

# WORKING PAPERS

## Towards Global Transitional Justice?

OLIVIER DE FROUVILLE  
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## SUMMARY

We generally think of transitional justice at the national level, in various contexts that are all characterized by the fact that the countries concerned are emerging from periods of conflict and repression. But if we can prosecute crimes against humanity through international tribunals, there must also be a concept of global transitional justice so as to establish the foundations for a better and fairer global society. This concept should help humanity not only to reconcile with itself, but also with so-called 'nature', in order to eventually conceive itself as part of nature.

# 1. THE CONCEPT OF GLOBAL TRANSITIONAL JUSTICE

## A. NATIONAL TRANSITIONAL JUSTICE

We generally think of transitional justice at the national level, in various contexts that are all characterized by the fact that the countries concerned are emerging from periods of conflict and repression. The question transitional justice generally seeks to answer is: what processes can we put in place to deal with this past so that it does not happen again, and at the same time, how can we lay new foundations for a fairer society? Justice in these contexts means the accountability of the perpetrators, but also truth and reparation. Truth not only covers historical truth – understanding why crimes and injustice prevailed – but also individual truth, that is the acknowledgement of the suffering and of the particular story of each and every person in society, especially those who were the most marginalized and were made invisible. Ultimately, transitional justice aims to reconcile societies with themselves and build a better and fairer society. But as Louis Joinet famously said: ‘[b]efore a new leaf can be turned, the old leaf must be read!’<sup>1</sup>

## B. GLOBAL TRANSITIONAL JUSTICE

Now, the question I want to ask in the conference is: why do we think about transitional justice exclusively at the state level? Most of the time we are speaking about large-scale and serious violations, about crimes against humanity. The notion of a crime against humanity, as you well know, was elaborated during the twentieth century and for the first time recognized in international law in the statutes of the Nuremberg and Tokyo tribunals. The idea was revolutionary: that some crimes affected not only state interests, but humanity as

a whole, beyond states – that is each and every individual comprising humanity, without any distinction of any sort, including nationality. Crimes against humanity is the foundation for the idea of an international tribunal that has the competence to judge individuals, whatever their official capacity, be they the head of state or part of the government. International prosecutors investigate and international tribunals judge crimes not on behalf of states, but on behalf of humanity, that is on behalf of all citizens of the world, you and me.

So, if crimes against humanity and large-scale crimes like genocide affect the whole of humanity, why is it that the transitional justice process can only be country-based? We can all agree that crimes against humanity and especially genocides create shockwaves around the world. No one is safe, everybody is shocked and, in fact, the whole world suffers from the consequences.

If I am personally – as a citizen of the world – affected and prejudiced by a genocide perpetrated in a faraway land, why am I not able to participate in a transitional justice process concerning these crimes?

If humanity itself can prosecute crimes through international tribunals, there must also be a concept of global transitional justice so as to establish the foundations for a better and fairer global society.

In fact, if we look around us, we can see that such global transitional justice processes already exist today in international law, albeit in a fragmented landscape. A number of claims have been made not only at the national but also the global level to look back at the past and understand past injustices as part of a process of healing wounds and preparing a better future.

First, the issue of *genocide* – and some genocides have been on the agenda of the United Nations for quite a number of years. In 2005, in its 60th session, the General Assembly adopted a

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<sup>1</sup> Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report prepared by Mr. Joinet Pursuant to Sub-Commission

Decision 1996/119, UN doc E/CN.4/Sub2./1997/20/Rev.1, 2 October 1997, §50.

resolution on ‘Holocaust remembrance’<sup>2</sup> and decided to designate 27 January as an annual International Day of Commemoration in Memory of the Victims of the Holocaust. The following year, it also adopted a resolution on ‘Holocaust denial’,<sup>3</sup> recalling that the ‘efforts to deny the Holocaust ... by ignoring the historical fact of those terrible events, increase the risk they will be repeated’.

