

## Contemporary Transitional Justice

Normalising a Politics of Exception

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# Contemporary Transitional Justice: Normalising a Politics of Exception

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*Transitional justice is not a special kind of justice, but simply an approach to achieving justice in a time of transition from state oppression or a condition of armed conflict.*

Deputy Prosecutor of the International Criminal Court, May 2015.

## INTRODUCTION

The field of transitional justice (TJ) identifies itself with the analysis and invention of new and distinctive legal forms of response to past mass violence.<sup>1</sup> Commonly institutionalised in rituals, memorials, truth commissions, lustration, vetting, amnesties, and trials, TJ is understood to depart from the administrative, political and legal goals and procedures that characterise stable societies.<sup>2</sup> It is an exceptional response to an exceptional political situation when societies emerge from past repression or atrocity; this response is legitimised by the transitional nature of such societies.<sup>3</sup> Thus, the “transitional” prefix sets TJ apart from normal justice.

This article argues that the exceptionalist understanding of the field belies the contemporary normative and empirical expression of TJ: TJ is increasingly being normalised, a process that is incomplete and contested. In the normalised paradigm, it is no longer legitimate to set aside normal rules in order to safeguard a transition or make justice a viable or particularistic project. Instead, TJ is increasingly understood as ordinary justice carried out in exceptional circumstances.

While some scholars have asserted that TJ is becoming normalised, they have not explored the causes, content and contradictions of this change.<sup>4</sup> This article theorises exceptionalism and normalcy and proposes that the process of normalisation stems from three inter-related developments in the field: its legalisation, internationalisation, and professionalization. To illustrate the argument, the article analyses Uganda’s TJ trajectory. The longevity of Uganda’s transitional project enables an empirical analysis of TJ from the mid-1980s to today. The analysis identifies the gradual yet contested de-legitimisation and dismantling of exceptional TJ responses and tracks the increasingly legalised, internationalised, and professionalised Ugandan field of TJ.

The article first theorises the exceptional and normal paradigms of TJ, presenting them as ideal types in order to clarify their political, moral, and legal dimensions. Then it discusses how legalisation, internationalisation, and professionalization have contributed to normalising the field. Lastly, the article studies these processes empirically by analysing Uganda's TJ trajectory in five periods from 1986 to today.

## **EXCEPTIONALISM IN TRANSITIONAL JUSTICE**

Theorised as dichotomous ideal types, the exceptional and normal paradigms offer a heuristic through which to understand changes in the field. Ideal types are a "synthesis" of selected elements of the studied phenomena.<sup>5</sup> They are not meant to describe all the characteristics of specific cases, but to help "explaining how modes of thought and practice come about, become socially entrenched, *and then* are or are not open to various transformations."<sup>6</sup> The exceptional paradigm thus accentuates certain features which were once dominant in the field.

Exceptionalism is a contested concept.<sup>7</sup> In TJ, exceptionalism signifies legalised deviance from ordinary justice, that is, the justice expected from stable, rule of law societies. It is contrasted with legalistic normalcy and stems from the idea that fragile, transitional situations need exceptional justice responses. In this politics of exception, moral and legal justice requirements are subject to the political imperatives of the transitional order. Thus, "justice in periods of political change is extraordinary."<sup>8</sup>

TJ exceptionalism has political, moral, and legal aspects. The political aspect reflects a notion of politics as negotiation, contestation, and an open-endedness derived from the possibility that political transitions may slip back into repressive or conflict modes. Thus, the future "is another country."<sup>9</sup> Possible reversals necessitate and legitimise the subjection of justice to transitional imperatives and create the conditions for transitional exceptionalism. As political action revolves around the struggle to influence or determine the future, justice becomes the art of the possible, reflecting a balance between two objectives: justice to victims of past abuse and the transition to a new future.

Morally, exceptionalism stems from the position that transitional contexts require different standards of appropriateness.<sup>10</sup> The process of transforming a society from "barbaric" to "minimally decent" involves the re-entry of entire collectivities into "a system of morality."<sup>11</sup> In this process, agents, collaborators, bystanders, and beneficiaries of systemic barbarism need to be reintegrated into society: "survivors" have to find a way to live among each other.<sup>12</sup> The moral position holds that this is a dangerous process: the subjection of perpetrators to the standards of substantive or complete procedural justice that characterise stable, non-transitional societies may alienate them and prevent their commitment to the transition, thereby endangering the latter.<sup>13</sup> The standards of justice should therefore match the transitional process.

The legal aspect emerges because the deviation from normal justice is protected by law.<sup>14</sup> TJ policies are often legalised through ordinary legislative procedures, their departure from ordinary justice constituting them as an "alternative legal response."<sup>15</sup> Thus, transitional jurisprudence is a particular and

liminal kind of law, “caught between the past and the future, ... between retrospective and prospective, between the individual and the collective.”<sup>16</sup> Law is approached instrumentally, as a means to a politically defined end; this makes law contingent.

