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A Critical Note on “Hypercritical” Studies of Transitional Justice⁽¹⁾

Kazuo Ohgushi *

I. Introduction

1. Transitional Justice and the Punishment of Human Rights Violators

Transitional justice (hereinafter “TJ”) refers to a set of judicial and non-judicial measures implemented to deal with the legacies of massive human rights abuses committed during armed conflict or under state repression. World interest in TJ continues to grow as more and more countries adopt some combination of TJ measures; there is a concomitant growth of research and publications on the subject.

Not only has the number of cases increased steadily over time, but the repertoire of measures used in the name of TJ has also expanded. Initially, when TJ was introduced in Latin America in the 1980s, it almost exclusively related to criminal prosecutions as well as truth commissions established for multiple purposes.⁽²⁾ To these basic measures, others were added at later stages, including

(1) Earlier versions of this paper were presented at the Annual Convention of the Japan Association of International Relations at the International Congress Center Epochal Tsukuba, Tsukuba, Japan, November 11-13, 2011, and at the international symposium on “Political Violence and Transitional Justice,” at International Christian University, Tokyo, Japan, January 18, 2014. The research for this article was supported by JSPS KAKENHI (Grant-in-Aid), Grant Number 23243019.

(2) “Truth commissions” are typically established after massive human rights violations to investigate their causes and circumstances. Their objectives may include fact-finding, the presentation of lessons for society, national reconciliation, reconciliation between perpetrators and victims, catharsis for the victims who testify before them, and providing a measure of accountability for the abusers.

lustration, reparations, state apology, commemorative projects such as memory sites and commemorative events, local efforts of commemoration and/or reconciliation, and the reforms of the military, police and other institutions. Moreover, whereas initial TJ cases in Latin America largely dealt with human rights violations under preceding dictatorial regimes, in the 1990s TJ began to address human rights violations in armed conflicts, and these cases have predominated recently.⁽³⁾

Today, as expressed in the reports of the UN Secretary General to the Security Council (United Nations, 2004, 2011) and the resolution by the General Assembly of December 16, 2005 (United Nations, 2005), TJ is recognized by the international community as an indispensable mechanism for countries emerging from dictatorship or internal armed conflict.

These UN documents support all of the above-mentioned components of the TJ package, a position shared by major international human rights organizations. In practice, too, international organizations and “Western” governments have both recommended and promoted these measures for emerging democracies, post-conflict countries, and even countries with on-going conflicts, although with considerable inconsistencies, especially in the cases of governments.

However, TJ has received strong criticism, especially with regard to the punishment of perpetrators of human rights violations. Somewhat ironically, these critiques emerged precisely because TJ was “mainstreamed.” As stated above, TJ, which began as a domestic effort in Latin America, was later adopted by the “international community” as part of peacebuilding measures, and was recommended to—or imposed on, depending on the perspective,—countries all over the world. This fact, as well as the generally negative perception on the achievement of the stated TJ goals, generated critical attitude towards the

(3) In this article, the term “human rights violations” refers to violations of the rights to life, physical integrity, and freedom, especially extrajudicial killings, disappearances, torture, and arbitrary detention, as well as economic loss concomitant of such violations. Although human rights violations under international human rights law include only those acts perpetrated by state agents, here they will also refer to the acts of non-state actors in breach of international humanitarian law.

“mainstream model” of TJ, including the component of criminal prosecutions. Indeed, it appears that while proponents of criminal prosecutions were dominant on that issue until the 1990s, those opposed have been increasingly influential in the scholarly debate since the 2000s.

2. “Hypercritical” Studies of Transitional Justice

Until the 1990s, most of the critiques of and opposition to the criminal justice component of TJ could be divided into two types. One type of critique/opposition was voiced by the perpetrators themselves and their supporters, who stood opposed to criminal prosecutions of perpetrators, justifying the perpetrators’ acts or claiming that the prosecutions were unjust. A second type of criticism was based on pragmatic grounds. Academics and practitioners who adopted this stance attached relatively little importance to the justice issues, and opposed the punishment of perpetrators on pragmatic grounds, claiming that it would endanger more important goals, such as peace and democratic stability. In addition, the experience of *ad hoc* criminal tribunals in former Yugoslavia and Rwanda aroused criticism of the vast sums of money required to conduct such prosecutions, and the minimal return in terms of the number of convictions and the achievement of beneficial effects, which such convictions supposedly were to bring about. These opponents and critics of criminal justice, overall, represented the conservative side of the political spectrum, until the 1990s.

Since the 2000s, a different brand of critique developed, this time from the leftist or progressive side of the spectrum, sometimes with a postmodern tint. This new brand of critique opposes the punishment of human rights violators for the following reasons. First, it asserts that criminal prosecutions are an arbitrary and “imperialistic” imposition by the Western powers. It also regards what it perceives to be the dominant or mainstream TJ model, which incorporates criminal justice, as an imperialistic attempt to impose Western liberalism on non-Western soil. Second, it maintains that criminal justice is not “victim-centered.”⁽⁴⁾ Victims have more important needs than the punishment of

(4) In this article, the term “victims” refers to those directly affected in their physical integrity and freedom, *as well as* to their family members.

perpetrators, such as those of distributive justice, and the pursuit of retributive justice detracts attention from their primary needs.⁽⁵⁾ Third, it is skeptical about the benefits of criminal justice, especially because such endeavors arguably do not solve the “root cause” of the conflict, namely, deplorable socioeconomic conditions attributable to Western colonialism or the Western promotion of neoliberalism (e.g., Tosa, 2006, pp. 128, 140). Finally, some authors suggest that, whereas in criminal justice there should be a clear distinction between perpetrators and victims, in internal armed conflicts in poor and heavily unequal countries, all inhabitants are victims and perpetrators to some extent, and criminal justice is not suitable or appropriate to deal with this type of situation (Arriaza and Roht-Arriaza, 2008, p. 153). Those who take an extreme position argue against any distinction between perpetrators and victims, proposing instead that all be called survivors (Mani, 2002, pp. 119-123; Shaw and Waldorf, 2010).⁽⁶⁾

Characteristically, and in contrast with earlier criticism, this new brand of critiques bases its criticism of criminal justice on justice considerations and ethical concerns. It finds current TJ endeavors to be morally corrupt and often paints a cynical picture of the promoters of current TJ projects, sometimes accusing them of advancing hidden selfish agendas. In contrast, these authors represent themselves as advocates of emancipatory agendas for weaker, marginalized people, thus positioning themselves on the left side of the political spectrum.⁽⁷⁾ Many of these critics have field experience in the countries where TJ

(5) For a useful review of critiques from the perspective of distributive justice, see Miller (2013).

(6) For the historical background to the development of this brand of critiques and the rationales of opposition to the punishment of human rights violators, see Ohgushi (2014). In this article, the present author qualifies the first two rationales (“Western imposition” and “not victim-centered”) by showing that, in Latin America, victims themselves strongly demanded retributive justice and that the punishment of human rights violators was made possible through the tenacious efforts of victims and their predominantly domestic supporters. This means that retributive justice was not imposed by Western powers, and it was implemented precisely due to the demands of the victims.

(7) Weinstein, H. M., Fletcher, L. E., Vinck, Patrick, and Pham, P. N. (2010) went so far as to characterize the current human rights field as “reactionary” (p. 28). It is important to note that not all leftists are against the punishment of human rights violators. For example, a large

is applied, either as an academic or as a practitioner, and assert that the advocates of mainstream TJ have little knowledge of those countries and no understanding of the complexities on the ground. They come from different academic backgrounds, among which anthropologists play an important role.

This article acknowledges that the failings of current TJ projects should be taken seriously, and that some of the concrete points made by these critics contain valuable observations.⁽⁸⁾ However, some of their arguments are deeply flawed. Nevertheless, an increasing number of researchers new to the field accept these arguments rather uncritically, a worrisome tendency for the future of TJ.

