Conclusion – Pushing the Limits of the Law

This study started with a suspicion: Might reparation in transitional justice "explode the limits of the law" – as Hannah Arendt suggested? The first three chapters of this book made abundantly clear that reparation practice in transitional justice deviates significantly from the international law on reparation. Such a disconnect would usually give rise to the simple conclusion that states violate international law – lamentably hardly an occurrence of such rarity that it would be worth deeper inquiry in and of itself. But there are reasons to suspect that blame lies not so much with states but with the law. The international law on reparation, as established in chapter one, seems so far removed from the particular circumstances of transitional justice that it might not be able to provide adequate guidance. However, if the law fails, the consequences could be grave. Survivors could have an even harder time securing justice, which would also impede the transformative aim of transitional justice. For that reason, this study began with a repudiation of Arendt. It started from the thesis that reparation in transitional justice does not explode the limits of the law. It might push the law close to a breaking point, but not beyond it. Did this study manage to corroborate this thesis?

A. A True Observation

The case studies of Sierra Leone, Colombia, and the ICC's Lubanga, Katanga, Al Mahdi, and Ntaganda reparation programs in the DRC and Mali proved the initial observation true. All six programs deviated in significant and similar ways from the international law on reparation. Instead of following its individualistic-conservative approach, Sierra Leone, Colombia and the ICC created special reparation mechanisms, which operated under a collectivistic-transformative logic. These special mechanisms categorized survivors and generalized their harm, which enabled them to cater to thousands, if not millions of survivors. States embarked on significant outreach efforts and removed barriers to access justice. They aimed at more than just restoring survivors to the situation they would be in had the violation not occurred. Instead, they aimed at transforming survivors' lives and positions in society.

B. A Justified Suspicion?

The case studies corroborated the suspicion that the international law on reparation, as it stands, might be inadequate for reparation in transitional justice. States did not deviate from the international law on reparation out of indifference but necessity. They did it to overcome the transitional situation's specific challenges: A large caseload, the need to repair grave harm on a large scale, volatile societal dynamics, pressure on the state's resources, etc. These circumstances made it impossible to carry out thousands if not millions of individual adversarial proceedings, subject to demanding evidentiary requirements. The conservative-individualistic logic of the international law on reparation thus proved difficult to implement in transitional justice. An inquiry into the roles of reparation in transitional justice further deepened the suspicion. Not only does the international law on reparation make it hard to account for the particular exigencies of the transitional justice situation, but it also fails to consider transitional justice's unique purpose. Transitional justice is a transformative project. Apart from providing individual justice under challenging circumstances, it seeks to transform society so that individuals and state institutions respect human rights again. Since the transitional situation is so far removed from that goal, transitional justice operationalizes it by seeking to establish generalized horizontal and vertical trust in that other members of society and state institutions respect human rights again. Reparation contributes to that aim by sending a message to survivors and members of society more generally that members of society and state institutions hold human rights to be valid, applicable to everyday life, enforceable, and important – now and in the future. Reparation thus attains the dual role of fulfilling individual corrective justice and contributing to the goals of the transition. In the form it is applied usually, the international law on reparation does not adequately reflect the latter role.

So, both practical and theoretical reasons support the suspicion that the international law on reparation inadequately reflects the exceptional circumstances of transitional justice. But does that mean that reparation in transitional justice explodes the limits of the international law on reparation?

C. Abandoning the Law?

Justified skepticism could lead to surrender. If the international law on reparation cannot adequately accommodate the challenges of transitional

justice, then maybe transitional justice is too complex, contingent, or diverse and escapes regulation by universal international law. Maybe transitional justice must remain a purely political process. That stance comes with significant downsides for survivors, who will often not occupy an essential place in that process. But that only justifies the desirability of regulating reparation in transitional justice through international law. Alas, desirability not always coincides with possibility.