Given this nature and role of transitional law, the exceptional paradigm entails a rule-of-law dilemma: “If ordinarily the rule of law means regularity, stability, and adherence to settled law, to what extent are periods of transformation compatible with commitment to the rule of law?”<sup>17</sup> To Teitel, the answer is contextual and depends on society’s understanding of legality.<sup>18</sup> To Elster, legality is “routinely violated” in TJ, sometimes “for good reasons.”<sup>19</sup> In reunified Germany, transitional exceptionalism permitted the prosecution of conduct that was legal in East Germany, while post-Communist Hungary’s Constitutional Court decided against prosecuting crimes committed when crushing the 1956 uprising. In both cases, the selected rule-of-law values – moral right in Germany and legal stability in Hungary – shaped and were situated in the transition.

The exceptionalism of TJ differs from those of Schmitt and Agamben, who have made exceptionalism central to their thinking about politics and law.<sup>20</sup> Schmitt’s exceptionalism signifies a legal vacuum in a legal order. It is constitutive of political order because sovereignty derives from the authority to define the exception: the sovereign can decide when a threat to the state “requires the suspension of normal rules and procedures so that the political order itself can be preserved.”<sup>21</sup> For Agamben, exceptionalism is extra-legal, an anomie, as there can be no suspension of law within liberal legality. It is “the political point at which the juridical stops and a sovereign unaccountability begins.”<sup>22</sup> Since law constrains the state, its exception enables the unlimited use of violence by the state.

In contrast, in TJ, exceptionalism establishes a legitimate, particular, transitional politics. Like that of Schmitt, the exceptionalism of TJ centres on decision-making and the relationship between order and disorder; it is a response to an existential crisis. However, exceptional TJ embodies an entirely different notion of politics: politics is agency and negotiation, while Schmittian politics is defined by the distinction between friend and enemy which enables the executive to absorb political agency.<sup>23</sup> Furthermore, TJ entails a teleology that distinguishes its exceptionalism from Agamben’s state of exception and enables the existence of the rule-of-law dilemma: TJ exceptionalism is a means to *end* rather than enable state violence, where Agamben’s exceptionalism-as-rule eliminates rights. As we shall see below, critics of TJ exceptionalism fear with Agamben that a Schmittian legal vacuum becomes the norm, thus undermining the rule of law and human rights.

The main symbol of the TJ exceptionalism is the amnesty policy, rather than Schmitt’s dictatorship and Agamben’s concentration camp. Transitional amnesties establish that acts that are ordinarily subject to prosecution and punishment are amnestied on condition of buy-in to the new political order.<sup>24</sup> This conditionality is important, as it distinguishes TJ exceptionalism from Agamben’s sovereign violence. While

the amnesty most clearly signifies TJ exceptionalism, other mechanisms, such as administrative vetting, also deviate from rule of law principles.

## **THE NORMALISED PARADIGM OF TRANSITIONAL JUSTICE**

Contemporary TJ is distancing itself from the exceptional paradigm and experiencing a process of normalization. While not a monolith, TJ is no longer predominately associated with a politics of exception; instead it seeks to reflect ordinary times and institutionalise the rule of law.<sup>25</sup> The transitional prefix is being reinterpreted, signifying not the *form* of justice, but the *context* within which justice is delivered. As the UN High Commissioner for Human Rights (OHCHR) explains, TJ is “*not a particular conception of justice, such as distributive or retributive justice*” but

rather *a technical approach to exceptional challenges*, such as dealing with massive human rights abuses committed in the course of armed conflict or by repressive regimes, in circumstances of scarce resources, urgently competing demands and frequent institutional breakdown.<sup>26</sup>

The lead professional agency, the International Center for Transitional Justice (ICTJ), likewise emphasises that TJ is “not a ‘special’ kind of justice, but an approach to achieving justice in times of transition.”<sup>27</sup>

While TJ exceptionalism foregrounds the political transition, the normalised paradigm entails a conceptual dislocation from the transitional context. Signifying this change, non-transiting countries implement TJ mechanisms,<sup>28</sup> while atrocity is prosecuted by the International Criminal Court (ICC), whose jurisdiction does not distinguish between transitional and non-transitional contexts.<sup>29</sup>

Like TJ exceptionalism, the normalised paradigm has moral, political, and legal aspects. Morally, as the violence of dictatorship and war is a result of individual choice rather than systemic barbarism, the same rules apply to stable and transitional societies: They must prosecute individuals responsible for human rights violations. Bhargava sketches this argument:

When people kill mercilessly, betray friends and family, and save their own skins at the expense of loved ones, they breach the same moral norms that a serial killer violates when he strikes. The moral response to this violation must be identical.<sup>30</sup>

Where the exceptional paradigm operates with survivors, normalised TJ distinguishes between victims and perpetrators by criminalising the latter.

TJ normalcy conceptualises politics as constrained by law: Municipal and international law and norms provide the framework within which the politics of transition takes place. Political stability derives from the rule of law rather from stakeholders’ negotiated moderation; ordinary justice will thus safeguard the survival of the new society. According to the UN Secretary-General,

the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.<sup>31</sup>

This notion of legality departs from the legal instrumentalist approach entailed in the exceptional paradigm. It values legal predictability, stability, and consistency in application – that is, the rule of law – as an end in itself. Legal transformation has thereby replaced political transformation as the primary object of transition.