The aim of this article is to subject the arguments of these critics to critical scrutiny.⁽⁹⁾ For the lack of a better term, I tentatively call these critical writings “hypercritical,” borrowing the expression from Roland Paris (2010, 2011).⁽¹⁰⁾

majority of leftists in Latin America demand the punishment of the perpetrators of human rights violations committed under the past authoritarian regimes.

- (8) This is not to say that the present author agrees with most of these existing criticisms, which are often exaggerated, logically flawed, unsupported by empirical evidence, or simply manifestations of the authors’ ideological convictions. This is unfortunate, since the difficulties of TJ are real, and it remains important to improve TJ through constructive criticism.
- (9) Although Latin America initiated the current wave of TJ, accumulating rich experience, both successes and failures, recent debates tend to ignore the Latin American experience. As a specialist in Latin American politics, the present author further aims to qualify recent arguments, drawing on insights from the Latin American experience.
- (10) Roland Paris (2010, 2011) used the term “hypercritical school” in his works on the “liberal peace” debate to refer to the scholars and commentators who “view liberal peacebuilding as fundamentally destructive or illegitimate” (Paris, 2011, p. 31). Paris, one of the major critics of the liberal peace himself, wrote that “[s]aving peacebuilding does not mean blindly defending current international practice,” that “[c]ritical perspectives themselves need to be subject to ongoing scrutiny and review,” and that “it is important to distinguish between justified and unjustified criticisms” (Paris, 2011, p. 32, 46). The present author fully agrees with this stance, and writes this article in the same spirit. Note that this article avoids using the term “school,” so as not to give the appearance of a coherent group of authors, which they are not. One further caveat is in order. The problem of hypercritical research does not reside in the *degree* of their criticism but in their content and logic. The adjective “hypercritical” should not be taken to mean that the problem is “too much criticism.”

The next section offers general critical comments on hypercritical analyses, focusing on their logic, their views of relevant actors, and alternatives or the lack thereof. Although the primary focus of this article is to examine critiques of criminal justice by hypercritical authors, the second section casts a wider net, identifying general problems with their works. The following two sections take up two of the arguments of hypercritical research and examine them in some detail. The third section analyzes the increasingly common criticism that the current transitional justice does not address structural violence. The fourth section questions the argument that denies the distinction between perpetrators and victims, and opposes the punishment of perpetrators on that ground. The conclusion underscores the need for explicitly highlighting the wrongness of the abuses committed, a perspective usually lacking in hypercritical analyses.

3. Hypercritical Studies of TJ and “Liberal Peace” Critique

Before proceeding to the next section, a few words on the liberal peace debate are in order. There is a wave of critical opposition to the current peacebuilding efforts involving the international community, which argues that such efforts are an attempt to impose democracy and market reforms derived from Western liberal ideas on non-Western societies. These criticisms are framed as critiques of “liberal peace” or “liberal peacebuilding.” These labels, coined by critics, are “most commonly associated with the notion that the establishment of liberal institutions—democracy, human rights, an open economy, and the rule of law—is a key condition for sustainable peace in societies affected by civil war” (Zaum, 2013, pp. 107-108).⁽¹¹⁾ However, these labels are often used loosely without explicitly defining the term, resulting in considerable confusion in the debates.⁽¹²⁾

(11) Zaum refers to the concept of “liberal peacebuilding,” but we may safely extend it to the “liberal peace” label.

(12) For example, *any* intervention by Western states, interventions motivated by liberal objectives such as addressing massive human rights violations, and interventions justified by liberal causal beliefs stated above, have *all* been associated with “liberal peace” or “liberal peacebuilding” (Zaum, 2013, p. 108).

Hypercritical studies taken up here may be seen as part of the liberal peace critiques. It is important to emphasize that TJ is not, or at least originally was not, a mere tool of peacebuilding, as some authors seem to believe now. There is considerable overlap between the two, of course, but it was not for peacebuilding that Latin American victims sought justice and truth. Justice and truth were important for them, but not because they are instrumental in maintaining peace. However, since TJ research and conflict studies began to comingle, TJ is increasingly seen simply as one of the tools of peacebuilding. Hypercritical research began to flow after this merging of the two fields, and most of them have in mind post-conflict situations, rather than post-dictatorship settings.⁽¹³⁾ For these reasons, the hypercritical arguments related to TJ can be seen as part of, or at least closely connected with, the liberal peace critiques.⁽¹⁴⁾

As a result, there is substantial overlap between the deficiencies of the “hypercritical school” of the liberal peace critiques and those of the hypercritical studies related to TJ. Careful readers will find many parallels between what follows and the problematic aspects of liberal peace critiques—those that are deemed “hypercritical,” —some of which are analyzed in Paris (2010, 2011). However, this article will not deal with critiques of the liberal peace per se, focusing instead on the TJ debates.

II. General Critical Comments on Hypercritical Studies

This section offers general critical comments on hypercritical studies, focusing on their logical flaws, their views of relevant actors, and alternatives or the lack thereof.⁽¹⁵⁾

(13) For a more elaborated typology of different types of TJ settings, see Ohgushi (2014).

(14) For TJ critiques that explicitly connect themselves with critiques of the liberal peace, see, e.g., Sriram (2009), Franzki and Olarte (2014), and Robins (2013, pp. 12-14).

(15) It is necessary to emphasize here that the authors included herein in the “hypercritical” camp do not constitute a coherent group, and do not necessarily have all or the majority of the flaws indicated in this section, although they tend to combine several of them.

1. Problems with Logic

(1) Conceptual Elasticity and Arbitrariness of “Western Liberalism”

Although hypercritical authors blame many wrongs on the Western liberal paradigm, the “Western” and “liberal” in their research are unsuitably elastic and arbitrary as terms of reference. Often, something is referred to as Western and liberal when it is found to be inadequate and deserving of criticism, while the same thing is presented as a non-liberal and non-Western alternative to Western liberal prescription when it is to be endorsed. For example, reparations are sometimes presented as a “liberal tool” (Hegburg, 2014, p. 193), while in other cases they are presented as an alternative more attuned to the needs of non-Western indigenous people (Robins, 2013). While reconciliation in South Africa was associated with *ubuntu*, an African value par excellence, it is “peculiarly Western” for other authors (Sampson, 2003, p. 181). In another manifestation of contradiction, the hallmark of the liberal paradigm can be either a too forceful intervention in favor of democracy and human rights, or the neglect of such values in the Third World, depending on the critic.⁽¹⁶⁾

Hypercritical authors often employ a crude dichotomy between “Western” and “non-Western” cultures, claiming that the dominant model of TJ has a Western bias. This view is problematic at least in two ways. First, mainstream elements of TJ are often demanded by the bearers of non-Western cultures. Second, the boundary between “Western” and “non-Western” is at times arbitrarily defined.

