Hansen, T. O. (2019). In pursuit of accountability during and after war, Journal of Strategic Studies, 42:7, pp. 946-970.

DOI: 10.1080/01402390.2019.1588120

In Pursuit of Accountability during and after War

WORD COUNT: 11335

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Key words: Transitional justice; armed conflict; war crimes; impact of transitional justice

Abstract: This article aims to identify and elaborate the causes and ramifications of applying transitional justice, in particular accountability measures, to situations of war. It focuses on the correlations between peace and justice – and hence an important perspective on the question 'how do wars end'. The article seeks to understand some of the main challenges associated with pursuing accountability for crimes committed in contemporary forms of conflict, including civil wars and abuses committed by major powers in armed conflict.

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1. Introduction

Transitional justice developed as a set of tools – and a conceptual framework – to address past abuses committed by authoritarian regimes, but is increasingly applied to situations of armed conflict, both during and after war has ended. The move from viewing transitional justice as primarily involving the judicial and quasi-judicial responses by newly installed democratic regimes to confront abuses committed by past undemocratic regimes to viewing transitional justice as relevant to a broad range of situations, including situations of past and ongoing armed conflict, raises a series of important questions. Notably, should transitional justice be viewed as a tool of conflict resolution, and if so how effective it is? Furthermore, as transitional justice, in particular accountability measures, aim at regulating the conduct of parties to armed conflict, for example by deterring the commission of crimes, what challenges do such measures face in light of the nature of contemporary types of conflict?

Although these questions are increasingly being addressed by transitional justice scholarship, much is yet to be understood. For example, whereas the interplay between justice and peace processes has gained some attention in recent studies, less attention has been paid to situations where the hostilities are not brought to an end through negotiated settlements, for example in the context of major powers' military interventions. More generally, the literature on transitional justice is yet to fully appreciate what new, and possibly unique, challenges emerge when pursuing accountability for crimes committed in contemporary types of armed conflict.

This Article sets out to address some of these developments and challenges to the field of

transitional justice. The Article primarily aims to identify and elaborate the causes and ramifications of applying transitional justice, in particular accountability measures, to situations of war. It does so by first outlining developments in the field of transitional justice, including understandings of the correlations between peace and justice – and hence an important perspective on the question 'how do wars end'. In this regard, the Article demonstrates how mainstream understandings have changed dramatically over time, from assuming that pursuing (retributive) justice poses a risk to peace, to assuming that justice is a prerequisite for building sustainable peace, and later towards an understanding that such binary claims concerning the synergies between peace and justice are too simplistic. Following this review of claims made in the literature, the Article next sets out some of the main challenges associated with pursuing accountability for crimes committed in contemporary forms of conflict. This involves a discussion of the dilemmas arising when pursuing accountability for large-scale abuses committed during civil war and while conflict is ongoing. The Article also addresses the challenges associated with applying the current legal frameworks as well as institutional challenges to promoting accountability for crimes committed in armed conflict. Finally, the Article examines a topic overlooked in many accounts of transitional justice relating to the specific challenges associated with pursuing accountability for abuses committed by major powers in armed conflict.

Accordingly, a key objective of this Article is to clarify the potential of transitional justice to address situations of war, thereby moving beyond its foundation as tool for truth and justice in democratic transitions. It argues that in so doing we need to distinguish between transitional justice's ability to contribute to ending war and to regulate the conduct of parties to armed conflict. In this sense, the Article contributes to the broader debate about how transitional justice can be

utilised to address the complexities of armed conflict. As such, the Article observes that whereas transitional justice provides a relevant framework for advancing accountability in situations of armed conflict, transitional justice faces significant challenges addressing the particular conditions of contemporary forms of conflict which require further exploration and clarification.

2. A Generation Shift? The Story of how Transitional Justice Developed from a Tool of Democratisation to a Tool of Conflict Resolution

Grounded in a merger of human rights advocacy and the 'transition to democracy' literature of the late 1980s and early 1990s, the field of transitional justice emerged in the context of the so-called 'third wave of democratisation'.[1] The early field focused primarily on understanding how the new democracies of Latin America and East and Central Europe could use justice tools to respond to the massive human rights abuses committed under previous authoritarian or totalitarian regimes.

One key assumption in the early field was that the political transition created a window of opportunity for rendering justice for the victims of past abuses. At the same time, it was thought that transitional justice could help consolidate the new democratic order and entrench the rule of law.[2] However, early commentaries also tended to accept that the selfsame justice processes could jeopardise democratisation if they failed to operate on the conditions set by the political transition,

[1] The term was coined by Huntington. See Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press 1991). Notable studies of the transitions to democracy of this era include Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Maryland: The Johns Hopkins University Press 1986); Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Maryland: The Johns Hopkins University Press 1996).

[2] See e.g. the studies in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume I and II (Washington D.C.: United States Institute of Peace Press 1995).

in particular because the former elites usually maintained influence both during and after the transition.[3] Accordingly, the 'transition' – seen as a unique and confined moment in time – was assumed to present both opportunities and limitations to the kind of justice that could be rendered in these so-called 'paradigmatic transitions'.[4] Transitional justice, it was suggested, can advance the liberal transformation, including consolidating democratic principles and the rule of law in the long term, but in so doing the process itself may need to compromise with the rule of law standards of ordinary times due to the unique circumstances in which transitional justice operates.[5] In other words, transitional justice was seen as something fundamentally distinct from justice in 'ordinary times'.[6] Often framed as a question of truth versus justice, early debates about transitional justice tended to center around the question of whether new democracies are best served by utilising criminal justice processes or considering other responses to the past abuses, in particular truth commissions.[7]

Since then, transitional justice has developed enormously. One particular important development, which I have referred to elsewhere as the 'horizontal expansion of transitional justice',[8] involves the extension of transitional justice discourse to justice processes aimed at addressing abuses (and

[3] See e.g. Carlos Nino, 'Response: The Duty to Punish Past Abuses of Human Rights into Context: The Case of Argentina' in Kritz (ed.), *Transitional Justice,* Volume I, 417; Diane F. Orentlicher, 'A Reply to Professor Nino' in Kritz (ed.), *Transitional Justice,* Volume I, 437.
[4] On the concept of 'paradigmatic transitions', and how transitional justice emerged as a tool to promote justice in these types of transitions, see e.g. Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31/2 (2009), 321–367.
[5] On the uniqueness of transitional justice and the nature and ramifications of such compromises, see further Ruti Teitel, *Transitional Justice* (Oxford: OUP 2000).
[6] One notable exception to this understanding involves Eric Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', *Harvard Law Review* 117 (2003), 762-825.
[7] See e.g. José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' in Kritz (ed.), *Transitional Justice,* Volume I, 203-206.
[8] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field', in Susanne Buckley-Zistel et al. (eds.), *Transitional Justice Theories* (London: Routledge 2013), 105-124.

more broadly the roots of conflict) in a variety of situations not characterised by a liberalising political transition. Key among these are situations of armed conflict, frequently of internal nature but almost equally frequent with some form of regional or international dimensions.

