

# LOOKING BACKWARD TO ADDRESS THE FUTURE? TRANSITIONAL JUSTICE, RISING CRIME, AND NATION-BUILDING

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## LOOKING BACKWARD TO ADDRESS THE FUTURE? TRANSITIONAL JUSTICE, RISING CRIME, AND NATION-BUILDING

James L. Cavallaro\*

### I. INTRODUCTION

[A] major appeal of the Nazi regime was its image as a bastion of “law and order.” The Nazi State incessantly declared that it was waging a successful “war on crime.” . . . The Nazis’ claim that they had instituted a respite from “lawlessness” is an enduring image of the regime that is similar to the myth of National Socialism’s “eternal victory” over unemployment. Neither of these claims was greatly discredited in German popular memory, even after the colossal failure of National Socialism.<sup>1</sup>

This is not an Article about the Nazi regime’s war on crime, nor does it analyze the possible lawlessness of the Weimar Republic. It does, however, consider the role of crime in transitional states. As such, the observation above is relevant to the issues examined in the pages that follow. Crime and the manipulation of the fear it promotes were essential to the rise of Nazism, the fall of the Weimar Republic, and the historical record of both regimes. The quotation above, in the context of this volume on nation-building, is intended to remind us of the potentially fatal challenge for transitional states and new democracies presented by crime, public insecurity, and their (mis)management.

Much as historians now understand Germany in the 1930s,<sup>2</sup> I contend that we must recognize the vital role of street crime in the stability and instability of newly democratic and transitional states, a role far more important in many ways than other, more studied threats to democratic stability and nation-building. Thus, for example, notwithstanding the overwhelming barrage of media coverage, academic analysis, and political punditry to the contrary, the greatest violent threat to human security, and by extension, to political stability, in the twenty-first century has not come from terrorism. Instead—and here, reliable data are quite clear—a far greater danger to human life in this century has been, and almost certainly will continue to be, non-political violent crime. A look at recent figures should resolve lingering doubts about this. According to the State Department’s most recent *Country Reports on Terrorism*, there were 14,338 incidents of terrorism resulting in the deaths of 20,498 individuals worldwide

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1. MICHAEL BERKOWITZ, *THE CRIME OF MY VERY EXISTENCE*, at xiii-xiv (2007).

2. Like Berkowitz, who considers the attribution of criminality to Jews by the Nazis, *see generally id.*, historian Eric Weitz in a recent analysis recognizes the importance of the promotion of an image of law and order for the Nazis. *See* ERIC D. WEITZ, *WEIMAR GERMANY: PROMISE AND TRAGEDY* 349 (2006). He writes that “[t]he Nazi Party fomented disorder, yet—in a very nice game—successfully presented itself as the party of law and order against the Communists and ‘alien elements’ so many Germans feared.” *Id.*

in 2006.<sup>3</sup> In that same year, homicides caused the death of 17,034 in the United States alone,<sup>4</sup> and likely more than 500,000 around the world.<sup>5</sup> Thus, it is fair to estimate that in any given year, globally, *more than twenty-five times* more violent deaths are caused by ordinary crime than by terrorist acts.<sup>6</sup>

Crime surveys and health data also demonstrate that homicide rates have risen steadily over the past several decades.<sup>7</sup> If the past is an indicator of the future (and it generally is), we can expect common crime to continue to pose grave threats to human security in years to come. Of particular relevance for this Article, in the scores of states that have undergone or continue to undergo some form of political transition over the past two decades, significant surges in crime have accompanied the process of change from authoritarian or totalitarian rule.<sup>8</sup> Further, police are generally unable to handle this crime surge. In many of these states, therefore, the inability to provide security to ordinary citizens becomes a major political issue, or even the main issue on the political agenda, with instability provoked by surging crime weakening support for democratic rule. Indeed, while human security is comprised of a range of elements, studies demonstrate that physical security and crime consistently overshadow other human security concerns in the eyes of the public. As Lucia Dammert and Mary Fran T. Malone have noted:

The [United Nations Program for Development in Chile] describes seven dimensions of human security that are threatened by the current model of development: economic, alimentary, health, environmental, personal, societal, and political. Crime becomes a convenient scapegoat for citizens because they can channel all their insecurities into fear of crime, which is more tangible than these other economic, political, and social insecurities.<sup>9</sup>

Related to this concern, the experience of countries that have undergone transitions in recent years demonstrates that surges in crime, which accompany the transitional period, lead to citizen hostility toward those perceived as defending the

3. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM (2007), <http://www.state.gov/s/ct/rls/crt/2006/82739.htm>. Of the 14,338 reported attacks, 6,630—about 45 percent—occurred in Iraq where approximately 13,000 fatalities—65 percent of the worldwide total—were reported. *Id.*

4. CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2006), [http://www.fbi.gov/ucr/cius2006/data/table\\_01.html](http://www.fbi.gov/ucr/cius2006/data/table_01.html).

