upon transitional justice processes than they can reasonably manage.[5] Where, exactly, the line should be drawn between transitional justice processes addressing violation of civil and political rights and economic, social, and cultural rights or development challenges remains unclear. That is to say, prosecutions of individuals for ''disappearing'' individuals but not for expropriating their property in the process would appear to distinguish somewhat arbitrarily among abuses of the same persons. The same may be true of exclusion of corruption charges when trying individuals for crimes against humanity committed simultaneously, whether in support of, or supported by, corruption.

Legacies of Transitional Justice and National Justice Systems

Finally, transitional justice measures are increasingly expected to leave legacies behind for affected societies. At one level, this should not be surprising, given the strong emphasis many scholars and practitioners place upon victim-centered approaches to justice. However, one specific expected legacy relates directly to peacebuilding: the demand that accountability measures, particularly local, international, hybrid, and transnational trials, make direct contributions to building national legal systems. Thus, for example, the Special Court for Sierra Leone has been expected to provide a legacy for the national judicial system, despite the formal institutional separation of the two, and the narrow mandate of the former and thus of the specialized legal knowledge it might be expected to impart. I remain skeptical that transitional justice mechanisms such as trials, regardless of where they are conducted, can assist (re)development of national legal structures, and concerned that they may instead promote a degree of brain drain in countries with limited trained legal personnel. In Sierra Leone, the most tangible legacy of the Special Court is the court and prison infrastructure. The latter has been transferred to the national prison authority and houses some female prisoners in considerably better facilities than the main Pademba Road prison in Freetown. This is undoubtedly positive. The effects of the transfer of the court facilities remain less clear: they are largely being transformed into a peace museum and memorial.[6] Similarly, there is reason for skepticism regarding the effects of the International Criminal Court (ICC) via ''positive complementarity.'' For example, the former ICC prosecutor claimed that ICC scrutiny would help to promote domestic or hybrid prosecutions in Kenya. However, only a small number of low-level prosecutions resulted, with increasingly strong resistance to the court by Kenya despite public protestations of state cooperation, culminating in the election in March of two ICC accused, Uhuru Kenyatta and William Ruto, to the posts of president and deputy president, respectively.[7]

Space limitations prevent further reflection, so I close with the observation that transitional justice has indeed branched out, to engage peacebuilding, and with demands that it expand further. I would caution against overreach.

Remarks by Deborah Isser*

The questions posed to this panel deal with the purported expansion of transitional justice into areas of international criminal law, institutional reform and rule of law promotion, and

[5] Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,* Soc. & Legal Stud. 1 (2012); Justice and Economic Violence in Transition (Dustin Sharp ed., forthcoming 2013).

[6] http://www.sierraleonetrc.org/index.php/sierra-leone-peace-museum.

[7] Chandra Lekha Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity, and Impact,* 12 Int'l Crim. L. Rev. 1 (2012).

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socioeconomic rights (such as land restitution and reform), and what this expansion does to the coherence of the field. I would argue that in branching out, the field suffers from a number of flaws both on a conceptual level and as it translates into practice.

What Transition?

The first problem is that it is no longer clear what is meant by ''transition.'' The original remit of transitional justice was the context of particular political transitions in Latin America, Eastern Europe, and South Africa in the 1980s and 1990s, and the effort to remedy the violations of the previous regimes, mostly led by the new one to cement a break from the past. Out of these experiences, a cottage industry was born, categorizing, refining, and developing templates for a series of mechanisms generally agreed to comprise criminal prosecutions (with a range of models from international tribunals, to hybrid to fully domestic ones); truth-telling (mostly in the form of standardized truth and reconciliation commissions); vetting (weeding out abusers from the public service, and police in particular); and reparations (compensation to the victims of abuse).

Today ''transitional justice'' has become a steady pillar of efforts to engage in far less clear-cut situations—where intrastate conflict either rages on, or has (partially) transformed from armed conflict to highly fragile and contentious political arrangements. The term ''transitional justice'' with regard to Darfur, for example, reflects perhaps an aspirational hope rather than the reality—most blatantly because the president of Sudan, Omar Bashir, is an ICC indictee. Bosnia and Herzegovina, Liberia and Afghanistan present better candidates as they each formed new governments following internationally sponsored peace agreements. Yet these reflected power-sharing arrangements among the previously warring parties rather than a clear break from an oppressive regime. These weak governments cannot afford to pursue transitional justice, not least because they share culpability for abuses and must maintain a fragile balance lest one party return to violence. In Iraq and Libya, transitional justice risks becoming victor's justice (as in the public hanging of Saddam Hussein) and a tool for fighting a continuing insurgency. Yet all of these countries have seen active efforts by members of the international community to apply the menu of transitional justice mechanisms.

Justice or Transition?

