that the transition from an authoritarian regime towards a democratic one was captured in a certain model which scholars and democracy activists developed during the 1980–1990s. Carothers calls this model, 'the transition paradigm'.[93]

The model highlights that the process of transition begins with the occurrence of 'opening'. The occurrence of opening means that the authoritarian regime starts to crack due to political liberalisation and the urge for democracy. After the period of opening follows the 'breakthrough'. The breakthrough means that the old regime breaks down and is fast being replaced by a democratic system. The emergence of a new democratic system is often established through a new constitution, elections and through the creation of democratic institutions. After the process of opening and the breakthrough, the transition period, comes the process of 'consolidation'. In this slower process, the early democratic reforms are strengthened through the regularisation of national

[92] A discussion regarding if the concepts of rule of law and democracy can exist without each other or not and if they can be seen as synonymous will not be held. Looking at the discourse of transitional justice it can though be noted that the first and more traditional view of "transition" was seen as a movement towards democracy. Since then several different scholars as well as the UN have started to stress the importance of transitional justice as a way to reach a society based on the rule of law. It can also be noted that the rule of law can be considered to be a fundamental element of democracy. Due to this, it is assumed that the transition period constitutes of a movement towards democracy based on the rule of law. See e.g. Teitel, *Transitional Justice* (n 2); Arthur (n 4); UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (n 7) 2; European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law, adopted by the Venice Commission at its 86th Plenary Session' (Venice 25–26 March 2011) CDL-AD(2011)003rev paras 16, 34. For a discussion on the relationship between democracy and rule of law see e.g. Corstens (n 2) 7–9; Narasappa (n 2) 13.

[93] Carothers (n 89) 5–6.

elections, continual reforms of governmental institutions and the establishment of civil society.[94]

Carothers believes that the model does not describe reality since the majority of the third wave countries, in the time of him writing the article, had entered the ‘gray zone’. This means that the countries were neither considered to be dictatorial nor were they on a clear route towards democracy. Carothers pointed out that what in the transition paradigm was seen as the middle-ground, or the transition itself, between dictatorship and accomplished democracy was rather the most common political condition and a state of normality for many of the third wave states. Countries being in the gray zone usually had some democratic aspects, like democratic constitutions and routine elections. However, the countries in the gray zone still dealt with aspects like public officials’ regular abuse of the law and a low participation in politics.[95]

Carothers argues that he could see that states in the gray zone usually developed into ‘dominant-power politics’ or ‘feckless pluralism’-states. The dominant-power politics means that the country in question has some basic forms of democracy. However, at the same time, the governmental system is dominated by a single group or family, for example, that has such control over the system that it is not likely that there would be a shift in the regime in a foreseeable future.[96]

Opposite to dominant-power politics is the feckless pluralism-state, which is politically free and has regular elections where the power is alternated between different political groups. Even though the political power is shifting and there exists political opposition, the democracy is still shallow due to the political parties generally being described as an elite group, isolated from the rest of the population. The elite is often ineffective and corrupt. These two

[94] Carothers (n 89) 7.
[95] Carothers (n 89) 9–10, 18; Huntington (n 4) 21–26.
[96] Carothers (n 89) 9–14.

patterns, should not be seen as a milestone towards democracy, however, but rather as alternative routes.[97]

Regarding the second question – for how long can transitional justice measures be utilised? – it can first be stated that there is no unanimous answer. The UN's definition of transitional justice, presented in section 2.1, does not mention the temporal aspect. However, the UN deals with the question to some extent in several other documents. The UN considers the timing of when to start implementing transitional justice measures as having to be decided with regards to the national contexts and the stakeholders, especially the victims. Moreover, it is stated that the transitional justice programmes are by definition seen as limited in time.[98]

There is no universal opinion regarding whether transitional justice measures have a certain and optimal period within which the measures need to be executed. At the same time, there is no unanimous view on whether transitional justice measures can be performed without a time frame.[99] Since this is the case, a doctrinal description is presented below in order to present some different academic positions.

Some scholars – Sanam Naraghi Anderlini, Camille Conaway and Lisa Kays – claim that transitional justice only include mechanisms that are short-term and often temporary.[100] This definition could assumingly then exclude processes like the war crimes tribunal in Bangladesh, since this transitional justice initiative started around four decades after the crimes took place.[101] In Argentina, for example, the Simón case initiated prosecutions first in 2001, 16 years after the junta-trials in 1985. The stalemate was due to the impunity

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[97] Carothers (n 89) 10–11, 14.
[98] UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (n 7) 4, 6.
[99] Alam (n 3) 16.
[100] Anderlini S N, Pampell Conway C and Kays L (n 23) ch 4 1.
[101] Alam (n 3) 16.

laws that had been implemented after the junta trials.[102] Could this process also be excluded by this understanding of transitional justice?

Another scholar, Anja Mihr, describes transitional justice as both a short-, medium- and long-term process. Mihr states that a narrower understanding of the word transition would be the following: the institutional and normative change that is taking place, from one regime to another regime, during the first four to five years. This first normative change may be done through, for example, the creation of a new constitution.[103]After the first transition period, Mihr argues, follows a transformation period which works with both medium- and long-term challenges. This transformation period can take decades and during this period transitional justice measures can be used. The first period, the transitional one, centres around using the transitional justice measures to delegitimise the last regime while the transformation period is used to legitimise the new type of regime. In the last decades, governments in France, Australia, Japan and Canada, among others, have been asked to acknowledge past atrocities committed by earlier regimes up to 70 years after they took place. Mihr argues that claims of transitional justice in both third and fourth generations after the violations took place is not an exception but rather the rule, which one can see in both Germany and Austria due to the heinous crimes committed during World War II.[104]

The scholar Mayesha Alam holds that if, when and how the initiatives to transitional justice should be undertaken should be based on the specific context and setting of the country in question. This is because timeframes which do not take the particular context into account are deemed, by Alam, not useful.[105]

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[102] UNHRC (27 August) A/HRC/27/56 (n 31) para 52.
[103] Mihr (n 5) 19, 21–22.
[104] ibid 22.
[105]Alam (n 3) 17.

When discussing the question of when the transitional measure, truth commissions, should be initiated the scholar Agata Fijalkowski argues that initiating a truth commission at the outset of the transition is preferred. She believes that the population's support is at its highest at the very beginning of the transition period. Fijalkowski categorizes the outset of the transition as the moment when a new regime has taken over the governmental power.[106]

The organisation ICTJ states the following regarding the question of transition

> *There can sometimes be unnecessary confusion about whether a country is in a period of "transition" or not, but practically speaking it is not that complicated. The question is whether an opportunity has emerged to address massive violations, even if it is a limited opportunity.*[107]

ICTJ claims that the opportunities often appear in regime changes, when a new regime replaces an old and repressive regime such as Chile in the 1990s and more recently, Tunisia. According to ICTJ there is no ultimate instruction on when and in which order the different measures should be used. Instead the transformation can both take place quickly while it in other times takes decades. ICTJ furthermore states that there is a real risk that the fragile political situation and the large number of atrocities will be used by some actors to continually delay the endeavour to achieve justice.[108]

In the article *How "Transitions" reshaped Human Rights: A conceptual history of transitional justice,* the scholar Paige Arthur argues that the word transitional itself and especially transition to democracy has an important role in the discussion. This is because that the understanding of transition towards democracy is what has shaped the understanding of what measures can be

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[106]Agata Fijalkowski, 'Truth and reconciliation commissions' in Olivera Simić (ed), An Introduction to Transitional Justice (Routledge 2017) 96; Priscilla B Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (Routledge 2002) 221–222.
[107] ICTJ, 'What is Transitional Justice?' (n 67).
[108] ICTJ, 'Focus: Transitional Justice: What is Transitional Justice?' <www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> accessed 21 December 2019; ICTJ, 'What is Transitional Justice?' (n 67).

used in a transitional justice process. Arthur also raises the issue of whether or not transitional justice measures can be used in situations where a transition is not recognizable. She states that it is very unclear how the typical transitional justice measures would be used in mature democracies regarding abuses that happened centuries ago but which still affect the descendants of the victims. In these cases, many reject transitional justice according to Arthur, since they see it as too narrow and something only applicable during a short period of transition. Instead they talk about transformation, meaning long-term endeavours often used in order to reach social reparation through, for example, land-reforms.[109]

Scholars like Cath Collins has started to discuss the term 'post-transitional justice'. This term describes when countries decide to revisit their past – through initiating prosecutions of perpetrators of the former regime – even though their transition took place a long time ago. Collins argues that the revisiting can take place as a result of early impediments – such as the shortcoming of judicial capacity, military resistance and absence of democratic institutional structures – being diminished in the democratisation process. Considering the history it is not unlikely that countries which are using transitional justice measures today in their transitioning will also initiate different forms of transitional justice again decades from today.[110]

The first word of the term transitional justice, the concept of transitional has been elaborated on in this section. This debate can be summarised by stating that there is criticism directed at the transition paradigm itself, and towards the view and theory of what the transition from an authoritarian regime towards a democratic state looks like. There are many different views regarding the question of for how long a country is in transition and for how long transitional justice measures can be utilised. There are also different opinions on whether this is an important question at all. The next section,

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[109] Arthur (n 4) 325–326, 362.
[110] Collins (n 57) 21–23; Reiter (n 4) 42.

section 2.3, deals with the term justice, the second word and component of transitional justice.

2.3 Justice

Following an analysis of the first half of the term transitional justice, this section explores the second half, justice. As mentioned in section 2.1, there are several different measures that can be used in a transitional justice process, both judicial and non-judicial ones, and they are all used in order to serve justice. The process and the implementation of different measures are supposed to be victim-centred. The understanding of justice is wider than the narrow definition of retributive justice – the punishment of perpetrators – it also encompasses acknowledgement of past wrongdoings and restoration. It is seen as a way to gain sustainable peace and reconciliation of the broader society.[111]

Some state that transitional justice aims at institutional justice, the effort to try and increase the population's trust in governmental institutions in order to strengthen the democratic rule of law. The concept of justice is based on two different aims, both to bring justice and recognition to victims and to create an order that is more just and democratic. It is not only about highlighting the history but also, and perhaps primarily, the endeavour to set a new direction for the future.[112]

Since transitional justice takes place in a context afflicted by the fall of an authoritarian regime it is shaped by certain factors such as the wider socio-political setting, the suffering of a society as a whole and the severity of the crimes. It is considered that criminal trials alone are not enough to satisfy the claim of justice for victims of massive or systematic human rights abuses. It

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[111] UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (n 7) 6; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 28; UNHCR Emergency Handbook, 'Transitional Justice' <https://emergency.unhcr.org/entry/55935/transitional-justice > accessed 16 December 2019.
[112] Mihr (n 5) 10; Arthur (n 4) 357; Alam (n 3) 16; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 28.

is not entirely clear why criminal trials alone are not enough but presumably due to that usually only a fraction of all perpetrators are investigated and prosecuted because of practical reasons e.g. lack of political will, the amount of perpetrators and that the prior regime still maintains some power. Instead, the concept of justice in a transitional justice setting does not only include the right to justice but also the right to truth, right to reparation and guarantees of non-recurrence of violations (duty of prevention). These rights can also be seen as four different measures to reach justice: criminal trials, truth-seeking processes, reparations as well as reforms of law and institutions. All of these measures are considered insufficient by themselves whilst the hope is that together they bring justice. The measures are also used in order to recognise victims as right-holders and to build trust both between victims and the rest of the civil society as well as between the victims and the state.[113]