5. In its most extensive study on deaths resulting from homicide, the World Health Organization estimated that 520,000 homicides occurred in 2000. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 10, tbl.1.2 (2002), available at [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf). The estimate of 520,000 does not include an additional estimate of 310,000 deaths that resulted from “war-related” interpersonal violence. *Id.*

6. Here, I am using the 2006 figure for deaths attributed to terrorist acts by the State Department, see *supra* note 3 and accompanying text, compared to the 520,000 non-war homicides reported by the WHO in 2000, see *supra* note 5, and estimating no increase or decrease in projecting the figures for 2006.

7. See, e.g., WORLD HEALTH ORGANIZATION, *supra* note 5, at 26-27 & 27 fig.2.2 (reporting that, between 1985 and 1994, in a study of sixty-six countries, youth homicide rates among males increased from fewer than ten to over twenty per 100,000).

8. See generally JAMES L. CAVALLARO, INT’L COUNCIL ON HUMAN RIGHTS POLICY, CRIME, PUBLIC ORDER AND HUMAN RIGHTS (2003).

9. Lucia Dammert & Mary Fran T. Malone, *Does It Take a Village? Policing Strategies and Fear of Crime in Latin America*, LATIN AM. POL. & SOC’Y, Winter 2006, at 27, 30 (2006) (citation omitted).

rights of criminals and criminal suspects. In this context, citizen concern with crime is transformed into hostility toward the defense of human rights and the rule of law. In transitional societies, this public sentiment and the pressure it promotes to restrict rights and/or cede power to authoritarian forces constitute grave threats to consolidating democratic stability.

These concerns take on still greater importance in today's world, as political analysts consider that roughly half of the world's governments may now be classified as transitional. To be sure, it is not clear that all of these states are transitioning in a linear manner to some type of democracy. As Thomas Carothers noted in 2002:

Of the nearly 100 countries considered as "transitional" in recent years, only a relatively small number—probably fewer than 20—are clearly en route to becoming successful, well-functioning democracies or at least have made some democratic progress and still enjoy a positive dynamic of democratization. . . . Most of the "transitional countries," however, are neither dictatorial nor clearly headed towards democracy. They have entered a political gray zone. . . . [A]n uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of countries in the developing world and the postcommunist world.<sup>10</sup>

In these states as well as in newly post-transitional countries that have succeeded in establishing the institutional framework of democracy, ordinary crime represents a leading cause of loss of life and consequently is often perceived as a vital political issue by the domestic public. Thus, given the potentially severe consequences of citizen insecurity in such states and the high percentage of countries currently located on the spectrum of democratic transition, it is clear that common crime represents a significant threat to the stability of much of the developing world.

Despite all this, I contend, insufficient attention has been paid during the transitional era to addressing ordinary crime during transitions and beyond. Nation-building, the central task of transitional efforts and the unifying theme of this volume, requires much more attention to common crime and to the establishment of transparent, efficient, and democratic police and criminal justice systems to control it. Unfortunately, transitional justice, as a field, has instead focused disproportionately on abuses of the past and the means of redressing (or pardoning and overcoming) these violations. This focus, of course, makes sense. States transitioning from periods of gross violations of fundamental rights, internal conflict, and even civil war cannot move forward without some process of reckoning with their pasts. To date, this process of reckoning has been quite varied, with transitional justice approaches ranging from amnesty laws to national criminal prosecutions, and from international or hybrid tribunals to truth and reconciliation commissions. To be fair, these transitional processes have increasingly addressed the issue of criminal justice and police reform, once again with a significant range of responses. Yet, I argue, in their consideration of the criminal justice system, transitional processes have been characterized by an emphasis on preventing the types of abuses committed by state agents acting under prior authoritarian or totalitarian governments, such as politically targeted secret

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10. Thomas Carothers, *The End of the Transition Paradigm*, J. OF DEMOCRACY, January 2002, at 5, 9, 18.

abductions, torture, and summary executions. Again, these issues are vital ones and must be addressed if a state's security forces are to become democratic. But responding to these abuses, while necessary, is not sufficient to address the major challenges faced by the criminal justice and police forces in the transitional period and beyond.

Rather than focusing solely on past abuses, I argue, transitional states must think and plan prospectively for the surges in ordinary crime and the accompanying public outcry that will almost inevitably come with the process of transition. These states must also consider the range of challenges for democratic security posed by criminal violence, some of which are quite severe. In other words, transitional states must focus as much or more on the types of problems that can reasonably be anticipated (through a prospective, system-wide focus) as on those that have historically plagued them during periods of non-democratic rule.