As one example, Wagner (2010) associates the recovery and identification of the remains of the disappeared in post-war Bosnia with a discourse of rights, both the right to know and the right to justice, reflecting the ideals of Western

(16) Selby (2013) criticizes that both the liberal peace proponents and its opponents hold the consensus that peacebuilding is an essentially liberal project, and points out that the liberal peacebuilding doctrines and practices are actually unevenly applied or plainly ignored. This criticism also applies to hypercritical analyses on TJ. The easy assumption that the actual TJ practices represent Western liberalism may be the underlying cause for attributing mutually contradictory features to Western liberalism.

liberalism (p. 27). Here, Bosnia is apparently placed outside the “Western” realm, and the author implies that something alien to Bosnian culture was imposed by Western powers. However, in Latin America, where disappearance was a characteristic instrument of brutal state repression, the right to the truth (*derecho a la verdad*) has been forcefully demanded by victims. They had a strong desire for the recovery of the remains of disappeared family members and almost as strong a desire to know the circumstances of the death of their loved ones. Through tenacious struggle, these victims and their supporters saw their “right to the truth” recognized by courts and governments in some countries. Latin American experience also contributed to the gradual recognition of this right in international law.⁽¹⁷⁾

Of course, Latin America is culturally closer to “Western” countries than, for example, African countries are, but it is doubtful whether Bosnia is more “non-Western” than Latin America. More importantly, this desire for the truth is not limited to urban Westernized victims. Quechua-speaking Andean indigenous people have the same desire to recover their loved ones’ remains and to know what happened to their family members. They want to bury the remains properly because, in their conceptions, “[w]hen a deceased person’s body is buried in an irregular way, the soul suffers (Equipo Peruano de Antropología Forense, 2012, pp. 38-41, 88). Similarly, the Mayan people in Guatemala strongly desire to bury the remains of their family according to their tradition because if this is not done, they believe they cannot reconcile with the dead ones (Kozaki, 2000, pp. 12-13).⁽¹⁸⁾ Ironically, Simon Robins (2013) presented truth—the private truth about victims’ loved ones—and reparations as the most fundamental needs of the families of the disappeared in Nepal and Timor-Leste, juxtaposing these

(17) Note that documents of the United Nations and international law use the term “the right to the truth” or “the right to know the truth” when referring to enforced disappearance and other human rights violations, and not “the right to know” as in Wagner’s chapter, a concept that has developed in a different context. For the origins of “the right to the truth” in international law, see United Nations (2006).

(18) These beliefs are not limited to Latin American indigenous cultures. For the significance of exhumations and reburials of missing family members in Zimbabwe, see Eppel (2014).

demands to retributive justice promoted by Western powers as part of the liberal peace model.

(2) Throwing the Baby Out with the Bathwater?

Sometimes it is not clear whether hypercritical authors criticize the TJ model sought by international human rights NGOs or the TJ practice distorted by international and domestic political dynamics. Sometimes, by a leap of logic, they often implicitly discard the yet unattained TJ model by criticizing the distorted TJ practice. International human rights NGOs and victims' associations in Latin America also criticize the distorted TJ practice, but make efforts to push the reality of TJ closer to the ideal. In contrast, hypercritics, by criticizing the distorted TJ, throw away both the distorted practice and the yet unattained ideal TJ model itself.

(3) “Root Cause” Argument

Sometimes hypercritical authors employ a “root cause” argument to deny the desirability of retributive justice. According to this argument, the punishment of human rights violators has little worth, since it will not solve the root cause of the conflict that caused human rights violations in the first place. This type of reasoning is problematic and even dangerous.

First, the causal dynamics of a conflict are complex, and it will be an arbitrary exercise to determine which factor is the root cause and which is not. For example, many authors blame civil conflict on international inequality, without offering any proof for the connection. Another purported root cause is poverty. It is true that there are more conflicts in poorer countries, but the correlation is not perfect, suggesting that poverty is only one of the causes. Moreover, in some instances, poverty may be the result rather than the cause of civil conflict. While we may safely say that poverty is one of the factors that increase the probability of civil conflict, it is rather temerarious to say that it is *the* root cause.

Second, even if one sees a root cause in some factor, it requires a leap of

logic to argue that perpetrators should be absolved of criminal responsibility for that reason. Consider the case of common crimes, for example. If poverty is the root cause of thefts and robberies, does that mean that all crimes committed by poor people should remain unpunished, however vicious they may be? As a rule, it would not be wise for us to only address some root cause and refrain from any other action.

Third, related to the previous point, not punishing human rights violations risks encouraging such behavior. Suppose that Western colonialism is the root cause of African conflicts; does that mean then, that Charles Taylor of Liberia and the like should escape punishment? Should perpetrators of rape in the Congo not be punished? Does that impunity bring better results for the society in question? Of course, it is debatable whether criminal justice has salutary effects for society apart from its significance for the victims, but that issue should be subject to serious empirical inquiry and should not be determined a priori by the root cause argument.⁽¹⁹⁾

Finally, the root cause argument risks encouraging violence of a different sort. If the root cause of conflicts is international inequality, then it will be difficult to morally condemn international terrorism to combat that root cause. Further, if the root cause is found in domestic inequality, insurgent violence to overcome such inequality, such as that of Sendero Luminoso in Peru, can hardly be morally rejected. History seems to show that such “revolutionary” violence does more harm than good, especially in the contemporary era.

2. Flawed Views of Relevant Actors in Transitional Justice

(1) Homogenization of “Local People”

In a dichotomy between “local people” and “Westerners,” the great diversity of preference and interests among “local people” tends to be ignored. Hypercritical authors speak of imposition on local people, but often the Western countries’ so-called imposition was an imposition on the established power

(19) There is an incipient but growing trend of empirical efforts at such verification. For an effort at analysis of post-dictatorship TJ, see Olsen, Payne, and Reiter (2010).

circles in favor of victims of human rights violations. Such was the case with Western pressures for the implementation of the recommendations of El Salvador's truth commission, as well as pressures on the Guatemalan government regarding the Public Prosecutors' Office. In these cases, to oppose foreign pressure is to take sides with the powerful elites against the weaker people. Not all pressures are positive forces, of course, but one must differentiate. Contrary to the critics' claim that they are sensitive to complexities, they ignore these internal contradictions and power differences among local people when they juxtapose the West with the local people. This homogenization of local people is problematic, as is the homogenization of the West, as indicated below.

(2) Simplistic View of Promoters of TJ

Hypercritical authors have a very simplistic view of the forces that promote TJ in the world. Such forces include Western governments, international organizations, supranational courts like the International Criminal Court (ICC), international human rights NGOs, domestic NGOs in the countries where TJ is applied, and victims' associations. These actors do not constitute a homogeneous group. Moreover, these actors are not homogeneous within themselves. In particular, governments, and to a lesser extent international organizations, contain within themselves a variety of individuals, sections, and objectives that often contradict each other. However, hypercritical analyses ignore these complexities. As a result, for example, the ICC, and the U.S. government that has systematically tried to undermine it, and international human rights NGOs that severely criticize certain U.S. policies and even demand prosecutions of the top U.S. officials for authorizing torture in the "war on terror," are all represented as if they constituted a coherent whole that seeks the same goals.⁽²⁰⁾

(20) This tendency is common with liberal peace critiques. Even Oliver Richmond, who is more sensitive to the internal tensions and "graduations" of the liberal peace model, overemphasizes consensus on the goals, and reduces the focus of tension to mere methods. He writes, "There is little questioning of the validity of the liberal peace, or the way in which its various

This is ironic, since “complexity” is one of the favorite words of some hypercritical authors. While they constantly emphasize the complexities on the ground, they hold a surprisingly simplistic stereotype of TJ promoters.

This simplistic view sometimes leads to inaccurate statements. For example, Finnström (2010) claims that in Uganda, “it is the media, international human rights organizations, and the Ugandan government that have had the upper hand in defining the discourse on meaning,” and thus “only one guilty party” was created, i.e., the Lord’s Resistance Army/Movement (LRA/M) (pp.140-141). However, it is simply not true that international human rights organizations created “only one guilty party.” On the contrary, major international human rights NGOs have severely criticized human rights violations by both the state agents and the LRA/M.⁽²¹⁾

Relating to the distorted view of TJ actors, we can also point out that hypercritical analyses tend to exaggerate the importance of Western governments as advocates of TJ while minimizing non-governmental and/or local actors. Thus, Pierre Hazan (2010) almost suggests that TJ is an invention of the Clinton Administration (pp. 51-52). In fact, the Clinton Administration did not exist when TJ started in Latin America, and the US government has always been a secondary actor at best in the TJ in the region. Arguably, it has also been a secondary force in Central and Eastern Europe and South Africa, the other two regions Hazan mentions in his chapter.⁽²²⁾

components fit together with some notable exceptions. Thus, it is assumed that democratisation, development, and economic reform, are complementary, along with human rights reform, and legal process.... Most of the critical focus, therefore, tends to be on the methods used to construct the liberal peace most effectively, efficiently, and as quickly as possible.” (Richmond, 2006, p. 299) See the next point for the problem of viewing all actors as promoting market reforms.