## **CAUSES OF NORMALISATION**

The commencement of the normalisation process is difficult to pin to a particular date, but the analysis of its causes highlights the 1990s as a crucial period for the emergence of normalised TJ. This decade saw two “apparently antithetical” trends: the establishment of mechanisms with a range of justice and social goals other than individual criminal accountability and the institutionalisation of international criminal justice.<sup>32</sup> Exceptional and normal elements thus co-existed, the latter subsequently being strengthened. Three related and mutually reinforcing processes have contributed to this gradual normalization: The legalization, internationalisation, and professionalization of the field.

The legalisation of TJ follows the more general legalisation of world affairs.<sup>33</sup> Since the end of the Cold War, international law has experienced an expansion and differentiation, while international delegation to courts has generated new or “upgraded” judicial mechanisms.<sup>34</sup> Domestic affairs have also been judicialised, as both human rights and universal jurisdiction trials have become more frequent.<sup>35</sup>

The legalisation of TJ accelerated in the early 1990s, when “law and legalism began to colonise the field.”<sup>36</sup> Over the next two decades, international criminal justice became central to TJ discourse and practice, with criminal prosecutions becoming “a means to address more broadly defined ideas of political and social transformation,” such as truth and reconciliation, and later peace.<sup>37</sup> The truth-versus-justice debate that defined the field in the 1990s was resolved by establishing truth as a component of criminal justice. While human rights advocates in the early 1990s were concerned with “[t]he whole truth and as much justice as is possible,” by 2009, they observed that the “false duality” between truth and justice had “become obsolete.”<sup>38</sup> Truth commissions had become complementary to criminal trials.

In the 2000s, the defining discussion took place through the peace-versus-justice debate. The dilemma between conflict resolution and criminal justice was settled by making peace conditional upon justice.<sup>39</sup> The dilemma was dismissed as a “relic of the past”<sup>40</sup> since peace and justice “promote and sustain each other.”<sup>41</sup> Thus, during the 1990s and 2000s the political elements of transitions gradually “became subsumed into a much broader narrative of transition, increasingly regulated by law.”<sup>42</sup>

Through the legalisation and judicialisation of the field, rule of law development became a key element in efforts to ensure a transition. The UN conceptualised TJ as a critical component in such

efforts and established in 2006 a Rule of Law Unit to support the organisation-wide promotion of the rule of law.<sup>43</sup> Hybrid tribunals were created in part to institutionalise the rule of law in their local context, while “positive complementarity” at the ICC aimed to enable local capacity-building in the rule of law.<sup>44</sup>

Transitional exceptionalism is difficult to legitimise from a rule of law perspective: A fluid, discretionary notion of justice is the antithesis of rule of law, which in turn is seen as necessary for the consolidation of democracy and peace. Echoing Agamben’s fear of sovereign unaccountability, it was argued that short-term exceptionalism could endanger rule of law consolidation:

The great danger in applying even the most ephemeral of realist and idealist deviations from the rule of law is that their perceived success in mediating transition from repression or war to democratic rule risks undermining or de-legitimizing the rule of law values of coherence, enforcement, equal application, etc., in the years after transition.<sup>45</sup>

The field’s legalisation brought this issue to the forefront, seeing not a dilemma to be mediated but a problem to be solved. The remedy was to delegitimise the exceptional paradigm, understanding TJ as reliable and fair criminal justice in a transitional context rather than as a partial and contingent form of justice.

A second cause of the normalisation is the latter’s internationalisation, meaning both the involvement of international agencies and the application of international standards to local paradigms. This process accompanied the field’s legalisation and was particularly shaped by the establishment of the ad hoc tribunals and the ICC. In the 1980s and 1990s, TJ policies were national, reflecting local solutions and debates about justice.<sup>46</sup> Early truth commissions in Argentina, Chile, South Africa, Chad and Uganda had no UN-sponsored mandate and their commissioners were nationals.<sup>47</sup> While the 2004 Secretary-General’s report marked the mainstreaming of TJ within the UN system, agencies such as OHCHR, the Development Program and the Department for Political Affairs internationalised TJ by subjecting it to international guidelines and normative positions.

The different standards and handbooks that guide or govern international involvement in political transitions seek to align TJ processes with prevailing interpretations of international social norms and respectability.<sup>48</sup> The international blueprint for TJ holds that criminal trials are a necessary but insufficient element in any transition and that transitional societies should strive for a comprehensive approach that combines different TJ mechanisms and complies with dominant interpretations of international norms. The blueprint derives from three positions.

Firstly, states have a duty to prosecute serious international crimes. If they do not provide criminal accountability, the international community may get involved through regional or international judicial bodies. Second, transitional agreements as well as individual TJ mechanisms must be in conformity with human rights law, international criminal law, humanitarian law, and refugee law. Third, TJ is an international phenomenon because it confronts acts of violence that “shock the conscience of humanity.”<sup>49</sup>

This provides international actors and NGOs with a right to express their preferences about essentially local TJ matters.