In a similar fashion, in 2003, the General Assembly designated 7 April 2004 as the International Day of Reflection on the Genocide in Rwanda,<sup>4</sup> which subsequently became, in 2018, the International Day of Reflection on the 1994 Genocide against the Tutsi in Rwanda.<sup>5</sup>

More generally, the UN has taken a number of initiatives to prevent future genocides, including the proclamation of 9 December as the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime,<sup>6</sup> and the nomination of a Special Adviser on the Prevention of Genocide.<sup>7</sup> The Human Rights Council (HRC), in this context, has called on states to ‘continue efforts aimed at the memorialization and remembrance of past genocides as a way to prevent them by educating

society’,<sup>8</sup> including as part of Target 4.7 of the Sustainable Development Goals.<sup>9</sup>

Since 2001, *slavery and colonialism* have also attracted much attention at the international level. Twenty years ago, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, constituted an interesting attempt to launch a global transitional justice process on these issues.<sup>10</sup> The Durban Declaration and Programme of Action<sup>11</sup> is clear with respect to the link between looking back at past crimes and building a better and fairer international society for the future. In addition to acknowledging ‘that slavery and the slave trade are a crime against humanity and should always have been’, states emphasized

the importance and necessity of teaching about the facts and truth of the history of humankind from antiquity to the recent past, as well as of teaching about the facts and truth of the historical causes, nature and consequences of racism, racial discrimination, xenophobia and related intolerance, with a view to achieving a comprehensive and

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<sup>2</sup> UNGA Res 60/7, 21 November 2005.

<sup>3</sup> UNGA Res 61/255, 26 January 2007.

<sup>4</sup> UNGA Res 58/234, 23 December 2003.

<sup>5</sup> UNGA Res 74/273, 20 April 2020.

<sup>6</sup> UNGA Res 69/323, 11 September 2015.

<sup>7</sup> In the context of the Action Plan to Prevent Genocide launched on the tenth anniversary of the Rwanda genocide, and in response to UNSC Res 1366 (2001), 30 August 2001, the Secretary General appointed a Special Adviser on the Prevention of Genocide in 2004.

<sup>8</sup> See e.g. HRC Res 43/29, 22 June 2020, §29.

<sup>9</sup> Ibid. §30. Target 4.7 of the the Sustainable Development Goals (SDGs): ‘By 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development’.

<sup>10</sup> See E. Tourme-Jouannet, *What is a Fair International Society? International Law Between Development and Recognition*, Hart Publishing, French Studies in International Law, 2013, p 191: ‘Durban was an attempt at implementing transitional justice on a world scale to recognise the crimes of the past so as to move into a postcolonial and post-Cold War world which is both appeased and does not repeat the mistakes of the past. The ultimate challenge was to see the descendants of the former colonial society live together in the same postcolonial world society and to bring about a transition to enable such co-existence to be organised.’ See also P. Hazan, *Judging War, Judging History: Behind Truth and Reconciliation*, Stanford University Press, 2010, especially p. 4, recalling the words of Mary Robinson, the then High Commissioner for Human Rights, explicitly mentioning the need to transpose the concepts and tools of transitional justice to the global scale.

<sup>11</sup> Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August–8 September 2001, UN doc A/CONF.189/12.

objective cognizance of the tragedies of the past.<sup>12</sup>

Aside from this stress put on truth-seeking, the Conference also insisted on various modalities of reparations for past crimes, including remembrance, expression of remorse and the presentation of apologies.<sup>13</sup> Among various follow-up initiatives, the General Assembly adopted in 2006 a resolution on the ‘Commemoration of the two-hundredth anniversary of the abolition of the transatlantic slave trade’,<sup>14</sup> which subsequently was renamed ‘Permanent memorial and remembrance of the victims of slavery and the transatlantic slave trade’.<sup>15</sup> It also decided that 25 March would become the annual International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade and established an outreach programme.<sup>16</sup>

More recently, the legacy of the transatlantic slave trade and racism became central to a renewed global movement that started in the United States with #BlackLivesMatter. In reaction to the murder of George Floyd by a US police officer, the HRC held an emergency debate at its 43rd session and adopted a resolution requesting the High Commissioner to prepare a report on systemic racism against Africans and people of African descent by law enforcement agencies, to contribute to accountability and redress for victims.<sup>17</sup> Subsequently, at its 47th session, the HRC adopted Resolution 47/21 and decided

to establish an international independent expert mechanism, comprising three experts with law enforcement and human rights expertise, ... in order to further

transformative change for racial justice and equality in the context of law enforcement globally, especially where relating to the legacies of colonialism and the Transatlantic slave trade in enslaved Africans.<sup>18</sup>