That the desire to regulate reparation in transitional justice lies within the realm of the possible can only be proven by example. Much of this study was dedicated to providing one. The normative framework established to that end in chapter four was off to a rocky start, though; it made it even harder for states to repair survivors in transitional justice. International law prohibits using eligibility and access to the reparation program as bottlenecks, through which most survivors fail to pass. Every survivor has a right to reparation and the right to access proceedings providing it. Reparation programs must therefore become genuinely comprehensive and complete. They must cover all survivors and give them a realistic chance to obtain reparation. To make matters worse, states must still provide full reparation. No transitional-justice-specific approach to reparation is warranted, which might allow states to circumvent their obligation to repair. States cannot seek synergies between reparation and their other obligations to the degree that they confuse reparation with assistance. They cannot rely on external support to the degree that they are outsourcing their obligation to repair. They have to follow through with their reparation programs until every survivor had a chance to apply and receive adequate reparation. In sum, there is no way around the basic premise of the international law on reparation: The responsible state must repair every survivor of a human rights violation by providing restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, which erase the harm caused as far as possible.

At the same time, it would be manifestly unjust to pursue full reparation at all costs. It would overwhelm the state and leave it with little to no resources to fulfill other vital functions.[1391] A way out of this dilemma comes with a normative conflict approach. Since the state cannot fulfill its obligation to repair while fulfilling its other obligations under international law to the full extent, these two sets of obligations conflict. They must be limited so that

1391 Again, one should not underestimate, how much resources can be in play, if political will exists. On the example of Great Britain's extremely costly reparation program for slave *owners*, see above, fn. 1251 and Andrews, *The New Age of Empire*, 56 f.

a fair balance is struck between them. This process can be operationalized by weighing the abstract weight of each set of obligations, their concrete importance, and the probability with which interferences materialize. The resulting share of the state's resources available for reparation must be distributed equally between the survivors based on the severity of their harm. Naturally, this process can never result in an exact calculation of the amount of reparation due to each survivor. Reparation in transitional justice will always remain subject to a political process. But the proposed balancing exercise can provide the parties to the process with a common language, through which they can justify, criticize and scrutinize reparation efforts and proposals. Thereby, it can help overcome an equivocation at the heart of many current debates about reparation. Often, the state and survivors have different concepts regarding the adequacy of reparation. While the former argues that it did everything in its power to provide as much reparation as possible, the latter hold that what they received did not suffice to overcome their harm. Frustration, not corrective justice and trust is the main result. A common legal framework determining the adequacy of reparation can bring the parties to the process together and allow, at the very least, for a fruitful negotiation.

Even with this lowered expectation, though, the proposal to balance competing positions only solved the problem that reparation in transitional justice overwhelms the state's resources by creating a new one. If a limited amount of resources is distributed equally between survivors, they only get a fraction of what they are entitled to. Reparation is then so diluted that it becomes meaningless. This problem does not justify deviation from the full reparation concept. Instead, a heavier reliance on symbolic reparation can solve it. Symbolic reparation measures repair not through their material value but their communicative function. Hence, they can be administered to many survivors simultaneously at a limited cost without losing their effectiveness. The international law on reparation only allows repairing survivors with nothing but symbolic means when they suffered financially non-assessable harm or small quantities of financially assessable harm. Unfortunately, that will not be the case in most transitional situations. Teleological interpretation provides a normative justification to expand the scope of symbolic reparation in transitional justice. Once it is necessary to substantially limit the amount of reparation each survivor is entitled to by the same factor, those survivors who suffered comparatively small harm will have their share reduced to close to zero. For those survivors, material reparation can neither fulfill its deontological role to provide corrective justice nor its instrumental role to further respect for human rights and generalized trust. On the contrary,

minimal amounts of reparation would be received as a mockery and would undermine reparation's transitional-justice-specific message. This at the cost that fewer resources are available to repair survivors who suffered comparably more harm. Such an interpretation would run counter to the principle of effectiveness. Instead, repairing survivors through symbolic means only, if the limited harm they suffered results in balancing reducing their share of material reparation to close to zero, better serves the aim of corrective justice and the transitional-justice-specific aim of reparation. Since the ordinary judiciary will often be in no position to implement all these obligations adequately, states will often be obliged to create special reparation mechanisms. Courts must exercise oversight over such mechanisms and can also serve as a primary avenue of redress. In any case, they are bound to uphold the normative framework established here and may not treat the cases before them as ordinary torts.

