



# JUSTICE MOSAICS

*How Context Shapes Transitional Justice in Fractured Societies*

EDITED BY ROGER DUTHIE AND PAUL SEILS

INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE



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## **INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE**

The International Center for Transitional Justice (ICTJ) helps societies in transition address legacies of massive human rights violations and build civic trust in state institutions as protectors of human rights. In the aftermath of mass atrocity and repression, ICTJ assists institutions and civil society groups in considering measures to provide truth, accountability, and redress for past abuses. Committed to the vindication of victims' rights and the promotion of gender justice, ICTJ provides expert technical advice and knowledge of relevant comparative experiences in transitional justice efforts from across the globe, including criminal prosecutions, reparations initiatives, truth seeking, memorialization efforts, and institutional reform. Learn more about ICTJ at [www.ictj.org](http://www.ictj.org)

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Cover photographs, clockwise from top left: Tunisian activists protest the Economic Reconciliation Bill presented to parliament that would offer a path for corrupt Ben Ali-era officials and business people to legalize their stolen assets and secure a form of amnesty, July 15, 2016 (Lina Ben Mhenni); Kenyan President Mwai Kibaki, center left, and opposition leader Raila Odinga, center right, sign a power-sharing agreement in Nairobi, Kenya, after weeks of bitter negotiations on how to end the country's deadly post-election crisis, February 28, 2008 (AP Photo/Jerome Delay); The elderly, women and children, and minority ethnic groups or castes can be particularly vulnerable following crises such the Nepal earthquakes, and growing food insecurity can impact heavily on these groups, June 3, 2015 (©FAO/Nepal); Revolutionary Armed Forces of Colombia (FARC) rebels stand in formation during a practice ceremony for the Bolivarian Movement, a new clandestine political party for the rebels, outside of San Vicente del Caguan in the FARC-controlled zone of Colombia, April 28, 2000 (AP Photo/Scott Dalton).

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# Introduction

*Roger Duthie*<sup>1</sup>

The contexts in which societies attempt to address legacies of massive human rights violations are integral to the concept of transitional justice. Such contexts vary widely. They can include ongoing conflicts, post-authoritarian transitions, post-conflict transitions, and post-transitional periods. They can also differ in terms of institutional and political fragility as well as economic and social development. Broad policy objectives in such contexts can include rule-of-law promotion, conflict resolution, peacebuilding, the vindication and protection of human rights, democratization, development, and social change. As the term suggests, however, the context in which a society undertakes transitional justice processes is usually to some degree *transitional*. This is an important factor because transitions can create opportunities for addressing past injustice, while at the same time they retain continuities with the past that can pose constraints or obstacles for doing so. The fact that context varies from setting to setting is significant because it affects the objectives of transitional justice efforts, as well as the processes through which they develop, which in turn affect the specific responses or measures that are most appropriate and feasible in each situation. Processes here refer to the different ways in which ideas and movements develop, promote, and coalesce in demands for accountability, acknowledgement, and reform.

Transitional justice efforts are often criticized as being understood and implemented as a template or a toolkit—that is, a narrow set of measures to be applied uniformly wherever widespread human rights violations have occurred.<sup>2</sup> Policymakers and practitioners are therefore frequently called on to take context into greater consideration when assessing, advocating, shaping, and designing transitional justice processes. To assist them, this edited volume examines some of the main contextual factors that have significant implications for responding to massive human rights violations: the institutional context, the nature of conflict and violence, the political context, and underlying economic and social structural problems. It presents the findings of a multi-year research project by the International Center for Transitional Justice on

the challenges and opportunities of responding to serious and massive human rights violations in different—and difficult—settings.<sup>3</sup>

Transitions in Argentina and Chile played out differently from those in Guatemala and El Salvador, just as the transition in South Africa since the end of apartheid did from those in Eastern and Central Europe. Transitions in Liberia and Sierra Leone differed from those in Nepal and Sri Lanka, just as they have from that in Tunisia and those potentially to come in Syria and Libya. The main differences in these transitions are not just geographic or temporal, but also institutional, political, social, economic, and conflict and repression related. Responding to the massive and serious human rights violations that occur in such different contexts requires careful interrogation of these factors and their interaction with justice processes. While countries have learned valuable lessons from the similarities in other experiences, it is important to keep in mind the differences among them as well.