Considering that not one of these tools can offer redress to all victims, transitional justice shall be viewed as justice which has a give-and-take element. This means that the transition period is founded on mutual acceptance between the state and the civil society that justice cannot be fully brought, since it is not possible to offer redress to all victims or to prosecute all perpetrators.[114] As ICTJ claims that, 'It is not "soft" justice. It is the attempt to provide the most meaningful justice possible in the political conditions at the time.'[115]

As stated earlier, the main discussion in this thesis concern victims' access to effective justice through criminal trials. However, as noted in this current section, all the different measures are considered insufficient by themselves and all the different types of measures are seen as crucial to be able to satisfy victims' justice claims.[116] Considering this, both retributive justice – which

[113] Alam (n 3) 15; UNHRC (27 August) A/HRC/27/56 (n 31) paras 18–19, 24; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 25, 37; UNGA (13 September 2012) A/67/368 (n 5) paras 60–61; UNHRC (9 August) A/HRC/21/46 (n 40) para 22.
[114] Alam (n 3) 15; UNGA (13 September 2012) A/67/368 (n 5) para 31.
[115] ICTJ, 'What is Transitional Justice?' (n 67).
[116] See e.g. UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 25.

focuses on victims' effective access to justice – is discussed as well as the concept of truth, reparation and guarantees of non-recurrence. First, retributive justice is covered in sections 2.3.1–2.3.1.3, followed by sections 2.3.2–2.3.3 which briefly examine the aspect of truth, reparations and guarantees of non-recurrence.

2.3.1 Retributive justice – Stability vs. victims' effective access to justice

This section presents the retributive approach in the striving for justice while the aspects of truth, reparation and guarantees of non-recurrence are presented below in 2.3.1–2.3.3. The retributive approach is built on the right to justice, which includes a duty to investigate, prosecute and duly punish responsible perpetrators for serious crimes under international law.[117] From a human rights perspective it can be argued that the state's duty to both investigate and prosecute flows from victims' right to effective access to justice.[118] The organisation the International Commission of jurists maintain that the state's obligation to prosecute and punish perpetrators exists independently of victims' rights. However, they claim that holding perpetrators accountable is one of the most important measures in order to give redress to victims, which is why it is sometimes called victims' right to justice.[119] Through the use of

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[117] See e.g. Alexander Mayer-Rieckh, 'Guarantees of Non-recurrence: An Approximation', (2017) 39 No. 2 Human Rights Quarterly 416 footnote 99; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 19; ICCPR (n 17) art 2; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 United Nations General Assembly Resolution 2106 (XX) entered into force 4 January 1969) 660 UNTS 195 (ICPPED) art 3, 6, 7, 11; CAT (n 18) art 4, 5, 7,12; United Nations General Assembly, 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General' (16 March 2012) UN Doc A/66/749 para 37; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) para 4.
[118] UNHRC (27 August) A/HRC/27/56 (n 31) para 28; ICCPR (n 17) art 2. 3; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (AChHPR) art 7.1(a); American Convention on Human Rights,"Pact of San José", Costa Rica (entered into force 22 November 1969) 1144 UNTS 123 (ACHR) art 25; European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14) (ECHR) art 13; Boucherf v. Algeria (30 March 2006) Communication No. 1196/2003 UN Doc CCPR/C/86/D/1196/2003 para 11; Kurt v. Turkey App No. 24276/94 (22 January 1997) Reports 1998-III para 140.
[119] International Commission of Jurists (n 3) 216; United Nations General Assembly, Resolution 57/228 'Khmer Rouge trials: Resolution adopted by the General Assembly' (27 February 2003) UN Doc A/RES/57/228 1.

prosecutions and criminal trials the victim can be recognised as a right-holder.[120]

Considering this, the sections, 2.3.1.1–2.3.1.3, looks at how states usually deal with prosecutions and punishment in a transitional justice process. This includes assessing both if and when a state has a duty to prosecute perpetrators in a transitional justice setting, as well as the aspects of amnesties and prosecutorial strategies and the use of criminal sanctions.

2.3.1.1 Duty to prosecute

The state's duty to prosecute regarding violations of human rights or humanitarian law in those cases where the actions constitute crimes under international or national law. Especially when it comes to war crimes, genocide, crimes against humanity[121] and also other gross violations of human rights such as slavery, rape and other types of sexual violence, extrajudicial or summary killings, enforced disappearance, torture and other forms of cruel, inhuman or degrading treatment as well as other serious violations of international humanitarian law. These are crimes which have often taken place in either an authoritarian or conflict-torn society, or in a combination thereof, prior to the transition-period. If a state does not fulfil its obligation it is considered to have breached human rights treaty law.[122]

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[120] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 37.

[121] The categories War crimes and Genocide are both prohibited under international criminal law. At the moment there is no convention regarding Crimes against humanity. Crimes against humanity has been defined and developed in international customary law and has been codified in Statute of the International Criminal Tribunal for the Former Yugoslavia (established by resolution 808/1993, 827/1993 and amended by Resolution 1166/1998, 1329/2000, 114/2002) art 3 and Statute of the International Criminal Tribunal for Rwanda (established by Security Council Resolution 955 (1944) of 8 November 1994, last amended by Security Council Resolution 1717(2006) 13 October 2006) art 4 as well as in Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 7. See United Nations Human Rights Council, 'Joint Study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity and their recurrence: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide' (6 June 2018) UN Doc A/HRC/37/65 para 7.

[122] UNHRC (27 August) A/HRC/27/56 (n 31) para 27; United Nations Human Rights Committee, 'General comment no. 31[80], The nature of the general legal obligation imposed

Some scholars argue that there is no universal duty under international law to prosecute.[123] The differing opinions on how large the scope of a state's duty to prosecute is calls for a brief examination of how some scholars view the state's duty to prosecute in the different international instruments that can be applicable in transitional justice processes.[124]

According to the Geneva Conventions,[125] states have a responsibility to both search for, prosecute, as well as punish perpetrators of grave breaches. The Convention on the Prevention and Punishment of the Crime of Genocide[126] also states an obligation for states to prosecute perpetrators who are

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on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 18; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 19.

[123] Fijalkowski (n 106) 128–129; McEvoy and Mallinder (n 22) 410.

[124] An in-depth examination of how big scope state's duty to prosecute is, if and when countries can use amnesties according to international conventions, treaties and international customary law falls outside the scope of this thesis. It has been deemed as important to briefly dwell on the state's duty to prosecute in order to lay a base for the following section on how amnesties and prosecutions are used in the transitional justice field. For deeper discussions regarding the state's duty to prosecute and state's possibility or no possibility to use amnesties in accordance with international law the reader is encouraged to have a further look at, among others, Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 No. 4 Law and Contemporary Problems 41; McEvoy and Mallinder (n 22).

[125] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 21 April – 12 August 1949, signed 12 August 1949 entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 21 April – 12 August 1949, signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 21 April – 12 August 1949, signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 21 April – 12 August 1949, signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (signed 12 December 1977, entered into force 7 December 1979); Protocol Additional to the Geneva Conventions of 12 August and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977 signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (Geneva Conventions).

[126] Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature and ratification or accession United Nations General Assembly Resolution 260 A (III) of 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (the Genocide Convention).

responsible for genocide. Some scholars claim that despite that the conventions state an obligation to prosecute, the duty is often not applicable in the aftermath of mass atrocities due to the limited scope of the conventions. The duty to prosecute in the Geneva Conventions and Additional Protocol I are limited to 'grave breaches' that have taken place in international armed conflicts and for internal armed conflicts there is no explicit duty to prosecute in either Common article 3 to the Geneva Conventions nor in Additional Protocol II. However, many of today's conflicts are not international armed conflicts, thus meaning that the duty to prosecute in Geneva Conventions and Additional Protocol I is not applicable. The obligation in the Genocide Convention only applies to perpetrators which have had the intent to destroy a substantial portion of the population of a national, ethnic, racial or religious group.[127]

To assess if there is a duty to prosecute for war crimes in internal conflicts and for crimes against humanity, customary international law has to be considered since there are no international conventions. Some scholars, such as Kieran McEvoy and Louise Mallinder, argue that due to the widely spread use of amnesties, the duty to prosecute in these cases can be considered as permissive rather than compulsory.[128] Regarding violations of human rights, international human rights law does not explicitly mention a duty to prosecute, however some argue that for the states to be able to uphold the right to life, for example, this means that they must also investigate the killings of persons. The Convention against Torture and Other Cruel,

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[127] Fijalkowski (n 106) 120; McEvoy and Mallinder (n 22) 418; the Genocide Convention (n 126) art 1–4; First Geneva Convention (n 125) art 3, 49–50; Second Geneva Convention (n 125) art 3, 50–51; Third Geneva Convention (n 123) art 3, 129–130; Fourth Geneva Convention (n 125) art 3, 146–147; Protocol I (n 125) art 85–86; Protocol II (n 123).

[128] Charles P Trumbull, 'Giving Amnesties a Second Chance' (2007) No. 25 Berkeley Journal of International Law 283 291, 345; Fijalkowski (n 106) 131; McEvoy and Mallinder (n 22) 419 and Mark Freeman, Necessary Evils: Amnesties and the Search for Justice (Cambridge University Press 2009) 4 refers to the following two studies; Louise Mallinder, 'Amnesties Challenge to the Global Accountability Norm?: Interpreting Regional and International Trends in Amnesty Enactment' in Leigh A. Payne and Francesca Lessa (eds) Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives (Cambridge University Press 2012); Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, (Hart Publishing 2008) see e.g. 19–24.