To support this contention, this Article draws on three case studies, two from Latin America (Brazil and El Salvador), and one from sub-Saharan Africa (South Africa).<sup>11</sup> It first briefly considers the similarity in focus of transitional justice approaches to police and criminal justice reform, invoking acculturation theory to explain the replication of a dominant, backward-looking script across different transitional states. Next, it considers the frequent inability of police and the criminal justice system to cope adequately with rising crime using these replicated scripts and the consequences of this failure for the defense of human rights, the rule of law, and the stability of new democracies. The Article assesses the particular dynamics of these processes for each of the three country case studies. Throughout the Article, I seek to demonstrate that it is crucial to address deficiencies in domestic criminal justice systems precisely during periods of transition and that criminal justice solutions should be developed at this time—to the extent possible—in an objective and comprehensive fashion, rather than in ways that seek to respond to problems of the pre-transitional state. In this way, I suggest, transitional justice can progress beyond existing, backward-looking frameworks to build nations capable of addressing the challenges they will face as they move forward.

## II. THE FOCUS OF TRANSITIONAL JUSTICE: RECKONING WITH THE PAST

As one commentator has noted, transitional justice may be defined as the way in which “societies ‘transitioning’ from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek ‘reconciliation,’ and how they create justice systems so as to prevent future human rights atrocities.”<sup>12</sup> Another leading figure in the field, Priscilla Hayner, has noted that the “basic question [of transitional justice is] how to reckon with massive state crimes and abuses.”<sup>13</sup> The

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11. This Article builds on previous work addressing the post-transitional work of human rights groups in these countries. See CAVALLARO, *supra* note 8; James Cavallaro & Mohammad-Mahmoud Ould Mohamedou, *Public Enemy Number Two?: Rising Crime and Human Rights Advocacy in Transitional Societies*, 18 HARV. HUM. RTS. J. 139 (2005). Here, however, I seek to focus on how the surge in crime and consequences for transitional states should inform thinking and practice during the transitional period.

12. Charles T. Call, *Is Transitional Justice Really Just?*, BROWN J. WORLD AFF., Summer/Fall 2004, at 101.

13. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 11 (2001).

focus in these definitions—and in many others—is clearly on the process of reckoning with the past and, in particular, human rights violations committed by repressive regimes. Even its view towards the future is framed by the past: under this model, the development of justice systems, rather than responding to future challenges, should ensure the prevention of the atrocities that marked the past. Significant attention in the study of transitional justice has been devoted to the different approaches and dimensions—normative, religious, legal, practical—that frame the process or processes by which states address past abuses. Perhaps the most important tension in this area concerns the relevant roles given to retributive rather than restorative justice. Martha Minow's seminal text frames the primary tension slightly differently as between vengeance and forgiveness.<sup>14</sup> Yet both retributive and restorative justice, as well as vengeance and forgiveness, as understood in transitional justice mechanisms, focus primarily on the relationship among past violators (security forces), victims (real and perceived opponents of the state), and the broader society. As such, they do not necessarily address directly the relationship among future violators (common criminals or police), victims (ordinary citizens or criminal suspects), and the society as a whole.

This Article does not enter into the rich debates on the issue of retributive versus restorative justice, nor the many related questions that flow from this tension. Instead, it focuses on the commonality of most approaches to transitional justice, at least insofar as the field has focused on addressing past violations as a means of strengthening the capacity of the transitional state to move forward. The flaw with this approach at a theoretical level, I suggest, is that in some areas (and here, I include the criminal justice system and police), addressing the future in transitional societies may require approaches *not* linked directly to past abuse. Instead, it may be the case that the best approaches to the criminal justice system and police, while grounded in an understanding of the impact of transition on crime, should not seek guidance for future direction from efforts to correct past mistakes and patterns of abuse. In this sense, these approaches would represent a marked difference from the practice that has characterized the field to date.

### III. TRANSITIONAL JUSTICE EFFORTS AND THE REPRODUCTION OF SCRIPTS

This Article does not purport to consider exhaustively the contours of the current transitional justice model's focus on reckoning with the past, nor why a particular consensus in favor of this focus on reckoning has developed. Still, it might be helpful to our consideration of means of responding to this focus to begin with a brief reflection on recent scholarship on the dissemination of global governance models in the field of human rights. Here, sociology's neo-institutionalism, or World Society School, may help to explain some of the factors at work. This school of thought seeks to explain the proliferation of worldwide governance models that draw on the same set of global scripts despite the existence of real differences between and among political contexts, differences that should result in greater variety in modes of governance.<sup>15</sup>

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14. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 9-24 (1998). Other chapters in the volume consider trials, truth commissions and reparations. *Id.* at 25, 52, 91.

15. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753 (2003).

Ryan Goodman and Derek Jinks have strengthened this framework with international relations scholarship, offering an account of state behavior based on the socialization of global models or scripts.<sup>16</sup> Goodman and Jinks argue that state behavior in the field of human rights is highly influenced by the surrounding international environment. In particular, the influence of this environment leads governments to copy the actions of other states through mimicry, identification, and status maximization, a collective process termed *acculturation*.<sup>17</sup> The result of this process is that the institutional models adopted by states often take strikingly similar forms across space and time (that is, displaying *isomorphism*), despite the fact that the particular regional and political contexts of the states in question may differ greatly and thus demand differing institutional approaches.