## TRANSITIONAL JUSTICE AND CONTEXT

States are obligated to respond to serious violations of international humanitarian, human rights, and criminal law in different ways and in different circumstances, including during armed conflict and in times of peace. Accountability, acknowledgement, and reform for such violations can therefore be justified as an obligation- and rights-based policy: ensuring human rights by responding to their violation has an inherent value and does not necessarily need to be justified by its instrumental value in bringing about other outcomes—that is, in contributing to broader change.<sup>4</sup> The protection and vindication of victims' rights is the most direct objective of transitional justice processes and should not be subsumed under other policy objectives. Nevertheless, societies have grappled with the question of how to respond to atrocities and other serious human rights violations in a range of very different contexts in which broader changes are underway.

Understood as a particular subfield of human rights work or as a distinct field altogether, the notion of transitional justice has not just been about responding to human rights; it has also been inherently about the contexts of those responses. Transitional justice can, arguably, be distinguished from other responses to human rights violations by the fact that the violations it responds to are massive and systematic and the context in which it occurs is one of transition, most typically through a change of government. The scale and nature of the violations is important from a contextual perspective because even in ideal

circumstances it is highly unlikely that an effective remedy could be provided for every victim or that every perpetrator could be held accountable.

The transitional context is important for three reasons: 1) it opens up *opportunities* to respond to violations that may not have existed under an authoritarian regime or during an active armed conflict; 2) the responses are seen to make a potential contribution to certain *objectives*, such as the vindication and protection of human rights, reconciliation, democratization, rule of law, or peacebuilding, depending on the context of transition; and 3) at the same time, a transition presents specific obstacles or *constraints*, whether they be political, institutional, or material. These opportunities and constraints may ebb and flow over time.<sup>5</sup> In his chapter in this volume, Lars Waldorf points out the many problems associated with the term *transition*, but usefully describes them as “‘critical junctures’ involving *attempted* democratization or *attempted* peacebuilding . . . typically initiated by extraordinary legal moments.”<sup>6</sup>

The context presents therefore a critical set of variables in identifying the objectives, challenges, and opportunities for initiating and shaping transitional justice processes. It is also relevant for assessing the flaws, limitations, and value of the concept of transitional justice and its relation to broader notions such as “dealing with the past” or “transformative justice.” Calls for transitional justice to be more context specific, to be more attuned and aligned to national and local context, are common. While it is true that some of the boundaries of the field have been pushed in response to practical difficulties faced in new political contexts,<sup>7</sup> we still need a better understanding of how transitional justice processes unfold in a range of contexts.<sup>8</sup>

This collection of papers attempts to further demonstrate and categorize some of the contextual factors that are most relevant in places where transitional justice processes are advocated, designed, and implemented. It identifies four main categories of contextual factors—the nature of institutions, the nature of conflict and violence, the nature of political settlements, and underlying problems of economic and social structures—and the implications of these for transitional justice.

The *institutional context* includes national and formal institutions, such as justice systems and constitutions, and more-local institutions, such as community-based justice and reconciliation practices. In transitional contexts, institutions are often fragile and/or corrupt. Transitional justice processes can both shape and be shaped by these institutions, which create challenges as well as opportunities to contribute to rule-of-law reform and other kinds of institutional reform.

The *nature of armed conflict* includes variations in the armed actors involved

and their motivations and the type and scale of violence and human rights violations that are committed, all of which affect the justice responses that are appropriate and the kinds of trust they seek to restore. In addition, while violence can be widespread during war, it can persist in different forms in the aftermath of war, which can present challenges for accountability, acknowledgement, and reform. Contexts of armed conflict raise questions about how transitional justice processes relate to conflict resolution and peacebuilding.

The *political context* brings both changes in and contestation over power dynamics, with significant implications for the form and feasibility of responses to massive violations. The political context generally makes trade-offs an inherent element of transitional justice, but it also usually contains spaces in which justice and change can be advocated and the past can be addressed in ways that can lead to more comprehensive processes in the future. Considering the political context means looking at the interests and incentives of a range of actors, including not just the state but also non-state armed groups, political parties, civil society actors (such as victims' groups, labor unions, and religious actors), and international donors.

Underlying *social and economic structural problems* often constitute contexts of gross inequality, marginalization, and discrimination, which both facilitate massive human rights violations and create obstacles for responding to them. They may also be important drivers of conflict. Notions such as development, resilience, and transformation are useful in thinking about the extent to which transitional justice processes are affected by and can at the same time address root causes and contribute to broad change.