Inhuman or Degrading Treatment or Punishment demands that states criminalise all acts of torture and either extradite or establish competence over the offences in those cases where the perpetrator is a national.[129]

2.3.1.2 Amnesties and prosecutorial strategies

Since it can be argued that holding perpetrators accountable is one of the most important measures in order to give redress to victims, this section provides a review of how the prosecutions of perpetrators in transitional justice is dealt with. This includes both states' use of amnesties of prosecutorial strategies and of selective prosecutions. These two components are discussed since they show how victims' effective access to justice in practice is prioritised and dealt with in a transitional justice process. Overall, in the retributive part of transitional justice there seems to be an ongoing balancing act between, what Teitel describes as, the actual political situation in the transition setting and 'ideal theories of law'.[130]

At the centre of deciding whether or not to prosecute the perpetrators of the old authoritarian regime lies what scholars define as the 'stability vs. justice-dilemma'.[131] The dilemma applies to whether or not the new regime should confront the outgoing regime with the threat of prosecutions and punishment since the outgoing regime quite often still has some remaining military strength and political power. Prosecutions and trials are deemed to have such destabilising effects that fragile democracies in the wake of transitioning might not survive a big number of criminal trials. Hence, only a fraction of the perpetrators of the old regime are investigated and prosecuted, in order not to threaten the transition from an authoritarian regime towards becoming a democracy. As a result, it is deemed probable that the old regime is more likely to let go of their governmental power if they do not face the threats of

[129] Orentlicher (n 50) 2568; Fijalkowski (n 106) 121; CAT (n 18) art 2, 4, 5.
[130] Teitel, *Transitional Justice* (n 2) 213, 224.
[131] Orentlicher (n 50) 2615; Collins (n 57) 8; Alexandra Barahona De Brito, 'Bibliographical Survey' in Alexandra Barahona De Brito, Carmen González Enríquez and Paloma Aguilar (eds), the Politics of Memory: Transitional Justice in Democratizing Societies (Oxford University Press 2001) 345.

prosecutions.[132] M. Cherif Bassiouni argues that the effects of this dilemma is that the rights of victims in reality become objects for political trade-offs in order for the country to transition.[133]

Many countries use amnesties in order to deal with the stability vs. justice-dilemma. The use of de facto amnesties is the most common measure that governments in transitional settings use.[134] Historically, it has been shown that countries in transition have been very tempted to give amnesties to protect perpetrators from legal responsibility even when it comes to the worst atrocities and despite the countries' national and international obligations. The use of amnesties has not diminished albeit that the discourse at the international level has shaped their present form. McEvoy and Mallinder argue that it is quite common that amnesties today are given in exchange for taking part in truth-processes.[135] Amnesties are often portrayed as something essential for the greater good, in order for a society to transition. This means that the individual victim's right to effective access to justice for some of the severest crimes is neglected in order to serve the interest of the greater good. Some claim that amnesties combined with restorative justice measures – such as truth commissions – can achieve national reconciliation, strengthen justice norms and enhance the rule of law through the wider society's dealing with the past.[136]

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[132] Orentlicher (n 50) 2615; Collins (n 57) 8–9; McEvoy and Mallinder (n 22) 412; UNGA (13 September 2012) A/67/368 (n 5) para 47; UNHRC (27 August) A/HRC/27/56 (n 31) para 24.

[133] M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 No. 4 Law and Contemporary Problems 9 12.

[134] Mihr (n 5) 5.

[135] UNHRC (27 August) A/HRC/27/56 (n 31) para 31; McEvoy and Mallinder (n 22) 415–416, 435 and Freeman (n 128) 4 refers to the following two studies; Mallinder, 'Amnesties Challenge to the Global Accountability Norm?: Interpreting Regional and International Trends in Amnesty Enactment' (n 128); Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (n 128) see e.g. 19–24.

[136] Call (n 75) footnote 10; McEvoy and Mallinder (n 22) 411, 427–428; Mcevoy and Mallinder bases their argument of amnesties being for the greater good on the following two studies; Sarah Cullinan, Torture Survivors' Perceptions of Reparation (The REDRESS Trust 2001); Tshepo Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 Journal of Human Rights Practice 208.

It can be noted that there is no international treaty which explicitly prohibits amnesties. Instead states have been unwilling to agree to even mild expressions of discouragements regarding amnesties in treaty law.[137] However, the UN holds the position – since the late 1990s – that amnesties which stop the prosecution of public officials who perpetrated genocide, crimes against humanity, war crimes and other gross violations of human rights are not in line with either UN policy or states' obligations in several different treaties. There appears to be a discrepancy between the position of the UN and state practice of using amnesties.[138]

In general, only a fraction of all perpetrators are investigated and prosecuted. This is not only due to the stability vs. justice-dilemma. The difficulties to enforcing a larger number of prosecutions usually depends on that the number of perpetrators can be so substantial that it is regarded technically impossible to try all perpetrators through fair trials within a reasonable time period. Often there is also a lack of capacity and scarcity of human and financial resources. In addition, incompetence in the police force and in the judiciary is often also a contributing factor.[139] Even in those cases where the state has the common tools for the achievement of retributive justice, such as effective legislation, judges, defence lawyers, prosecutors and a competent police force, the attempt to prosecute is often stopped due to lack of political will. The lack of political will and unequal power positions are considered to be two of the main reasons that states do not initiate prosecutions. Important to notice is the fact that no legal mechanism can be used in order to deal with the absence of

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[137] Fijalkowski (n 106) 130–131; McEvoy and Mallinder (n 22) 417; Freeman (n 128) 33.

[138] McEvoy and Mallinder (n 22) 420; Fijalkowski (n 106) 118; United Nations Human Rights Committee, 'General Comment No. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.9 (Vol. I) 15; UNHRC (26 May 2004) CCPR/C/21/Rev.1/Add.13 (n 122) para 18; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 24; UNHRC (27 August) A/HRC/27/56 (n 31) para 29.

[139] United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Question of the impunity of perpetrators of human rights violations (civil and political)' (26 June 1997) UN Doc E/CN.4/Sub.2/1997/20 para 48; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 37; McEvoy and Mallinder (n 22) 412; UNHRC (27 August) A/HRC/27/56 (n 31) para 33; Friigard (n 42) 1–3.

the political or societal will or to fully neutralize unequal power relations which stand in the way of dealing with past atrocities.[140]

Because of the difficulties associated with prosecuting perpetrators, the former Special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo De Grieff has written a report on how states can deal with the question of prioritising the prosecutions of perpetrators. In comparison to De Grieff's suggested strategies it can be noted that the standard approach on how to prioritise prosecutions in most domestic jurisdictions is, usually, to take the cases one by one, treat them individually and take them in the order they come in to the court. Prosecutorial strategies, or prioritisation strategies, are seen as necessary in order to maximize the impact of the scarce resources at hand, considering that prosecuting and trying all perpetrators in a criminal trial might be impossible. The overall aim of De Grieff's suggested strategies is to dismantle the structures and the web of persons that made the violations possible and to maximize the accountability. The Special rapporteur differentiates the prioritisation of prosecutions from mere selection of cases.[141]

The suggested prosecutorial approaches are, together with other aspects, based on how prosecutions have been done in the past. These approaches serve as a good example of how victims' right to effective access to justice through prosecutions usually is, and can be, dealt with in transitional justice.[142] It is stated that since the violations of the past regime often have been systemic, the implementation of a prosecution strategy should be a

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[140] UNHRC (27 August) A/HRC/27/56 (n 31) para 76; Christopher K Hall, 'The Danger of Selective Justice: All Cases Involving Crimes under International Law Should be Investigated and the Suspects, When There is Sufficient Admissible Evidence, Prosecuted' in Morten Bergsmo (ed), Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edn, Torkel Opsahl Academic EPublisher 2010) 180.
[141] UNHRC (27 August) A/HRC/27/56 (n 31) 1 paras 24–26, 33–34, 44; Frigaard (n 138) 1–3; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 43.
[142] UNHRC (27 August) A/HRC/27/56 (n 31) paras 47–73.

concern for a society as a whole and not only a concern for the specific victims.[143]

One strategy De Grieff suggests is to start with those violations that are considered to be ‘most serious’. Usually this category refers to cases where the violations have meant serious violation of a person’s physical integrity or the loss of the person’s life. It includes genocide, war crimes and crimes against humanity, since they are considered the most severe crimes according to the international community. Prioritising the most serious crimes has been common practice for a long time. A problematic aspect of this type of prioritisation is that the severity of the crime does not necessarily correspond with the prevalence. Often the most common violations that have taken place in an authoritarian regime do not fall within the international community’s description of most serious crimes. If the prioritisation leads to only targeting the most serious crimes it creates an impunity gap, in other words the majority of the violations remain unaddressed. De Grieff believes that the International Criminal Court’s decision to only prosecute for the most serious crimes has influenced how countries at the domestic level prioritise their prosecutions.[144]

Another strategy De Grieff suggests is to start with the ‘high-impact’ cases, a strategy that has been used in some transitions, for example in Argentina. This means that a country prioritises those cases which can, in a positive way, raise awareness among the population and can send important signals and thus create a positive public discourse. One type of high-impact cases are cases which can be used as a tool to motivate reforms in the legislation and establish legal precedents.[145]

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[143] UNHRC (27 August) A/HRC/27/56 (n 31) para 40; United Nations General Assembly, ‘Note by the Secretary-General: Promotion of truth, justice, reparation and guarantees of non-recurrence’ (13 August 2013) UN Doc A/68/345 paras 17–18.
[144] UNHRC (27 August) A/HRC/27/56 (n 31) paras 54–55, 57–58; Office of the Prosecutor, International Criminal Court, ‘Prosecutorial Strategy 2009–2012’, (1 February 2010) para 20; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) art 5.
[145] UNHRC (27 August) A/HRC/27/56 (n 31) paras 51–53.

'Symbolic' or 'paradigmatic' cases focus on selecting those type of cases that shake the conscience of a particular group, the bigger society or humanity at large. De Grieff argues that if a country cannot prosecute all cases, either simultaneously or over a period, then it can be important to concentrate on this category of cases. Possible problems which can occur is if the cases are defined as the object of popular concern, since the procedure then would be based on different biases. If the procedure would be based on popular concern there could be a risk that violations against marginalised groups would not be prosecuted since they, most likely, would not reach the level of popularity needed.[146]Another of De Grieff's strategies is to start by prosecuting 'most responsible perpetrators'. As the name indicates, this strategy focuses on prosecuting those who were the most responsible for the committed crimes. These being the people who are in senior leadership or who have the power of influence to either incite, arrange or order the crime. This strategy is intended to send the message that everyone is equal before the law.[147]

Some claim that it is considered unrealistic to force states to prosecute all perpetrators. Instead, prosecutions on an international or domestic level are suggested to be selective, both when it comes to what crimes the country addresses and which perpetrators are held accountable. As stated earlier, transitional justice has an aspect of give-and-take, meaning that there is an understanding that not all crimes are going to be punished. The current international practice, which is also reflected in the statutes of the international tribunals, is set on prosecuting those who are seen as the 'most responsible perpetrators' for ordering and instigating past atrocities. McEvoy and Mallinder claim this is also the case when treaties which have an explicit duty to prosecute are applicable.[148]

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[146] UNHRC (27 August) A/HRC/27/56 (n 31) paras 68–70.
[147] UNHRC (27 August) A/HRC/27/56 (n 31) para 59; UNGA (13 September 2012) A/67/368 (n 5) para 57; Office of the Prosecutor, International Criminal Court, 'Prosecutorial Strategy' 2009–2012, (1 February 2010) para 19.
[148] McEvoy and Mallinder (n 22) 418; Alam (n 3) 15–16; Friigard (n 42) 2.

The practice of selective prosecutions can be critiqued. Bassiouni claims that the practice of only prosecuting a few of all perpetrators can be viewed as tokenism. Bassiouni describes the practice as a fig leaf, meaning that society sees the prosecutions of the few as justice being done while it in reality means that the rest of the perpetrators gain impunity. Foremost, the token prosecutions are used as a way to establish individual responsibility separating the few perpetrators from the rest of the society in order to cleanse a society's collective guilt.[149]

The next section, 2.3.1.3, provides a brief description of the use of criminal sanctions in transitional justice processes. As was shown in section 2.3.1, to duly punish perpetrators for serious crimes under international law is seen as the duty of the state and it can also be considered to be a measure of redress for victims.[150] Lastly, the section also provides a summary of retributive justice in transitional justice.