The third normalisation cause stems from the professionalization of the field. As TJ became a more widespread phenomenon, organisations and international consultants developed specialised TJ portfolios, contributing, in turn, to its further diffusion, internationalisation, and judicialisation.<sup>50</sup> The lead professional agency, the ICTJ, was established in 2001 in response to a TJ “explosion” that was “constantly creating new experiences and precedents.”<sup>51</sup> University courses, journals, networks, and blogs act as forums for analysis, critique, and discussion of the field.

TJ has become an industry in the north and south, mainly funded by Western donors.<sup>52</sup> The professional landscape is flexible and open, with individuals moving between inter-governmental organisations, tribunals, commissions, governments, universities, and NGOs. Different roles such as advocacy, adjudication, consultation, and teaching often combine in one career. This creates a high level of inter-textuality among different organisations, ensuring a convergence of positions and interpretations.

TJ professionals have built a body of transferable knowledge that align with and reproduce the international blueprint. The normalised paradigm is diffused through international and expert involvement in transitional processes, the establishment of country offices, and support to local actors. The “limited repertoires” of international advisors may narrow the range of policy options for countries.<sup>53</sup> As TJ professionals tend to have a legal background, they have tied TJ closer to a rule of law conception of justice.<sup>54</sup>

Through legalisation, internationalisation and professionalization, then, TJ is being de-exceptionalised. This is, however, a contentious and incomplete process, resembling Moore’s notion of partial regulation: “reglementary processes,” which are attempts to organise and control behaviour through the use of explicit rules, are met by “countervailing activities” which operate to reinterpret, replace, or alter these rules “whenever it is situationally advantageous to someone to do so.”<sup>55</sup> Empirically, as we shall see, normalisation may be appropriated, resisted, and unmade.

While the article has thus far discussed normalisation from a perspective of international macro-processes, its impact on local TJ processes can be studied in societies in long-term transitions. The following case study of Uganda’s TJ experiences analyses the gradual normalisation of its exceptional justice portfolio and the resistance this process engenders.

## **CASE STUDY: TRANSITIONAL JUSTICE IN UGANDA**

Uganda’s trajectory of TJ from 1986 to 2015 represents a contested movement from exceptionality to normalcy. The transition has been one of relative democratisation and conflict mitigation, intimately linked to the ruling party since 1986, the National Resistance Movement (NRM).<sup>56</sup> The NRM, led by Yoweri Kaguta Museveni, has employed TJ instruments strategically to consolidate its power. However, NRM rule constitutes both the transitional context and the source of injustice, as the government perpetrated large-scale



civilian violence during its initial take-over and in the subsequent conflict with the Lord's Resistance Army (LRA).

It is useful to divide the trajectory into five phases, each of which has sought to tackle a transitional problem: Breaking with the past, de-incentivising insurgency, legitimising military counter-insurgency, negotiating rebel settlement, and institutionalising TJ. Together, the phases illustrate the field's increasing legalisation, internationalisation, and professionalization and the corresponding de-legitimation of the exceptional paradigm. Rather than a linear process of normalisation, however, Uganda's five-phase trajectory is one of contestation over the authorship of TJ.

### **Phase 1. Breaking with the Past: The Truth Commission and Constitutional Reform (1986-1995)**

The first phase of Uganda's trajectory had the overarching aim of legitimising the new government and consolidating its power by communicating a break with the past and embarking on a political transition. It covers a truth commission (1986-1995) and a constitutional reform process (1989-1995), the impetus for which came from the NRM's revolutionary project of fundamentally altering politics.<sup>57</sup>

The NRM established the truth commission three months after it took the government by force in January 1986. The Commission of Inquiry into Violations of Human Rights (CIVHR) was mandated to inquire into "all aspects of violations of human rights, breaches of the rule of law and excessive abuses of power, committed against persons in Uganda by the regimes in Government, their servants, agents or agencies" between independence in 1962 and January 1986.<sup>58</sup> It aimed to distinguish the new government from previous regimes, particularly those of Idi Amin (1971-79) and Milton Obote (1962-71; 1980-85), but not to provide acknowledgement, truth, reparations or justice to the victims.<sup>59</sup> Being mainly symbolic, the Commission received no government funding for its day-to-day activities.<sup>60</sup> Upon completion in 1995, the CIVHR report was shelved.<sup>61</sup>

CIVHR was not conceptualised as a criminal justice project. Its terms of reference did not grant it authority to recommend prosecution or to forward evidence to bodies of criminal investigation. They referred to the constitution and the Universal Declaration of Human Rights, but not to the Ugandan penal code.<sup>62</sup> CIVHR's chairman estimates that there were perhaps 50,000 perpetrators of serious human rights violations, of which 2,000-3,000 were identified.<sup>63</sup> The Commission forwarded about 200 cases for further investigation, but the Director of Public Prosecutions (DPP) prosecuted about 50.<sup>64</sup> The government's unwillingness to prosecute human rights violations sprang from its transitional project.