One of the major challenges faced in the field is what has been called the "implementation gap," meaning the frequency with which measures to address past human rights violations are proposed and even designed but go unimplemented or only partially implemented.<sup>9</sup> This volume illustrates some of the explanations for this implementation gap, while suggesting ways of reducing it. One of the key points it makes is that implementation is difficult because contextual factors change slowly and incrementally. Institutions and structural inequalities can take decades to change, and political contexts can carry divisions and violence over from conflict to peace. Transitions bring both change and continuity. The tension between human rights principles and contextual opportunities must always be kept in mind. It is argued here that while the concept of transitional justice has value in part because it emphasizes its context, the practice of transitional justice needs to do more to adapt to that context.

## INSTITUTIONAL CONTEXT

The institutional context in which transitional justice processes take place varies considerably. While countries such as Argentina and Chile in the 1980s had relatively strong state institutions, with the capacity to implement national-level measures, like reparations programs, countries such as Afghanistan and the Democratic Republic of the Congo (DRC) in the 2000s and 2010s have had far less institutional capacity (and faced ongoing conflict) and less success in implementing transitional justice measures. “Fragile and conflict-affected states” present relatively weak institutional environments, but so too may post-authoritarian states where corruption has reduced the state’s capacity to function and respond. It is important, therefore, to examine the institutional context of transitional justice, in terms of its institutional preconditions and its potential contributions to institutional formation—the opportunities, constraints, and objectives discussed above. A closer look at institutional context provides a more realistic view of what transitional justice processes can and should be expected to achieve.

As Waldorf explains in his chapter, institutions have been defined as the rules and practices through which societies are organized and within which a range of agents or actors function. Institutions can be national and formal ones, such as the rule of law, constitutions, judicial systems, security sectors, and financial systems, and more local and informal ones, such as community justice and reconciliation practices. Where formal institutions are weak, institutional corruption may generate different outcomes or local practices may function as substitutes.<sup>10</sup> The field of transitional justice, contends Waldorf, is often theorized and practiced in ways that underestimate the importance of institutions and overemphasize the agency of human rights advocacy. This has begun to change, however, as demonstrated by the 2011 *World Development Report: Conflict, Security, and Development* and the examination of guarantees of non-recurrence by the UN Special Rapporteur on truth, justice, reparations, and guarantees of non-recurrence.<sup>11</sup>

Institutional context needs to be taken into account when selecting, designing, implementing, and assessing transitional justice policies and processes, at least in part because transitions usually involve a certain amount of institutional continuity.<sup>12</sup> From the standpoint of individual transitional justice measures, as Waldorf argues, criminal trials are often severely hampered by credibility, capability, access, and resource constraints in legal institutions, as in Burundi, Côte d’Ivoire, DRC, and Uganda. For reparations, a lack of implementation is often the result of limited institutional capacity, technical resources,

fiscal capacity, and other structural factors. Institutional reform measures like vetting processes are often hindered by limited capacity in personnel management, information management, due-process guarantees, and resources, as seen in Kenya, Liberia, and Sierra Leone. Truth commissions may be less constrained by institutional weaknesses, but their institutional environment can present implementation problems and administrative delays, disincentives for participation, and difficulty in implementing recommendations.<sup>13</sup>

At the level of formal, national-level institutions, constitutions can provide an important part of the context in which transitional justice processes are designed, shaped, and assessed. As Juan Méndez has explained, constitutions “contain a framework for the administration of transitional justice specific to that community’s context and become the mandate against which the legitimacy of transitional justice mechanisms and initiatives will be measured.”<sup>14</sup> A constitution may include a mandate to do transitional justice, contain enabling norms, or create obligations by incorporating international law into domestic jurisdiction. A constitution can also impose significant constraints on carrying out transitional justice measures, which depend for their legality on the interpretation of constitutional principles.<sup>15</sup> For constitutions established during transitions, the nature of that framework will likely depend on the nature of the transition.<sup>16</sup> In South Africa, for example, writes Christine Bell in her chapter, where the transition from apartheid rested on a compromise between the African National Congress and the former regime, the 1993 interim constitution directly linked amnesty to the broader process of bridging the past and the future through state building.<sup>17</sup> When East Germany was incorporated into West Germany after the Cold War, the constitutional framework for addressing the past of the former became the fully developed constitutional system of the latter. This allowed for a more comprehensive set of measures than in countries like Hungary, where, as part of a negotiated transition, a non-democratically elected parliament amended the constitution.<sup>18</sup>