In another text, with co-author Sebastian Albuja, I have argued that these top-down, transitional justice schemes based on standard international models may have been adopted by states largely as a result of this process of acculturation, and not necessarily as a consequence of the suitability of these models for context-specific needs.<sup>18</sup> Acculturation helps to explain the similarity of approach between and among truth commissions along important dimensions, despite the different contexts that these commissions are meant to address.<sup>19</sup> This Article suggests that acculturation may also help explain the similarity in focus of transitional justice approaches to the criminal justice system—that is, the excessive focus on reckoning with the past and designing institutions based on avoidance of the errors of that past. Though both vital and understandable, this focus might not be most suitable for transitional states almost certain to face crime waves, along with threats to human security and political stability.

In their focus on denouncing and documenting gross violations of civil and political rights, transitional justice approaches have empowered societies to consider and apply a range of solutions to respond, however inadequately, to past abuses. However, based on the case studies that follow, I suggest that these models have failed to address the problems of rising crime prospectively and thus have failed to respond adequately to the threat that criminal violence poses to new democracies. To the extent that choices during the transitional period are the result of acculturation, however, there is hope that critical reevaluation based on the experience of states that have undergone transitions may lead to the implementation of more adaptive models. In particular, states in the process of developing and restructuring criminal justice systems and police forces may learn from the experience of states that have focused on reform based on backward-looking efforts focused on politically motivated abuses.

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16. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004).

17. *Id.* at 626.

18. See James L. Cavallaro & Sebastián Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, in TRANSITIONAL JUSTICE FROM BELOW (Kieran McEvoy & Lorna McGregor eds., forthcoming July 2008).

19. *Id.*

## IV. CRIME AND TRANSITION

Over the last quarter of the twentieth century and the beginning of the twenty-first, criminal violence has increased around the world.<sup>20</sup> In research done in Argentina, Brazil, Peru, Nigeria, South Africa, Ukraine, and Russia, a team of researchers for the International Council on Human Rights Policy found consensus among government officials, criminal justice practitioners, and civil society members interviewed, as well as in the available official statistics, on the existence of surges in violent crime during the transitional period.<sup>21</sup> This research found greater consensus still on the general sense that the public's perception of insecurity had increased significantly in the transitional period.<sup>22</sup> The research team also considered the nature of official responses to rising crime in these transitional societies.<sup>23</sup> An article I wrote with co-author Mohammad-Mahmoud Ould Mohamedou based on this study observed that:

Police forces in authoritarian states tend to suppress not only dissent but also criminality, or at a minimum, they are widely perceived as being effective at crime control. To the extent that it is not merely a misperception, such "control" is achieved at a high cost to individual rights and the rule of law. Prior to transition, crime control in all the states considered here focused on repressive and frequently brutal methods, including systematic torture and summary execution of suspects.<sup>24</sup>

Further, that piece noted that one particularly difficult aspect of crime control associated with periods of transition is the demobilization or reform of repressive security forces used during authoritarian and totalitarian regimes, both to control political dissent and to fight crime:

One of the first acts of new governments is often to dismantle the old security apparatus, often leading to a security vacuum. This gap leads to wide-spread appeals for more effective order maintenance, especially by people who have been victimized and who attribute their victimization to this vacuum. . . . Such collective anger shapes the nature of the request for more effective order maintenance, frequently through increased demands for retributive justice. . . . [T]hese demands result in the mobilization of repressive responses, that is, measures designed to crack down on crime through police sweeps, raids, and similar tactics. . . .

In the context of a security vacuum, state policymakers in transitional societies are charged with the difficult task of assuring citizen safety while not allowing police and other security forces to revert to abusive practices characteristic of the pre-transitional society. This is a challenge that is seldom met. In many circumstances, authorities turn a blind eye to continued abusive practices. In other instances, they may encourage police to continue to crack down on crime, knowing that in practice this will entail serious rights abuse.<sup>25</sup>

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20. CAVALLARO, *supra* note 8, at 19.

21. *Id.* at 4-5, 16; *see also* Cavallaro & Mohamedou, *supra* note 11, at 144.

22. Cavallaro & Mohamedou, *supra* note 11, at 144.

23. CAVALLARO, *supra* note 8, at 26-27.

24. Cavallaro & Mohamedou, *supra* note 11, at 145 (citation omitted).

25. *Id.* at 146-47. I am indebted to Clifford Shearing and Janet McCarthy who expressed these ideas in a framing paper as part of the research process for the International Council on Human Rights Policy study on crime, public order, and human rights. *See* Clifford Shearing & Janet McCarthy, *Crime, Rights and Order: Reflecting on an Analytical Framework* (Int'l Council on Human Rights Policy, 2001).