(21) See the news and reports available at the websites of Amnesty International (URL: <http://www.amnesty.org/>) and Human Rights Watch (URL: <http://www.amnesty.org/>).

(22) Latin America, South Africa, and Central and Eastern Europe have adopted much different TJ models one from another. Furthermore, there is considerable variation in TJ models among the countries of the same region, whether in Europe or in Latin America. It is strange to explain all those dissimilar practices as stemming from the policies of the Clinton Administration.

(3) TJ as Agent of Neoliberal Agenda

It is often asserted that TJ has the objective of imposing a free market economy (e.g., Lundy and McGovern, 2008, pp. 276-277; Franzki and Olarte, 2014; Miller 2008, n.11). This misconception arises from the failure to distinguish among actors stated in the previous point, as well as the confusion of multiple objectives those actors pursue.⁽²³⁾

It is true that the promotion of a free market economy is one element of the policy objectives of some governments, notably of the U.S., that simultaneously promote TJ. However, there is no empirical effort to prove that that policy objective has actually driven any particular TJ projects. As regarding the ICC and other international and internationalized courts, it would be a product of wild imagination to assert that the judges and prosecutors working there have an ulterior motive of imposing neoliberalism.

International human rights NGOs, probably the most consistent promoters of TJ, do not have any official stance on the economic model, and critics cite this fact as evidence of human rights NGOs' tacit support of the neoliberal order. However, this reality can be more plausibly interpreted as arising from considerations similar to those of political neutrality: it is advisable for human rights NGOs not to take sides on potentially divisive issues unless those issues are directly connected with their human rights work, since such partiality might alienate potential allies and risk their credibility as impartial observers. In fact, the present author knows many individual members of human rights NGOs who are not comfortable with neoliberal policies. Moreover, even though human rights NGOs do not endorse particular economic models or policies, as far as they champion economic and social rights, they tend to be at odds with purely neoliberal policies.

Thus, TJ is promoted by a heterogeneous set of actors, some of which are in favor of neoliberalism, while others are not. To say that TJ is promoted to

(23) Sometimes, this perspective of TJ as agent of a neoliberal project reflects hypercritical authors' cynical view of the "international community" and other actors that promote TJ. These authors tend to think that the promoters of TJ have hidden and selfish agendas, but fail to provide convincing evidence to prove the point.

impose neoliberalism is, to say the least, not careful scholarship.

The tendency to view TJ as part of the neoliberal agenda seems to arise at least partially from what could be called “the ideology of liberal peace critique.” This ideology reifies the liberal peace and sees it as an indivisible whole rather than an enterprise that contains a set of variegated and often contradictory objectives and that has shifted in content and emphasis.⁽²⁴⁾ Thus, the components of liberal peace have rarely been treated as discrete elements, some of which could be promoted without embracing others. This reification is especially problematic with respect to the coupling of liberal democracy and neoliberal market economy, since the two objectives are differently valued by different actors, and some actors are only concerned with one or the other. Nevertheless, according to the logic of the ideology of liberal peace critique, if TJ is part of the liberal peace and the liberal peace imposes market reform, then TJ should be intrinsically connected with neoliberalism. Note the term “ideology” here, which is used because the connection between TJ and neoliberalism is an assumption at best (a dubious assumption at that), and not a statement that is more or less reasonably supported by factual evidence.

3. Ambiguities and Absence of Alternatives

(1) Liberal or Illiberal?

The hypercritical authors have an ambiguous and contradictory attitude toward Western liberalism. For example, many traditional cultures are characterized by patriarchy, but it seems that no hypercritical authors approve of its existence. Is gender equality not an imposition of “Western” and “liberal” values on non-Western cultures?⁽²⁵⁾ Obviously, there is no easy answer to this difficult moral question, but it should be noted that a soul-searching attitude

(24) For a similar observation, see Newman (2009, p.46) and Sabaratnam (2011, pp. 13, 25). For an analysis of the shifting emphasis in international conflict management since the end of the Cold War, see Sabaratnam (2011).

(25) Perplexingly, gender blindness is also attributed to the dominant TJ model that is supposedly “steeped in Western liberalism” (Nagy, 2008, pp. 275-276). To my mind, discourse on gender equality is one of the most conspicuous contemporary features of Western liberalism. If it is not, then which culture is more feminist?

among hypercritical authors is rarely seen on this point, when they pass judgments on the actions of the international community and of the local actors.

(2) Liberal Democracy as an Undesirable Goal?

Liberal democracy may be defined here as a political regime characterized by free and fair elections, respect for human rights, and the rule of law. The imposition of democracy and human rights by Western governments and the UN is one of the most common targets of hypercritical authors. At the same time, these authors claim that they are promoting an emancipatory agenda.

This article does not purport to engage in an ideological battle, but if the hypercritical authors pursue an emancipatory agenda, how can a society be emancipatory when there is no liberal democracy, and especially its human rights components, as evidenced by the daily experience of torture, extrajudicial executions, and other abuses? After all, it is precisely the marginalized people, the hypercritical authors' touchstone, that are most vulnerable to such abuses. It is one thing to ask for the balance between social justice and liberal democracy, but it is quite another to ignore liberal democracy as a desirable goal. Hypercritical analyses do not explicitly reject liberal democracy per se, but do denigrate efforts in that direction.⁽²⁶⁾

(26) It is true that elections are sometimes given undue importance compared with human rights in the conceptions of liberal democracy (Ohgushi, 2002, pp. 7-9). Moreover, their optimal timing can also be debated. In the end, however, elections will be necessary, since the alternatives are worse or unfeasible. One alternative is for the international community to pick up the governing elite. This will not only create a legitimacy deficit for the government, but the international community will also lose the appearance of neutrality, arouse resentment against it, and stir up—this time, justified,—harsh criticism from hypercritical authors. Another alternative is spontaneous consensus on the constitution of government, which is highly unlikely. The last alternative is to let sheer force determine the winner, but this course would contradict the very *raison d'être* of international intervention. These considerations may leave only one reasonable alternative: to let people decide on their leaders. Thus, holding elections in post-conflict societies may be a product of practical considerations rather than a Western liberalizing missionary zeal, as some might suppose.

(3) Lack of Mutual Engagement

Hypercritical authors agree with each other in their usually severe criticism of what they regard as the dominant TJ model and its promoters, but on closer look, not all the critiques go in the same direction. Many of the hypercritical authors are critical of criminal prosecutions—in particular, international courts—and truth commissions. However, some authors severely criticize the international community for the opposite reason. For example, Drexler (2010) condemns the fact that no international court was established in East Timor, allowing Indonesian perpetrators to get away with impunity. She even argues that “it is precisely the localization of accountability and liability that forecloses the possibility of justice,” an assertion that directly contradicts the localizing agenda cherished by other hypercritical authors (p. 61). Hazan (2010) criticizes the international community for not making warlords criminally accountable for their acts against the wish of the Afghan people (pp. 59-61). Dwyer (2010) speaks of “a keen suspicion that transitional justice is ‘third world justice,’ one that accepts a lack of government accountability for past abuses in the name of consolidating peace and democracy and channeling flows of capital” (p. 229). These views are in direct contradiction to the criticism that the international community overemphasizes criminal prosecution and imposes it in disregard of the wishes of local people. In other words, the views of hypercritical authors are not compatible with each other.