At the local level, community-based practices can also provide a framework for responding to human rights violations. Legal pluralism can play a particularly prominent role in conflict-affected settings. In the 1990s, explain Lisa Denney and Pilar Domingo in their chapter, international actors began paying more attention to legal pluralism as a way to legitimate security and justice reforms by grounding them in the local context.<sup>19</sup> Local justice and reconciliation practices, based on local community beliefs, norms, and traditions, have since become more prominent in the field of transitional justice, particularly in such countries as Burundi, Mozambique, Rwanda, Sierra Leone, Timor-Leste, and Uganda, among others.<sup>20</sup> These practices, suggest Denney

and Domingo, are often seen by citizens to have more legitimacy and to provide a greater sense of identity than state-led ones. They are, of course, not without flaws and limitations—they raise concerns about due process; they tend to be run by those who hold power within a community, sometimes to the detriment of those who do not; and they are based on practices usually designed to address more common forms of violence.<sup>21</sup>

Institutional corruption can also form part of the transitional context. Corruption can represent a form of institutional continuity throughout and after transitional periods. It can stifle transitional justice directly, if corrupt networks resist accountability processes in order to protect themselves or to keep stolen assets secret and the means to generate illicit revenue intact, or indirectly, if it undermines the trust in public institutions that transitional justice processes seek to foster. Corruption tends to persist on its own, but it is also often tolerated by policymakers in the interests of stability, as in countries such as Afghanistan and DRC.<sup>22</sup>

During transitions, state, local, and informal institutional factors, such as constitutions, local practices, and corruption, bring both continuities with and breaks from the past. The continuities can put constraints on transitional justice processes, but the breaks can create opportunities—both to pursue accountability and acknowledgement, and to contribute to institutional reform or formation. Transitions are often periods of institutional reform that can facilitate, and be facilitated by, transitional justice processes. While it is possible that those processes can strengthen the capacity or authority of state institutions, it is much more likely that they can improve the legitimacy of institutions, an element that donors have often underemphasized in development and peacebuilding work.<sup>23</sup>

The “UN principles for combating impunity”—which grew out of and helped consolidate the understanding of transitional justice as a specific set of objectives—call for justice, truth, and reparation, as well as measures that function as “guarantees for non-recurrence” of gross human rights violations.<sup>24</sup> These measures heavily focus on institutional reform, including administrative reform of state institutions such as the military, security, police, and intelligence, and the judiciary, as well as legislative reforms that aim to ensure respect for the rule of law and the protection of human rights.<sup>25</sup> If not all of these reforms are understood to be transitional justice processes, they certainly are intended to complement those that are and therefore make up part of the institutional context of transitional justice.

Transitional justice processes may contribute to the reform of institutions, potentially increasing perceptions of their integrity and legitimacy. Vetting, for



example, can remove compromised personnel, dismantle criminal networks, and signal the willingness of institutions to commit to protecting rights.<sup>26</sup> As Waldorf summarizes, domestic criminal trials may contribute to the rule of law by delegitimizing past crimes, recognizing the rights of victims, expressing norms, producing demonstration effects, increasing the capacity of the justice sector, and fostering trust in justice institutions.<sup>27</sup> Truth commission reports often contain findings and recommendations regarding institutional failure and reform, particularly focusing on the human rights compliance and democratic accountability of the state's justice and security sectors. But while such recommendations may have contributed to improving institutions in Chile and El Salvador, they have often been ignored by governments in countries such as Kenya, Liberia, and Sierra Leone.<sup>28</sup>

The process through which transitional justice measures are designed and implemented can also affect institutions. Such measures can demonstrate the state's commitment to the rule of law—for example, if they operate in compliance with its requirements, such as due process, even-handedness, nondiscrimination, presumption of innocence, and procedural fairness.<sup>29</sup> Consultation and participatory processes may also make a difference by empowering local populations to advocate their interests and hold powerful actors accountable, although where measures such as trials are perceived to be selective and/or unfair, as in Côte d'Ivoire, DRC, Rwanda, and Uganda, they are unlikely to foster institutional trust.<sup>30</sup>

## CONFLICT AS CONTEXT

While the notion of transitional justice as initially conceived may have emphasized its role in political transitions from authoritarianism to democracy, the practice of transitional justice has unfolded in a range of contexts. Less examined as a contextual factor than democratization, transitions from armed conflict have particular implications for the objectives, opportunities, and challenges of transitional justice. With fewer post-authoritarian transitions occurring today and civil wars continuing, these implications may become even more relevant.<sup>31</sup>