Despite this tendency to support repressive responses, transitional authorities rarely succeed in controlling violent crime. Instead, experience demonstrates that transitional police are quite poor in suppressing crime. As the case studies below demonstrate, crime surges follow the transition with predictability. The consequences are nearly immediate for new democratic authorities: public outrage not only presses them to take drastic measures, but also undermines their capacity to govern and, in extreme cases, threatens the stability of the transitional government.

## V. THREE CASE STUDIES

### A. Brazil

#### 1. Authoritarian Abuses and the Focus of Transitional Efforts

Along with its southern cone neighbors, though perhaps to a lesser extent, military authorities in Brazil engaged in widespread, politically motivated violations of core civil and political rights during the 1964-1985 military dictatorship, torturing thousands and kidnapping and murdering hundreds of dissidents, activists, and guerrillas.<sup>26</sup> After twenty-one years of military rule, Brazil began a transition at the federal level with indirect presidential elections in 1985, followed by a constitutional assembly that led to the drafting of the 1988 constitution.

In many ways, efforts to redress the abuses of the military period focused on the constitution. That document, as a result, is quite advanced in its direct protection of rights, as well as its incorporation of international human rights instruments into domestic law.<sup>27</sup> Reform of the criminal justice sector and police, however, was not a major focus of the constitutional reform. As scholar Paulo de Mesquita Neto observes, the 1988 constitution “promoted very limited changes to the structure of the public security system established under the authoritarian regime.”<sup>28</sup> In addition, as Emilio Dellasoppa and Zoraia Saint’Clair Branco noted recently, “Fifteen years after the 1988 constitution, the federal police force still lacks framework legislation, as does the civil police force of the state of Rio de Janeiro.”<sup>29</sup> While debate in Brazil on reforming the structure of the police has been significant for the past several decades, concrete changes have been very difficult to implement. Indeed, as Mesquita Neto notes, “Despite the transition to democracy and the new constitution, there were few changes in the public-security system established during the authoritarian regime.”<sup>30</sup>

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26. See generally ARCHDIOCESE OF SÃO PAULO, *TORTURE IN BRAZIL: A SHOCKING REPORT ON THE PERVERSIVE USE OF TORTURE BY BRAZILIAN MILITARY GOVERNMENTS, 1964-1979* (Joan Dassin ed., Jaime Wright trans., 1986).

27. See CONSTITUIÇÃO FEDERAL [C.F.], art. 5 (Brazil).

28. Paulo de Mesquita Neto, *Crime, Violence and Political Uncertainty in Brazil*, in *CRIME AND POLICING IN TRANSITIONAL SOCIETIES: 30 AUGUST–1 SEPTEMBER 2000*, 77, 82 (2000), available at [http://www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf\\_4865\\_2.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_4865_2.pdf).

29. Emilio Enrique Dellasoppa & Zoraia Saint’Clair Branco, *Brazil’s Public-Security Plans*, in *PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS* 24, 25 (John Bailey & Lucía Dammert eds., 2006).

30. Paulo de Mesquita Neto, *Public-Private Partnerships for Police Reform in Brazil*, in *PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS*, *supra* note 29, at 44, 47.

## 2. *The Surge in Crime and Political Consequences*

Figures over the past two decades demonstrate a clear surge in violent crime corresponding to the first stage of transition in Brazil. According to a recent study, the homicide rate in Brazil doubled over the sixteen year period from 1980 to 1996, from 11.7 per 100,000 residents to 23.7.<sup>31</sup> Over the same period, the rate of homicide with firearms nearly tripled, rising from 5.1 per 100,000 residents to 14.0.<sup>32</sup> Along with the rise in homicides, Brazil has witnessed the growth of gang violence and organized criminal activity. The most visible manifestation of the power of these groups to provoke instability came in May of 2006 when a series of prison revolts and attacks on public buildings organized by the First Command of the Capital (*Primeiro Comando da Capital*, or PCC) effectively paralyzed São Paulo for several days.<sup>33</sup> Even before the May 2006 attacks, the PCC had demonstrated its strength within the prison system by coordinating simultaneous uprisings in detention centers throughout the state five years earlier.<sup>34</sup> In Rio de Janeiro, several criminal gangs have operated throughout the state and beyond in a range of organized illicit activities.<sup>35</sup> Public insecurity in major metropolitan areas in Brazil is widely considered to top the concerns of urban dwellers and plays a key role in politics at the state and national level.<sup>36</sup> Crime surges routinely provoke calls for military intervention in policing, if not in governance. They have also led to a boom in private security and vigilantism.<sup>37</sup>

In Brazil, and throughout the region, broad segments of society have grown increasingly disillusioned with democratic rule, in significant part due to the perceived

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31. Mesquita Neto, *supra* note 28, at 78.