The government took a pragmatic approach to the issue of criminal accountability, seeking instead to consolidate power by co-opting former enemies. Insurgencies were settled politically, with rebels amnestied and demobilised and their leaders given ministerial positions.<sup>65</sup> Such measures aimed to stabilise the volatile political situation, generate a minimum consensus, and create the basis for intra-elite

collaboration in the country's reconstruction.<sup>66</sup> Museveni's first cabinet therefore included persons like Moses Ali, former Minister of Finance and rebel leader, who had allegedly perpetrated atrocities.<sup>67</sup>

A cornerstone in the political transition was the promulgation of a new, popular constitution. Launched in 1989 with the establishment of a 21-member Constitutional Commission, the reform process included national consultation and civic education seminars.<sup>68</sup> Among the wider population, there was "excitement" about the constitutional reform process, but little interest in the truth commission.<sup>69</sup> During the tenure of the two commissions, northern Uganda was marked by insurgency and counter-insurgency, with civilians terrorised by both the LRA rebels and the national army.

Uganda's first phase reflected the dominant TJ paradigm at the time, which held that "what is fair and just in extraordinary political circumstances was to be determined from the transitional position itself."<sup>70</sup> To advance successor legitimacy, "pragmatic principles guided the justice policy and the sense of adherence to the rule of law."<sup>71</sup> The government's exceptional TJ – its subjection of justice to the political imperatives of stabilisation and regime legitimisation – met with international understanding; Uganda became a "donor darling" and the truth commission received funding from several western governments.

The acceptance of Uganda's exceptional justice was possible because phase 1 took place before the field was internationalised and professionalised. The commissions did not have to adhere to best practice and had no foreign commissioners or consultants; apparently, CIVHR refused financial support because it was conditional upon accepting a foreign advisor.<sup>72</sup> Phase 1 also occurred before the duty to prosecute international crimes became a dominant norm within the field. The government openly co-opted suspected mass killers, being in effect "unable or unwilling" to prosecute them. In contrast to Uganda's later experiences, there was no international pressure to provide criminal accountability for past atrocity.

### **Phase 2. Ending Insurgency: The Amnesty Policy (1998-2003)**

Reflecting the field at the time, phase 1 and 2 was "concededly contextual, limited, and provisional."<sup>73</sup> The objects of TJ were external to the government, such as human rights crimes committed before 1986 or by regime opponents. Justice was the art of the possible, signified by the ad hoc use of rebel amnesty in phase 1 and the introduction of a blanket amnesty in phase 2. The impetus for a systematic use of amnesty came from civil society.

In the northern region, religious leaders came together as a cross-denominational advocate for peace negotiations, launching a campaign for a blanket amnesty in 1998. The rationale was to incentivise rebel defections, ensure the reintegration of former abductees, and enable a negotiated settlement of the conflict. Reflecting moral exceptionalism, criminal punishment of ex-rebels was considered inappropriate: as many LRA rebels were initially forcibly abducted, "anyone could be subjected to the conditions that produced the perpetrators of the crimes experienced in the conflict."<sup>74</sup> To transform northern Uganda into a "minimally decent" society, to use Bhargava's terminology, ex-rebels needed reintegration into the "system of morality."<sup>75</sup>

An amnesty bill reached parliament in 1999. Limited to Acholi region and excluding the offences of genocide, rape, murder and kidnapping, parliament rejected the bill. A subsequent national consultation found support for a general amnesty covering all combatants who denounced rebellion.<sup>76</sup> The resulting Amnesty Act 2000 offered amnesty to any Ugandan who rebelled against the government.<sup>77</sup>

During phase 2, amnesty was understood domestically and internationally as a legitimate response to an extreme situation. Signifying the transitional as the form of justice, the Ugandan parliament rejected the proposed subject-matter limitation in the 1999 amnesty bill. Powerful foreign actors pressured Museveni to accept the amnesty law and the Amnesty Commission received extensive international funding.<sup>78</sup> Internationally, the norm of the duty to prosecute certain crimes was fomenting, indicated in the 1998 Rome Statute and, in 1999, the UN's withdrawal of support for amnesty in Sierra Leone's Lomé Agreement.

### **Phase 3. Legitimising Military Pursuit: ICC Involvement (2003-2007)**

In the third phase the government internationalised and judicialised the conflict and thus any transition to peace, while the Ugandan field of TJ was professionalised. International judicialisation suited the government because it signalled a fresh approach to the LRA problem, while legitimising the continued military pursuit of the rebels: Capture of the rebel leaders logically preceded their prosecution in The Hague.

The ICC prosecutor opened an investigation into the situation in July 2004 and issued sealed warrants of arrest for five LRA commanders in May 2005. Once these warrants were issued, the country's LRA policy was no longer for the government to determine and for the civil society to influence. Instead, it became subject to the standards of ordinary justice, the transitional confined to context. Three developments highlight the beginning of a process of normalisation of Ugandan TJ: The international reception of an amnesty offer to the LRA leader, international pressure to amend the Amnesty Law, and extensive study of popular attitudes to TJ.

In May 2006, in the context of commencing negotiations in Juba, the president offered an amnesty to the LRA's leader, Joseph Kony.<sup>79</sup> To amnesty rebel leaders in return for political buy-in had been a government prerogative as late as June 2002, when the Uganda National Rescue Front II had accepted a settlement. However, in 2006, Museveni's offer triggered an international outcry.<sup>80</sup> Western donors, the ICC and NGOs argued that a failure to arrest the indictees breached international law.