2.3.1.3 Criminal sanctions

To duly punish perpetrators for serious crimes under international law is seen as a duty of the state. Some international treaties also include a specific obligation of the state to adopt criminal sanctions.[151] Both the prosecution of the perpetrator as well as the punishment of the perpetrator can also be viewed as a measure of redress for victims.[152]

Teitel claims however that in many transitional justice processes the criminal sanctions is limited to only initiating an investigation in order to establish the

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[149] Bassiouni 'Perspectives on International Criminal Justice' (n 80) 311, 315.

[150] International Commission of Jurists (n 3) 239; See e.g. UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 19; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) para 4; ICPPED (n 117) art 7; CAT (n 18) art 4; the Genocide Convention (n 126) art IV.

[151] See e.g. International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted United Nations General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entered into force 18 July 1976) art IV; ICPPED (117) art 4, 7; the Genocide Convention (n 126) art IV, V, VI; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985 entered into force 28 February 1987) OAS Treaty Series No. 67 art 1, 6.

[152] International Commission of Jurists (n 3) 239.

guilt of the perpetrator. The establishment of guilt and sanctioning of punishment becomes separated in transitional justice, while ordinarily punishment follows from the establishment of guilt.[153] The criminal sanctions being fixed, stable and justified through purposes relating to the specific offense the individual perpetrator has committed can be seen as essential in a rule of law system. In a transitional period, the (limited) punishment is instead justified through aspects outside the scope of the individual perpetrator and the individual crime. The punishment goes beyond regular aspects of retributive justice, such as deterrence. The aim of countries transitioning towards becoming rule of law states is used to justify the criminal sanctions being limited.[154]

Instead of punishment only being a consequence of the crime of the individual, the limited punishment is seen as a tool for normative change. It is used to establish that the old regime committed wrongdoings, while avoiding the question of individual responsibility for systemic wrongs. Selective and symbolic prosecutions, with little or no punishment, thus become a foundation for a society's normative change towards democracy based on the rule of law.[155]

To summarise, transitional justice looks at how to both proportionately and appropriately respond to the illegitimate act, the one who has perpetrated the act and the victims of the illegitimate act. However, retributive justice in the transitional justice paradigm takes place in the aftermath of mass violence or political overturn. Due to this setting, transitional justice is selective. It also takes into account the wider socio-political context, the suffering of the whole community and the severe nature of the harm that has been caused. Teitel, for example claims that the practices of transitional justice are both limited and partial, and that the measures focus are on enabling the reconciliation of a society as a whole. Meaning, according to Teitel, that it is a practice of forced

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[153] Teitel, *Transitional Justice* (n 2) 46–47.
[154] ibid 49–50, 66.
[155] ibid 47–50, 66–67.

unity far from the individualism which is essential in contemporary constitutionalism.[156]

2.3.2 Restorative justice

This section, 2.3.2, deals with the measures of truth and reparation, two of the non-judicial, restorative measures that are used alongside prosecutions and criminal trials in transitional justice.[157] As has been noted in earlier sections, criminal prosecutions are generally only initiated in a few cases, and other measures such as truth commissions – in order to establish truth – and reparation programmes – to give some type of reparation – are often used instead. However, it can be argued that the aspects of truth as well as reparation can also be fulfilled through a judicial procedure. Courts can for example through procedural and evidential standards test the truth of what has happened and establish it through a court record. Courts can also establish adequate reparation for the harm that the victim has suffered. In the transitional justice process these are though often separate measures taken alongside or instead of criminal trials.[158]

2.3.2.1 Truth

The right to truth means that victims should be able to both seek and get access to relevant information regarding the alleged violation. The right should also be seen as that there exists an obligation on states to establish procedures and institutions that have a mandate to seek out the truth in those matters and situations that are disputed. The right to truth for victims and their families is not declared in a specific international convention but the framework has, as a part of the broader right to remedy, been developed by international judicial bodies and national courts.[159]

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[156] Alam (n 3) 15–16; Teitel, *Transitional Justice* (n 2) 230.
[157] Anderlini, Conway, Kays (n 23) 2; Alam (n 3) 79.
[158] United Nations Commission on Human Rights, 'Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights' (8 February 2006) UN Doc E/CN.4/2006/91 paras 48, 57; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) paras 11, 17; UNHRC (26 May 2004) CCPR/C/21/Rev.1/Add.13 (n 122) para 16; UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 25.
[159] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) paras 51–52; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principles 2–5; UNCHR (8 February 2006)

The UN has found that truth-seeking processes are an important tool which can complement criminal trials and have considered them to play a role in the enhancing of accountability.[160] The different tools that can be used in the process of truth-seeking are among others, the opening of archives documenting the past, scientific research on the events that have taken place and truth commissions.[161] However truth-seeking processes, unless they lead to prosecutions, are not a tool to gain retributive justice. They are not considered to be judicial institutions and should not determine criminal responsibility neither should they pass a judgement or impose a sentence. Truth commissions for example are instead a way to gain social peace and to give both recognition and acknowledgement for the suffering of the victims. Some scholars claim that truth commissions have in some transitions served as the second-best alternative to criminal trials. Truth commissions emerged mostly in Latin America where military regimes halted the transition to democracy through demanding amnesties for massacres, extrajudicial killings and torture.[162]

2.3.2.2 Reparation

The right to reparations include both symbolic and material benefits that are supposed to redress and recognize the violation of human rights and can be distributed to both whole groups and specific individuals.[163] The individual's right to reparation and remedy is cherished in many different international instruments. There is a rich jurisprudence, from both international, regional and national courts on claims from periods of mass atrocities, which

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E/CN.4/2006/91 (n 158) para 38; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) para 24.

[160] United Nations General Assembly, Resolution 67/1 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law and the National and International Levels: resolution adopted by the General Assembly' (30 November 2012) UN Doc A/RES/67/1 para 21; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 5; United Nations Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (12 October 2011) UN Doc S/2011/634 para 23.

[161] Mihr (n 5) 4.

[162] Hayner (n 106) 14–16; Call (n 75) 103–104; UNGA (13 September 2012) A/67/368 (n 5) para 72; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 8.

[163] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) para 60.

establishes that a state's obligation to give reparation not only includes a monetary compensation, but also: legal reforms, restitution of employment, property and liberty as well as public apologies.[164]

In many transitional justice processes the reparation has been dealt with through large-scale administrative programmes. The programmes hand out the same type of reparation to all victims within the same category, instead of dealing with judicial resolution in the individual case. The thought with the large-scale administrative programmes is that even though they do not deliver "flawless justice", the programmes have been able to provide some sort of reparation to tens of thousands of victims.[165] It can be noted that *The updated Set of Principles for the protection and promotion of human rights through action to combat impunity* states regarding reparation-procedures that every victim shall have access to effective remedy in the form of civil, criminal, disciplinary or administrative proceedings. Although, the principles also claim that reparations may be provided through administrative programmes funded by international or national sources. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* appears to take a broad definition of reparations, one that does not exclude prosecutions.[166]

Next section 2.3.3 provides a brief explanation on the fourth measure in transitional justice, guarantees of non-recurrence.

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[164] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) paras 61, 65; United Nations General Assembly, 'Note by the Secretary-General: Promotion of truth, justice, reparation and guarantees of non-recurrence' (14 October 2014) UN Doc A/69/518 para 30; UNSG 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (March 2010) (n 7) 8–9; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) paras 15–23; For different international instruments see e.g. ICCPR (n 17) art 2; ICPPED (117) art 24; UDHR (n 20) art 8.

[165] UNHRC (7 August 2017) A/HRC/36/50/Add.1 (n 3) paras 63–64.

[166] UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 32; UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) Section III para 4; Jemima Garciá-Godos, 'Reparations' in Olivera Simić (ed), An Introduction to Transitional Justice (Routledge 2017) 184.

2.3.3 Guarantees of non-recurrence of violations

Beyond a state's obligation to both recognise the victims of past atrocities and serve them reparations, the state also has a duty to prevent repeated future violations. In other words, guarantees of non-recurrence have a preventive character.[167] The obligation of the state to make sure that human rights are respected does not only mean that there exists a general obligation to hinder future violations. There is also a more specific aspect of the obligation, the prevention of the specific type of violation that has already taken place. In striving for the prevention of future violations, one looks at the past and sees what resources, structures and agents that contributed to the possibility of the violation's occurrence.[168]

The measures states should take in order to guarantee non-recurrence can be categorised into: institutional reforms, demobilising parastatal armed groups and the reformation of laws that contribute to impunity. These measures have been proven to be important for the prevention of recurring human rights violations.[169]

2.4 Concluding remarks chapter two

This section provides an analysis on the following research questions:

- *What is meant by the term transitional?*
- *For how long can transitional justice measures be utilised?*

The research question regarding if the approach towards victims' effective access to justice is different in transitional justice compared with in a rule of law state is answered after a description of the rule of law has been provided in chapter three.

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[167] Mayer-Rieckh (n 117) 416, 433; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1(n 44) principles 35–38.
[168] Mayer-Rieckh (n 117) 433; UNCHR (8 February 2005) E/CN.4/2005/102/Add.1 (n 44) principle 35.
[169] UNCHR (8 February 2005) E/CN.4/2005/102/Add.1(n 44) principles 35–38.

2.4.1 What is meant by the term transitional?

The term transitional is described in many different ways, with words such as 'an interval', 'movement', 'continuum' and 'a political passage'. Overall defines the term a movement, or a transition, between something that has been or to some extent still exists but with the aim of changing the society into something new. The movement takes place between two different regimes.[170]

The two different regimes the movement takes place between are an authoritarian regime and a democracy based on the rule of law. The understanding that the transition is going to lead towards a democracy is both the historical understanding of the term transitional but also how modern actors see the term. It is worth noting that more recently the understanding of the term transitional has also started to encompass when the movement includes a transition from a conflict.[171]

2.4.2 For how long can transitional justice measures be utilised?

Even though it seems quite clear between what types of regimes the transition takes place, between these stages it is very unclear for how long a country is in transition. This question is dealt with in the final analysis in chapter four whilst tackling the question of whether or not the term transitional can be seen as a problematic. It is also unclear for how long transitional justice measures can be utilised, both on a theoretical level, and presumably even more so on a practical one.

Some scholars, like Anderlini, Conaway and Kays, argue that transitional justice measures can only be used temporarily and for a short-term period. Nonetheless, they do not describe how long a short-term period is. Should, for example, the definition of a short-term period be relative to how long the

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[170] Section 2.2.
[171] Section 2.1.1; Section 2.2.

country had been an authoritarian regime? If the country had been an authoritarian regime for 40 years then perhaps a short-term period could be around 4–6 years in order to deal with the atrocities. Though, if the authoritarian regime has only existed for around 15 years in total could it then be that 4–6 years is instead considered to be a long-term period? Mihr claims that a narrower understanding of the term transitional only includes the institutional and normative change the first four to five years. However, Mihr does not claim that it is only during this period where the transitional justice measures can be used. Instead it seems like these can be used during a longer period - perhaps up to decades after the violations took place. It appears that Mihr makes a distinction between the transition period itself and the utilisation of transitional justice measures. If the measures can be used decades after the first opening, as Carothers defines the transition period, can they then still be seen as being used temporarily as Anderlini, Conaway and Kays claim that they should? [172]

Fijalkowski on the other hand, claims that truth commissions should be used from the outset of the transition period due to the population's support often being the highest in the outset of the transition. The claim that it should be initiated at the outset of the transition seems to propose a short-term use that also fits with what Mihr describes as the narrower understanding of the term transitional. It is interesting to contemplate about what happens in those cases when the population's support is not high in the beginning of the transition.[173] Should the government then wait and see if the population's support becomes higher even if this is not in the beginning of the transition? If so, this could also open up to the possibility that the government could wait for higher support as an excuse to postpone the establishment of transitional justice measures in order to avoid dealing with past atrocities.

