



# Uniting States:

## New Avenues for Transitional Justice

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### 1. Introduction

How can transitional justice form unity amongst deeply divided societies? This commentary argues that the election of President Joe Biden in the United States (US) provides an interesting case to interrogate this question. After decades of polarisation, which culminated in the Capitol Riots of the 6<sup>th</sup> of January 2021, the US is facing questions of how to move forward and unify a deeply divided country. By extension, calls for accountability and reform are mounting in US political discourse. This paper attempts to outline ways in which a close look at the US case can add novel instruments to the toolbox of transitional justice.

The first section of this essay will establish the backdrop of transitional justice, establishing its benefits, use, and shortcomings. The second section will then outline the way in which the US case could help identify new answers to questions raised by transitional justice. Lastly, this essay concludes by providing impetuses for further research.

### 2. The Contours of Transitional Justice

Transitional justice works to heal deeply divided societies after they have experienced severe conflict.<sup>1</sup> It does this by using creative mechanisms for accountability, which often stray from western standards of strict justice. Its end goal is to turn the deeply divided society or

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<sup>1</sup> Martti Koskeniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of United Nations Law Online* 6, no. 1 (2002). <https://doi.org/10.1163/18757413-00601002>; Louise Arbour, "Economic And Social Justice For Societies In Transition," *New York University Journal of International Law and Politics* 40, no. 1 (2007).

state into one with sustainable peace and democratic rule.<sup>2</sup> The United Nations defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.”<sup>3</sup>

The central and most common mechanism is the truth commission, which provides enough accountability to “satisfy political, moral, and normative demands, while falling short of criminal responsibility as investigation, prosecution, and punishment.”<sup>4</sup> Indeed, these trials exist to reveal the truth, instead of providing for deterrence or punishment, as most trials do in an established democracy.<sup>5</sup> This lack of punitive measure is commonly accepted in post-conflict societies since it is only granted to those lower on the chain of responsibility. Those responsible for the most serious crimes are often still held criminally accountable.<sup>6</sup>

The exceptionality of transitional justice as a form of the law lies in its unique application of international law. A negative reading of the subject, as Bell puts it, recognises that the readjustment of human rights norms needed for transitional justice cannot always be limited to the transitional situation in which they are applied.<sup>7</sup> Perhaps it is for this very reason that transitional justice hinges on a high threshold of violence having occurred during conflict. Roht-Arriaza, for example, suggests that transitional justice should be used only in situations of “grave” (international, that is) human rights abuses.<sup>8</sup> This is because “a balance must be struck between the state’s sovereignty interest” and “the international community’s interest in protection of international human rights norms”.<sup>9</sup> This tension is emblematic of the whole of transitional justice which attempts to balance binaries: dictatorship or democracy, peace or war,

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<sup>2</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*. (Oxford: Oxford University Press, 2008); Catherine Turner, “Deconstructing Transitional Justice,” *Law and Critique* 24, no. 2 (2013). <https://doi.org/10.1007/s10978-013-9119-z>.

<sup>3</sup> United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (New York: United Nations, 2004), 4, <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

<sup>4</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, 250.

<sup>5</sup> Koskenniemi, “Between Impunity and Show Trials.”

<sup>6</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*.

<sup>7</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, 256.

<sup>8</sup> Naomi Roht-Arriaza, “The New Landscape of Transitional Justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Javier Mariezcurrena and Naomi Roht-Arriaza (Cambridge: Cambridge University Press, 2006), 405.

<sup>9</sup> Roht-Arriaza, “The New Landscape of Transitional Justice,” 405.

amnesty or accountability. Undoubtedly, the parties to a deeply dividing conflict will be at odds; just as there will be societal cries for accountability for the perpetrators of the atrocities, there will be hesitancy amongst the perpetrators to enter peace negotiations and adhere to peace agreements since the presumption is that they will face subsequent punishment.<sup>10</sup> In short, transitional justice attempts to balance the binaries of law and politics, struggling to bring justice and accountability to fruition through the very real, local politics inundating it.

Transitional justice can be broken down into three functional aspects. Firstly, there is an antecedent problem of division, i.e., the atrocities that precede the transitional justice process. Secondly, there are responses that tackle the atrocities directly. Thirdly, there are responses that aim to reform the society so that the atrocities are not repeated. Since the level of atrocity is so great in common occurrences of transitional justice, resource allocation is, albeit justly, greatly skewed towards addressing the second aspect instead of the third. This results commonly in the underutilisation of transitional justice's unique ability to help an evolving state to develop economic, social, and cultural rights – which are crucial to that state's long-term success.<sup>11</sup> While it is imperative for transitional justice to address the deep-rooted societal issues that led to the conflict, skewing of resource allocation makes this more challenging, if not impossible, to attain.<sup>12</sup> To be clear, this is not a critique. Resources are commonly not allocated to addressing economic, social, and cultural rights development or tangentially the deep-rooted issues that build up to the conflict. Within transitional justice processes, more attention should thus be focused on providing for the development of economic, social, and cultural rights in order to address the issues driving divisions.<sup>13</sup>

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<sup>10</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*; Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal* 100, no. 8 (1991), <https://doi.org/10.2307/796903>; David Cohen, "Transitional Justice in Divided Germany after 1945," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge University Press, 2006).