32. *Id.*

33. See James L. Cavallaro & Raquel Ferreira Dodge, *Understanding the São Paulo Attacks*, REVISTA: HARV. REV. OF LATIN AM., Spring 2007, at 53. The attacks in May have been described in the following terms:

In May 2006, [the PCC] launched an organized campaign of revolts in 83 prisons and 274 attacks on police stations, fire departments, private schools, hospitals, the public prosecutors' office, automatic teller machines, and city buses. In the first four days, the planned violence claimed the lives of 31 police officers, eight prison agents, and four civilians. The wave of attacks caught the city by surprise (although authorities had some prior knowledge) and its lack of preparation showed. Thousands of terrified residents refused to leave their homes to go to work and school (in part, unable to do so because of the destruction and interference in public transportation); many others left early. São Paulo, South America's greatest economic hub, nearly ground to a halt in the coming days, costing the city and the region tens of millions of dollars.

*Id.*

34. *Id.* at 54.

35. See generally ENRIQUE DESMOND ARIAS, *DRUGS AND DEMOCRACY IN RIO DE JANEIRO: TRAFFICKING, SOCIAL NETWORKS, & PUBLIC SECURITY* (2006) (discussing the political operations of criminal gangs in Rio de Janeiro).

36. Cavallaro & Dodge, *supra* note 33, at 54.

37. Cavallaro & Mohamedou, *supra* note 11, at 155-56. For example, Teresa Caldeira has found: [T]he relationship between the Brazilian illegal market in security services and uniformed security guards in private condominiums, where policemen or ex-policemen (who have their own guns) are paid to "clean up any major problem." This market interacts with many of the same personnel who act as *justiceiros* (literally "justice makers"), but who are more accurately described as death squads engaged in summary executions.

*Id.* at 156.

inability of elected leaders to control ordinary crime. In a 1996 *Latinobarómetro* poll, only 50% of Brazilians questioned responded affirmatively to the statement, "Democracy is preferable to any other type of government," the second lowest level of support among eighteen Latin American countries surveyed.<sup>38</sup> In that year, only Hondurans manifested lower levels of support for democratic rule.<sup>39</sup> In 2007, support for democracy in Brazil had fallen further, to 43%.<sup>40</sup> By then, three countries joined Honduras with levels lower than those in Brazil: El Salvador, Guatemala, and Paraguay.<sup>41</sup> Interestingly, all three are states that had undergone transitions and crime surges between 1996 and 2007.<sup>42</sup> Also of note, as the *Economist* observes, the 2007 annual poll represents the first time that "crime seems about to displace unemployment at the top of the list of problems in the region."<sup>43</sup>

### *B. El Salvador*

#### *1. Authoritarian Abuses and the Focus of Transitional Efforts*

The civil war in El Salvador during the 1980s was extremely violent and marked by atrocious rights abuses, including widespread summary executions, death squad murders, forced disappearances, torture, and routine violations of other basic civil and political rights. Estimates place the number killed at 75,000.<sup>44</sup> Thousands were forcibly displaced from their homes; thousands more fled into exile in the United States, primarily, as well as to neighboring states. Along with Nicaragua, El Salvador occupied a central role both in the region and in United States foreign policy, leading the small Central American state to become the focus of significant attention throughout the period of civil strife and during the first years of transition. In 1991, the United Nations established a mission in the country to broker a peace agreement between the warring factions.<sup>45</sup> This mission, ONUSAL, by its Spanish acronym, played a key role in designing transitional justice measures.

As in other states recovering from civil war, El Salvador sought to confront its violent past and its record of horrendous human rights abuses. In many ways, in part due to the significant international influence in the transitional period, El Salvador is perhaps the best case of an apparent good faith effort to overhaul the main component of the criminal justice system: the police. As part of the ONUSAL accords, the national police forces were disbanded and reconstituted as the National Civil Police, or *Policía Nacional Civil* (PNC), incorporating former security and guerrilla forces.<sup>46</sup> Quotas were established for police, military, and rebels: 20% of the new police force

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38. *The Latinobarómetro Poll: A Warning for Reformers*, THE ECONOMIST, Nov. 17, 2007, at 45-46.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 2 (2007), available at [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf). The Author supervised this research project in El Salvador and edited the text along with Spring Miller.

45. S.C. Res. 693, 46th Sess., U.N. Doc. S/RES/693 (May 20, 1991).

46. INT'L HUMAN RIGHTS CLINIC, *supra* note 44, at 9-10.

would be comprised of former state security forces, 20% would be former guerrillas, and 60% would be persons not directly engaged as combatants.<sup>47</sup> Initial assessments of the design were favorable.