Reflecting this change in the field's focus, transitional justice is now typically defined in ways that embrace justice after authoritarian rule as well as justice after war. According to Roht-Arriaza, for example, transitional justice can be understood as a 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[9] However, as discussed further below in this Article, attempts at rendering justice for serious crimes increasingly occur, not only after war has ended, but while it is still ongoing, raising important questions as to how justice and peace processes interact.

From a scholarly perspective, one way of looking at the above is to say that the field has developed as a consequence of the fact that the type of legal and quasi-legal measures referred to as transitional justice when occurring in paradigmatic transitions are now increasingly utilised in situations such as Sierra Leone, Colombia and Uganda where the (main) transition in question is not one from authoritarianism to democracy but one from some form of armed conflict to (relative) peace and stability. In a sense, the fact that justice processes in these and other countries ostensibly undergoing peaceful transformation are now being debated as transitional justice could be seen as a generation shift, reflecting a change in world affairs with fewer democratic transitions and where

[9] Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: CUP 2006), 1-16, at 2.

large-scale abuses increasingly take place in the context of armed conflict, in particular civil wars and other forms of internal strife.[10]

The move towards conceptually embracing transitions that predominantly concern an already existing or attempted move from armed conflict to (relative) peace brings into question whether one can operate with one common theory of what transitional justice is and what it can achieve, or if there is a need for developing more context-specific frameworks, and if so how.[11] It also begs the question whether all efforts to promote accountability for serious crimes should be understood as 'transitional justice'.[12] One particularly important question concerns the goals that transitional justice should advance. On the one hand, some scholars imply that a normative framework which emphasises democratic consolidation as a key outcome of transitional justice may also be suitable for addressing other types of transition currently addressed by field.[13] On the other hand, some commentators suggest that the expansion of the types of situations addressed by transitional justice must be matched by an expansion of the goals of transitional justice.[14] As discussed in further detail below, the potential of transitional justice to advance peace-building is now pointed to as a

[10] See further Andrew Reiter et al., 'Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts', *Transitional Justice Review* 1/1 (2012), 137-169 (noting at 138 that whereas the number of post-authoritarian transitions is waning, 'civil wars continue to proliferate around the world, offering new opportunities for transitional justice.').
[11] See further Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory', *Oregon Review of International Law* 13/1 (2011), 1-46.
[12] Some scholars have warned against confusing transitional justice with international criminal law. See e.g. Jens Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics', *International Journal of Transitional Justice* 7/3 (2013), 413–433.
[13] See e.g. Fionnuala Ni Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies', *Human Rights Quarterly* 27 (2005), 172-213 (noting at 174 that the 'end goal of transition in conflicted democracies is the same as that in paradigmatic transitions, namely the achievement of a stable (and therefore peaceful) democracy').
[14] See e.g. Phil Clark, 'Establishing a Conceptual Framework: Six Key Transitional Justice Themes', in Phil Clark and Zachary Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst 2008), 191-205 (arguing that transitional justice should ideally aim to achieve all of the following: reconciliation, peace, justice, healing, forgiveness and truth).

central goal.

3. The Correlations between Peace and Justice

3.1. The First Generation Argument: Peace versus *Justice*

From the onset, transitional justice was particularly occupied with a question key to understanding 'how wars end', namely a perceived tension between peace and justice, specifically whether pursuing criminal justice for past crimes would endanger peace and stability. For example, in an early account of transitional justice, Zalaquett concluded that actors such as the armed forces, who may be opposed to transitional justice, will 'determine the scope of governmental action inasmuch as they may affect its stability or force its hand, depending on the actual human rights policy the government attempts to carry out'.[15] Zalaquett viewed the tension between peace and justice as a tension between principles and pragmatic concerns: 'Ethical principles provide guidance but no definite answer. Political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints, lest in the end the very ethical principles they wish to uphold suffer because of a political or military backlash'.[16] Even scholars such as Nino who strongly called for criminal justice measures in countries such as Argentina undergoing transition in the late 1980s and early 1990s acknowledged that limiting the scope of criminal justice could be necessary because the armed forces 'still retained a monopoly on state coercion and were united in their opposition to the trials', and therefore had the capacity to threaten the 'only force backing the trial – the democratic

[15] José Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints', in Kritz (ed.), *Transitional Justice,* Volume I, 3-31, at 17.
[16] José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations', in Kritz (ed.), *Transitional Justice,* Volume I, 203-206, at 205.

system.'[17]

Accordingly, a key concern in the early writings on transitional justice was that efforts to prosecute those responsible for past abuses could pose an existential threat to the new democracy because the transition, often facilitated through elite pacts, usually did not completely rid the former rulers responsible for the abuses of power. In short, the mainstream view was that criminal justice should ideally be pursued to address the crimes of the past, but that the particular – or even unique – circumstances of the political transition create significant limitations to how much justice can be achieved in practice.

3.2. The Second Generation Argument: No Peace without Justice

A radical development occurred in the 2000s as numerous scholars and practitioners alike started suggesting that the pursuit of justice – including criminal justice – should be viewed, not as an obstacle, but as a *prerequisite* for peace.[18] Rather than posing a potential threat to peace and stability as had been assumed in much of the earlier writings on transitional justice, the mainstream view became that only by pursuing justice for past crimes can sustainable peace be achieved. Without justice for the abuses of the past, it was suggested, peace would be only a temporary condition since the grievances of the past would re-surface and jeopardise any settlement made in the transition.[19] 'No peace without justice' became the dominant mantra of the time.

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[17] Carlos Nino, 'Response: The Duty to Punish Past Abuses of Human Rights into Context: The Case of Argentina', in Kritz (ed.), *Transitional Justice,* Volume I, 417-436, at 421.