Ongoing conflict and post-conflict situations raise questions about the extent to which transitional justice processes can contribute to conflict resolution and peacebuilding processes. The nature of conflict and political violence raises questions about the human rights violations to be addressed, the types of trust or reconciliation that need to be fostered, and the appropriate

measures to do so. The nature and scale of violence and the ways in which it can persist into transitional periods creates difficulties for justice processes. Transitional justice is now seen to be an integral part of the UN post-conflict reconstruction and peacebuilding agenda,<sup>32</sup> but the particular implications of conflict and post-conflict settings for responding to massive human rights violations are under explored.<sup>33</sup>

Contexts of political violence can vary widely, including intra-state wars, inter-state wars, non-state armed conflicts, military coups, elections-related political violence, and one-sided violence, all of which can involve widespread human rights abuses.<sup>34</sup> This range of contexts, particularly those that qualify as intra-state or civil wars, can present challenges for transitional justice processes that may not be as salient in the aftermath of repression by an authoritarian regime. For example, the nature and dynamics of the parties to a conflict are often complex, messy, and shifting. Conflict can be characterized by organized armed groups with a coordinated military strategy, as in the former Yugoslavia, or by weak and diffuse organization, as in Sierra Leone. This can potentially complicate questions of responsibility and distinctions between combatants and noncombatants, and create methodological difficulties for measures like truth commissions in investigating patterns of violence.<sup>35</sup> Furthermore, when conflict spills across borders in the form of movements of non-state armed groups or displaced populations, it creates difficulties for holding perpetrators accountable and providing redress to victims. There are also political and logistical challenges in designing and implementing justice measures that operate regionally, rather than in one country.<sup>36</sup>

Conflicts involving non-state armed groups present particular challenges for transitional justice processes, as Annyssa Bellal explains in her chapter. These groups—including armed opposition groups, paramilitary groups, terrorist groups, vigilante or self-defense groups, mafia-type organizations, urban gangs, and mercenaries—can have a wide range of structures and ideologies, and operate according to different incentives than governments.<sup>37</sup> They also do not necessarily fit in the same legal frameworks, with different legal standards potentially applicable in different situations. The current international legal framework, argues Bellal, remains state centric; it has not yet fully adjusted to the power and control of non-state actors.<sup>38</sup>

The motivations of armed groups also matter. As Rachel Kerr explains in her chapter, in the conflicts that plagued Angola, DRC, and Sierra Leone economic incentives were an important motivation alongside political grievances.<sup>39</sup> This raises questions about how transitional justice should address economically motivated crimes, on the one hand creating an opportunity to

draw attention to the ways in which indirect support from foreign governments and corporations can play a role in fueling conflicts in which abuses are committed, and on the other hand making it difficult to establish the legal basis for the jurisdiction of certain crimes and the evidential basis for holding perpetrators accountable.<sup>40</sup>

Finally, the scale and nature of the crimes and human rights violations committed during armed conflict are often different from those committed under authoritarian regimes, involving a different balance of “horizontal violence” to “vertical violence,” overlapping groups of perpetrators and victims, and numerous past cycles of violence.<sup>41</sup> In contexts of horizontal violence, violations are often more widespread and committed by all sides, victim-perpetrator categories overlap, children are used as combatants, and violence is committed by and against citizens, as opposed to (or alongside) the vertical violence committed more by a state against its citizens. Horizontal violence can leave a legacy of particularly sharp social divisions, especially at the local level, as former enemies as well as perpetrators and victims can end up living as neighbors. Widespread violence in conflict is also often targeted at civilians living in remote and marginalized rural areas, which makes accessing justice a challenge for victims.<sup>42</sup>

Local justice processes can be appropriate in contexts of greater horizontal violence, contend Denney and Domingo, in part because the objectives of such processes are different than those of national-level transitional justice measures: they focus on rebuilding the social fabric and trust between citizens at the community level, rather than between citizens and state institutions.<sup>43</sup> Local processes in the aftermath of widespread violence in settings like Sierra Leone and Northern Uganda have involved a range of local and cultural practices that emphasize reconciliation, community involvement, community-level norms and beliefs, and reintegrating former combatants, particularly former child combatants. Where conflict involves such exceptional violence, however, local justice processes may be insufficient or problematic, particularly from an accountability, acknowledgement, and reform standpoint.<sup>44</sup>