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[172] Section 2.2.
[173] ibid.

As has been discussed, Mihr talks about a transformation period that follows the transition period. This transformation period, Mihr states, can take decades, during which transitional justice measures can be utilised. ICTJ also believes that the transition can take up to several decades. If these transitional justice measures are used after many decades perhaps this could mean that they could rather be seen as post-transitional justice measures as Collins defines it.[174] Are the measures then used as a way to revisit the past, as Collins puts it, or should they be seen as a continuation of the transition-period? Or perhaps categorized as a transformation-period continuing the transition period as Mihr argues?

Both the UN and the scholar Alam promote a context-centred approach on when to initiate transitional justice measures. It is the particular country and context in question which should determine when the measures are initiated. Similar claims are made by ICTJ, however ICTJ also points out some risks with this approach. ICTJ believes that context-centred approaches, where one takes into account the social, legal and political circumstances such as the fragility of the state can be used as as a mere excuse to continually delay the initiation of the transitional justice measures.[175]

Clearly, there are many different views regarding for how long transitional justice measures can be utilised; some claim that they are limited in time. Some scholars specify that they should only be used for short-term, however, what is meant by short-term is though unclear. Others believe that the measures can be used for decades, but then they claim that the measures are a part of a transformation period rather than a transitional period. The question then, is if the transformation period is something outside of the transition? On the other hand, Mihr, one of the scholars who claims that the transitional period is followed by a transformation period, describes the transformation period very similarly to how Carothers describes the process of consolidation

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[174] Section 2.2.
[175] ibid.

– something he believes to be a part of the transition paradigm.[176] They both describe a process where a society has started to stabilize itself through establishing a particular political culture and the strengthening of institutions. It must be deemed unclear whether what some call a transformation period is a part of the transition period or something separate following the transition period.

One can question if those who consider that the measures can be used for decades still believe that there is a limited timeframe for the measures or if they can be used "forever". If so, this evokes questions about whether or not descendants of victims of abuses that took place centuries ago, who are still affected, can claim transitional justice measures? And if so, is this possible also in those cases where there has not been a clear transition? Arthur argues that in these cases many claim that transitional justice measures are too narrow – and hence should only be used during the short transition period – and that one should instead use other types of measurements to ensure social reparation. [177]

In summary, it seems safe to say that it is unclear for how long transitional justice measures can be utilised. The views of scholars can be categorised by those who believe measures should be used in the short-term and those who believe they should be used over a longer period. Others claim that the time frame is unimportant but that one should rather look at the specific context. All the different approaches are however unclear and no single answer exists on how long transitional justice measures can be utilised.

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[176] Section 2.2.
[177] ibid.

3 The rule of law – at the other end of the transition

At the other end of the transition from one regime towards another lies a democratic state based on the rule of law. The concept of transitional justice places the rule of law into a temporal context, considering that the transition takes place along a continuum towards becoming a democratic state based on the rule of law.[178] This chapter defines some of the central elements of the rule of law in order to understand what the transitional justice process is supposed to lead to.

3.1 Definition of the rule of law

Firstly, it can be noted that the majority of the dominant rule of law theories come from some form of Liberalism. Furthermore, the rule of law is seen as an inherent part of the democratic society and as the cornerstone of national legal and political systems.[179] Legal liberty – the belief that laws shall be precise and publicly declared in advance as well as applied equally and interpreted with certainty – is the main theoretical understanding of the rule of law among liberal democracies. Simply put, citizens can only be seen as subjects to laws and not the subjects of the arbitrary will of the state.[180]

In the simplest form rule of law can be seen as the opposite to the rule of men. That is to say the understanding that *law* should rule over *men.* This means that it should not be possible for the ones who govern to exercise their power through law without themselves being subject to the law. Even the governmental power is subject to the law. This understanding of the rule of law is widely accepted, but the precise components of the rule of law are more

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[178] Section 2.2.
[179] European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law, adopted by the Venice Commission at its 86th Plenary Session' (n 92) 5; The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 48) 6; Tamanaha (n 2) 24–25; Narasappa (n 2) 22.
[180] Tamanaha (n 2) 25–26; Narasappa (n 2) 22–23.

incomprehensible.[181] Another essential part of the rule of law is 'separation of powers'. Separation of powers means, in short, that the judicial, legislative and executive power need to be separated in order to minimise the risk of abuse of power. The legislative power establishes the rules, while the executive power applies them and the judicial power controls the legality of the actions of the other two. Through this separation, the different powers can call on the other powers to stop their actions if necessary.[182]

The rule of law is endorsed in several international human rights instruments as well as in other international documents. It can, among others, be found in the preamble to the Universal Declaration of Human Rights[183] and in the preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms[184]. The European Commission for Democracy through Law (hereafter the Venice Commission) is of the opinion that national as well as international legal provisions which refer to the rule of law do not describe the concept in much detail. Instead the legal provisions give the concept a rather general character. The lack of a detailed definition has led to some questioning if the rule of law truly can be seen as a practical legal concept.[185]

Despite the lack of a detailed definition, the Venice Commission states that there seems to be a consensus on the necessary elements of the rule of law. The Venice Commission describes them as following: legality, which includes a transparent, accountable and democratic process to enact the law, prohibition of arbitrariness, respect for human rights, legal certainty, non-

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[181] The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 48) 10; Narasappa (n 2) 1; UNGA (13 September 2012) A/67/368 (n 5) paras 6–7.
[182] Corstens (n 2) 12; Baron de Montesquieu, *The Spirit of Laws*, vol. 1 (Thomas Nugent tr, new edition revised by J.V. Prichard, Batoche Books 1914) 162–163.
[183] For full name see (n 20).
[184] For full name see (n 118).
[185] European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law, adopted by the Venice Commission at its 86th Plenary Session' (n 92) paras 2, 67–69.

discrimination and equality before the law as well as access to justice before courts which are impartial and independent.[186]

This can be compared with the definition of the rule of law that was offered by the former UN Secretary General Kofi Annan in 2004,

> *It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*[187]

The UN considers that without a human rights framework, the rule of law will turn into rule by law – meaning that it will become a legal framework without a normative foundation that secures justice. Human rights cannot be guaranteed if the rule of law is either weak or absent, since the rule of law is the mechanism that implements and assures human rights. The UN considers human rights and the rule of law to be two sides of the same coin, both protecting the individual's freedom to live in dignity.[188][189]

The scholar Geert Corstens believes that a state can never become a fully complete rule of law state. Instead, he claims, that the rule of law should be

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[186] European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law, adopted by the Venice Commission at its 86th Plenary Session' (n 92) para 41.
[187] UNSC (23 August 2004) S/2004/616 (n 3) para 6.
[188] United Nations General Assembly, 'Strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General' (11 July 2014) UN Doc A/68/213/Add.1 paras 14–15, 17.
[189] It can be noted that some does not agree on that the protection for fundamental rights must be considered to be a part of the rule of law. See e.g. Bingham (n 1) 66–68.

considered to be a concept of where the quality varies.[190] The Venice Commission share a similar view of the rule of law. The Commission describes it as

> *The Rule of Law is realised through successive levels achieved in a progressive manner: the more basic the level of the Rule of Law, the greater the demand for it. Full achievement of the Rule of Law remains an on-going task, even in the well-established democracies.*[191]

As stated earlier, the rule of law is considered to be on the other side of interval, transition and continuum of a state's movement from an authoritarian regime towards becoming a democracy based on the rule of law. In order to grasp the end-goal of this movement sections 3.1.1–3.1.2 look at the concepts of accountability before the law, access to justice, the right to a fair trial and the right to an effective remedy. These are all aspects which can be seen as vital when one discusses the redress of victims who have suffered harm committed by public officials.

3.1.1 Accountability before the law

The aspect of individual accountability is central to the concept of rule of law. Accountability is the understanding that both citizens and the ones who govern the law should obey the law. Accountability before the law also means that those violating the law will have to face the legal and social consequences of their violation.[192] It is deemed as important that both a society as a whole and its politicians are subjects to the law since the law and the society's accountability before the law enables a predictable and stable society. A system where individuals regardless of their rank and status are held accountable for their action favours the individual's liberty and security. Accountability of individual perpetrators is seen as a central measure in order to give redress to victims. Accountability before the law is seen as a key

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[190] Corstens (n 2) 4.
[191] European Commission for Democracy through Law (Venice Commission), 'The Rule of Law Checklist: Adopted by the Venice Commission at its 106th Plenary Session' (n 21) 13.
[192] The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 48) 7; Nollkaemper, Wouters and Hachez (n 2) 5; Teitel, *Transitional Justice* (n 2) 216.

component for an equitable and fair justice system. Ensuring that individual perpetrators are held accountable is essential to guarantee the stability of a rule of law state.[193]

Usually, courts are seen as the natural mechanism to ensure accountability, since the courts can ensure both effective and equal application of the law. That is to say: the courts can hold individuals' accountable for their actions. Through courts and criminal trials the principles of the sovereignty of law and the principle that everyone is accountable before the law is upheld.[194] In the next section, the role of courts as accountability mechanisms is dealt with through the concepts of access to justice, the right to a fair trial and the right to an effective remedy.

3.1.2 Effective access to justice

As was stated in section 3.1 the rule of law can be considered to be based on the separation of powers. According to the separation of power the legislature should be the one establishing the rules, the executive power applies the rules in their activities and the judiciary who looks at the legality of the governmental action and in cases of violations of the law imposes a penalty. In other words, it can be seen as essential that victims have effective access to court since without effective access to court the executive and legislative powers can act unrestrained.[195] One can say that victims' effective access to justice is based on three different aspects, access to justice, the right to a fair trial and the right to an effective remedy. These aspects are all related and cover each other to some extent.[196] These aspects are all essential in a rule of

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[193] UNSC (23 August 2004) S/2004/616 (n 3) para 6; UNGA (13 September 2012) A/67/368 (n 5) para 57; UNGA Res 57/228 (27 February) A/RES/57/228 (n 119) 1; International Commission of Jurists (n 3) 216; The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 48) 9–10.
[194] Nollkaemper, Wouters and Hachez (n 2) 6; UNGA (13 September 2012) A/67/368 (n 5) para 57.
[195] Corstens (n 2) 14–15; Francesco Francioni, *Access to Justice as a Human Right* (Oxford University Press 2007) 1.
[196] UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) paras 11–12; United Nations Development Programme, *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (United Nations Development Programme 2005) 86; Francioni (n 195) 1.

law system, since, as just stated, the trial can be used as a tool to ensure that the governmental and executive powers respect the rights of the individual.[197]

Access to justice refers to the individual's ability to access an impartial and independent court. Impediments towards the access to a court can encompass both aspects such as high court costs, geographical proximity but may also include the state evading the access to justice on formal grounds. That is to say, both de facto and de jure circumstances can be seen as impediments to access justice. Access to justice means that all individuals who are either subjects to a state or on the state's territory must be ensured access to courts regardless of for example nationality, sex, religion and ethnicity.[198] According to international law, states have a wide margin when it comes to how they want to organise their national system of different remedies. International law opens up for criminal, civil, administrative as well as informal justice systems as remedies in order to serve justice. However, the most important aspect to consider is that in order for the domestic administrative system of justice to be in line with the purpose of access to justice that justice is brought in such a way that is equivalent to remedies that in a strict sense can be deemed as judicial. Meaning, that the remedy needs to be in conformity with international norms and standards, be effective and deliver impartial and fair justice.[199][200]

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[197] Nowak (n 43) 143, 164; European Commission for Democracy through Law (Venice Commission), 'The Rule of Law Checklist: Adopted by the Venice Commission at its 106th Plenary Session' (n 21) 10–11.