The legacy of colonialism is also now coming at the forefront through various processes. At the HRC, China and others have sponsored a resolution on the ‘negative impact of the legacies of colonialism on the enjoyment of human rights’. The Council has thus decided to convene a panel discussion at its 51st session in 2022 ‘to identify challenges in addressing the negative impact of the legacies of colonialism on human rights, and to discuss ways forward’.<sup>19</sup>

In parallel, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence submitted to the 76th session of the General Assembly a new report on ‘Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts’<sup>20</sup>

The legacy of *gender inequality and patriarchy* and their consequences in terms of gender-based violence throughout history and on all continents is also being looked at, albeit to a lesser extent than genocides, slavery and colonialism. This not only concerns injustice towards women – the more we look at the issue, the more we understand that gender inequality, patriarchy and gender-based violence are injustices towards all humanity and often the cause for other injustices. In an important 2018 report analysing the theme of ‘reasserting

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<sup>12</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration and Programme of Action, §98.

<sup>13</sup> Ibid., §101.

<sup>14</sup> UNGA Res 61/19, 28 November 2006.

<sup>15</sup> See e.g. UNGA Res 73/345, 16 September 2019.

<sup>16</sup> See e.g. Programme of Educational Outreach on the Transatlantic Slave Trade and Slavery. Report of the Secretary-General, UN doc A/76/134, 13 July 2021.

<sup>17</sup> HRC Res 43/1, 19 June 2020. Target 4.7 of the SDGs, supra fn 9.

<sup>18</sup> HRC Res 47/21, 13 July 2021, §10.

<sup>19</sup> HRC Res 48/7, 8 October 2021.

<sup>20</sup> Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. Note by the Secretary-General, UN doc A/76/180, 19 July 2021.

equality, countering rollbacks',<sup>21</sup> the Working Group on the issue of discrimination against women in law and in practice of the HRC clearly stated that '[e]quality between women and men is humanity's struggle'.<sup>22</sup> It also called on 'the human rights community' to make 'every effort to block any position in international human rights spaces that endorses patriarchal and discriminatory norms'.<sup>23</sup>

Genocides, slavery and the slave trade, colonialism, gender inequality and violence against women: these four themes are high on the international agenda. They call on us to look back to the past, know our history and draw the consequences for the future to build an international society that is fairer. It is clear though that there is still much selectivity in the way the UN is looking at the past, and this creates some tensions, as could be seen in Durban, where grief on one side triggered defence mechanisms on the other. A more balanced and exhaustive examination is needed. To that end, a global transitional justice process would not only mean an 'international' or 'world' process, but also a process that would look at *all* the wrongs, in all regions of the world, rather than being selective in its approach.

But looking back at what humanity did to humanity is not enough. The structures of injustice, discrimination and violence go well beyond what humans do to other humans. They also include, and are inherent to, the relation of domination that humanity has established with the biosphere and the other forms of life on earth. As humanity denied other parts of humanity a right to existence, it also denied the existence of other natural entities, that is *its* environment. Humanity and *its* environment – as if these are two distinct entities, with humanity having full ownership of its environment, including the rights of exploitation and destruction. The violence and

crimes perpetrated against the biosphere and the other forms of life go hand in hand with, is dependent on and inherent to, the violence perpetrated by parts of humanity against other parts of humanity.

So, if there is to be global transitional justice, it should also aim to tell the truth about and bring accountability and reparation for the crimes humanity has perpetrated against the biosphere and the other forms of life. It should aim to reconcile humanity with so-called 'nature' so that humans can think of themselves as part of nature.

Here again, international law does not start from zero. A retrospective look at an anthropocentric conception of the world is being taken at the global level. Already in 1982, the General Assembly adopted the World Charter for Nature,<sup>24</sup> in which it recognized, inter alia, that '[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients', and that '[e]very form of life is unique, warranting respect regardless of its worth to man'. More than 25 years later, in a distinct but similar process, Ecuador and Bolivia promoted the new concept of 'Harmony with Nature' and in 2009 the General Assembly proclaimed 22 April International Mother Earth's Day. Since then, a resolution is adopted every year and the Secretary-General's reports document 'non-anthropocentric' approaches and initiatives throughout the world. The proposal of Harmony with Nature is itself based on the assumption that '[s]ince the Industrial Revolution, Nature has been treated as a commodity that exists largely for the benefit of people, and environmental problems have been considered as solvable through the use of technology'.<sup>25</sup> To overcome this paradigm, the initiative calls on states to found a new ethic of the relation

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<sup>21</sup> Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, UN doc A/HRC/38/46, 14 May 2018.