Internationalisation and professionalization created demands for aligning the amnesty law with the new blueprint. Upon Rome Statute ratification in 2003, the Amnesty Act became inconsistent with Uganda's obligations to the treaty. The ICC Prosecutor therefore successfully lobbied the president to amend it,<sup>81</sup> while NGOs called on Uganda to "revoke its unlawful national amnesty."<sup>82</sup> In spite of opposition by MPs and community leaders, the Act was amended in May 2006, empowering the Internal Affairs Minister to declare a person ineligible for amnesty and to lapse the Act's amnesty-granting Part II.<sup>83</sup> This provision was utilised in phase 5.

Efforts to normalise TJ also comprised extensive surveying of attitudes to justice in northern Uganda. Research centres, UN agencies and NGOs measured popular support for criminal and other forms of justice; at least eight such surveys were conducted between 2005 and 2007.<sup>84</sup> The ICC and international NGOs carried out outreach and “sensitisation” activities and established country offices and partnerships.<sup>85</sup> These initiatives reflected a concern with mapping local attitudes onto the emerging international blueprint and with the distinction between victims and perpetrators central to the normalised paradigm.

In phase 3, the government again sought to use TJ institutions instrumentally, discovering, however, that TJ was now less amenable to political imperatives. As a result of international advocacy, Museveni’s security offer was abandoned and the amnesty law was amended. Furthermore, by providing the objects of documentation, analysis, and education, the northern region became a vehicle for the further internationalisation and professionalisation of Ugandan TJ.

#### **Phase 4. Negotiating a Settlement: The Juba Accountability and Reconciliation Agreement (2007-2008)**

The fourth phase represents a return to the civil society concern with survivors and negotiated settlements. Sitting within a context of the Juba Peace Talks, this phase covers negotiations on what kind of justice to accompany the prospective transition to peace. Given the judicialisation of phase 3 and the LRA’s refusal of ordinary justice, a solution had to lie conceptually between ICC prosecution and an amnesty process.

In June 2007 and February 2008, the conflict parties agreed on a justice policy that would “resolve the conflict while promoting reconciliation.”<sup>86</sup> The justice mechanism had five features: National proceedings, a restorative notion of accountability, an alternative penalty and sentencing regime, a focus on individual responsibility, and a forward-looking victim approach.<sup>87</sup> Through these, it held serious perpetrators accountable while offering them rehabilitation.

The Agreement on Accountability and Reconciliation and its Annexure relied on an exceptional notion of TJ that aimed to support the transition to peace. According to mediators, justice had to “accommodate other things than prosecutions followed by long-term imprisonment as the model” and “introduce other elements of accountability.”<sup>88</sup> In order to safeguard Uganda’s ordinary justice system from the negotiated justice, the Annexure established a special high court division.<sup>89</sup> Thereby it protected the rule of law from transitional jurisprudence.

Knowing its controversial nature, the government sought to legitimise the agreement through a national consultation, which showed that the “whole country wants an expeditious end to this war and said they are ready to forgive but demanded some form of accountability.”<sup>90</sup> Internationally, however, the agreement was met by hostility, the criticism reflecting the international blueprint for TJ.<sup>91</sup> The transition to peace was understood as ontologically separate from the nature of its justice process.

In phase 4 of Uganda’s trajectory, negotiators and mediators considered exceptional justice necessary. Reflecting the earlier TJ paradigm, this justice was contextual, limited, and provisional. However,

in contrast to phase 1 and 2, stabilisation, peace and popular endorsement did not legitimise the negotiated policy internationally. In its place therefore, Uganda implemented the international blueprint.

#### **Phase 5. Institutionalising Justice: The International Crimes Division and the TJ Policy (2009-).**

The last phase illustrates TJ normalisation through policy formulation and implementation by Uganda's internationalised and professionalized justice sector. In this phase, the exceptional justice regime negotiated in Juba is institutionalised as ordinary justice, while societal groups struggle over the future of the amnesty law and the national TJ policy. The normalisation process is incomplete, the field occupying a tense legal and political terrain of contested ordinary and exceptional forms of TJ.

Phase 5 began after the Juba Talks ended in December 2008. Although Kony had not signed the final peace agreement, the government unilaterally implemented selected features of it, including the special court. The International Crimes Division of the High Court (ICD) officially fulfilled the government's "commitment to the actualization of Juba Agreement on Accountability and Reconciliation," yet it became an ordinary criminal court: It prosecutes international crimes and derives jurisdiction from the penal code, the Geneva Conventions Act (1964), and the International Criminal Court Act (2010), among others.<sup>92</sup> It does not provide for reconciliation, "alternative penalties and sanctions," or traditional justice mechanisms "as a central part of the framework for accountability and reconciliation," as per the agreement.<sup>93</sup> The case against Thomas Kwoyelo, the Division's first trial, represents the ICD's ordinary justice and the contemporary contestation over TJ in Uganda.