[198] ICCPR (n 17) art 14.1; United Nations Human Rights Committee, 'General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 paras 8–9; Oló Bahamonde v. Equatorial Guinea (20 October 1993) Communication No. 468/1991 UN Doc CCPR/C/49/D/468/1991para 9.4; Graciela Ato del Avellanal v. Peru (28 October 1988) Communication No. 202/1986 UN Doc Supp. No. 40 (A/44/40) at 196 para 10.2; United Nations Development Programme (n 196) 86; Nowak (n 43) 164.

[199] Francioni (n 195); 4–5; ICCPR (n 17) art 2.3; ECHR (n 118) art 13; UNSC (23 August 2004) S/2004/616 (n 3) para 7; UNGA Res 67/1 (30 November 2012) A/RES/67/1 (n 160) paras 11–15.

[200] It can be noted that the UN Human Rights Committee states in UNHRC (23 August 2007) CCPR/C/GC/32 (n 198) para 24 that informal justice systems such as religious courts or courts based on customary law should only be able to give binding judgements if the courts fulfil some requirements. The courts need to make sure that the requirements of a fair trials and other guarantees of ICCPR (n 17) are met. The judgments made by these court should also be validated by State courts. Lastly, the proceedings should be limited to

As noted above the trial itself must also be fair. In order for a trial to be considered to be fair it cannot be under any intrusion or influence, neither direct nor indirect, regardless of who or what motive is at work behind the influence. This means, that the procedure must give equal and fair opportunities to both parties. This procedural fairness is described as equality of arms. Furthermore, in order for a trial to be seen as fair, it requires the judicial body to be independent, impartial and competent. Another important element of the fairness of trials is the requirement that proceedings, especially criminal ones, should be held without undue delay.[201]

The right to an effective remedy and reparation can be described as the assurance that the trial should end in some kind of redress for the victim.[202] The redress can be delivered through reparation for the harm that the victim has suffered. The reparation should be proportional relative to the harm of the victim as well as how grave the violation was. Reparation is given in several different forms. The reparation can for example constitute of restitution, the attempt to restore the victim to the situation before the harm was done. It can also constitute of satisfaction through initiating measures in order to cease the continuation of violations as well as administrative and judicial sanctions against the perpetrator.[203]

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minor criminal and civil matters. No deeper discussion or specification will be held regarding different types of courts. When the words ”court”, ”court of law” or “trial” is used it implies courts and trials which fulfil the right to a fair trial and the other provisions set out in art 2.3 and 14 in ICCPR (n 17). It can also be noted that the type of crimes that is discussed and used as a base in the comparison between transitional justice and the rule of law are likely to be seen as so severe that they cannot be seen as “minor criminal cases”. Meaning that they, assumingly, should not be held in informal justice systems.

[201] ICCPR (n 17) art 14; Bingham (n 1) 90–92; UNHRC (23 August 2007) CCPR/C/GC/32 (n 198) para 13, 19, 25; Frank Robinson v. Jamaica (30 Mars 1989) Communication No. 223/1987 UN Doc CCPR/C/35/D/223/1987 para 10.4; Miguel Gonzales del Rio v. Peru (28 October 1992) Communication No. 263/1987 UN Doc CCPR/C/46/D/263/1987 para 5.2; Sholam Weiss v. Austria (3 April 2003) Communication No. 1086/2002 UN Doc CCPR/C/77/D/1086/2002 para 7.4; Lucy Dudko v. Australia (1 January 2007) Communication No. 1347/2005 UN Doc A/62/40, Vol. II at 266. para 7.4.

[202] Nowak (n 43) 164; ACTIONES project (n 54) 3.

[203] UNGA Res 60/147 (21 March 2006) A/RES/60/147 (n 58) paras 15–22.

As has been noted in section 2.3.1, from a human rights perspective it can be understood that from victims' right to effective access to justice flows the state's duty to investigate and prosecute.[204] Prosecutions and the role of the prosecutor can be deemed as crucial for the victims' effective access to justice and the overall administration of criminal justice.[205]

In sum, these three essential elements together state that individuals should have the procedural right to effective access to a hearing which is deemed fair. The hearing is supposed to establish the individual's right to an adequate redress. They can together be called effective access to justice.[206] These aspects are crucial for individuals to which harm has been done. It is through the availability of effective judicial remedies that human rights can be guaranteed protection. The possibility for a victim to gain effective access to justice is deemed as essential since an unenforceable right or obligation is of little value and can be seen as futile due to its unenforceability.[207]

3.2 Concluding remarks chapter three

In the concluding remarks in chapter two the term transitional has been discussed. This section provides a discussion of the term justice, namely retributive justice and victims' effective access to justice. The concluding remarks in 3.2.1 are followed by chapter four, which holds the concluding analysis, where the remaining research questions are answered. The final analysis serves as a deepening and summarising analysis of the thesis as a whole.

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[204] UNHRC (27 August) A/HRC/27/56 (n 31) para 28; see e.g. ICCPR (n 17) art 2. 3; AChHPR (n 118) art 7.1(a); ACHR (n 118) art 25; ECHR (n 118) art 13; Boucherf v. Algeria (30 March 2006) Communication No. 1196/2003 UN Doc CCPR/C/86/D/1196/2003 para 11; Kurt v. Turkey App No. 24276/94 (22 January 1997) Reports 1998-III para 140.
[205] United Nations Development Programme (n 196) 89–90.
[206] ACTIONES project (n 54) 3.
[207] Corstens (n 2) 31–33; European Commission for Democracy through Law (Venice Commission), 'The Rule of Law Checklist: Adopted by the Venice Commission at its 106th Plenary Session' (n 21) para 96; Francioni (n 195) 1; Bingham (n 1) 85; UNGA (16 March 2012) A/66/749 (n 117) para 22.

3.2.1 Is the approach to victims' effective access to justice through criminal trials different in transitional justice compared to in a rule of law state?

As has been stated this question focus on victims' effective access to justice through the use of criminal trials. This is done since the criminal trial can be deemed a very appropriate forum to deal with serious violations of human rights. This is both internally, for the victims themselves, and externally, as a way to protect the fundamental rights of individuals on a systematic level.

Both ICTJ and the Secretary-General of the UN claim that if the criminal trial is executed in such a way that the victim can take part in it to some extent, then the trial can secure a sense of dignity for the victim. It also serves as a forum of direct accountability where the victim can see the perpetrator being obligated to answer for the crime committed. Andersson claims that legal peace can be achieved through the use of civil procedure, both externally and internally, presumably legal peace can also be established through criminal trials. Andersson argues that the civil procedure gives legal peace internally since the relationship between the two parties is normalised when their dispute is settled at court.[208]

In addition to the fact that the criminal trial might have an internal beneficial effect for the individual victim, it can also be important externally, for the wider society. Andersson argues that when disputes are handled in court this prevents people from taking matters into their own hands. This can be seen as having a stabilising effect.[209] Victims' effective access to criminal trials can also be considered crucial as a way to uphold the separation of powers, since in order for the independent and impartial judiciary to actually function as a restraining mechanism on the legislative and executive powers victims need to be able to have effective access to court. No effective access to justice

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[208] Section 1.4.
[209] ibid.

risks thwarting the human rights system as a whole, since rights that are unenforceable can be deemed as being of little practical value.[210]

Firstly, before a comparison is made regarding whether the approach to victims' effective access to justice is different in transitional justice compared to a rule of law state, it should be noted that the concept of transitional justice was born out of practice. It is a concept which is very influenced by the socio-political context at hand in the specific transitional justice process. The transitional justice period is affected by circumstances such as the stability of the process, the amount of perpetrators and lack of resources. There appears to be a constant balancing act between ideal theories of law and the political situation at hand. The concept of rule of law on the other hand, one could claim is a concept which is not influenced by the political situation at hand. Rather, it seems to belong to the category of ideal theories of law. If this can be claimed, that rule of law can be categorised as an ideal theories of law while transitional justice is shaped by its socio-political circumstances, this consequently means that the concepts are analysed from different bases. However, since many consider that transitional justice leads to democracy based on the rule of law, it is still interesting to analyse transitional justice from the perspective of the rule of law. [211]

Connected to the fact that the concepts as such are to some extent analysed from different bases is the stability vs. justice-dilemma which the transitional justice process faces. The stability vs. justice-dilemma circulates around the thought of whether public officials of the old regime should be prosecuted or if this threatens the stability of the transition. Should the individual victim's right to effective access to justice through criminal trials be considered if that risks destabilising the transition and society as a whole? Bassiouni describes this dilemma as a political trade-off between the rights of the individual victim and society's possibility of transitioning.[212]

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[210] Section 1.4; Sections 3.1.1–3.1.2.
[211] Section 2.3; Section 2.3.1.2.
[212] Section 2.3.1.2.