This is not a problem in itself. It is only natural and even beneficial that those disagreements exist. What is not easy to understand is why these authors rarely engage with each other critically. Their harsh criticisms are only directed against Western governments and the international community, but from opposite flanks.⁽²⁷⁾

(27) A related tendency of most of these authors is to morally question only the “international community” and to not do the same with local actors, both elites and non-elites, some of whom “overemphasize” criminal prosecutions, others torpedoing the former, bringing about “third world justice,” and others having committed atrocities in the first place. Does this not mean to strip local actors of agency, if we are to use an expression favored by these authors?

(4) Lack of Alternatives (Leaving Us at a Loss)

Finally, hypercritical analyses make one wonder what they propose as alternatives, both at the level of values and the level of a concrete course of action. At the level of values, if they criticize the liberal peace and liberalism with their emphasis on democracy and human rights, then what values do they stand for? Illiberal values? Do they accept torture and extrajudicial executions? If so, it will be helpful for them to declare it clearly. However, if they oppose human rights violations, on what grounds do they do so? Is it not grounded on liberal values?

Hypercritical analyses do not usually present alternatives of concrete actions, either. To be fair, this does not apply to all authors. Some of the critics advocate local reconciliation and memory projects as an alternative to the punishment of perpetrators. Others value silence and oblivion rather than truth telling. While one may debate the virtue of these proposals, it is to these authors' credit that they put forth clear alternatives.

However, other hypercritical analyses criticize TJ practice without presenting any alternatives. Revisiting Wagner (2010), she suggests that the very acts of identifying the remains of the missing persons and commemorating the victims in Bosnia have reinforced ethnonationalist discourses. She asserts that the ignorance of the Balkan history on the part of the international community led it to an attempt to ameliorate ethnic division and create an overarching collective identity, only to end up in failure before the reality of strong ethnic nationalism (pp. 32-41). Her entire chapter is spiced with anti-imperialist rhetoric and phrases.

In light of that criticism then, what should have been done? Wagner seems to imply that it was inevitable for the identification-commemoration project to galvanize ethnic antagonisms. So, should it not have started in the first place? Would that have been acceptable to the victims?⁽²⁸⁾ As for the efforts of the

(28) According to a former political advisor to the Office of the High Representative, Bosnia and Herzegovina, there was almost no one who opposed the exhumation project in Bosnia. Personal conversation with an anonymous former officer, November 2011.

international community to overcome the ethnic antagonism, what was the better alternative— to just recognize the reality and do nothing about it? Wagner’s chapter is silent on these questions.⁽²⁹⁾

In the face of these criticisms with a cynical tone in which the acts of the international community are represented as “intervention” (Wagner, 2010, *passim*), one might be tempted to think that the best that can be done for local people is to do nothing, ceasing the flow of the vast sum of money and human resources into TJ projects. But then, hypercritical authors are always there to reproach the *inaction* of the international community. Drexler (2010) asserts that the international community had the “command responsibility” for knowing and failing to prevent Indonesia’s military campaign in East Timor, and blames the international community for acquiescing to Indonesian impunity (p. 52). So, paradoxically, the international community is accused of imperialism by embracing the “Responsibility to Protect” and *at the same time* is accused of inaction, which is interpreted to be a sign of approval of the deplorable situation on the ground.

III. Transitional Justice and Structural Violence

This section examines the criticism that the current transitional justice does not address structural violence.

1. Should Transitional Justice Grapple with Structural Violence?

As stated at the outset of this article, the modern TJ started with a few

(29) Wagner’s chapter is also an example of another tendency of some hypercritical authors to assert that TJ promoters are ignorant of the local reality, and attribute their actions to that ignorance. The problem is that these authors, for the most part, do not present empirical evidence showing that particular policies were in fact adopted because of that alleged ignorance. Their reasoning is based on the assumption that, with sufficient knowledge, TJ promoters would have acted differently. This assumption is questionable. In the case of the post-war Balkan region, it may be more likely that international organizations would have attempted to tame hostile ethnonationalism if—and, indeed, even more if—they had a deep understanding of its history of severe ethnic conflict.

components such as criminal prosecutions and truth commissions, and gradually has expanded its repertoire. Nevertheless, its focus has not shifted. It has always been to deal with the legacies of physical violence (and concomitant economic loss) of dictatorship or civil conflict. In recent years, however, an increasing number of authors bitterly criticized precisely this point. They disapprove of the current TJ practice for not tackling inequality and structural violence.

Miller (2013) summarizes these criticisms as follows: “[a]rguments for including questions of inequality and structural violence fall primarily into three categories of justification: pragmatic (based on sustainable peace and root causes), philosophical (based on distribution or equity after conflict), and sociological (based on survivors’ preferences)” (p. 377).

The third justification, according to Miller (p. 378), “argues ‘on behalf of’ or relies on the voices of victims who prefer economic relief to narrative catharsis or prosecutorial excellence.” This claim can be accommodated within the framework of the TJ debates as the question of priority among different TJ measures (criminal prosecutions, truth commissions, and symbolic measures versus reparations) so long as the “victims” in question are those affected by physical violence. However, it requires much more than TJ to satisfy the other two justifications, and therefore, these criticisms are more a plea for displacement and destruction of TJ, rather than for its reform and reconstruction.⁽³⁰⁾

Miller (2008) criticizes TJ for not addressing socioeconomic rights, instead overemphasizing civil and political rights. By “socioeconomic rights,” she refers to “economic inequality, structural violence, redistribution and development” (p. 266). This author contends that TJ is fundamentally concerned with civil and political rights violations as well as the economic, social, and cultural rights

(30) Criticizing current TJ for its lack of consideration of inequality and poverty, Saffon and Uprimny (2010) propose what they call “transformative reparations,” which appear to be, essentially, reparations adjusted with the concern for transformation of social relations. In the present author’s view, such adjustment is perfectly possible within the TJ field, but this is not the type of solution offered by other authors, as will be seen below.

violations associated therewith, and it should remain so. TJ is not suitable for overcoming structural violence and inequality, firstly because this task requires a vast effort of development and structural transformation that may extend for decades, while TJ is a relatively limited enterprise in scale and time horizon (Waldorf, 2012, p. 179).⁽³¹⁾ Second, and more importantly, almost all measures conceived to this day in the framework of TJ are not adequate tools for addressing structural violence. For example, one of the differences between structural violence and physical violence is that in the case of the former, it is usually difficult to pinpoint the culprits and those who *illegitimately* benefited from the situation,⁽³²⁾ a reality that will preclude criminal prosecutions and civil damage suits. Similarly, state apology and other symbolic measures—such as the establishment of the “day of poverty,” a commemorative monument to inequality, and the naming of streets and parks after emblematic victims of poverty—are meaningless or even ridiculous. Lustration and vetting are also useless for structural violence.

Still, truth commissions can address the socioeconomic factors behind internal conflict in their report. There can be two types of cases. The first type is the situation in which truth commissions are established *in the absence of* massive human rights violations with the mandate to investigate structural violence per se. The other type is when truth commissions are established to deal with the legacies of massive physical violence, but analyze poverty and inequality as underlying factors of human rights violations, and then include in their recommendations a statement urging policies to address them.

(31) Although, in practice, there can be observed prolonged processes of TJ, such as criminal prosecutions after thirty years of the acts, this is not because of the nature and design of TJ, but because of the lack of political will, insufficient funding of judicial institutions, deliberate obstruction by defense counsel, and other obstacles. Obviously, this is not the situation after which TJ should be modelled, for “justice delayed is justice denied.”

(32) Apartheid and slavery are exceptions in this regard, because in those situations, it is relatively easy to view the benefit from cheap labor as illegitimate. The so-called “historical injustices” caused by colonialism or colonial settlers’ policies are also amenable to reparations since the culprits are relatively clear. Nevertheless, it is harder to say the same for inequality in general.