<sup>22</sup> *Ibid.*, §83.

<sup>23</sup> *Ibid.*, §85.

<sup>24</sup> UNGA Res 37/7, 28 October 1982.

<sup>25</sup> Harmony with Nature, 'Programme', <http://harmonywithnatureun.org> (last accessed 18 January 2022).

between humankind and nature<sup>26</sup> and to have recourse to an ‘earth-centred education’<sup>27</sup> based on ‘earth jurisprudence’.<sup>28</sup>

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Now, how do we intend to implement this global transitional justice process? Again, a number of processes already exist. We need to reconceive these as part and parcel of global transitional justice, and add more coherence and strength. We need to invent a new toolbox for global transitional justice.

## 2. THE MEANS OF GLOBAL TRANSITIONAL JUSTICE

### A. LEGAL TOOLS – LAWFARE

Just as in domestic processes of transitional justice, legal tools play a very important role in global transitional justice. By legal tools, I particularly mean legal actions and strategic litigation based on human rights, international humanitarian and international criminal law. Accountability is key to moving a number of processes forward. Legal justice before courts and independent expert bodies is a privileged way of making injustice more visible and dismantling conservative narratives. It also helps claim the accountability of perpetrators, establish at least partial truth through judicial fact-finding, and provide at least partial reparations to a number of victims. In recent times, claims to repair historic crimes have multiplied, sometimes leading to success, and always contributing to making these crimes better known to the general public. Also, claims for environmental justice and climate justice have soared in numbers, in all parts of the world, insisting not only on state but also business obligations and responsibilities under domestic and international law. Judges

and experts are also contributing throughout the world to deconstructing an exclusively anthropocentric view of the biosphere, by recognizing rights of natural non-human entities.<sup>29</sup>

All these legal actions greatly contribute to global transitional justice processes, in the sense that very often they are not strictly domestic in their scope but bring a sense of transnational or global justice.

But the experience of domestic transitional justice processes have shown that legal claims and actions are not enough: very often they lead to partial results. By their very nature, they are based on cases with a limited number of victims and focus on a limited range of facts that may have legal consequences. They provide limited reparation and few guarantees of non-repetition. Moreover, legal actions involve opposing parties, and appear as a continuation of war by legal means: lawfare. As such, there is a risk that they end up exacerbating the grief, rather than leading to consensus and constructive reforms.

So, besides legal tools, there is also a need for other processes based on scientific knowledge and leading to political consensus in the global society.

### B. POLITICAL PROCESS – A SCIENTIFIC-POLITICAL PLATFORM ON PAST INJUSTICES

When I speak about global society, I am not speaking about the world of sovereign states. States count, but reconciling humanity with itself and with nature cannot be limited to diplomatic processes among states.

Firstly, because states are different from peoples – there are peoples without states and there are states without peoples, or few people. Secondly, because states would generally have a politicized view of what a global transitional justice process should be. This was the main

<sup>26</sup> See e.g. Harmony with Nature. Report of the Secretary-General, UN doc A/67/317, 17 August 2012, §57ff.

<sup>27</sup> See e.g. Harmony with Nature. Report of the Secretary-General, UN doc A/74//236, 26 July 2019, §66ff.

<sup>28</sup> See e.g. Harmony with Nature. Report of the Secretary-General, UN doc A/73/221, 23 July 2018, §54ff.

<sup>29</sup> See Harmony with Nature. Report of the Secretary-General, UN doc A/75/266, 28 July 2020, especially Part V, ‘A Mosaic of Earth-Centred Law for Planetary Health and Human Well-Being’.

criticism addressed to the Durban Conference, as it appeared to some extent as a field of confrontations between various national or regional interests, as represented by states.<sup>30</sup> The downside of having a state-led process is also apparent in what happened at the HRC's 48th session in September–October 2021, when the Council debated the resolution initiated by China and others on the legacy of colonialism. Even though it could hardly be said that the topic was not legitimate, the initiative was opposed by a number of states including not only all European Union states but also others such as Japan, Mauritania, Togo and Uzbekistan. The United Kingdom asked for a vote and the resolution was adopted with 27 states in favour, none against and 20 abstentions.<sup>31</sup> The representative of Austria, speaking on behalf of all member states of the EU, explained their particular abstention by saying they 'had difficulties to see that initiative as a genuine effort to advance the cause' and that 'the resolution took a narrow focus which failed to recognize that colonialism was not only a thing of the past'.<sup>32</sup>