This normative framework shall serve as the example proving that reparation in transitional justice does not explode the limits of the law. As it is usually applied, the international law on reparation does not fit the particular exigencies of transitional justice. However, it can be carefully adapted through interpretation so that it can provide adequate guidance to transitional justice reparation efforts. Whether the normative framework truly fulfills this function must be left for the reader to decide. The author must admit that it remains highly abstract. The guidance it provides in any concrete situation will hence be limited. That, however, is no shortcoming but in keeping with the humble role that the law should play in transitional justice.

D. One More (and Last) Time: The Limits of the Law

Diversity, complexity, and enormous challenges characterize transitional justice situations. Transitional justice measures will, therefore, always be both a legal and a political endeavor. They will always be the result of a political and social process, contingent on the circumstances. They must be constantly revised and adapted to changing contexts, needs, and new information. In such a dynamic situation, the law cannot determine a state's every move. It can provide a minimum standard below which the state must not fall. It can open a space for the processes to flourish by providing a common language in which the actors can negotiate. It can never determine the exact outcome of the process. Truly adequate reparation programs arise from the creativity,

ingenuity, and flexibility of the actors devising and implementing them. Law cannot prescribe these qualities. It should therefore be humble, cognizant of what it can achieve and when to make room for more important actors. To put it with the words of Méndez: Law must provide a framework, not a straightjacket.[1392]

E. Overcoming the Blind Spots of Transitional Justice

This limited role is not only adequate for the exceptional circumstances of transitional justice. It also guards against the blind spots and risks of transitional justice practice. As discussed in the introduction, as a transformative project based on human rights, transitional justice is always at risk of becoming part of a new civilizing mission by the Global North. Through its power in international relations and international law, the Global North can hegemonialize standards and condition states' legitimacy on adhering to them. Transitional justice is no exception. Too often, the international community, international "expertise", and international donors drive transitional justice processes. This corrupts transitional justice on the one hand because these actors tend to impose one-size-fits-all-solutions on a great variety of situations. This lack of care for local suitability of transitional justice processes invariably leads to their failure.

On the other hand, this blind spot corrupts transitional justice because it leads to its limited application. Transitional justice processes take place predominantly in the Global South. They treat systematic human rights violations as domestic affairs with little connection to the Global North. As mentioned before, this is not the result of the impeccable legal and moral behavior of the Global North. States in the Global North have their own systematic human rights violations to answer for. They created the deadliest border in the world and discriminate against large parts of their population, to arbitrarily name two.[1393] They were and are involved in systematic human rights violations in the Global South not only as a savior, who provides the resources and "expertise" to overcome the harm that ensued. Often enough, the Global North and the international community contributed to

1392 Méndez, *Peace, Justice and Prevention*, 17.

1393 IOM, *Four Decades of Cross-Mediterranean Undocumented Migration to Europe*, 1; UN, *On the Black Lives Matter Protests and other Mass Demonstrations Against Systemic Racism and Police Brutality – Joint Reflexions by United Nations Senior African Officials,* 2020; Andrews, *The New Age of Empire,* passim.

the structures that gave rise to systematic human rights violations, actively participated in their commission, and profiteered from them. It is thus high time to make transitional justice a genuinely global project; not in the sense that certain actors travel around the world to distribute their wisdom, but in the sense that the distribution of transitional justice efforts should fit the global distribution of systematic human rights violations.

Because legal approaches to transitional justice inherently proceed from a top-down-logic, they exacerbate the risk of hegemonializing certain transitional justice approaches. They are therefore always at risk of reproducing the blind spots and corrupting effects just referred to. For that reason, it serves the adequacy of transitional justice efforts to limit the law's role to provide a framework, which is for the relevant actors to fill.