This latter type of efforts is not only feasible but also beneficial in the present author's mind.⁽³³⁾ In contrast, however, the benefit of the first type of truth commissions is disputable. One of the important functions of truth commissions is to reveal unknown facts and authoritatively confirm them, offering lessons to society. Structural violence such as poverty and inequality may still have facts to be revealed but, as a rule, its contours are well known in society. It is true that there should be more research and diagnosis of structural violence in order to tackle it, but that task requires a specialist team rather than truth commissions as we know them, which rely heavily on testimony, especially from victims.

Furthermore, TJ measures are proposed and implemented after exceptionally violent experience, but structural violence is already present without such exceptional violence. One does not have to wait for the occurrence of physical violence to begin tackling structural violence. If one values economic and social rights in their own right, one should always advocate it, regardless of whether a society experienced violence in the past. If one specializes in a "critical theory" of TJ and tries to downplay civil and political rights in the framework of TJ, one is essentially undermining the redress of violations of civil and political rights, regardless of one's subjective intentions.

Inequality and massive poverty are real problems in many societies, and these problems should be confronted, creating mechanisms most suitable for the task. As already stated, TJ measures practiced until the present day are not appropriate for the objective. Structural violence differs in nature from physical violence and concomitant economic loss—the traditional objects of TJ—, so it is natural that appropriate measures are also different.

It follows from this that these two tasks should be independent of each

(33) Admittedly, there are limitations in this type of undertaking. Truth commissions cannot decide on the causal importance of social and economic factors with the same certainty as when they address specific physical violations. Thus, for example, a truth commission cannot "determine" that resource and land inequity "caused" Rwanda's genocide (as Miller would have liked) with the same authoritativeness as when it describes the facts of physical violence.

other, for the merging of the two will denaturalize the essence of TJ and at the same time will be an inefficient means of tackling inequality and poverty. There can be, and probably should be, coordination between the efforts toward the achievement of different tasks, but never the subsumption of one into the other. The importance of inequality and poverty can raise the question of balance and priority, but that balancing can be done without forcing the amalgamation of the two tasks with negative consequences for both.

2. Does Social Justice Claims Trump Those of Transitional Justice?

Most hypercritical analyses are critical of retributive justice but are in favor of reparations to victims. However, if one were faithful to the position that prioritizes economic and social rights, the logical consequence would be the promotion of those rights without distinguishing between victims of physical violence and non-victims. This would preclude reparations. Pablo Kalmanovitz, a political theorist, precisely advances such a position. He argues that, in the aftermath of a massively destructive war that affects directly a large majority of the population, rights and obligations of social justice (i.e., overcoming poverty) should trump all rights of corrective justice (i.e., reparations) (Kalmanovitz, 2010, p. 72).

Kalmanovitz divides population into (I) poor victims, (II) well-off victims, (III) poor nonvictims, and (IV) well-off nonvictims, and argues that for people below a suitable social justice threshold, social justice priority trumps competing corrective justice entitlements; reparation is due to those above the social justice threshold only if no one is below that threshold (p. 78).⁽³⁴⁾

He offers essentially two rationales for his claims. First, whereas corrective justice aims to reestablish the conditions of the *status quo ante bellum*, it is

(34) Although he concedes the possibility of prioritizing members of the group of poor victims (I) over the poor non-victims (III), he does so only for the sake of rehabilitation—that is, as “special assistance to develop the same level of functioning and capacity of enjoyment as those unharmed who are below the SJ [Social Justice] threshold,”—justifying such assistance by the social justice principle, *not* by that of corrective justice (p. 87).

impossible to do so after massively destructive wars. Second, resources for post-war reconstruction are scarce, and funds for corrective justice have to compete with funds for providing social minima (pp. 84-85, 91).

Although interesting in abstract, his arguments are not convincing. As regarding the first rationale, if we follow this logic, we will encounter the paradox that the more damage one suffers, the *less* right to reparation one has, regardless of whether it is after a severe conflict. For example, if person A suffers an arbitrary detention only for one year, he will be able to resume his life plan, but if person B endures 30 years of arbitrary detention, he will not be able to resume his original life plan. In such a situation, according to Kalmanovitz' logic, person A has *more* right to reparations than person B. Similarly, reparation to the family members of the massacred would not recover the lives of the dead. Such reparation would be useless as corrective justice in Kalmanovitz' conception. Consequently, a person who suffered a minor economic loss has *more* rights than the family members of the massacred. Most people will concur that this is unreasonable.

Kalmanovitz' second reason, in contrast, is a potent one to qualify the right to corrective justice. In fact, in responding to this rationale, a model of reparation has been adopted in many countries; this model does not compensate individuals' loss in a precise manner, but instead offers a fixed sum of money smaller than the actual losses for each category of victims. However, Kalmanovitz even opposes this kind of "diluted version" of corrective justice (p. 88).

In practical terms, if we follow Kalmanovitz' recommendations in poorer countries, it is most probable that this will simply mean the abandonment of any reparation because the social justice threshold will never be attained in the near future, and victims of abuse will not be recognized as such. Worse, given the political constraints of many poorer countries, a more likely result will be little social transformation without any TJ.⁽³⁵⁾

(35) Although Kalmanovitz does not preclude TJ mechanisms other than reparations, such as

But what is more questionable about Kalmanovitz' argument is that he seems to underestimate the suffering of poor victims (I). However destructive a war may be, people do not suffer in the same way. Nevertheless, an implicit assumption behind Kalmanovitz's reasoning seems to be that "below a suitable social justice threshold," the poor suffer equally; for example, the disappearance or massacre of family members adds little if any to the existing suffering from poverty, making it unnecessary to differentiate between members of group (I) and group (III). If we do not presuppose this assumption, it is difficult to understand his extreme position geared towards denying all corrective justice under a certain threshold of social justice.⁽³⁶⁾ The author's modest knowledge of poor Peruvian peasants indicates that this assumption completely distorts the real lives of the poor. "Below a suitable social justice threshold," there are still happy moments and additional suffering.

Of course, resources are scarce in poorer countries, which may preclude complete restitution and ideal reparation. However, rather than abandoning reparation in a blanket manner as Kalmanovitz does, there is room to give *some* reparation to victims ("diluted version" of corrective justice), however symbolic, concomitantly pushing ahead with the social justice agenda. It is important to note that reparation not only has the function of compensation, but also the symbolic function of acknowledging the evil of human rights violations and

criminal prosecutions and truth commissions (pp. 92-93), this is difficult to understand given his logic offered above. Most TJ mechanisms incur costs, except state apology (by far the cheapest measure), lustration and some symbolic measures, such as the establishment of commemorative dates and the renaming of streets and parks. If we follow Kalmanovitz' logic, we should refrain from using public money for such purposes until the last person rises above the "suitable social justice threshold."