[18] Of course, the change in perceptions did not occur overnight and there were dissenting voices. However, a highly promoted and widely attended 2007 conference in Nuremberg, entitled 'Building a Future on Peace *and* Justice' appears as a key turning points whereby the view that peace and justice are not only compatible notions but are mutually dependent outcomes of a transition was consolidated as the mainstream.

[19] For example, writing in 2002 – the same year that the International Criminal Court became operational – M.

The proponents of 'peace *and* justice' often suggested that the 'peace *versus* justice' argument was based on a false dichotomy. For example, writing in 2006, Ellis argued: 'decisions not to prosecute are often premised on a misguided belief that it is necessary to choose between justice and peace, but this is a false choice. There can be no lasting peace without justice, and justice cannot exist without accountability. Peace cannot exist unless society first deals with the deep divisions created by human rights abuses'.[20] Impunity, rather accountability, thus came to be seen as the threat to peace – and it continues to be so by many advocates and scholars of transitional justice.

The understanding that peace and justice are mutually dependent and reinforcing moved transitional justice form the periphery of the democratisation literature to the very center of debates about peace and human rights, in that way presenting new expectations to how wars should end. In a sense, as Nagy observes, it made transitional justice a 'global project', endorsed by almost everyone because it was seen to be 'good' in almost all ways.[21] However, despite broad consensus that long-term peace can only be achieved if justice for past abuses is done, surprisingly few attempts were made in this period to justify these claims with reference to empirically-grounded research. In other words, the proponents of 'peace *and* justice' made lofty assertions, often advocating for far-reaching criminal justice processes, to address serious crimes committed by past authoritarian regime or, increasingly, in the context of armed conflict. But they often failed to

Cherif Bassiouni, a leading international lawyer, argued that 'if peace is not intended to be a brief interlude between conflicts, it must, in order to avoid future conflict, encompass what justice is intended to accomplish: prevention, deterrence, rehabilitation, and reconciliation'. See Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in Bassiouni (ed.), *Post-Conflict Justice* (New York: Transnational Publishers 2002), 3-54, at 9.

[20] Mark Ellis, 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability – The Role of International War Crimes Tribunals', *Journal of National Security and Policy* 2/1 (2006), 111-164.

[21] See Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly* 29/2 (2008), 275-289, at 276.

demonstrate why the correlations between peace and justice should be perceived so straight-forward. In particular, many proponents of 'peace *and* justice' seemed to overlook the importance of understanding how political dynamics, both local and international, impact justice and peace processes and that neither peace nor justice processes are static, but rather dynamic and multifaceted processes that may interact in multiple, complex ways and may differ significantly over time and space.

3.3. The Third Generation Argument: Towards Understanding Peace and Justice Complexities?

One important trend in more contemporary studies of transitional justice involves the turn to empirical research on peace and justice correlations, and more broadly the development of more sophisticated methodologies to understand the impact of transitional justice.[22] Importantly, from the late 2000s onwards, scholars increasingly started using social science methods to undertake cross-country comparative analyses of transitional justice, developed databases on transitional justice tools, and used detailed case studies to test the assumptions made about peace and justice correlations.[23]

However, the results of such studies often contradict each other, making it difficult to reach clear conclusions concerning how transitional justice impacts conflict prevention and resolution – and

[22] To my knowledge, the first comprehensive study which elaborates methodological issues concerning impact studies in transitional justice is the 2009 volume, *Assessing the Impact of Transitional Justice* (edited by Hugo van der Merwe, Victoria Baxter and Audrey Chapman) (Washington D.C: United States Institute of Peace Studies 2009).

[23] See e.g. David Backer, 'Cross-National Comparative Analysis', in Hugo van der Merwe, Victoria Baxter and Audrey Chapman (eds.), *Assessing the Impact of Transitional Justice*, 23-90. Louise Mallinder has developed the extensive Amnesty Law Database involving information on 506 amnesty processes in 130 countries introduced since the Second World War. See further Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing 2008).

hence the 'end of war'. By way of example, claiming to offer the first systematic empirical assessment of the deterrent effects of the International Criminal Court (ICC), Jo and Simmons observe that the Court can deter perpetrators and reduce intentional violence against civilians in civil wars, in that way contributing to ending wars.[24] Yet, some question Jo and Simmons' methodology as well as their conclusions concerning the ICC's potential to deter potential perpetrators, and more generally its ability to prevent atrocities.[25] Despite the turn to empirically-based research, transitional justice's contribution to ending wars thus remains disputed. If anything, it has become clear that context matters. Emphasising that 'there is no strict formula for timing and sequencing of peacebuilding or transitional justice activities' because both sets of activities are dynamic and context-specific, Sriram et al. highlight ways in which transitional justice mechanisms can both complement and contradict various aspects of peacebuilding such as disarmament, demobilisation, and reintegration; security sector reform; and rule of law promotion.[26]

At the same time, there is increased awareness that pursuing synergies between transitional justice and 'liberal peacebuilding' can be problematic. Noting that a 'forceful criticism of liberal peacebuilding has developed in recent years' which challenges its 'twin emphases on democratisation and marketisation and the presumption that democratisation and market

[24] See Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?', *International Organization* 70/3 (2016), 443-475.
[25] See Jack Snyder and Leslie Vinjamuri, 'To Prevent Atrocities, Count on Politics First, Law Later', *OpenDemocracy*, 12 May 2015, available at https://www.opendemocracy.net/openglobalrights/jack-snyder-leslie-vinjamuri/to-prevent-atrocities-count-on-politics-first-law-late. For a further debate about the ICC's claimed deterrent effect, see Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security* 28 (2003), 5-44.
[26] Chandra Lekha Sriram, Johanna Herman and Olga Martin-Ortega, '*Beyond Justice versus Peace: Transitional Justice and Peacebuilding Strategies'*, in Karin Aggestam and Annika Björkdahl (eds.), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans* (New York: Routledge 2012), 1-23, at 4.

liberalisation are themselves sources of peace', Sriram argues that transitional justice could be subject to much of the same criticism, as it shares with liberal peacebuilding a number of under-examined assumptions and unintended consequences.[27] Since then, some of these assumptions and consequences have been subject to more scrutiny. Notably, Sharp argues that 'the dominant liberal transitional justice paradigm has often resulted in a relatively narrow or thin approach to questions of justice in transition that foregrounds physical violence, including violations of physical integrity and civil and political rights issues more generally, while pushing questions of economic violence and economic justice to the margins'.[28] Sharp concludes that there are 'strong reasons to suspect that more integrated approaches to peacebuilding and transitional justice will have the tendency to exacerbate some of the tendencies that have given rise to these parallel critiques rather than alleviate them'.[29]