<sup>11</sup> United Nations Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (New York and Geneva: United Nations Office of the High Commissioner for Human Rights, 2014), <https://www.ohchr.org/Documents/Publications/hr-pub-13-05.pdf>.

<sup>12</sup> Niamh Reilly, "Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach," *International Journal of Law in Context* 3, no. 2 (2007), <https://doi.org/10.1017/S1744552307002054>.

<sup>13</sup> OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*.

In the next section, we will give an overview of the US case before purporting that a deeper analysis thereof could inspire transitional justice scholars to design creative responses that may help overcome political divisions driving violence.

### 3. The US Case

On the 3<sup>rd</sup> of November 2020, millions of US citizens cast their ballots and elected Joe Biden as the new President.<sup>14</sup> Biden's predecessor may be characterised as having led the most controversial administration in modern US history – not least because of the President's explicit disdain for democratic guardrails, such as freedom of the press, independent courts, and law enforcement. Throughout its four years in power, President Trump's administration has further divided US society by distorting facts, stirring fears of immigrants and demonising parts of the US populace (e.g., Trump labelling the press "enemies of the people").<sup>15</sup> This pattern intensified in the weeks before and after the 3<sup>rd</sup> of November election, as Trump spread unfounded claims of voter fraud, endorsed conspiracy theories which allege satanic cabals among the US' political elites and ordered a far-right militia group to "stand by."<sup>16</sup> All this culminated in a violent riot at the US Capitol on the 6<sup>th</sup> of January 2021, the day on which Congress gathered to certify the results of the election, during which five people lost their lives.<sup>17</sup>

Just fourteen days later, Joe Biden was inaugurated as the 46<sup>th</sup> President of the US. Speaking on the steps of the capitol, President Biden emphasised the importance of unity within the US.<sup>18</sup> However, the new President, and the Democratic Party are, as a whole, facing important questions. How should this unity come about? Should the new administration try to hold the Trump administration accountable, risking potential further division and alienation in

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<sup>14</sup> Katie Glueck, "Joe Biden is elected the 46th president of the United States," *New York Times*, November 7, 2020, <https://www.nytimes.com/2020/11/07/us/politics/joe-biden-is-elected-the-46th-president-of-the-united-states.html?searchResultPosition=1>.

<sup>15</sup> Richard S. Conley, *Donald Trump and American Populism: New perspectives on the American Presidency* (Edinburgh: Edinburgh University Press, 2020).

<sup>16</sup> "Trump now tells far right to 'stand down' amid white supremacy row," *BBC News*, October 1, 2020, <https://www.bbc.co.uk/news/election-us-2020-54359993>.

<sup>17</sup> "Donald Trump's Reckoning: The Right and Wrong Ways to Hold the President to Account," *The Economist*, January 16, 2021, <https://www.economist.com/leaders/2021/01/16/donald-trumps-reckoning>.

<sup>18</sup> Joe Biden, "Full Transcript of Joe Biden's Inauguration Speech." *BBC News*, January 20, 2021, <https://www.bbc.co.uk/news/world-us-canada-55656824>.

an already deeply divided congress, or should they try to “reach across the aisle” to pass policy initiatives? If the former option was to be chosen, what would accountability look like? These questions run parallel to questions of transitional justice, that is after an unprecedented and exceptional period of division, how does a society reform itself?

To be sure, the US does *not* mandate transitional justice. First of all, in modern US history, there has not been large-scale violence or atrocities that would make a transitional justice process necessary. In other words, political divisions in the US have not met the implicit “threshold of violence” that makes transitional justice an exceptional tool of international law.<sup>19</sup> Secondly, the democratic system of the US did not fail. Despite some setbacks, the US still ranks as one of the freest countries in the world, and the election of Joe Biden can be interpreted as proof that the US system of checks and balances works.<sup>20</sup> Thirdly, the cleavages that persist in the US are of a political nature and have not yet translated into outright violence on a scale that would constitute the invocation of transitional justice, since the capitol riots and recent events of hate crimes/police brutality fall short of this measure. Lastly, the US remains the most powerful actor in international affairs by both hard and soft power measures.<sup>21</sup> US exceptionalism makes the imposition of transitional justice, in this context, fairly unlikely, as the government is capable of resisting such an outright infringement on its sovereignty.

Despite these limitations, the US case may serve as an interesting case to study for transitional justice scholars. In his article *Give War a Chance*, Edward Luttwak argued that peace settlements may be unsustainable, as they often fail to address the political grievances that sparked violence in the first place.<sup>22</sup> To address the issue of unresolved political cleavages, Luttwak proposed to let wars run their course and have the warring parties quite literally “fight it out”.

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<sup>19</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*; Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime.”