- (36) Another possible interpretation is that he assumes that the victims of physical violence do not deserve reparation from the perspective of corrective justice because such harm cannot be repaired (i.e., returned to the *status quo ante bellum*). This interpretation is grounded in the fact that his examples are limited to economic loss caused by wars.

recognizing the rights of the victims.⁽³⁷⁾

In short, TJ is not, and cannot hope to be, a panacea for every problem; its existence alone is not sufficient to satisfy the multiple needs of societies. If one has more than one problem, one has to address them all. If one has stomach ulcer and a bad tooth, both have to be treated. One cannot complain about his dentist for not curing his ulcer, nor is it wise to stop going to the dentist just because he will not cure his other disease. The same applies to TJ. If TJ is not useful for overcoming structural violence, it does not follow that TJ is meaningless.⁽³⁸⁾

(37) In addition to the rationales presented above, Kalmanovitz offers two more reasons to doubt the normative force of the right to reparation in the aftermath of war. First, the aim of reparation is to restore the *status quo ante bellum* but that *status quo ante bellum* caused the war in the first place. Second, where conflicts and human rights violations succeeded one after another, it is difficult to determine how far we should go back, that is, which *status quo ante bellum* we should restore (pp. 72-74). This latter point indeed raises difficulty in some cases, but the first reason, which other hypercritical authors also adduce, is almost a quibble. Kalmanovitz gives the example of the Somoza family in Nicaragua. The present author does not agree with his judgment that expropriation of its assets deserves reparation, since it is well known that the Somoza appropriated Nicaragua's wealth through dictatorship and corruption. However, a more important point is that when we discuss reparation, we are not talking about the Somoza, but about largely poor peasants and city dwellers. It is not fair to question the appropriateness of reparation using very exceptional (almost unique) cases. In the actual world, the large majority of victims of human rights violations are poor citizens, a fact that Kalmanovitz even mentions in his chapter (p. 86). How can a modest reparation to poor peasants in Peru whose family members were massacred in conflict be equated to restoring the pre-conflict inequality that caused violence? Or, how can the restitution of land to poor peasants in Colombia, which was appropriated by paramilitary forces, equate to the reenactment of conditions that caused the war? It is important to consider the matters in terms of real conditions on the ground, rather than from abstract logic and exceptional examples convenient to one's thesis.

(38) In addition to economic issues, another frequent criticism on the supposed "blindness" of TJ is its gender insensitiveness. Actually, gender issues are gaining importance in TJ. There is jurisprudence at international level that wartime sexual violence can constitute crimes against humanity, and some of the recent truth commissions dedicated special attention to the issue. However, feminist scholars criticize TJ for not tackling or resolving structural oppression of patriarchy (Vijayarasa, 2013). Although this article cannot give an extensive treatment to this question, what has been already stated with respect to poverty and inequality applies here as well. While some of feminists' complaints can be accommodated in a gender-sensitive TJ, TJ is not an adequate tool to confront long-term gender inequality or oppression.

IV. Are Perpetrators Victims, and Vice Versa?

This section critically evaluates the argument that denies the distinction between perpetrators and victims, and opposes the punishment of perpetrators on that ground.

1. Denial of Distinction Between Victims and Perpetrators

It should be stated at the outset that this world is not inhabited by purely homogeneous groups of perpetrators and victims. For example, there may be perpetrators who are also victims in some sense; there are also bystanders and beneficiaries of atrocities who are more or less morally censurable. To this extent, this article is in agreement with the hypercritical approach. What this article does not agree with is twofold: first, employing that empirical fact to oppose the punishment of perpetrators; and, second, attempting to erase the distinction between perpetrators and victims altogether.⁽³⁹⁾

In fact, it is in the context of arguments against retributive justice that the categories of victim and perpetrator are problematized and their elimination is advocated. The proponents provide the following reasons in favor of their argument (Mani, 2002, pp. 119-123; Shaw and Waldorf, 2010, pp. 8-10; Mamdani, 2001, pp. 272-273):

A) The term “victim” disempowers victims by emphasizing their denial of and need for rights. “Victim” defines individuals in terms of their past, ignores their desire to move beyond that past, and strips victims of agency. Sometimes victims themselves prefer to be called survivors.

B) Everyone is a victim of the structural and systemic injustices in poor countries where TJ is applied.

C) There is a gray zone between victims and perpetrators.

(39) For an analysis of the complexities of the concepts of perpetrators and victims without eliminating the distinction between the two, see Borer (2003).

None of the reasons are convincing, as shown in the following discussion.⁽⁴⁰⁾

Contrary to the position arguing against the term itself (reason A), this article argues that victims are not always helpless, even though they may have been so at some moment in time. The current author's knowledge of vigorous victims' movements in Peru leads him to think that the term "victim" does not strip them of agency. Many victims are quite active, having become empowered through the process of their struggle, and still claim their victimhood with that term (*víctima*). It is true that these victims are anchored to the past in a sense. After all, if they continue to struggle to this day, it is exactly because they cannot erase the past events that had such a profound impact on their lives. However, it would be unconvincing to argue that it is because of the term "victim" that they cannot forget the past. Some victims feel that they have a moral obligation to their dead family members to be active in their struggle.⁽⁴¹⁾

That said, the connotation of a word is highly personal, and it cannot be confirmed that the term "victim" does not have a disempowering effect, since systematic research has not been conducted from any perspective to verify or disprove the point. Consequently, there are only fragmentary pieces of evidence that contradict each other. Regardless, it would do little harm to simply substitute the word "survivors" for the "victims" in response to the preference of

(40) Apart from reasons A to C, there is another argument that a victim-perpetrator dichotomy is the result of depoliticizing perspective that cannot adequately address the needs of the post-conflict society where entire communities suffered the war. Shaw and Waldorf (2010) criticizes that victims and perpetrators are not treated as political actors. They assert that such depoliticization produces a "victim-perpetrator" dichotomy (pp. 8-10). Such criticism against depoliticization of retributive justice, which is recurrently heard (curiously, not from political scientists but from anthropologists), is somewhat perplexing, since the depoliticization of the actors is deliberate and necessary in judicial proceedings. This arises from the requirement of equality before the law. You cannot be treated differently just because you are a strong man or you are a poor peasant. Judicial proceedings are also criticized for "depoliticization" because, it is argued, they cannot adequately elucidate the political background of conflict. However, a truth commission can be established for that task simultaneously with criminal prosecutions. To employ the medical metaphor in the third section, such criticism is just like opposing the treatment of a bad tooth by a dentist because he does not cure stomach ulcer.

(41) The author's conversation with a prominent leader of victims' movement.

some victims while *at the same time* maintaining the distinction among those “survivors,” perpetrators, and ordinary survivors. It does become deeply problematic, however, when reason A is used to erase the distinction between victims and perpetrators by calling everyone a survivor, as will be shown in the discussion of reason C.

As for reason B, first, this author has already stated in the previous section that attention to the victims of structural violence or systemic injustice should not be confused with TJ, and that task should be undertaken on its own. Second, it is true that often the vast majority of population suffers the consequences of war in one way or another, but that should not obscure the fact that people experience war much differently. Some suffer torture and the disappearance of their family members, others only suffer the consequences of general economic deterioration, and still others actually benefit from the war. As already noted with regard to Pablo Kalmanovitz’s argument, the experience of human rights violations makes a huge impact on the victims, which cannot be conflated with other types of suffering, and certainly is not made meaningless because of other sufferings. Those directly affected, such as families of the massacred and disappeared, have specific needs and rights to be acknowledged, not ignored in the diluted collective needs and rights.

2. “Gray Zone” Argument

Finally, reason C warrants a somewhat more extensive treatment. In the first place, it is a leap of logic and morally unjust to treat all people uniformly as if everyone were in the same condition because of the existence of a gray zone between victims and perpetrators. If one opposes the supposedly homogeneous categories of victims and perpetrators for the reason that such categories ignore the complexities of reality, one has even more reason to oppose the invention of the homogeneous category of survivors that subsumes those of victims and perpetrators denying any differences between them. True, there are people who are victims and perpetrators at the same time, but that situation can be described precisely because we distinguish conceptually between victims and perpetrators.

Critics may refute that while subsuming perpetrators and victims in the same category of “survivors,” we can still conceive of that category as a heterogeneous group of people, with different roles played in the past. However, under this reasoning, one loses the rationale to oppose the categories of victims and perpetrators, for these categories can also be conceived of as heterogeneous groups of people that have variegated relations with the past human rights violations. It is not necessary to discard a concept in order to rescue the complexities behind it; there is even less reason to do so if the result is the construction of a concept like survivors, which obscures even more, not less, the differentiated roles played in the past.