Furthermore, it has gradually become clear that, rather than having one singular impact on peace processes, it is necessary to discern how different aspects of accountability processes relate to different aspects of conflict and conflict resolution. Focusing specifically on the ICC's impact on conflict and peace processes, Kersten observes that the type of actors targeted by the Court in a given situation is key determinant.[30] This author's research in Kenya similarly suggest that the

[27] Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice', *Global Society*, 21/4 (2007), 579-591.
[28] Sharp further notes that liberal peacebuilding 'has at times resulted in a "top-down" approach to justice, concerned more with the bargains between elite groups needed to sustain the political transition than a more participatory approach to building democracy from the grassroots', and has 'tended to privilege the state, the international, and the universal, over the local, the traditional, and the particular'. See Dustin Sharp, 'Interrogating the Peripheries; The Preoccupations of Fourth Generation Transitional Justice', *Harvard Human Rights Journal* 26 (2013), 149-178.
[29] Dustin Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique', *Chicago Journal of International Law* 14 (Summer 2013), 165-196.
[30] Kersten points to a range of other interactions between peace and justice, some of which are discussed further below in this Article. See further Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford: OUP 2016), at 193-200.

Court's intervention had a significant and complex impact on domestic politics, including the creation of new alliances as a consequence of whom the Prosecutor decided to prosecute.[31]

Moreover, the *timing* of justice processes has emerged as a key topic, as it has become clear that the feasibility of pursuing criminal justice in particular can vary significantly over time. Noting that the 'Dirty Wars' in Latin America of the 1970s and 1980s are now increasingly being addressed by local courts after years of de facto or de jure impunity, Collins for example argues that new opportunities for pursuing criminal justice often arise long after a democratic order has been formally established, due to institutional reforms; the impact of other transitional justice measures, especially truth-seeking; the simple passage of time; and other factors.[32]

Accordingly, there is now recognition that the contribution of justice processes to efforts to prevent or end war are more complex than those advocated in earlier phases of transitional justice scholarship. In particular, it has become clear that justice processes impact differently on peace processes in different situations; that justice processes contain a range of dynamics which may impact peace and conflict processes in multiple, sometimes contradicting ways; and that transitional justice must be viewed not as a one-off event, but rather as a range of processes that can take different directions over time and space.[33]

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[31] See Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', *California Western International Law Journal*, 42/1 (2011), 1-35.
[32] See Cath Collins, 'The End of Impunity? "Late Justice" and Post-Transitional Justice in Latin America', in Nicola Frances Palmer et al. (eds.), *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia 2012), 399-423, at 399-419.
[33] For a further discussion of the 'time' and 'space' of transitional justice, see Thomas Obel Hansen, 'The Time and Space of Transitional Justice', in Dov Jacobs et al. (eds.), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar Publishing 2017), 34-51.

4. General Challenges pursuing Accountability for Crimes in War

4.1. The Nature of Contemporary Armed Conflict

There is general agreement that we have witnessed a 'discernible shift from the industrialised total warfare of the first half of the twentieth century, to contemporary forms of low-intensity conflict in conditions of state breakdown'.[34] Such low-intensity conflicts – frequently intra-state, but often with regional or international dimensions – are typically characterised by less clear distinctions between combatants and civilians. Partly because of this, as Engstrom notes, whilst 'most war fatalities in the early twentieth century were military personnel, at the turn of the century most war fatalities were civilian'.[35] Civilians are often deliberately targeted as part of the broader strategies of the warring parties, including large-scale sexual violence, forcible recruitment and displacement and other international crimes. Besides the necessity of *resolving* the conflicts that surround these abuses, there is a need for *regulating* the conduct of parties to armed conflicts through effective accountability regimes and otherwise. However, the nature of contemporary forms of conflict, in particular civil wars, presents a range of challenges pursuing accountability for the abuses frequently associated with them.

Notably, it can be difficult to draw a clear distinction between victims and perpetrators in contemporary forms of conflict. This presents a number of dilemmas for transitional justice, especially accountability processes. For example, in the only trial commenced to date before the

[34] Par Engstrom, 'Transitional Justice and Ongoing Conflict', in Chandra Lekha Sriram et al. (eds.), *Transitional Justice and Peacebuilding on the Ground: Victims and Excombatants* (London: Routledge, 2012), 41-61.
[35] Ibid, at 3.

ICC relating to the conflict in Northern Uganda, Dominic Ongwen, in his capacity as a commander of the Lord's Resistance Army (LRA), stands accused of multiple war crimes and crimes against humanity, including conscription and use of child soldiers – a crime he was himself subjected to in a young age when he was abducted into the LRA while walking to school.[36] Ongwen is thus both a victim and a perpetrator, illustrating, as Drumbl notes how the 'lines between victims and victimizers in atrocity often are porous'.[37] The legitimacy of prosecuting Ongwen before the ICC has left both academics experts and local communities divided,[38] but the challenges are not unique to this case.

Another important point is that civil war contexts tend to be characterised by a higher magnitude of violent acts compared with the abuses committed under authoritarian rule which informed the early field of transitional justice.[39] This has serious ramifications for the feasibility of transitional justice. For example, in situations where significant proportions of the population have been victimised, it is unrealistic to expect that transitional justice tools such as reparations programs can attend to the individual needs and rights of all victims. In addition, the sheer number of perpetrators may, combined with the effects of war such as the total or partial collapse of the legal system, make it impossible to pursue individual accountability in domestic courts in the post-war context

[36] See the info available at https://www.icc-cpi.int/uganda/ongwen.
[37] Mark Drumbl, 'The Ongwen Trial at the ICC: Tough Questions on Child Soldiers', *OpenDemocracy*, 14 Apr. 2015, available at https://www.opendemocracy.net/openglobalrights/mark-drumbl/ongwen-trial-at-icc-tough-questions-on-child-soldiers.
[38] For a symposium of academic commentaries on the topic, see 'The Dominic Ongwen Trial and the Prosecution of Child Soldiers – A JiC Symposium', *Justice in Conflict,* available at https://justiceinconflict.org/2016/04/11/the-dominic-ongwen-trial-and-the-prosecution-of-child-soldiers-a-jic-symposium/. For a discussion of the reactions to the trial in Northern Uganda, see e.g. Lino Owor Ogora, 'Just or Unjust: Mixed Reactions on whether Ongwen should be on Trial', *JusticeHub*, 25 Apr. 2017, available at https://justicehub.org/article/just-or-unjust-mixed-reactions-whether-ongwen-should-be-trial.
[39] See similarly Reiter et al., 'Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts', 137-169, at 139.