A related but under-examined question is how the discourse used to frame violence has implications for transitional justice—in particular the discourses of “terrorism” and “counterterrorism.” This has become an especially salient issue since the attacks of September 11, 2001, but it had a long history before that. Bell discusses how every armed conflict has a “meta-conflict”—a conflict over what the conflict is about—in which each position presupposes a different set of solutions. In this way, competing discourses over the legitimacy

and morality of actors and their actions can have implications for transitional justice processes. In Northern Ireland, for example, a general agreement to disagree created insufficient consensus for developing a comprehensive transitional justice policy.<sup>45</sup> Part of the reason for this may have been that armed republicanism in Northern Ireland had long been framed as “terrorism,” hindering potential reconciliation between the two sides to the conflict.<sup>46</sup>

In certain cases, transitional justice processes are discussed or undertaken while armed conflict is still ongoing. In Colombia, argue Rodrigo Uprimny Yepes and Nelson Camilo Sánchez, this helped set the stage for future peace and justice processes. These included introducing a set of core legal standards that helped to bring the parties to the conflict together; empowering victims by recognizing them as stakeholders and making their rights central to public debate; and exposing structural problems, such as land dispossession and inequality, and the need for broad reforms.<sup>47</sup> But ongoing conflict can also present a range of obstacles for transitional justice processes. As Uprimny and Sánchez explain, these include the risk of violence against victims making justice claims and those advocating for and implementing justice measures; difficulties brought about by an ever-expanding universe of victims; challenges in evidence collection; the risk of losing momentum and public support; the prioritization of military strategy over justice aims; distinguishing humanitarian from justice measures; and, most broadly, balancing a justice policy with the need for peace and the opportunity for political solutions.<sup>48</sup>

The challenges associated with pursuing accountability in the midst of violence do not necessarily end when formal peace has been achieved, however, as peace agreements do not always signal the end of crime and human rights violations.<sup>49</sup> In countries such South Africa, Guatemala, and El Salvador violence and criminality have persisted during and after transitional periods, often reaching levels close to or above what was experienced during the conflict or repression. Such violence and criminality can threaten gains made by transitional justice processes, as it can penetrate, hollow out, and undermine public trust in institutions, weaken support for democracy, and provoke citizens' hostility to the defense of human rights and the rule of law.<sup>50</sup> Furthermore, alliances between organized crime and armed groups that form during conflict tend to be difficult to dismantle, blurring the distinction between war and peace,<sup>51</sup> with organized crime groups often among the first to oppose and undermine transitional justice efforts.<sup>52</sup>

## POLITICAL CONTEXT

The nature of institutions and conflict are important contextual factors for transitional justice processes, but they are very much tied up with a third factor, which is the political context, or the nature of the “political settlement” that is established during and after a transition. In transitions to democracy, the political context depends on the way in which the end of an authoritarian regime comes about, whether through negotiation or collapse, and the balance of power that results. In transitions to peace, the political context depends on the way in which the war ends, whether through military victory or negotiated agreement, and the resulting balance of power.<sup>53</sup> In all cases, there will be political opportunities and political constraints, space to advocate for justice and change as well as the risk of creating instability. The existence of opportunity does not mean that it will lead to perfect justice, and the existence of constraints does not mean that advocates of justice should back down. They do mean, however, that analyzing the political context should be central to every stage of seeking accountability, acknowledgement, and reform.

The political settlement process, according to Christine Bell in her chapter, involves the reconstruction of the state and the reconfiguration of “how power is held and exercised” and involves political bargaining through formal and informal processes.<sup>54</sup> The context is often one of “political rupture,” explains Clara Sandoval in her chapter, which brings a new configuration of political forces that can challenge an old one that has lost political power and/or legitimacy. This can create opportunities for society to address past human rights violations and for transitional justice measures to contribute to the transformation of the ideologies and structures that permitted or consented to atrocities.<sup>55</sup> At the same time, however, transitions are periods of political contestation, which bring constraints for transitional justice processes. As Bell explains, justice measures are often part of a “tapestry of tradeoffs” made as part of an agreement on the new configuration of power.<sup>56</sup> Continuities with the previous governing arrangements, the potential to destabilize peace processes, the relatively limited power of victims and their organizations, and the varying and conflicting interests and alliances of different local, national, and international actors—all of these factors have implications for the success of transitional justice processes.<sup>57</sup>