Rama Mani (2010) asserts that “[w]hile everyone is a victim, everyone is also a perpetrator, making the distinction pointless” (p. 123). However, it is impossible to conceive of how newborns in rural Guatemala were perpetrators, when they were held by the feet by the soldiers of the Guatemalan Army during the civil war, who battered their heads against the walls to kill them; or how the infants in rural El Salvador or rural Peru were perpetrators, who were massacred with their parents in scorched earth campaigns. If a peace activist in Israel who actively opposes Israel’s oppressive policies in Palestine and is crusading against it is killed in an indiscriminate terrorist attack by the Palestinian extremists or even Jewish extremists, was this peace activist not only a victim but also a perpetrator? It is profoundly unjust to state that “everyone is a perpetrator.”

It may be useful here to caution against the easy argument based on the dichotomy between post-conflict TJ and post-dictatorship TJ, which claims that one cannot speak of victims and perpetrators in post-conflict settings, while it is possible to do so in post-dictatorship contexts. While this may be true to some extent, sweeping generalizations are unwarranted. First, there is great difference and diversity among conflicts. Second, the majority of fatalities in civil war are civilian populations whose “perpetratoriness” rarely amounts to that of direct perpetrators. Third, and most importantly, post-dictatorship settings are not free from “gray zones.” Without considering moral accomplices of beneficiaries, facilitators, and bystanders, some of the victims were armed revolutionaries who

took up arms against democratic regimes. There were also dissenters to dictatorship who were forced to collaborate with the repressive apparatus after they were captured. The rank and file members of the repressive apparatus may be considered to have some "victimhood," considering that they were trained to obey blindly orders from above. Thus, post-dictatorship TJ and post-conflict TJ do not make a sharp contrast, as stereotyped arguments would assume.

The second problem with reason C is that, while it is true that one person can be both a victim and a perpetrator, that fact does not make him or her a non-victim or non-perpetrator. Suppose a perpetrator is a victim, not in relation to the victim of his or her acts, but in relation to other people or structures (for example, a victim of poverty and inequality). That victimhood does not deny the perpetratorhood in relation to the victims of his or her acts. Nor does the victimhood of the perpetrator move the victims of his or her acts into the gray zone of victim-perpetrator.

What about the case in which a victim of human rights violations has some "perpetratorhood" in relation to the same human rights violator? For example, suppose an armed group initiated a rebellion against a democratic government, and a member of the armed organization is tortured and executed extrajudicially by security forces. In this case, the victim bears "perpetratorhood" in relation to the state agents. Should we not punish the human rights violators in such situations?

It is suggested here that to oppose the punishment of the perpetrators because of the "perpetratorhood" of the victims themselves is tantamount to justifying torture and extrajudicial executions. It is critically important to spread the human rights norms that prohibit torture and extrajudicial executions in whatever circumstances, even to the members of enemy organizations. In this sense, justice should be "depoliticized."

Hence, to argue that there are no victims or perpetrators not only distorts the reality in which individuals have played differentiated roles, but also advocates complete impunity as a logical consequence. Is this justice? Could this not result in inducing dictators around the world to commit atrocities free from any fear of

accountability?

The third problem with reason C is that the position that criminal prosecutions are not suited for the cases in which victims and perpetrators are not pure categories (e.g., Arriaza and Roht-Arriaza, 2008, p. 153) is based on ignorance and stereotyping of criminal justice, or on a double standard towards it. Ordinary criminal justice deals on a daily basis with cases where victims and perpetrators are in complex relations. For example, a youngster who was raised by a criminal father who trained him for robbery is certainly a victim in a sense. For such cases, ordinary criminal justice allows wide discretion to judges who can consider mitigating circumstances. In many countries, a person who was forced to commit a crime may even be acquitted of blame. Ordinary criminal justice also deals with the cases where someone kills a person during a physical altercation, or where, for example, a daughter kills her father as retaliation of his sexual abuse against her.

Eric Posner and Adrian Vermeule (2004) correctly point out that criticism against criminal justice in TJ is based on “a stereotyped view of ordinary justice in consolidated democracies” (p. 764). The present author expands on this, suggesting that there is also a double standard in judging TJ and ordinary justice. If the existence of a gray zone is a sufficient reason not to punish the perpetrator, then logically that principle should also extend to all cases and societies, not only to TJ contexts. Thus, we should exonerate from criminal accountability all persons who killed someone in a fight, and all poor people (i.e., victims of poverty and inequality) who killed someone in an armed robbery. Such advocacy is unheard of. Moreover, while no one opposes the existence of criminal courts just because crimes do not disappear or the families of the murder victims do not stop mourning the death, there are those who oppose criminal prosecutions of TJ precisely for such reasons.

V. Conclusion

This author does not argue that human rights abusers should always face criminal prosecution regardless of the circumstances. However, he does advocate some form of accountability mechanism, except in the context of an exceptionally severe short-term peace vs. justice tradeoff. This accountability is not only for the victims but also for the *society*, and not only at the local and national levels, but also at the global level. Such a standard is to reinforce the norm of human rights, to convert human rights from mere “ideals” to a firmly entrenched common sense that certain things must not be done, whatever the circumstance—the notion that you must not kill a person, even if you are a victim of oppression and inequality, or even before a member of an antagonistic group. Admittedly, there is a long way to go before human rights norms become commonsensical, but it is important to always take steps in that direction, however small they may be.

In order to thus reinforce the human rights norms, it may not always be necessary to punish all the perpetrators. Nonetheless, even when amnesty is granted, it should be made absolutely clear that the acts committed were morally wrong. This perspective is conspicuously absent in the arguments that deny the distinction of victims and perpetrators. These arguments dilute the moral wrongness of abuses by attributing the same condition to everyone. In that sense, they do harm to human rights. As Marie Smyth argues in her criticism of the discourse that all are victims, “[c]laiming victim-hood should not be institutionalised as a way of escaping feelings of guilt, shame or responsibility” (Smyth, 1998).

If one considers world history and how human beings have killed each other, it is easy to think that the attainment of commonsensical human rights norms described above is a daydream. However, slavery was once a common practice, and now is taboo; the same is true with colonialism. It is probable that human rights violations will not attain the same level of taboo status in the near future but, nonetheless, if we make progress in strengthening the norm that

human rights violations cannot be justified whatever the circumstances, it will make it more difficult, for example, to block international efforts to address human rights violations in particular countries.

Even then, human rights violations will continue to occur in some places, just as murders still occur as we try to stop them. However, alas, in contrast to common murders, human rights violations and political violence always have apologists seeking to justify or condone the acts for varied reasons. To the extent that the reinforcement of human rights norms makes such justifications difficult, the world will be more peaceful.

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A Critical Note on “Hypercritical” Studies of Transitional Justice

<Summary>

Kazuo Ohgushi

Transitional justice refers to a set of judicial and non-judicial measures to deal with the legacies of massive human rights abuses committed during armed conflict or under state repression. Transitional justice has gained importance over the past thirty years, as more and more countries adopt some combination of transitional justice measures; there is also a concomitant growth of research and publications on the subject.

A distinct brand of critics of transitional justice emerged around the early 2000s, and they are growing in number. These authors criticize what they consider to be the mainstream transitional justice model from a leftist/progressive stance, and often denounce it as an imperialistic imposition of Western powers. This article critically engages these authors.

The first section briefly introduces this brand of criticism, which the present article tentatively labels “hypercritical” studies. The second section points to the flaws in this literature. These flaws concern logic, views of relevant actors, and alternatives or the lack thereof. The third section examines the increasingly common criticism that the current transitional justice does not address structural violence. This section argues that, although it is necessary to grapple with structural violence, it should be done so in its own right and *not* as part of transitional justice measures. The fourth section questions the argument that denies the distinction between perpetrators and victims as a basis for opposing the punishment of perpetrators. This section finds the line of argument logically unsound and morally

objectionable, and points to a double standard in judging transitional justice against ordinary criminal justice. The conclusion underscores the need for explicitly highlighting the wrongness of the abuses committed, a perspective usually lacking in hypercritical analyses.