It is possible to argue that the threat of victims' access to the criminal trial can destabilise the transition, leading to the transition not taking place, thus meaning that the abusive rule of the authoritarian regime continues to function. This consequence can occur due to the old regime not necessarily wanting to give away its power if threatened with prosecution. This is to be contrasted with the concept of the rule of law, where holding perpetrators individually accountable through the use of criminal trials is what guarantees the stability of the rule of law state. Letting victims have access to criminal trials can be seen as an impediment to the arbitrary rule of the legislative and executive power. If a public official within these powers commits an abuse against an individual's fundamental rights then the public official is held criminally liable for the act committed. The criminal trial in which the public official is held accountable creates internal legal peace for the victim but also externally, since citizens do not feel they have to take matters into their own hands due to everyone being held accountable before the law. The criminal trial can also be seen as a mechanism that hinders arbitrary rule by public officials. Thus victims' effective access to justice stabilises a rule of law system.[213]

That is to say, the criminal trial with an independent and impartial judiciary, to which there is effective access, ensures that the legislative and executive powers respect the fundamental rights of the individual. However, in the beginning of a transitional justice period, the threat of criminal trials is instead a factor that might lead to the transition not taking place. Instead the threat of criminal trials in a transitional justice period is an aspect that does not lead to the control of the legislative and the executive power, but is instead a threat which means that the legislative and executive power might continue their human rights abuses, in an authoritarian setting, since they might refuse to let the transition take place in order to avoid being prosecuted. The understanding that holding perpetrators accountable through criminal trials is

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[213] Section 1.4; Section 2.3.1.2; Sections 3.1.1–3.1.2.

a destabilising factor in transitional justice process and a stabilising factor in a rule of law state arguably influence the approach to victims' effective access to justice which can be seen below.[214]

Many states have used amnesties to be able to initiate the transition. Amnesties can be considered as tools to deal with the stability vs. justice-dilemma. It must however be noted that the UN believes that amnesties should not be given. They argue that the use of amnesties is not in line with a state's obligations in international treaties. Some, like McEvoy and Mallinder, portray amnesties as a tool for the greater good, that is to say that amnesties are a way for a whole society to transition, even though this comes at the expense of the individual victim's right to effective access to justice. Considering this, one can perhaps claim that at least in the way McEvoy and Mallinder describes the use of amnesties as being a tool for the greater good, can be seen as having a collectivised approach. If one thinks of it as that the individual's right to get redress, through a criminal trial, being sacrificed in order to ensure the welfare of a society as a whole through the enabling of a transition.[215]

Teitel claims that what she describes as the forced unity of transitional justice is far from the individualism which is central in contemporary constitutionalism. It can be deemed as reasonable to assume that by contemporary constitutionalism Teitel means a democratic state based on the rule of law. If so, this is interesting. If individualism is supposed to be central in a rule of law system, does this then mean that a victim should have the possibility to hold a perpetrator accountable before the law in a court, regardless of the implications for the rest of the society? Even if the criminal trial would have destabilising effects? Does this imply an individualised approach to victims' effective access to justice?[216]

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[214] Section 2.3.1.2; Sections 3.1.1–3.1.2.
[215] Section 1.4; Section 2.3.1.2.
[216] Section 1.4; Section 2.3.1.3.

At the core of the rule of law is the notion that everyone is individually accountable before the law, regardless of rank or status. Also politicians are supposed to obey the law. For everyone to be accountable before the law regardless of rank or status could perhaps mean that they should be accountable before the law regardless of the destabilising effects the criminal trial might have. Otherwise they could be considered to be above the law if the system takes into account the military, economic or political power the perpetrators might have when deciding whether to prosecute them or not. Perhaps, victims' effective access to justice – when compared with the principle that everyone is accountable before the law – can be understood as individualised in a rule of law system.[217] If so, this could be contrasted with the collectivised approach in transitional justice, as described by Teitel, McEvoy and Mallinder. This is where one denies the individual victim a criminal trial, due to its destabilising effects, in preference of the greater good, thus enabling the country's possibility to transition.

The current international practice is set on only prosecuting most responsible perpetrators even in those cases when treaties state an explicit duty to prosecute. Even if this is the current international practice and it is reflected in international tribunals, it is an interesting practice when it is placed in a process which is supposed to lead to the rule of law. Considering that the notion that everyone is accountable before the law, in a rule of law context, not only applies those on high positions, but anyone, regardless of rank. Victims' right to effective access to justice in a rule of law state must assumedly be valid even when the perpetrator is of lower rank. Otherwise, those of lower rank would be considered to be above the law and could then be used to violate the rights of the individual. [218]

Both the high-impact and the symbolic or paradigmatic strategies could be seen as prioritisation strategies which focuses on society as a whole. The

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[217] Section 1.4; Sections 3.1.1–3.1.2.
[218] Section 2.3.1.2; Sections 3.1.1–3.1.2.

high-impact strategy prioritises those cases that can impact the public's discourse in a positive way and motivate reforms on a systematic level. The symbolic or paradigmatic strategies prioritises those cases that can shake the conscience of either a particular group, the bigger society or the humanity at large. Even if these are prioritisations, and are claimed to not be selective, it can be noted that at least in the outset of the transition cases which are deemed important for society as a whole are prioritised. The choice of prosecution strategy is supposed to be a concern for the whole society and not only for the specific victim, thus holding an approach that could be considered focusing on the collective. It is understandable though that prioritisations need to be made considering the many crimes committed and the large number of victims and perpetrator. The prioritisations strategies can be contrasted with the standard approach in most domestic jurisdictions, presumably rule of law states, were one usually treats the cases individually and take them in the order they come to the court.[219]

Another practice important to discuss is when countries limits the criminal sanctions, where the state only initiate investigations but do not duly punish the perpetrator. As stated before, both the prosecution and punishment of the perpetrator can be seen as a way to give redress to the victim. The criminal sanctions being fixed and justified through purposes related to the specific offense and the individual perpetrator can be seen as essential to the rule of law. Arguably, this also includes that the sanctions as such is connected to the harm that has been done to the individual victim. Nevertheless, in the transitional period, Teitel argues, the sanctions are decided through a scope that is wider than the individual perpetrator and the crime committed. Thereby, a scope that is wider than the harm done to the individual victim. Teitel claims that this is done to establish the wrongdoing of the old regime and to avoid the question of individual responsibility of the perpetrator for the

[219] Section 2.3.1.2.

systematic abuses committed by the old regime. She claims that the limited sanctions foster a normative change.[220]

Teitel does not go into much detail regarding what she means by these limited sanctions serving as normative change, but perhaps one can assume that she means, just as Mihr argues, that the investigation itself delegitimises the old regime. It exposes that the abuses of the old regime were wrong. At the same time, through avoiding the question of the perpetrator's individual responsibility and thereby the question of a criminal sanctions, one avoids the practical difficulty of punishing hundreds or thousands of perpetrators. Perhaps, the limited sanctions can also be seen as a way to avoid the stability-dilemma. It must be assumed that if – let's say – the members of the military or the police force are not threatened by a punishment then it is more likely that they will not try to stop the transition.[221]

Through establishing the wrongdoing of the old regime, Teitel argues, without giving out a criminal sanction, one can foster the normative change towards democracy based on the rule of law. Is it possible to claim that this is also to some extent shaped by a collectivised approach? Especially considering that one takes into account factors that are outside the scope of the specific crime. Teitel is not clear regarding what sort of aspects are taken into account when deciding that the criminal sanctions should be limited. However, if the sanctions are limited due to enabling a stable transition, believing the limited sanctions to be for the greater good of the society, then one could argue that this would be a collectivised approach.

How does this resonate with the rule of law? As discussed above, Teitel calls the transitional practice a forced unity which she deems to be far from the individualism that she considers to be essential to contemporary constitutionalism. She argues that the fact that the punishment is fixed and

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[220] Section 2.3.1.3.
[221] Sections 2.3.1.2–2.3.1.3.

that it is only justified through purposes related to the perpetrator in question and the specific offense – presumably not justified through aspects connected to the wider community such as a society's possibility to transition – can be seen as essential to the rule of law. The practice of limiting criminal sanctions might be understandable from a practical point of view, but it does not seem to resonate well with rule of law since one takes into account aspects which are not related to the specific crime.[222]

If one imagines that the transitional justice process has a collectivised approach, and if one imagines that the rule of law, as Teitel and Alberstein argues, holds an individualised approach then it is interesting to, on a theoretical level, discuss where the breaking point is. Here the discussion poses that the movement towards the rule of law starts with a collectivised approach, where one prioritises a society's transition as a whole. The end-state, the rule of law, is an individualised system where the victim has effective access to justice regardless of whom the perpetrator might be.[223] There are questions one can ask to attempt to establish where the theorised breaking point is, such as: how many institutional changes or how many democratic elections need to take place before the system is individualised, or is it individualised as soon as the country has gained some stability? And when the system has been individualised and the stability-threat is gone does this mean that all victims have the right to an effective access to justice, also for the abuses which took place during the authoritarian regime?

Before a summary is provided it can be, briefly, noted that the prosecutions of perpetrators are considered to be insufficient to satisfy the claims of justice in transitional justice, presumably due to only a fraction of all perpetrators being prosecuted. Due to this, the measures of truth, reparations and guarantees of non-recurrence have been initiated, aspects that to some extent can also be fulfilled in and through the use of a criminal trial. These measures

[222] Section 2.3.1.3.
[223] Section 1.4; Section 2.3.1.3.

can be deemed important as they often deal with the countries' past abuses as a collective. Measures such as reformation of laws and institutions, falling under the category guarantees of non-recurrence, change the country on a systematic level. Using both non-judicial measures together with criminal trials – where the trial is used as a forum of direct accountability – can be seen as a good way to deal with the atrocities of the old regime. Together they can both reinforce the victim's individual rights and serve as a way to change and reconcile the society as a whole. However, only using non-retributive measures combined with de facto or de jure amnesties should be considered problematic, since the forum of direct accountability disappears and legal peace is not internally nor externally established. It can be noted that the UN claims that truth commissions can be seen as enhancing the accountability in the society. Presumably due to the fact that it is a forum where the systematisation and patterns of the abuses can be revealed. However, truth commissions are not used in order to determine criminal responsibility, judge or impose a sentence on the perpetrators. In order to hold an individual perpetrator accountable before the law it must be seen though that the criminal trial before a court of law serves as the best alternative. Since it is a forum of direct accountability and the court has the possibility to determine the criminal responsibility and impose a sentence on the perpetrator. Presumably the choice to not prosecute public officials can be seen as setting aside important values of the rule of law, such as accountability before the law.[224]

To summarise, it appears that in a transitional justice period upholding victims' effective access to justice is impinged by the political situation at hand. The criminal trial and its consequences are understood by some as a factor which can destabilise a society's transition, at least in an early stage. The transitional justice period is perhaps – due to the stability vs. justice-dilemma, the large numbers of perpetrators and the scarce resources – a process which is sometimes mainly focused on the transition as such, holding

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[224] Section 1.4; Sections 2.3.2–2.3.3.

a collectivised approach.[225] From a pragmatic point of view one can of course ask the question: what alternatives are there?

Upholding victims' effective access to justice can be seen as being at the centre of the rule of law, since the criminal trial guarantees the rights of the individual and ensures accountability before the law. Instead of being destabilising, one can argue that victims' effective access to criminal trial, even when the perpetrator is a public official, is what stabilises a rule of law state. It is an impediment, hindering the state to act arbitrarily and it protects individuals from the state. Perhaps it is possible to argue that rule of law holds an individualised approach to victims' effective access to justice, since the victim shall have the power to hold the perpetrator accountable in a court of law regardless of whoever the perpetrator may be.[226]

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[225] Section 1.4; Section 2.3.1.2.
[226] Section 1.4; Sections 3.1–3.1.2.

4 Concluding analysis

This section holds a concluding analysis which answers the remaining research questions:

- *For how long is a country in transition?*
- *In what ways can the term transitional be seen as problematic?*
- *Can transitional justice be considered to be a legally useful term?*

Some final thoughts are also given in the end of this section.

4.1 For how long is a country in transition? And in what ways can the term transitional be seen as problematic?

Considering how different scholars argue the length of the transition, it is slightly unclear whether the term transitional only means the first fragile steps a society takes in striving towards becoming a democracy based on the rule of law, or if it means the whole process of becoming a fully-fledged democracy. Thus, meaning that it is unclear for how long a country is in transition.

The term transitional and how it is conceptualized by different scholars indicate that there is a certain starting-point, point A, and a certain ending-point, point B. Arguably, these two points are by definition far too unclear to be considered as being the beginning and end of a democratic movement.