for any significant proportion of perpetrators, even in situations where there is political will to do so.[40]

Despite the emergence of a system of international justice, the ability of institutions such as the ICC to prosecute perpetrators of international crimes also remains limited, in part due to lack of resources, the complexity of investigating and prosecuting international crimes and the need for State cooperation and enforcement. In the DRC – the situation in which the ICC has indicated the largest number of individuals – seven arrest warrants have been issued to date, mostly for mid-level rebel leaders.[41] Combined with the absence of a comprehensive domestic accountability process, the vast majority of perpetrators of international crimes, especially government-connected, are thus treated to impunity.[42] Similarly, despite attempts at pursuing accountability in other situations of civil war, such as Uganda, Central African Republic, Sudan, and Libya, these only a tiny fraction of those responsible for the massive crimes committed are brought to account, and in many situations suspected perpetrators continue to wield political or military power. Yet, such attempts at rendering justice, even if limited in scope, may in some ways positively impact the conduct of parties to the hostilities. For example, some suggest that awareness of the unlawfulness of conscribing child soldiers has increased following the indictment and later

[40] Accordingly, tensions may arise between promoting accountability norms and respecting due process rights of suspected perpetrators, as was so clearly the case in Rwanda following the genocide and the civil war that surrounded it. See e.g. William A, Schabas, 'The Rwanda Case: Sometimes It's Impossible' in Bassiouni (ed.), *Post Conflict Justice*, 499-522.

[41] See the info available at https://www.icc-cpi.int/drc.

[42] For a recent account of the challenges associated with pursuing accountability, internationally and nationally, for crimes in the DRC, see Patryk Labuda, 'Taking Complementarity Seriously: Why is the International Criminal Court Not Investigating Government Crimes in Congo?', *Opinio Juris*, 28 Apr. 2017, available at http://opiniojuris.org/2017/04/28/33093/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

conviction of Lubanga for such crimes.[43] More broadly, the existence of accountability processes can empower actors working to constrain abuses in armed conflict.

4.2. One-sided Justice

War crimes and other abuses committed in war are often perpetrated by combatants on all sides to the conflict (though of course the scope and seriousness of crimes committed by different actors can vary). This presents, at least partially, a difference from the contexts of democratic transitions that informed the early field of transitional justice.[44] Complicity on both sides raises important questions as to how to ensure even-handed justice, and the consequences of failing to do so. In situations where war ends with a clear victory to one side, accountability measures at the domestic level tend to apply to the losing side only. In Rwanda, for example, the post-genocide Gacaca courts have prosecuted hundreds of thousands of genocide perpetrators, whereas members of the Rwandan Patriotic Front (RPF) responsible for war crimes and possibly crimes against humanity in the civil war that surrounded the genocide have not been brought to account.[45] Yet, problems with one-sided justice are not limited to accountability mechanisms at the national level, but extend to international tribunals (and have done so since the Nuremberg trials).[46] Although the

[43] For a thoughtful debate about the ICC's ability to deter specific crimes such as recruitment of child soldiers and the impact of the Lubanga ruling, see Abigail Reynolds, 'Deterring the Use of Child Soldiers in Africa: Addressing the Gap Between the Mandate of the International Criminal Court and Social Norms and Local Understandings', *Master Thesis submitted to Leiden University*, June 2016, available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/41163/Reynolds,%20Abigail-s1754807-MA%20Thesis%20PS-2016.pdf?sequence=1.

[44] As noted by Reiter et al., while 'authoritarian regime transitions tend to involve abuses by one set of actors, war tends to involve complicity on both sides'. See Reiter et al., 'Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts', 139.

[45] See e.g. René Lemarchand, 'The Politics of Memory in Post-Genocide Rwanda', in Phil Clark and Zachary Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst Publishers 2008), 21-30.

[46] See e.g. Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', *Journal of Human Rights* 4/2 (2005), 213-231.

establishment of an accountability system at the international level was intended to promote accountability for State crimes,[47] the fact remains that international justice is typically only successful prosecuting those in opposition to the incumbent, including rebel forces and ousted State leaders.

Attempts by the ICC to render justice for all sides to a conflict responsible for abuses have so far proven largely unsuccessful, for a large part due to the Court's dependence on States' cooperation.[48] For example, in the situation relating to Darfur, Sudan, the Court has issued arrest warrants and summonses to appear for both government officials, including sitting head of State Omar al-Bashir, and rebel leaders, but only the latter have appeared before the Court due to the non-cooperation of the Sudanese government (and other States).[49] In the Kenyan situation, the Prosecutor deliberately pursued a strategy of targeting both sides to the 2007-08 post-election violence.[50] This strategy arguably aimed at countering the criticism arising from earlier situations such as Uganda where the Office had pursued only one party to the conflict (i.e. the LRA), notwithstanding credible allegations that the Ugandan army is also responsible for serious and

[47] See further William A. Schabas, 'State Policy as an Element of International Crimes', *Journal of Criminal Law and Criminology* 98 (2008), 953-982.
[48] On the importance of State cooperation (and the ICC's limited ability to promote it), see further Rita Mutyaba, 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions', *International Criminal Law Review* 12 (2012), 937–962; Human Rights Law Centre, University of Nottingham, 'Cooperation and the International Criminal Court Report', Report on Expert Workshop, 18-19 Sep. 2014.
[49] See e.g. Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir', *Fordham International Law Journal* 34/6 (2011), 1585-1619. Most recently South Africa failed to arrest al-Bashir as he attended a meeting there in June 2016, leading to significant controversy, which arguably was a major reason why South Africa later announced its intention to withdraw from the ICC. See e.g. International Commission of Jurists, 'South Africa appears before ICC for failure to arrest Sudanese President Bashir – The ICJ observes the hearing', 6 Apr. 2017, available at https://www.icj.org/south-africa-appears-before-icc-for-failure-to-arrest-sudanese-president-bashir-the-icj-observes-the-trial/.
[50] The PEV did not amount to an 'armed conflict' in humanitarian law terms, but the dynamics discussed here are nonetheless of interest.