Despite such constraints, argues Bell, it is likely that past violations will be raised in political bargaining at multiple points before and during a transition, for practical and principled reasons.<sup>58</sup> For example, pre-transition human rights monitoring in countries such as South Africa, Guatemala, and El

Salvador as well as debates on the discourse to be used to describe the nature of violence and the parties to the conflict (for instance, whether violence is “political” or not or whether it constitutes “terrorism” or not) in negotiations affect how that past violence will be addressed in the future.<sup>59</sup> In South Africa, discussions about political prisoners and political violence “began to tell a story about the nature of the past conflict and create a certain pathway dependency for how the past would be dealt with,” helping to “determine the contours” of the future truth commission.<sup>60</sup> Each time the past is addressed, Bell argues, it opens up debates, provokes resistance, mobilizes new constituencies around justice claims, and prompts legal strategies that may affect how transitional justice is enacted in the future.<sup>61</sup>

Furthermore, as Briony Jones and Thomas Brudholm have emphasized, resistance to transitional justice should not be reduced to the actions of “spoilers,” but can be “morally or politically legitimate”—as when outcomes such as forgiveness or reconciliation are seen to be demanded of victims and affected communities—and provide a prism through which we can better understand the power dynamics of each context.<sup>62</sup> Past experiences in rule-of-law reform and conflict transformation suggest the importance of tools such as “actor mapping,” “stakeholder analysis,” or “political economy” analysis of the environment for any policy intervention.<sup>63</sup> With regard to transitional justice processes, their efficacy and long-term impact may be greatest when they have “emerged from local social movements, and actors embedded in social movements and victims’ communities took on leading roles.”<sup>64</sup> In this context of political contestation, relevant actors will engage with or avoid justice issues according to their different interests and incentives, including national actors such as non-state armed groups, political parties, civil society groups, religious actors, and labor unions, as well as international actors, like donors.

For non-state armed groups, the question of amnesties can be critical. In some cases, explains Bellal, the fear of criminal prosecution may be among the factors pushing non-state armed groups to continue to fight, while amnesties may be among the only ways to bring such groups to the negotiating table. A “contextual approach” to amnesties would require that they be legitimate, based on widespread political consensus, and accompanied by non-judicial justice measures.<sup>65</sup> There are risks with even limited amnesties, however. In Burundi, for example, “temporary immunities” given to members of armed forces and non-state armed groups in 2003 are still in place, for political and other crimes. From the perspective of preventing recurrence, it is important to see non-state armed groups not only as potential perpetrators of violations but also as actors that may make a positive contribution to transitions and

that should be allowed to take some ownership of demobilization and reintegration programs and transitional justice measures. In Northern Ireland, for instance, former combatants have helped to implement and participate in transitional justice.<sup>66</sup>

Political parties, as Ken Opalo explains in his chapter, can potentially serve as focal points around which elites and voters can articulate their views and reactions to transitional justice issues, playing an important role through their power to shape public opinion.<sup>67</sup> In practice, however, political parties that emerge in post-conflict contexts frequently reinforce, rather than overcome, wartime cleavages—often representing the political wing of former armed groups, lacking strong connections to their bases of support, and being susceptible to extremist positions. While parties can provide platforms for building the political consensus that transitional justice processes may require to achieve their objectives, conflictual party politics can conversely create incentives for leaders to politicize justice processes and to provide cover for perpetrators within parties, by encouraging groups to approach transitional justice as collectives, especially when backed by geographically concentrated ethnic groups.<sup>68</sup>

Civil society actors have been instrumental to both authoritarian and post-conflict transitions, but they have also sometimes been responsible for or complicit in past human rights violations, making them potentially important actors in transitional justice processes both as participants and subjects.<sup>69</sup> Despite its critical role, however, most donor funding to transitional justice goes to state or UN bodies; “in many countries, civil society actors are woefully underfunded and excluded from initial strategy setting, which may have negative effects on the local ownership and legitimacy of a [transitional justice] process and its potential for fostering social change.”<sup>70</sup> Given recent trends in development aid practices, including calls for more focal control of development strategy and delivery by recipient governments, there is reason to believe this situation will continue.<sup>71</sup> Furthermore, contexts of state fragility often feature systemic exclusion, including the “closing of space for civil society,” which involves efforts by governments to “block foreign funds from flowing to activists within the country.”<sup>72</sup> In countries such as Uganda, advocating for transitional justice “in the streets” can be dangerous due to this reduced space for NGOs.<sup>73</sup> There is also a political dimension to civil society, with different actors competing for resources and influence, which transitional justice processes, of course, can affect, both positively and negatively—potentially demobilizing more radical social movements or reinforcing mistrust.<sup>74</sup>