Kwoyelo is an LRA commander captured in March 2009 and charged with grave breaches of the Geneva Conventions.<sup>94</sup> He renounced rebellion, but the DPP refused to authorise the grant of amnesty; the ICD accordingly opened a trial against him in July 2011. Then followed four years of legal dispute over the government's right to prosecute Kwoyelo, involving the Constitutional Court, the High Court, and the Supreme Court. While the Constitutional and High Courts in Uganda found that Kwoyelo qualified for an amnesty certificate,<sup>95</sup> the Supreme Court in April 2015 upheld the DPP's right to prosecute him.<sup>96</sup>

The amnesty law had in fact been under domestic and international political pressure throughout phase 4 and 5. To donors and the donor-funded Justice Law and Order Sector (JLOS) coordination network, the Act conflicted with Uganda's international obligation to prosecute serious international crimes.<sup>97</sup> International NGOs wanted the law and 20,000 amnesty certificates repealed.<sup>98</sup> The OHCHR explicitly advised the government to amend the law, its "UN Position on Uganda's Amnesty Act" signifying internationalisation and de-contextualisation.<sup>99</sup> The government duly lapsed the amnesty-granting Part II of the Act, however, in a manner that resembled the campaign of phase 2, an outcry from northern leaders and NGOs prompted its reinstatement.<sup>100</sup>

Across the five phases, Ugandan TJ has been gradually normalised in a process of partial regulation. Representing the legalisation, internationalisation and professionalization of TJ, a working group at the JLOS secretariat has since 2008 drafted a National TJ Policy that seeks to align the field with

“Uganda’s national, regional and international obligations” and “global best practices.”<sup>101</sup> The policy proposes a comprehensive framework for accountability, truth-telling, reparations and rituals, excluding amnesty for international crimes. The TJ sector is today so internationalised that “if donors withdrew, the entire transitional justice project would collapse.”<sup>102</sup> Normalisation has thus severed the link between the field and its transitional context.

## CONCLUSION

This article has argued that the field of TJ is undergoing a process of normalisation which is changing its fundamental concepts and identifiers. Departing from the exceptional paradigm that constructed its distinctiveness, contemporary TJ is increasingly becoming ordinary justice; this change is indicated by the “transitional” signifier, pertaining now to transitional contexts rather than their justice responses.

Normalisation thus creates a paradox at the heart of the field: Its model of justice, intended to be exceptional, appears to reject exceptionalism.<sup>103</sup> Furthermore, if TJ is ordinary justice, what makes the field distinct from those of law and development? In Uganda, where the National TJ Policy is formulated by the ordinary justice sector and its western donors, people may struggle to answer this question.

The article makes a theoretical contribution to the study of TJ, theorising the exceptional and normalising paradigms as well as the field’s conceptual and empirical movement between them. Currently, as the normalising blueprint is promoted by global governance institutions such as the EU, the ICC, UN agencies, and the World Bank, exceptional justice policies in individual countries are likely to be challenged. As the OHCHR told Burundi, “truth, justice, reparation, and guarantees of non-recurrence, should be conceived of as elements of a comprehensive policy, and not as items in a menu from which governments can simply ‘pick and choose.’”<sup>104</sup> Confronted with such demands for particular institutions, transitional societies must self-consciously decide the meaning of *their* TJ. Perhaps the article’s analysis of the two TJ paradigms and their empirical expression in Uganda can contribute to such an endeavour by relativizing and historicising the contemporary global blueprint.

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<sup>3</sup> Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

<sup>4</sup> Dustin N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal*, vol. 26 (2013), pp. 149-178; Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, vol. 16 (2003), p. 90.

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<sup>5</sup> Weber, quoted in Hilliard Aronovitch "Interpreting Weber's Ideal-Types," *Philosophy of the Social Sciences*, vol. 42 (2012), p. 357.

<sup>6</sup> *Ibid.*, p. 367, emphasis in original.

<sup>7</sup> See, e.g., Giorgio Agamben, *State of Exception*, (Chicago: University of Chicago Press, 2005); Anu Bradford and Eric A. Posner, "Universal Exceptionalism in International Law," *Harvard International Law Journal*, vol. 52 (2011), pp. 1-54; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, MA.: MIT Press, 1985 [1922]).

<sup>8</sup> Teitel, *Transitional Justice*, *op. cit.*, p. 6.

<sup>9</sup> Desmond Tutu, "Foreword by Chairperson," in *Truth and Reconciliation Commission of South Africa Report* vol. I (The Truth and Reconciliation Commission), p. 4.

<sup>10</sup> Rajeev Bhargava, "Restoring Decency to Barbaric Societies," in *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), pp. 45-67.

<sup>11</sup> *Ibid.*, p. 49.

<sup>12</sup> Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror* (London: Verso, 2009).

<sup>13</sup> Bhargava, *op. cit.*, p. 49.

<sup>14</sup> South Africa Constitutional Court, *Azapo et al. v. the President of the Republic of South Africa et al.* 1996, case no. CCT 17/96.

<sup>15</sup> Minow, *op. cit.*, p. 2.

<sup>16</sup> Teitel, *Transitional Justice*, *op. cit.*, p. 6.

<sup>17</sup> *Ibid.*, 11.

<sup>18</sup> *Ibid.*, 19;

<sup>19</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), p. 88.