large-scale violations of international law.[51] However, the attempt at rendering justice to both sides of the violence in Kenya ultimately proved unsuccessful, in part because those targeted continued to wield – or subsequently accessed – power and effectively mobilised against the ICC and because the Court had few remedies in the face of witness interference and lack of cooperation by the Kenyan government that followed the attempt to hold to account those in power. Due to these and other factors, all of the ICC cases relating to the post-election violence ultimately collapsed.[52]

A key challenge promoting even-handed justice is therefore that the effective operation of the system of international justice depends on State cooperation, but States tend to cooperate only when it is their opponents that are being targeted.[53] As Kersten notes, one key ramification of prosecuting only one party to a conflict is that international accountability systems risk creating an 'asymmetrical understanding of the causes and drivers of violence as well as the responsibility for atrocities'.[54] Yet, even if rarely even-handed and lucidly influenced by politics, the contemporary system for pursuing accountability for violations of the law on war presents progress from a rule of law perspective compared to the total impunity that characterised previous periods. The legitimacy of institutions such as the ICC cannot be simply dismissed because it largely

[51] See further Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *The European Journal of International Law* 21/4 (2011), 941-965.
[52] See further Thomas Obel Hansen, 'The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice', *Australian Journal of Human Rights* 18/2 (2012), 187-217; Yvonne M. Dutton, 'Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya', *Indiana International and Comparative Law Review* 26/7 (2016), 7-32.
[53] However, the Prosecutor has also been faulted for not developing sufficiently clear strategies on the basis of the goals of international justice for making selection decisions. See further Margaret M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Michigan Journal of International Law* 33/2 (2012), 265-320.
[54] Kersten however also notes that the ICC does not necessarily create, but rather tends to reinforce already existing narratives of 'good versus evil'. See Mark Kersten, *Justice in Conflict*, at 194-195.

operates on the premises of a world order that continues to privilege State sovereignty, rather than transgressing it.[55]

4.3. Blurred Lines between War and Peace

The starting point for bringing into play justice measures for serious crimes has historically been *after* war and/or the end of repressive regimes. However, justice tools, in particular accountability measures, are increasingly applied in 'institutionally and politically very fragile and unstable situations, before any discernible transition' from war to peace.[56] The fact that accountability processes are now frequently brought into play in situations where war is still ongoing presents, as Engstrom notes, 'a dramatic shift in the global accountability regime'.[57] Although the practice of international judicial interventions in ongoing conflicts can be traced back to the International Criminal Tribunal for the former Yugoslavia (ICTY), this trend has become more outspoken due to the operations of the ICC.[58] Indeed, the majority of ICC investigations were launched at a time where some form of armed conflict was still ongoing in the relevant countries.

As the ICC intervenes in ongoing conflicts in places such as Uganda, Sudan, Libya, the DRC, the

[55] For an account of the legitimacy challenges facing the current system of international justice, see further Thomas Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise', in Per Andersen et al. (eds.), *Law and Legitimacy* (Copenhagen: DJOEF 2015), 73-100.
[56] Par Engstrom, 'Transitional Justice and Ongoing Conflict' (further noting that 'there has been a discernible shift from the pursuit of accountability strategies after the cessation of armed hostilities on the one hand, and in the aftermath of political transitions on the other, to attempts to achieve accountability for atrocities even before a political settlement of armed conflict has been reached', at 42.
[57] Ibid. On the topic of justice in conflict, see further Thomas Unger and Marieke Wierda, 'Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice' in Kai Ambos, Judith Large et al. (eds.) *Building a Future on Peace and Justice* (Berlin: Springer 2009), 263-302.
[58] See similarly Par Engstrom, 'Transitional Justice and Ongoing Conflict' (noting that: 'the ICTY issued only few indictments during the armed conflict itself and cases only came to trial after the end of the war. Instead, the first significant attempt to pursue justice during ongoing conflict came with the indictment of Slobodan Milosevic during the NATO bombing of Kosovo', at 42.

Central African Republic, and Mali, the question emerges as to why this change concerning the timing of accountability processes has occurred. It has been argued that the pursuit of accountability during ongoing conflict is underpinned and driven by two main underlying trends, namely the intractability of contemporary armed conflict and the dramatic expansion of the international legal architecture.[59] More generally, scholars such as Sikkink point to the existence of a 'justice cascade', understood to comprise a shift in the legitimacy of the norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions – domestically and internationally – of transgressions of that norm, which has emerged for a large part due to the creativity and increased global reach of activists and human rights lawyers.[60]

However, despite the apparent normative appeal of accountability norms and the expansion of international legal regimes, there are significant challenges for international law to adequately address accountability issues in contemporary conflicts. For example, various forms of low-intensity conflict may not necessarily amount to an 'armed conflict' within the meaning of humanitarian law, which can present obstacles for pursuing individual criminal accountability for crimes committed during such conflicts. More generally, it is disputed to what extent humanitarian law applies beyond classical situations of war, including in situations labeled post-war but characterised by high levels of violence.[61] As the lines between 'war' and 'peace' have become

[59] Ibid, at 3. See also Luis Moreno-Ocampo, 'Transitional Justice in Ongoing Conflicts', *International Journal of Transitional Justice* 1/1 (2007), 8-9, at 8.
[60] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are changing World Politics* (New York and London: W.W. Norton and Company 2011).
[61] As Stahn notes: 'the norms of international humanitarian law, by definition, apply only to a limited extent to the period following the cessation of hostilities. Additional Protocol I provides that the application of the Geneva Conventions and the Protocol will cease "on the general close of military operations". This moment is usually deemed to occur "when the last shot has been fired". Only selected provisions apply after the "cessation of active hostilities". A "post-conflict" duty, namely the obligation to repatriate, is activated in a classical "wartime" situation, namely before the close of military operations, which marks the date of the termination of "armed conflict". Moreover, parts of the "law of war", namely specific duties of the occupant under the laws of occupation, continue

increasingly blurred, ambiguity concerning the applicable legal frameworks also increases. As Stahn argues, the 'classical dichotomy of peace and war has lost part of its significance due to the shrinking number of inter-state wars after 1945 and the increasing preoccupation of international law with civil strife and internal armed violence'.[62] Partly due to the current interweaving of the concepts of intervention, armed conflict and peace-making, Stahn suggests that the classical rules of *jus ad bellum* and *jus in bello* should be complemented with a third branch of international law, namely rules and principles governing peace-making after conflict, referred to as *jus post bellum*.[63]