F. Overcoming the Limits of the Law: Survivor Participation

Under this lens, survivor participation attains a special meaning for reparation in transitional justice.[1394] Admittedly, this study refuted an unconditional norm making survivor participation in reparation programs obligatory. Instead, it took the position that survivor participation is obligatory only insofar as necessary to make reparation adequate. Often, that will be the case. But even where it is not, the fact that survivor participation is not mandatory does not mean that it is not advisable. On the contrary, numerous initiatives founded and led by survivors demonstrate that they often know how to overcome the harm they suffered.[1395] Take, for example, the people of Puerto Berrío, Colombia, who had to live with the fact that the river next to their village washed corpses ashore, which the parties to the conflict threw into the water upstream. They coped with this gruesome reminder of the conflict by reburying the corpses, giving them names, caring for their graves, and asking them favors. With that, they lent new meaning to the situation

1394 Generally on the local dimension of transitional justice and its interactions with other dimensions, McGregor, *International Law as a "Tiered Process" - Transitional Justice at the Local, National and International Level*, in: McEvoy/McGregor (eds.), *Transitional Justice From Below - Grassroots Activism and the Struggle for Change,* 2008, 47. More specifically embedding participation in a wider discourse, Lundy/McGovern, *Transitional Justice From Below*, 123 ff.

1395 McGregor, *International Law as a "Tiered Process"*, 60.

and honored the unknown dead.[1396] Women of the displaced community of Mampuján started to deal with the violations they suffered by weaving quilts, displaying their experiences and hopes. Again, this gave their experiences meaning, helping them to overcome their harm. The group activity brought them together and repaired social relationships in the community.[1397] The Sierra Leonean NGO Fambul Tok assembles communities, which suffered under the conflict at a bonfire to talk about their experiences. It thereby opens a space in which reconciliation becomes possible and often occurs.[1398] Such examples of the resilience, creativity, and ingenuity of survivors abound. States can tap into that invaluable resource by making genuine, meaningful survivor participation possible.

G. In the end…

…reparation in transitional justice does not explode the limits of the law. Interpretation can push those limits so that the law provides some guidance to states and societies seeking to repair survivors of systematic human rights violations. Lawyers must remain humble, though. They must be cognizant of the fact that many paths lead to adequate reparation in transitional justice. The law cannot prescribe a single correct one. It can narrow down the range of acceptable paths, among which the society concerned must choose one that fits the situation. To follow the path remains an arduous task, subject to many challenges. Law cannot substitute a lack of will to move forward. Neither can it prescribe the creativity, ingenuity, and flexibility needed to complete the journey. But it can continue to provide limited guidance throughout the journey and help to prevent deviations. In the end, the path will hopefully lead the society concerned to a point at which survivors feel adequately repaired

1396 Abdelrahim, *Puerto Barrío - La Ciudad Donde se Adoptan los Muertos*, El País, 29 September 2012. The artist Juan Manuel Echavarría documented the graves in his thoughtful project "Requiem NN", https://jmechavarria.com/en/work/requiem-nn/.

1397 Ordóñez Narváez, *Los Tejidos de Mampuján - Una Lectura Desde la Reparación Simbólica*, in: Sierra León (ed.), *Reparación Simbólica - Jurisprudencia, Cantos y Tejidos,* 2018, 291, 310 ff., including images of some of the quilts.

1398 Hoffman, *Reconciliation in Sierra Leone - Local Processes Yield Global Lessons*, 2008 Fletcher F. World Aff. 32(2), 129, 132 ff.; Graybill, *Traditional Practices and Reconciliation in Sierra Leone - The Effectiveness of Fambul Tok*, 2010 Conflict Trends 3, 41, 44 ff.; More critically Martin, *Deconstructing the Local in Peacebuilding Practice - Representations and Realities of Fambul Tok in Sierra Leone*, 2020 Third World Q. Online Publication.

and trust that state institutions and their fellow members of society respect human rights again. Law itself cannot bring about that outcome, much less guarantee it. But if cognizant of its limited role, it can help achieve it.