Starting with the beginning of the transition, it is notable that the transition, according to Carothers, can be understood to have begun when the regime has started to break down because of political liberalisation. This is what Carothers describes as the occurrence of opening. This then follows with a breakthrough*,* the phase in which the old regime is being replaced. This model, that Carothers himself criticises, is very unclear since all societies, including authoritarian ones, do not look the same. One must assume that the

"starting point" for different countries differ from one another, presumably the atrocities and the scale of them are different in different regimes. Does this factor, for example, mean that it takes a different amount of effort before the state can be considered to be opening? Furthermore, one must also ask the question of what sort of political liberalization is required for the country to be seen as opening.[227] If the government starts to liberalise the economic system but still systematically torture and imprison political opponents, can the country still be considered to be in a phase of opening? Or does it require other types of liberalisation?

Perhaps even harder to define is when the transition phase has reached its ending-point. It has been described that the transition can be seen as a movement along a continuum towards becoming a state based on the rule of law. However, according to the Venice Commission the implementation of the rule of law is an on-going task, even for established democracies. In other words, the end-goal of the movement is in itself fairly unclear. The question is then: does the transition phase end when the most basic level of rule of law has been achieved, or does it never end since the rule of law can be considered to be an on-going task?[228]

The vagueness of the term transitional must be seen as problematic, if nothing else than because it triggers the question of when victims of atrocities can start to claim their "transitional justice-rights" and for how long they can claim those rights. Does the concept entail an understanding that when the state has "reached" the rule of law this means that victims do not have the possibility to claim those rights anymore? And in those cases where the victims do claim transitional justice measures, is it because the country is still in a transitional phase because it is not possible for a state to be a fully-fledged democracy based on the rule of law? Or is it that the state has reached a post-transitional justice phase, in line with what Collins argues?[229] Which then

[227] Section 2.2.
[228] Section 2.2; Section 3.1.
[229] Section 2.2.

would mean that the state is rather revisiting their past than still being in a transitional phase.

An interesting thought is if one understands the transition paradigm as a movement which begins with a country opening towards democratic change and that this continues up until a country becomes a fully-fledged democracy based on the rule of law. However, as stated, the concept of the rule of law should be seen as an ongoing process. Can then the ancestors of the victims claim transitional justice measures against the state 300 or 400 years from now? Since the state then – if the rule of law is seen as an ongoing process – still has not reached the rule of law. This provokes some questions. One can discuss whether one can use transitional justice measures as long as the country is in transition or if these should be seen as two separate things? Is the transitional period perhaps a longer one but the victims' effective access to justice for past abuses shorter? There are no clear answers to these questions.[230]

The term transitional can be seen as problematic already by the fact that many countries seem to enter what Carothers describes as the gray zone, in which the countries are not authoritarian but cannot either be considered to be heading towards democracy.[231] Interesting to elaborate on is the question of whether the term transitional requires constant movement? Can a state that is not heading towards democracy and not moving backwards towards authoritarianism still be considered to be in a transitional phase? If the country pauses its movement for a year but continues it the following year, could this perhaps mean that the country for that one year fell outside of the transition paradigm? Arguably the fact that a country pauses its movement for some time should instead be seen as a part of a state's wider transitioning, considering, that the term transition tries to explain the movement of real

[230] Section 2.2; Section 3.1.
[231] Section 2.2.

states and it is very logical to imagine that these states take one step forward and two steps back.

Perhaps it can be claimed that the theorisation of the term transitional is unnecessarily confusing and that the term in itself might be unnecessary and problematic. ICTJ believes that instead of focusing on whether the country can be seen to be in transition or not, the focus should instead be on whether an opportunity to address large-scale atrocities has emerged.[232] However, since the term transitional justice after all includes the word transitional some theorisation is important due to the fact that it affects how and when the atrocities are dealt with. It is of the utmost importance that victims of large-scale atrocities get a clear view of when and if they can claim their rights.

To summarise, the term and concept of transitional can be seen as somewhat problematic since to its core are the questions of when the transition has started, for how long it continues and when it has ended. Questions to which there are no clear answers, despite Carother's model. Especially since in reality many countries could be considered to forever be in the transitional phase, either because the country gets stuck in the gray zone or if one sees the concept of rule of law as an on-going task.[233] In other words, there is no clear answer to how long a country can be considered to be in transition.

4.2 Can transitional justice be considered to be a legally useful term?

This last research question brings together the concepts of transitional and the concept of justice. The vagueness and possible problems with the term transitional justice have been observed throughout the thesis. This section and research question can be seen as both deepening the discussion as well as summarising the thesis as a whole.

[232] Section 2.2.
[233] Section 2.2; Section 3.1.

In the theory section, section 1.4, the scholar Marianne Nordman was presented in order to give some tools to be able to answer this question. Firstly, Nordman argues that it is important for a legal term to be manageable. Nordman also claims that it is important that the individual citizen can understand the term correctly. One can perhaps claim that this means that the citizen must be able to predict the consequences of the legal term. In other words, it is important that a legal term is created in such a way that the individuals who are supposed to obey by the laws which hold the term should be able to plan their life. Nordman also argues that not only should the individual be able to understand the term correctly, the term should neither be possible to misinterpret. One can also discuss if the term can be considered useful in legal argumentation.[234]

As has been discussed, the term transitional in itself can be deemed problematic due to the fact that there is no clear definition of when the transition begins and when it ends. One can question if it is possible to misinterpret the term due to the lack of a clear definition. It appears to be possible to misinterpret the term transitional in such a way that one believes that the transition has started or ended when it in fact has not.

The only thing there appears to be a consensus on is that the movement is heading towards democracy based on the rule of law. Otherwise, both scholars and the UN all view the term transitional very differently which implies that the term is hard to interpret correctly, especially for the individual.[235] Considering what was discussed in section 4.1, it can be claimed that the term provokes more questions than it gives answers. Such as: When does the transition start and for how long does it go on?

It seems safe to assume that in order for a term to be considered useful as a legal term it should not provoke more questions than there are answers.

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[234] Section 1.4.
[235] Section 2.2.

Especially if the term is supposed to be constructed in such a way that it is manageable, possible to understand correctly and impossible to misinterpret.[236]

If one moves on to the concept of justice, some scholars claim that the transitional justice process must be understood to have a give-and-take element. A society must understand that not everyone can be held accountable through a criminal trial neither can everyone expect to get reparations. Arguably, the fact that the term justice holds a give-and-take element makes it un-useful as a legal term.[237] How is the individual citizen going to know if he or she is the one who "gives" or "takes" his or her rights? Is it impossible to misinterpret or possible to correctly understand the term if there is a give-and-take component?

One can argue that even though the give-and-take aspect is very understandable from a pragmatic point of view it still makes the term un-useful as a legal term. With the give-and-take element, as well as the stability vs. justice-dilemma, it becomes very hard for victims to plan their lives and enforce their rights.[238] The enforceability becomes difficult since the argument can then always be to the specific victim that their right was "given away" to someone else, thus making it hard for victims to know if they can count on their perpetrator being prosecuted or not. And is the argument that one's rights were "given away" something that the victim can appeal against?

Arguably even if an individual citizen in an authoritarian regime hears that the country has entered a transitional period – thus stating that the period has actually started – it still appears that the term transitional justice is too imprecise to be seen as a legally useful term because the term is so intertwined with pragmatism and the political situation at hand. Like ICTJ calls it, one must understand justice as the effort to achieve the 'most meaningful justice'

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[236] Section 1.4.
[237] Section 2.3.
[238] Section 2.3; Section 2.3.1.2.

feasible considering the political context. The expression most meaningful justice must be deemed as a very ambiguous description.[239] A description that provokes questions such as: what is meaningful justice and who is to decide what is meaningful? The statement by ICTJ regarding the political conditions points out the core of the problem with the term justice. Both the outcome of the transitional justice process and the process itself are closely intertwined with how imminent the stability vs. justice-dilemma is in the specific setting, the amount of resources and the numbers of perpetrators.[240] Factors that are impossible for the citizens to overview in such a way that they understand the consequences of these aspects and thereby how they should interpret what justice comprise – such as what measures to expect – in the particular setting.

It must be seen as impossible for the individual citizen to accurately understand what is meant by justice since it is a changing concept, both from process to process and also probably during the specific transition due to the actual circumstances. Even though if one knows that the country is in a transitional period it must be assumed that it is difficult to know if and what kind of measures one has a legitimate claim to. Especially since the measures differ due to the political context and that an individual should be prepared that one can either be expected to "give" or to "take".[241]

Combining the two words, does not make the term clearer or more manageable. As been stated earlier it can be seen as unclear when a transitional justice period ends. Perhaps one can also state that it is unclear how the transitional justice process develops over time. Assuming that over time the state becomes more stable as it sets up certain institutions and checks and balances, meaning that the stability vs. justice-dilemma is not as imminent anymore.[242] Can this then mean that victims after a while can start to claim their right to effective access to justice? And for how long should a

[239] Section 2.3.
[240] Section 2.3.1.
[241] Section 2.3.
[242] Section 2.3.2.1.

victim then wait for this potential future right? Can the state claim that this right is not enforceable right now but it will be in two years?

In sum, one can consider the term transitional justice to not be precise enough to serve as a legally useful term. Only the fact that the concept of transition is so unclear makes it hard to understand the term correctly and perhaps makes it easy to misinterpret. The term justice as it stands is also closely connected to pragmatism and the circumstances of the specific setting, which can imply that it makes it hard for the individual citizen to know what to expect. Transitional justice seems like an appropriate term to describe how the countries during the third wave of democratisation dealt with the abuses of former regimes.[243] However, it is far too unclear to be considered a legally useful term.

4.3 Final thoughts

The concept of transitional justice was born out of practice, through analysing how authoritarian regimes transitioned from their authoritarian rule in the hope of establishing democracy. However the field remains undertheorized and there does not appear to exist one specific theory on transitional justice.[244] It does not either exist one single understanding of for how long a transitional period takes place or for how long transitional justice measures can be utilised. Some claim that the term transitional is problematic and have started to use the term post-transitional justice.[245] The aspect of justice is fulfilled through four different complementary approaches, these being criminal trials, truth-seeking processes, reparation and guarantees of non-recurrence. However, the understanding of justice is afflicted by the socio-political environment, the give-and-take element, political will and the justice vs. stability-dilemma. All aspects that makes it hard for victims to enforce their rights. [246]

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[243] Section 2.1.1.
[244] Section 1.7.
[245] Section 2.2.
[246] Section 2.3; Section 2.3.1.2.

It is hard to get a hold of the term transitional, to understand for how long it is supposed to prevail. To know when it begins and ends. Thereto is the understanding and term justice to a high-degree shaped by pragmatism and is therefore hard to get a comprehensible overview of, and hard to enforce. Considering this, transitional justice cannot be considered to serve as a legally useful term.[247] Both the different words by themselves and together are far too unclear.

It is also interesting to note the fact that transitional justice is a concept that many claim is aimed at leading to democracy based on the rule of law. However, it seems possible to claim that the journey towards the rule of law is tainted by the fact that not everyone is held accountable before the law and not all victims are given effective access to justice through criminal trial. This is done in order to enable the transition from the authoritarian regime towards a democratic state based on the rule of law.[248] In other words, one is setting aside rule of law in order to reach the rule of law.

[247] Section 1.4.
[248] Section 1.1; Sections 2.2–2.3.

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