The truth is that these issues are too serious to be left to states alone. There is a need for scientific knowledge to establish the truth about what happened, how it happened and what the responsibilities are. There is also a need for simple people – especially victims or their families – to participate actively in the process of truth-seeking. More generally, civil societies should be fully involved, beyond their governments. And the interests of the biosphere and of non-human life on earth should also be represented in the discussion and given their say. This is what is generally done in truth processes at the domestic level. The difference here is that we would need a more global effort: this would include, on the one hand, scientists coming from all parts of the world to interact with the aim of

establishing accepted historical facts; and, on the other hand, members of civil society, victims' associations and organizations advocating in favour of the biosphere and other life on earth, who would participate in global debates about past injustices, based on historical facts.

Having said that, this does not mean that governments should be left out, but rather their proposals and actions regarding a global transitional justice process should be based on facts established by a global scientific effort.

In other words, we would need a scientific-political platform for global transitional justice. There are existing models. In a completely distinct field of international law, namely environmental law, the Intergovernmental Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity (IPBES) follow such a framework of associating scientific knowledge with states' power, as the main players in international relations. Closer to our issue, the International Holocaust Remembrance Alliance (IHRA) is also an inspiring model, being an international organization composed of 34 states and the delegation of each state being composed of experts and academics rather than diplomats. The aim of the IHRA is to promote Holocaust education, research and remembrance. As explained on its website, '[t]he IHRA's network of trusted experts share their knowledge on early warning signs of present-day genocide and education on the Holocaust. This knowledge supports policymakers and educational multipliers in their efforts to develop effective curricula, and it informs government officials and NGOs active in global initiatives for genocide prevention.'<sup>33</sup>

In the same spirit, a Nature Knowledge Network was created in the context of the UN's Harmony with Nature process, to 'advance an Earth-centred worldview in which human-Earth

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<sup>30</sup> According to Pierre Hazan, '[t]he United Nations asked states – by definition motivated by individual national interests and self-image – to put themselves into a post-Westphalian order', Hazan, *Judging War, Judging History*, supra fn 10, p 64.

<sup>31</sup> HRC Res 48/7, supra fn 19.

<sup>32</sup> As transcribed from the webcast.

<sup>33</sup> International Holocaust Remembrance Alliance, 'About Us', <https://www.holocaustremembrance.com/about-us> (last accessed 18 January 2022).

relationships are balanced within the greater web of life to live in Harmony with Nature'.<sup>34</sup>

Based on scientific knowledge and civil societies' deliberations, the states would elaborate programmes of action at the global level, in order to implement guarantees of non-repetition that would include, for instance, mutually agreed acknowledgement of historical facts and why not a global history textbook, including the history of human groups and their interactions as well as a history of humanity in its relation to nature?

Overall, if it is not to achieve a global consensus on all historical wrongs against humanity and nature, I think such a global transitional justice process would make a contribution to peace-building through exchange and understanding among peoples.

At a time when nationalistic passions seem to be making a comeback and nationalistic leaders tend to instil suspicion towards others, there is a great need to establish the truth about the past, heal legitimate grief, provide accountability reparations to victims and draw lessons from the past in the form of guarantees of non-repetition.

Here is a programme of action for the 21st century – something to take home with you as a souvenir from the cosmopolitan city of Geneva, a city of tolerance and peace.

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<sup>34</sup> Harmony with Nature, 'Welcome', <http://harmonywithnatureun.org/welcome/> (last accessed 18 January 2022).

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The Geneva Academy of International  
Humanitarian Law and Human Rights

Villa Moynier  
Rue de Lausanne 120B  
CP 1063 - 1211 Geneva 1 - Switzerland  
Phone: +41 (22) 908 44 83  
Email: [info@geneva-academy.ch](mailto:info@geneva-academy.ch)  
[www.geneva-academy.ch](http://www.geneva-academy.ch)

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