However, this fundamentally backward-looking political accord would be undone in practice by political forces. The restructuring process sought to counter the predominant historic use of the national police force, that is, as a means of exerting extreme violence for political ends. The balancing of percentages of ex-security forces and rebels incorporated responded to a political logic, rather than a holistic approach to police reform. Compounding the difficulties that would eventually undermine this ambitious project was the politicized nature of its implementation from the very start. As a study that I directed for the International Human Rights Clinic at Harvard Law School has observed:

Domestic human rights organizations and international observers trace many of the PNC's current problems to its initial composition. . . . The post-war government did not abide by the terms of the peace accords [with respect to limited inclusion of former security forces and rebels], going so far as to "plac[e] former military personnel into the new force, including the wholesale incorporation of units slated to be disbanded." . . . The strong presence in the PNC of actors associated with the militarized public security institutions from the years of military rule has seriously undermined its capacity to help protect human rights and build the rule of law in El Salvador.<sup>48</sup>

The Harvard Clinic report concludes that as a result of the political manipulation of the PNC:

A decade and a half after the signing of the peace accords, combat affiliations may not be as visible or as expressly divisive as they were in the mid-1990s; however, the PNC is still seen as an institution that is frequently more responsive to powerful political and economic forces than to the exigencies of the rule of law.<sup>49</sup>

To date, as the Harvard Clinic report notes, the PNC continues to be highly politicized and inefficient.<sup>50</sup>

## *2. The Surge in Crime and Political Consequences*

In the years since the transition in El Salvador, registered levels of non-political, violent crime have soared. While there is debate among social scientists about the reliability of official figures, those who study crime and violence in the country agree that the homicide rate has reached troubling levels. As José Miguel Cruz observes:

According to various sources, after the civil war and during the development of the new police, El Salvador faced one of the highest crime rates in the Western Hemisphere in recent years. . . . Some estimates suggest that rates increased to as high as 130 homicides per one hundred thousand population; others suggest lower rates. There is little doubt that during the years following the signing of the peace accords,

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47. *Id.* at 10.

48. *Id.* (citations omitted).

49. *Id.*

50. *See id.* at 10-11.

the rates reached a minimum of approximately 80 homicides per one hundred thousand population, which is a quite severe problem.<sup>51</sup>

Given these alarming statistics, it should come as no surprise that crime and responding to crime has become a central—if not *the* central—issue in contemporary El Salvadoran politics. It has also become the subject of significant manipulation and fear mongering as a means of promoting reactionary policies that threaten core democratic principles. In 2003, for example, the legislature, pressed by the President and in response to growing concern about criminal gangs, adopted an anti-gang law so marred with violations of individual rights that even in the midst of anti-crime hysteria in April 2004, the Supreme Court invalidated several sections.<sup>52</sup> Another form of manipulation of crime involves both the intensified media coverage of, and actual increase in, brutal homicides in the days and weeks immediately prior to national elections. The Harvard Clinic found, for example, a significantly higher number of killings reported in the month preceding elections as compared to other periods, as well as a clustering of extremely brutal killings.<sup>53</sup>

### C. South Africa

#### 1. Authoritarian Abuses and the Focus of Transitional Efforts

The apartheid regime in South Africa was marked by severe, widespread rights abuses, including political killings, torture, and the routine violations of core civil rights, abuses inherent in a racially-stratified system. After decades of well-documented and repressive rule, and a successful campaign to end apartheid that transcended the country's borders, South Africa embarked on an ambitious social transformation project. Its transitional process was closely followed by many of the same international forces engaged in the struggle against apartheid.

The structures created during the transition sought to respond to the worst abuses committed by the previous repressive regime. The Truth and Reconciliation Commission (TRC), created in 1995, focused on gross violations of human rights rather than lesser abuses and addressed only abuses considered overtly political.<sup>54</sup> This focus may have led those who designed South Africa's transitional justice mechanisms to fail to appreciate the dynamics of police reform, as well as the mundane challenges faced by South Africa's population.

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51. José Miguel Cruz, *Violence, Citizen Insecurity, and Elite Maneuvering in El Salvador*, in PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS, *supra* note 29, at 148, 152 (citation omitted).

52. INT'L HUMAN RIGHTS CLINIC, *supra* note 44, at 38-41.

53. *Id.* at 72-74.

54. See Janine Rauch, *The South African Police and the Truth Commission*, 36 S. AFR. REV. SOC. 208 (2005). Rauch notes:

The TRC final report made a recommendation on these issues that seemed to come out of left field:—that provincial governments should not be permitted to exercise 'unfettered power' over Provincial Police Services. The TRC report-writers seem to have been unaware of the complex Constitutional arrangements for national, provincial and local accountability of the new police service, and of the contents of the 1996 South African Police Services Act, which created mechanisms and procedures for the relationship between national and local governments in respect of policing. As such, this recommendation of the TRC was not implementable.

*Id.* at 226 (citation omitted).