In these cases transitional justice tends to look more like international justice, that is, calls for application of principles of international criminal law that require accountability for grave abuses of human rights. It is thus pursued not as a means of cementing a political transition and enabling a society to turn the page and engage in a common nation-building endeavor, but rather as an obligation to the international rights regime. This is certainly a laudable and critical aim, but it muddies the conceptual underpinnings of transitional justice. Perhaps this is better framed simply as justice—international justice in line with the emerging body of international law and norms, where the task is really pressure and advocacy to provide justice for wrongs, through retributive and/or restorative means.

But the field of transitional justice makes claims beyond this, that is, beyond accountability and beyond mechanisms that follow political transitions, to the claim that it can actually foster transitions. Truth commissions, for example, are often held up as ways of generating personal and group catharsis, mending state society fissures, and proposing sweeping recommendations aimed at institutional changes. Prosecutions make claims of deterrence, changing local narratives, and demonstrating a commitment to ending impunity.

While these claims are appealing, whether or not they in fact achieve those goals is not a normative question, but an empirical one that is bound up in deeply contextual factors related to the nature of the political settlement, development trajectories, and other forces of social and political change or stagnation. Here is where the four core transitional justice products, bolstered as they are by normative claims of justice, may not be fit for purpose in the messy and non-linear realities of complex transitions out of conflict. Or, put differently, they may advance some goals, but rarely all of the claims that are made, and sometimes at the expense of others. Take, for example, the ICTY, which has undoubtedly made tremendous contributions to international jurisprudence regarding war crimes, and has done a great service in removing some of the key perpetrators from the scene. But nearly 20 years after its establishment, politics and ethnicity in Bosnia and Herzegovina remain as divided as ever, and victims have generally not found satisfaction in the justice meted out by the ICTY. Liberia's Truth and Reconciliation Commission made important findings in terms of long-standing fissures and the need for reform, but was largely dismissed for threatening the fragile political order.

Nor have the claims of transitional justice proponents to the creation of legacies in terms of more effective domestic rule of law systems borne true. In Sierra Leone, Timor Leste, Rwanda, the Solomon Islands, and the Balkans, for example, international justice efforts focused heavily on mechanisms to prosecute serious crimes from the conflict, but (perhaps with the exception of Bosnia) there have been no legacy effects on the domestic justice system. Perhaps to the contrary, donor funds that might have focused on establishing an effective justice system were largely diverted to the transitional justice efforts.

This is not meant in any way to diminish the critical role of promoting accountability that has been played by transitional justice. Rather, it is to note that the field may well overreach in its claims to simultaneously promote peacebuilding and transition aims.

Rule of Law/Justice Reform as Transitional Justice?

The tensions between backward-looking transitional justice (dealing with past crimes) and forward-looking rule of law efforts (establishing effective and legitimate justice systems) are somewhat reconciled through increasing focus on complementarity—supporting domestic justice systems to provide effective prosecutions and thereby obviate the need for ICC intervention. Dialogue between transitional justice and development practitioners is beginning on this issue, but at present they remain uncomfortable partners. The former is ultimately an externally promoted political agenda (albeit with more or less strong domestic constituents) and brings to the table a set of advocacy and leverage tools to achieve particular goals—mostly accountability for perpetrators or reparations for victims. The latter has been grappling with the challenges of fostering institutional reform that is embedded and sustainable and that has proved largely impervious to external ''best practice'' efforts to ''fix'' deficits.

Justice reform efforts, particularly in fragile and conflict-affected states, have been said to have reached ''a crisis of confidence.''[1] The critiques have been around for decades: in a nutshell, justice systems cannot be imported as a technology; efforts to identify and then fix deficits and gaps with respect to an idealized end state, primarily through law drafting, training, capacity-building, bringing up to internationally recognized human rights standards, regularly fail to achieve real change. Many of these efforts fall prey to what has been termed

[1] Eric Scheye, *Some Thoughts on Law and Justice: What to Do About the 'Crisis of Confidence'?*, USAID Office of Development Effectiveness (2012).

''premature load-bearing'' (expecting too much from institutions that are lacking basic nuts and bolts); ''isopomorphic mimicry'' (transplanting ''best practice'' institutional forms with the assumption that they will result in the same functionality in different contexts); and state centrism (ignoring the multiple sets of norms, authorities, and rules of the game outside of formal state institutions that have a much greater impact on behavior and conflict resolution).[2] The World Bank's *World Development Report 2011: Conflict, Security and Development* further tells us that justice and governance institutions are the hardest to reform, taking an average of 41 years for the fastest reformers to achieve basic governance transformations.