As the law currently reads, there are multiple, partly overlapping, legal frameworks regulating the conduct in armed conflict and the accountability regimes relating to it. Importantly, whereas abuses in armed conflict may, depending on the circumstances, amount to violations of international humanitarian as well human rights law, the consequences of applying the respective legal frameworks vary significantly as the former primarily triggers individual criminal accountability whereas the latter primarily concerns State liability. Despite the emergence of notions of 'victim-centered' justice in international criminal law, victims of serious abuses committed in times of armed conflict may often be better served by pursuing accountability within a human rights framework, to the extent it applies to the situation where the abuses were committed.[64]

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to apply in a "peacetime" situation, namely after the close of military operations The norms of international humanitarian law are therefore only to a limited extent relevant to the broader process of building peace after conflict'. See Carsten Stahn, 'Jus ad bellum', 'jus in bello' . . . 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force, *European Journal of International Law* 17/5 (2007), 921–943, at 927.

[62] Ibid, at 923.

[63] Ibid, at 929.

[64] From a victims' perspective, pursuing accountability under human rights law may often prove the more feasible route, partly due to the relative accessibility of courts such as the ECtHR and other regional human rights courts and due to the ability of victims to bring human rights cases before domestic courts. Even if the ICC is mandated to order reparations to victims of international crimes and victims can participate in the proceedings, these regimes face significant challenges. See further Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court', *Journal of International Criminal Justice* 13 (2015), 281-311; Christine van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law* 44 (2011), 475-496. Human rights law, however, only applies to situations of armed conflict to

Beyond the legal uncertainties, the blurred lines between war and peace and the tendency to pursue justice while conflict is still ongoing raise questions concerning the reach of transitional justice, especially accountability measures, and the ramifications thereof. Justice processes which aim to address abuses committed in times of ongoing conflict in cases such as Sudan are now regularly conceptualised as transitional justice even if a transition is yet to occur – and it is uncertain if it will in any foreseeable future. This highlights a central expectation in contemporary transitional justice scholarship, namely that justice processes can help *initiate* a transition, rather than being pre-conditioned on the existence of it – or at least that what is now sometimes being referred to as 'pre-transition transitional justice' can advance other important goals such as providing victims with a level of redress.[65] However, in cases such as Sudan where a repressive regime remains in place and massive violations continue to take place there are obviously significant challenges related to operationalising any genuine justice process.[66] In other places, such as Colombia,[67] however, it has proven possible to bring in accountability measures in peace arrangements. Though frequently combined with some form of amnesty or reduced sentences, the move towards integrating accountability measures in peace agreements and other forms of settlements of armed conflict presents a significant development for how wars end.[68] This may impact the incentives of

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the extent the armed forces have 'effective control', as will be the case for example in detention facilities. See e.g. Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford: OUP 2016).

[65] See e.g. Freedom House, *Delivering Justice Before and After Transitions*, 2013, available at https://freedomhouse.org/sites/default/files/Delivering%20Justice%20Before%20and%20After%20Transitions%20Istanbul%20Report%20Final%202014.pdf.

[66] See e.g. Brian Kritz and Jacqueline Wilson, 'No Transitional Justice without Transition: Darfur – A Case Study', *Michigan State Journal of International Law* 19/3 (2010–2011), 475-500.

[67] See e.g. Maria A. van Nievelt, 'Transitional Justice in Ongoing Conflict: Colombia's Integrative Approach to Peace and Justice', *Cornell International Affairs Review* 11/2 (2016), 101-138.

[68] The UN has stated that 'United Nations endorsed peace agreements can never promise amnesties for genocide, crimes against humanity or gross violations of human rights'. See UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 Aug. 2004, para 10. On the actual use of amnesties, see further Louise Mallinder, *Amnesty, Human Rights and Political Transitions*.

parties to a conflict in multiple ways, but does not necessarily make the conclusion of peace arrangements less likely.[69]

5. Challenges pursuing Accountability for the Crimes of Major Powers

Conflicts involving military presence by major powers create unique challenges from an accountability perspective, especially perhaps to the extent this occurs in fragile or (partly) collapsed States and involves military engagement with non-State actors. Sometimes, as in Iraq following the ousting of Saddam Hussein, such presence is authorised by the regime in place. In other cases, such as Syria, the regime has not consented to Western powers' military operations, thereby raising *jus ad bellum* questions in addition to the *jus in bello* issues discussed here. The type of crimes occurring in such conflicts tend to differ from the large-scale atrocities committed in the type of conflicts discussed above. Yet, some crimes, such as abuse of detainees, appear to have been committed systematically in Iraq, Afghanistan and other situations and were seemingly authorised by the military or political leaderships in the US and elsewhere.[70] Such situations pose particular challenges from an accountability perspective, both due to the nature of the abuses and the secrecy that often surround them and due to the ramifications of potentially implicating senior military and political leaders of major powers.

Whereas transitional justice has historically not been particularly occupied with abuses committed by major powers in the context of military campaigns and security operations abroad,

[69] See further Mark Kersten, *Justice in Conflict*.
[70] For an account of US abuses in the war on terror, including a description of government authorisation under the Bush administration, see Human Rights Watch, 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees', 2011.

accountability issues are now increasingly on the table, for a large part due to the activities of the ICC. Notably, since 2007, the ICC has conducted a preliminary examination of the situation in Afghanistan, involving scrutiny of the conduct of US military forces and the Central Intelligence Agency (CIA) relating to allegations of the war crimes of torture, rape and other crimes in detention facilities and in the context of renditions.[71] Emphasising the apparent systematic nature of these abuses and the general absence of domestic accountability processes for these crimes,[72], the ICC Prosecutor stated in November 2016 that the Office will 'imminently' make a final decision as to whether to request the Pre-Trial Chamber's authorisation of a formal investigation into the situation in Afghanistan.[73] Besides the preliminary examination in Afghanistan, the ICC Prosecutor is currently conducting preliminary examinations involving a number of other major powers (or their close allies), including an examination into the situation in Iraq, involving an assessment of whether British troops committed war crimes in detention centers and elsewhere during the Iraq war and occupation;[74] an examination of the situation in Palestine, involving an assessment of whether the Israeli Defence Forces committed war crimes during the 2014 Gaza conflict and whether the Israeli government's settlement activities on West Bank territory amount to crimes under the Court's jurisdiction;[75] and an examination of the situation in Ukraine, involving an assessment of the events in Crimea and Eastern Ukraine from 20 February 2014 onwards, assumedly including scrutiny of the conduct of pro-Russian forces.[76] The Office of the Prosecutor has further opened a full-scale investigation into the situation in Georgia relating to the August

[71] See OTP Report on Preliminary Examination Activities (2016), paras. 198, 199 and 211.
[72] Ibid, paras. 212-220.
[73] Ibid, para 230.
[74] Ibid, paras. 75-108.
[75] Ibid, paras. 109-145.
[76] Ibid, paras. 146-191.