<sup>20</sup> Schmitt, *op. cit.*; Agamben, *op. cit.*, see also Stephen Humphreys, "Legalizing Lawlessness: On Giorgio Agamben's State of Exception," *The European Journal of International Law*, vol. 17, no. 3 (2006), pp. 677-687; Jef Huysmans, "The Jargon of Exception - On Schmitt, Agamben and the Absence of Political Society," *International Political Sociology*, vol. 2 (2008), pp. 165-183.

<sup>21</sup> Michael C. Williams, "Words, Images, Enemies: Securitization and International Politics," *International Studies Quarterly*, vol. 47, no. 3 (2003), p. 516.

<sup>22</sup> Leland de la Durantaye, *Giorgio Agamben: A Critical Introduction* (Stanford: Stanford University Press, 2009), p. 338.

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<sup>23</sup> Huysmans, *op. cit.*; Schmitt, *op. cit.* But see Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *The European Journal of International Law*, vol. 21, no. 4 (2011): 941-965.

<sup>24</sup> Minow, *op. cit.*, p. 28.

<sup>25</sup> Teitel, "Transitional Justice Genealogy," *op. cit.*, p. 71; see also Catherine Turner, "Deconstructing Transitional Justice," *Law Critique*, vol. 24 (2013), pp. 193-209.

<sup>26</sup> *UN Approach to Transitional Justice. Address by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights*, (New York: United Nations, 2009), pp. 2-3, emphasis added. Available: <https://www.un.org/ruleoflaw/files/TJ%20panel%20discussion%20-%20HC%20statement.pdf> (accessed 3 December 2015).

<sup>27</sup> "What is Transitional Justice," <https://www.ictj.org/about/transitional-justice> (accessed 12 November 2015).

<sup>28</sup> Thomas Obel Hansen, "Transitional Justice: Toward a Differentiated Theory," *Oregon Review of International Law*, vol. 13, no. 1 (2011), pp. 1-53.

<sup>29</sup> Luis Moreno-Ocampo, "Transitional Justice in Ongoing Conflicts," *The International Journal of Transitional Justice*, vol. 1, no. 1 (2007), pp. 8-9.

<sup>30</sup> Bhargava, *op. cit.*, p. 49.

<sup>31</sup> "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General," UN Doc. S/2004/616 (12 January 2004).

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<sup>35</sup> Máximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes," *The American Journal of International Law*, vol. 105, no. 1 (2011), pp. 1-49; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company, 2011).

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<sup>37</sup> *Ibid.*

<sup>38</sup> Zalaquett, quoted in Diane F. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," *The International Journal of Transitional Justice*, 1, no. 1 (2007), p. 12, Tayler, quoted in Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2<sup>nd</sup> ed. (New York: Routledge, 2011), p. 92.



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<sup>39</sup> "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," *op. cit.*, para. 21.

<sup>40</sup> Mark Drumbl, "The Future of International Criminal Law and Transitional Justice," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham: Ashgate Publishing Limited, 2013), p. 537.

<sup>41</sup> "UN Approach to Transitional Justice" *op. cit.*, p. 8.

<sup>42</sup> Turner, *op. cit.*, p. 196.

<sup>43</sup> "UN Approach to Transitional Justice. Concept Note. Dialogue with Member States on Rule of Law at the International Level" (2 December 2009), p. 1. Available: <https://www.un.org/ruleoflaw/files/Panel%20on%20Transitional%20Justice%20Concept%20Note.pdf> (accessed 3 December 2015).

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<sup>45</sup> McAuliffe, "Transitional Justice and the Rule of Law," *op.cit.*, p. 151.

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<sup>47</sup> Naomi Roht-Arriaza, "Editorial Note," *International Journal of Transitional Justice*, vol. 7, no. 3 (2013), p. 386.

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<sup>50</sup> Sandrine Lefranc and Frédéric Vairel, "The Emergence of Transitional Justice as a Professional International Practice," in *Dealing with Wars and Dictatorships: Legal Concepts and Categories in Action* (The Hague: TMC Asser Press, 2013), pp. 235-252.

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<sup>52</sup> Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice*, vol. 8, no. 3 (2014), p. 340; Sharp, *op. cit.*, p. 156.

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<sup>54</sup> Lefranc and Vairel, *op. cit.*

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- <sup>63</sup> Hayner, *Unspeakable Truths*, *op. cit.*, p. 97.
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<sup>88</sup> Interview with member of mediation team to the Juba Peace Talks, London (UK), February 2013.

<sup>89</sup> Government of Uganda and LRA/M, *Annexure to the Agreement*, *op. cit.*

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<sup>94</sup> A copy of the indictment is on file with the author.

<sup>95</sup> *Thomas Kwoyelo alias Latoni v. Uganda. Constitutional Petition no. 036 of 2011* (Kampala: Constitutional Court of Uganda, 2011); *Ruling in Thomas Kwoyelo alias Latoni versus The Attorney General, before: Hon. Mr. Justice V.T. Zehurikize* (Kampala: High Court of Uganda, 2012).

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<sup>97</sup> Interview with representative of one of Uganda's donor partners, Kampala (Uganda), April 2011; *Justice at Cross Roads? A Special Report on the Thomas Kwoyelo Trial* (Kampala: Justice, Law and Order Sector, 2011).

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