What does this all tell us about justice reform? It is a deeply political process, and one that must emerge primarily from local forces of contestation, development trajectories, and changing political settlements. While normative-based advocacy and a focus on accountability have a role to play, development practitioners need to find much more nuanced, contextual, and adaptive forms to coax these (historical) processes toward socially generative reform. In this way, transitional justice and its emphasis on immediate redress is not a particularly useful framing for rule of law development work.

Transitional Justice and Socioeconomic Rights

The panel was asked how it sees the role of land rights and land restitution as a question of transitional justice. In some ways it is an easy fit. Forced displacement, forced eviction, land-grabbing, and illegal exploitation of natural resources are all, unfortunately, common features of today's conflicts. As significant rights violations they should be remedied too.

The Dayton Accords, which brought peace to Bosnia and Herzegovina set an important precedent in this regard, providing for the right of the displaced to return to their homes. Ten years later, the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (known as the ''Pinheiro Principles'') affirmed a right to restitution (derived from the right to property and right to a remedy), with compensation allowed only where restitution was not possible. A transitional justice framing can be useful in keeping the focus on victims, wrongs, and remedies, and indeed it has done so with great success in Colombia, leading to an ambitious land restitution and victims reparations scheme.

This approach, however, also has drawbacks. Restitution implies putting Humpty Dumpty back together. But this is rarely the case in conflicted settings. The status quo ante may have been unjust and an underlying cause of conflict; many of the displaced may never have had property rights in the first place; there may have been waves of displacement, migration, and legal change such that the status quo ante is highly subjective and political; land and resource scarcity, demographic changes, and politics may all require more context-based, developmental, and pragmatic approaches than a rights-based approach allows. A focus on victims may lead to preferential treatment deemed unfair by others, hindering reconciliation efforts. A focus on victims also may call for a concentration of resources on special-purpose institutions, taking away capacity from the broader developmental aims and services of the state, which may be necessary to address underlying sources of conflict (some fear this is may be the case in Colombia).

[2] *See, e.g.,* Lant Pritchett, Michael Woolcock & Matt Andrews, *Capability Traps? The Mechanisms of Persistent Implementation Failure* (Center for Global Development Working Paper No. 234, 2010); Deval Desai, Deborah Isser & Michael Woolcock, *Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies,* 4 Hague J. on Rule of L. 54–75 (2012).

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Conclusion

In sum, the field of transitional justice has made great strides in promoting the end of impunity and a focus on victims. This is at its strongest when supported by the norms and language of international justice. But the field loses its clarity when it tries to frame broader issues of peacebuilding and development, which may require different approaches to addressing underlying sources of injustice, tension, and conflict. Those efforts may well correspond with the vernacular meaning of transitional justice, but muddy the waters of the transitional justice field as it has developed.

Remarks by Payam Akhavan*

Complementarity

I have come to question what can realistically be achieved by international criminal justice. In particular, the ICC's complementarity scheme is a very, very complex equation in practice. The drafters of the ICC Statute decided to give primacy to national jurisdictions. Under what circumstances, then, does the Court exercise jurisdiction? There are two criteria for when, despite national proceedings, the ICC should exercise jurisdiction: unwillingness and inability.

Unwillingness is relatively straightforward, as was the case in the former Yugoslavia where the prospect of national courts exercising jurisdiction over Slobodan Miloščaronić was zero. In those scenarios international courts are most relevant but least effective. This is true unless there is some sort of regime change or some sort of external pressure that will force the surrender of the accused, or we are satisfied that the mere stigma of an international arrest warrant can have effect. Inability is the litmus test for the ICC, and, in the extreme case, a failed state with a collapsed judicial system.

Is the complementarity scheme a rush to judgment, or do we have to interpret it in light of a transition, which, by necessity, involves a long-term process of institution-building? In Libya, the Security Council referred the case to the ICC when the Gaddafi regime was in power; by the time the arrest warrants were executed, the regime had collapsed. In that sort of situation, the ICC has to strike a balance between avoiding the rush to judgment and the much more important process of capacity-building. On the other hand, balancing must be done in a way which recognizes the complementarity scheme. The only way to allow for some sort of balance as opposed to rushing to judgment is to prolong that process of determining whether a case is admissible or inadmissible; if you give no time, then in effect no cases in transitional situations can be declared inadmissible because there will be every opportunity to find some fault with the judicial system.

The ICC has understandably shown a reluctance to make determinations on unwillingness or inability; invariably you are putting an entire judicial system on trial. The ''same conduct'' test is the easier way out; it is part of the two-step process of determining admissibility. First, there must be national proceedings in relation to the ''same person'' and the ''same conduct,'' after which the Court will determine whether there is willingness or ability. So far, the Court has found a way out through a very particularistic determination that the ''same conduct'' test is not satisfied.

Does this mean that national authorities must mirror exactly the same case as the ICC prosecutor? Must the victims be identical, the incidents exactly the same?

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