2008 war between Georgia and Russia over the territory of South Ossetia involving allegations of crimes by the Russian armed forces.[77]

Taken together, these preliminary examinations and investigations suggest a significant shift in international justice whereby the conduct of major powers in armed conflict is increasingly being scrutinised by international justice institutions, specifically the ICC. This raises a range of novel and important questions. On the one hand, potential ICC prosecution of members of the armed and security forces of major powers, or even senior civil servants who may have authorised crimes, would present a major boost for accountability norms (and for the ICC as an institution). On the other hand, this would also bring the Court into a head-on collision with these powers, which it may not be geared to handle. It is therefore likely that the Office of the ICC Prosecutor views its institutional interests as best preserved if the opening of these preliminary examinations and investigations results that major powers undertake credible investigations and prosecutions domestically, in that way triggering the Court's so-called complementarity regime whereby ICC cases become inadmissible to the extent there are genuine domestic criminal processes dealing with the persons and incidents subject to ICC investigation.[78]

However, the extent to which so-called 'positive complementarity' whereby the Court's activates are thought to encourage such genuine domestic processes actually 'works' is disputed. For example, the ICC's Iraq/UK preliminary examination has not 'triggered' a genuine domestic

[77] See Office of the Prosecutor of the International Criminal Court, *Request for Authorisation of an Investigation pursuant to Article 15*, ICC-01/15-4, 13 Oct. 2015, paras. 98; 140.
[78] For a detailed account of such strategies in the Iraq/UK preliminary examination, see further Thomas Obel Hansen, 'Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses', in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices* (TOAEP 2017), 399-450.

accountability process so far. Even if British officials have in the past cited to the ICC's preliminary examination as a justification for the continued existence of the Iraq Historic Allegations Team (IHAT) – a body set up to investigate allegations of crimes by the armed forces in Iraq – that body was created to satisfy the demands to investigate under human rights law, and in early 2017 the government announced its intention to dissolve IHAT, notwithstanding that the ICC's preliminary examination is still on-going.[79] This suggests that the ICC may have a less decisive impact on decision-making processes relating to domestic justice processes in the UK than hoped for by advocates of positive complementarity.[80] There are even fewer reasons to believe that the US – which is not a State Party to the Rome Statute and has in the past taken a hostile attitude towards the ICC when perceiving the Court's actions to contravene its interests – will fundamentally alter its approach to accountability for torture and other war crimes allegedly committed in Afghanistan and elsewhere as a consequence of ICC activities.[81]

Despite the activities of the ICC, there are significant challenges related to promoting criminal accountability for members of the political and military leadership of major powers who allegedly authorised or accepted the use of methods of warfare in violation of international law. However, other less far-reaching approaches to accountability may prove more feasible addressing these types of abuses. For example, lawyers have successfully brought civil suits against the Ministry of Defense in the UK, leading to settlements whereby hundreds of Iraqi victims have received

[79] Ibid.

[80] For examples of such expectations, see e.g. Fatou Bensouda, 'Reflections from the International Criminal Court Prosecutor', *Case Western Reserve Journal of International Law* 45 (2012), at 508-509.

[81] On US-ICC relations, see further David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: OUP 2014).

compensation.[82] The UK has also witnessed a continued debate about the legality of the Iraq war, including attempts at holding to account the political leaders who ordered and planned the invasion.[83]

6. Conclusions

Justice tools, regularly conceptualised as transitional justice, are increasingly applied to situations of armed conflict, both after war has ended and while hostilities are still ongoing. Transitional justice claims to possess the ability to both contribute to resolving and regulating the conduct in armed conflict. Exploring these claims, this Article has pointed to the significant progress made giving effect to accountability norms for crimes committed in armed conflict, but also a range of complexities and challenges in so doing. Concerning the ability of transitional justice to contribute to ending war, it is clear that the correlations between peace and justice cannot be summarised in simple slogans such as 'peace versus justice' or 'no peace without justice'. Rather, justice processes entail a range of dynamics which impact peace processes in multiple, sometimes contradicting ways, and which can vary significantly over time and space. Concerning the ability of transitional justice to regulate the conduct of parties to armed conflict, the nature of contemporary forms of conflict presents significant challenges, for example due to the magnitude of abuses frequently associated with civil wars and because a distinction between victims and

[82] 'Hundreds of compensation claims against British soldiers could be abandoned after controversial law firm announces closure', *The Telegraph*, 15 Aug. 2016, available at http://www.telegraph.co.uk/news/2016/08/14/hundreds-of-compensation-claims-against-british-soldiers-could-b/.

[83] Lawsuits relating to the legality of the 2003 Iraq War, brought on the basis of rules concerning private prosecution, have been filed in British courts, requesting trial of then prime minister Tony Blair, foreign secretary Jack Straw, and Lord Goldsmith, the attorney general at the time. However, the High Court ruled in July 2017 that the crime of aggression does not exist under English law and hence blocked the suit. See further 'Tony Blair Prosecution over Iraq War blocked by Judges', *Guardian*, 31 July 2017, available at https://www.theguardian.com/politics/2017/jul/31/tony-blair-prosecution-over-iraq-war-blocked-by-judges.

perpetrators cannot always be easily drawn. Furthermore, justice for atrocities in war, whether occurring at the national or international level, continues to be usually one-sided. Unsurprisingly, it has in particular proven problematic pursuing political and military leaders who continue to hold power. At the same time, however, accountability for crimes committed by major powers in armed conflict is now increasingly on the agenda, in particular due to the ICC's recent activities.

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