The first several years of the transition addressed the need to transform the apartheid police into a more democratic force. As Elrena Van Der Spuy observes, Western assistance for policing during this process “was driven by the need to transform an apartheid institution into an accepted and legitimate organ of social control.”<sup>55</sup> Not until the second phase of foreign assistance that started in 1996 were Western efforts “directed to the emergence of ‘crime’ as one of the most central challenges facing the stabilisation of the emerging industrial democracy. Within this context the lack of institutional capacity inside the police machine to counteract crime became starkly evident.”<sup>56</sup>

Still, even after 1996, police reform efforts failed to respond adequately to the threat posed by ordinary crime. Analysts Anton du Plessis and Antoinette Louw conclude, for example, that short-range thinking driven by political pressures prevailed well after the recognition that ordinary crime had become a major issue in South Africa.<sup>57</sup>

## 2. *The Surge in Crime and Political Consequences*

Writing in 2003, Tony Roshan Samara summarized the crime surge in post-apartheid South Africa in the following terms:

Figures are now available . . . for all years between 1994–2001. What they show is that, with the exception of murder, major crimes have increased substantially in almost every category in all nine provinces of the country. The decline in murders, furthermore, is likely due to the decline in political violence after 1994, more than to improvements in policing and the criminal justice system. The exception to this trend is the Western Cape, where murders have increased since 1994 by 32 per cent.<sup>58</sup>

Furthermore, researchers du Plessis and Louw conclude, “the figures recorded by the police after 1994 indicate that recorded crime in South Africa has increased by 30% over the past decade. Recorded violent crime has increased more than any other crime type (by 41% compared to 28% for property crime).”<sup>59</sup> Due to the lack of reliable statistics from before the transition, it is difficult to demonstrate with absolute certainty the existence and degree of increase in crime after the end of apartheid.<sup>60</sup> Whatever the reliability of crime statistics in post-apartheid South Africa, however, popular

55. Elrena Van Der Spuy, *Foreign Donor Assistance and Policing Reform in South Africa*, 10 POLICING & SOC. 343, 349 (2000).

56. *Id.*

57. Anton du Plessis & Antoinette Louw, *Crime and Crime Prevention in South Africa: 10 Years After*, 47 CAN. J. CRIMINOLOGY & CRIM. JUS. 427 (2005).

58. Tony Roshan Samara, *State Security in Transition: The War on Crime in Post Apartheid South Africa*, 9 SOC. IDENTITIES 277, 285 (2003).

59. du Plessis & Louw, *supra* note 57, at 428 (citation omitted).

60. While there is broad consensus that reported crime has increased since the transition, there is significant debate about the extent of the increase, and even about the existence of a rise in crime, as opposed to an increase in reporting. One leading scholar notes that in South Africa “no reliable crime statistics for the whole country were recorded before January 1994.” MARK SHAW, *DEMOCRACY’S DISORDER? CRIME, POLICE AND CITIZEN RESPONSES IN TRANSITIONAL SOCIETIES* 9 (2002). Roshan Samara writes that “[i]t is very possible that crime was equally high prior to 1994, but was not reported to police, and was not an object of police investigation.” Samara, *supra* note 58, at 285-86.

response to perceived insecurity was palpable. In particular, public concern with the inability of police and public authorities to control crime grew in the aftermath of the euphoria of the transition.<sup>61</sup> Researchers Sekhonyane and Louw found that seven years after the first democratic elections, the overwhelming majority of South Africans doubted the government's ability to control crime.<sup>62</sup> Reviewing this research, the International Council on Human Rights Policy noted:

In 2001, less than one in ten South Africans (nine per cent) believed that government had "full control." Nearly half (forty-nine per cent) said government had "some control." No less than thirty-five per cent thought government was "not in control." The remaining (seven per cent) of the sample said they did not know.<sup>63</sup>

Lack of confidence in the police led to the growth of the private security industry and a boom in vigilante groups.<sup>64</sup> Over the past decade, crime has increasingly earned a central position in South African politics. Not only has vigilantism grown, but anti-democratic discourse and appeals for other violent and repressive measures to control crime have gained strength from the perceived inadequacy of democratic authorities to respond to the challenge posed by crime.<sup>65</sup>

## VI. CONCLUSION

This Article has sought to establish that transitional justice, at least in the three case studies examined and almost certainly more generally, has prioritized reform measures based on backward-looking efforts to redress the crimes of the past and, through that redress, to prevent their commission in the future. In doing so, these mechanisms have failed to comprehensively prepare for one of the principal threats associated with transitional states: ordinary crime.

Restructuring criminal justice and police systems is a difficult process, rife with political barriers and constrained by limited resources. Even if reformers were to take a holistic approach to change during the transitional period, the challenges they would face in police and criminal justice reform would be daunting. There are few clear answers among scholars and practitioners in the field of criminal justice to the questions that would animate any attempt to restructure police forces during a transition. Still, there is reason to believe that they might fare better in combating ordinary crime if their point of departure were the future needs and challenges to be faced by the police and criminal justice systems, rather than the need to avoid repetition of the past.

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61. See du Plessis & Louw, *supra* note 57, at 429.

62. Makubetse Sekhonyane & Antionette Louw, *Violent Justice: Vigilantism and the State's Response* 14 (Inst. for Sec. Studies, Monograph No. 72, 2002).

63. CAVALLARO, *supra* note 8, at 86.

64. *Id.* at 86-88.

65. *Id.* at 42, 86.