<sup>20</sup> “United States: Freedom of the World 2020 Country Report,” *Freedomhouse*, accessed February 13, 2021, <https://freedomhouse.org/country/united-states/freedom-world/2020>.

<sup>21</sup> Doug Stokes, “Trump, American Hegemony and the Future of the Liberal International Order,” *International Affairs* 94, no. 1 (2018), <https://doi.org/10.1093/ia/iix238>; The International Institute for Strategic Studies, “Chapter Three: North America,” in *The Military Balance 2020* (London: Routledge, 2020), 45.

<sup>22</sup> Luttwak, “Give War a Chance.”

In contrast to Luttwak, we argue that a closer look at the US case may provide transitional justice scholars with inspiration to design responses that help overcome political divisions underlying violence. We suggest three key insights that could be drawn from the US case, and which work at the different functional aspects outlined above. These insights concern: (1) the nature of political cleavages, (2) the concept of accountability, and (3) reforms to democratic stability.

Firstly, the US serves as an interesting case to investigate the nature of political cleavages. As Barber and Pope highlight, supporters of Donald Trump do express an immense flexibility of policy preferences.<sup>23</sup> Instead of advocating for a specific set of policies that broadly fall into the same ideological basket, they rather adhere to the personalistic appeal of Donald Trump. A lack of clearly defined policies is a common characteristic of warring parties in post-conflict societies.<sup>24</sup> The way in which the US addresses this problem could help inform transitional justice reforms.

Secondly, transitional justice raises questions regarding what accountability means and to whom it should be applied. Questions of accountability, especially where actions were non-violent but may have the potential to inspire violence, sat at the core of the second impeachment trial of Donald Trump.<sup>25</sup> Though the trial was a function of party affiliation rather than a thorough analysis of the meaning of accountability, the arguments brought forward, as well as possible reforms that will follow, may reshape and help deepen our understanding of accountability in society.

The third and last parallel pertains to democratic stability. Transitioning to peace and democracy is only the first of many hurdles for post-conflict societies.<sup>26</sup> An integral question for transitional justice is how to prevent another conflict. Similarly, the US is interrogating its

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<sup>23</sup> Michael Barber and Jeremy C. Pope, "Does Party Trump Ideology? Disentangling Party and Ideology in America," *American Political Science Review* 113, no. 1 (2019), <https://doi.org/10.1017/S0003055418000795>.

<sup>24</sup> Stathis N. Kalyvas, "How Civil Wars Help Explain Organized Crime — And How They Do Not" *Journal of Conflict Resolution* 59, no. 8 (2015), <https://doi.org/10.1177/0022002715587101>.

<sup>25</sup> The Editorial Board, "Accountability After Trump," *New York Times*, December 19, 2020, <https://www.nytimes.com/2020/12/19/opinion/sunday/trump-presidency-accountability.html>; The Economist, "Donald Trump's Reckoning: The Right and Wrong Ways to Hold the President to Account."

<sup>26</sup> Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*.

democratic stability with the aim of preventing another populist government, which could risk shattering the foundations of US democracy. For example, discussions regarding the control of social media companies, and their role in giving a platform to falsehoods and conspiracy theories, may yield innovative policies that could serve as inspiration for both old and new democracies around the world.<sup>27</sup>

It is important to reiterate that the point of this commentary is not to argue that transitional justice should be applied to the US. This would not only be inadequate to the US situation, but would also severely damage the exceptionality of transitional justice, harming the integrity of international law. Rather, we aim to highlight the different insights that can be drawn from the US case to the study of transitional justice, specifically addressing the political cleavages underlying violence.

We should also be wary of an interventionist agenda. Potential lessons that can be drawn from the US case should not be viewed as universally applicable best practice. The lessons we have outlined can only serve as inspiration for reforms that may be helpful for transitional justice societies to stabilise their newfound peace and democracy.

#### **4. Conclusion**

This commentary makes the case for an analysis of the US after Trump to derive lessons for democratic reform. These reforms, as we argue, tackle deep divisions that are prevalent in both the US and societies in which transitional justice is applied. A greater focus on the political cleavages within societies could help transitional justice scholars and practitioners to generate creative and more sustainable solutions to the questions with which transitional justice wrestles. As Capoccia argues: “The decision on whether to prosecute the violators or to declare an amnesty is an entirely political one [...]”.<sup>28</sup> This case raises notable questions. For example, how can resource allocation in common cases on transitional justice better help to develop economic, social, and cultural rights? Likewise, careful questions could be asked about the

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<sup>27</sup> Robert H. Frank, “The Economic Case for Regulating Social Media,” *New York Times*, February 11, 2021, <https://www.nytimes.com/2021/02/11/business/social-media-facebook-regulation.html?searchResultPosition=1>.

<sup>28</sup> Giovanni Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Baltimore: Johns Hopkins University Press, 2007), 53.

value of transitional justice in political science. For example, could US policymakers borrow ideas from transitional justice to solve the impasses they face? Why or why not? We hope that this commentary may inspire some to find new avenues between the study of transitional justice and politics.

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