Two types of civil society actors that have been relatively neglected in terms

of their roles in transitional justice processes are religious actors and labor unions. According to Ioana Cismas in her chapter, religious actors are often called on to participate in transitional justice processes, at least in part because of their potential to bring legitimacy to the process and embed international accountability norms in local contexts.<sup>75</sup> And while it may be expected that notions of reconciliation and forgiveness are driving forces for some religious actors to become involved in transitional justice processes, which may be true to an extent in some places, their political and economic interests have been at least as relevant to their engagement in countries as diverse as Romania, Rwanda, and Tunisia. Whether such actors remain silent or take a spoiling or enabling approach can usually be explained in part by their past conduct—whether they were responsible for or complicit in human rights violations—and past treatment—whether they were subject to violations by others. Furthermore, religious actors are not, as some might expect, necessarily the main promoters of amnesties for perpetrators, sometimes working against them and often advocating for criminal justice.<sup>76</sup>

Labor unions are historically among the strongest and best organized actors in civil society, often playing important roles in political transitions. In transitional justice processes, explain Eva Ottendorfer Mariam Salehi, Irene Weipert-Fenner, and Jonas Wolff in their chapter, unions can be active participants but also subjects to the extent they suffered or were complicit in violations. They can call for justice measures, submit information, provide support, and propose truth commission recommendations, while trials and commissions can address crimes committed against or by unions. Unions can be part of advisory/monitoring bodies and public memory and public education initiatives, apply pressure from outside, and be the objects of recommendations and verdicts.<sup>77</sup> Labor unions tend to have limited importance in transitional justice processes, however, in part because they may not consider transitional justice to be a primary aim or an important means of making their demands heard, preferring other avenues for negotiating with the state. As with religious actors, complicity in injustice in the past as well as close alliances with the current regime also likely affect their approach to transitional justice.<sup>78</sup>

International actors that intervene in transitional contexts affect the balance of power as well, and, as Bell argues, should be seen as part of political bargaining processes in which transitional justice is negotiated. International criminal law can be understood to sometimes take on a “strategic instrumental role,” she suggests, used by actors to punish individuals who are seen to disrupt peace processes and transitions, as with the Special Court for Sierra Leone and former Liberian President Charles Taylor and the Revolutionary



United Front; the ICC and members of the Lord's Resistance Army in Uganda and President Omar Al-Bashir in Sudan; and the International Criminal Tribunal for the former Yugoslavia (ICTY) and former Serbian President Slobodan Milosevic. Regional human rights systems—such as the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European Court of Human Rights—also influence national transitional justice measures.<sup>79</sup>

The role of donors and their political and resource commitments to transitional justice are also very much connected to domestic political contexts.<sup>80</sup> Fragile and conflict-affected states, explains Elena Baylis in her chapter, are difficult environments for development work because of the risks they bring, including the concern that aid could be diverted to ongoing conflict or may shift political dynamics in unforeseeable ways.<sup>81</sup> Donors may, therefore, be reluctant to explicitly engage in transitional justice processes because they might undermine their other work, preferring to support rule-of-law initiatives more broadly, or they may label what could be seen as transitional justice work as something else, such as human-rights or capacity-building activities.<sup>82</sup> When international assistance does go to transitional justice processes, it is often distributed to a “standard list” of professional NGOs, rather than to supporting political activities or broader social movements.<sup>83</sup> This can have a “distorting effect” in local contexts, exacerbating inequalities in local civil society,<sup>84</sup> and leading civil society actors to advocate for the donor's conceptions of justice, which may not resonate locally.<sup>85</sup>

## **SOCIAL AND ECONOMIC STRUCTURAL CONTEXT**

Widespread human rights violations often occur in settings with social and economic structural problems, such as gross inequality, marginalization, and poverty, which can facilitate violations and present a range of challenges for attempting to address them during transitions. The concepts of development, resilience, and transformation are useful in thinking about the bi-directional relationship between contexts of social and economic structures and transitional justice. This relationship raises questions about the nature and objectives of transitional justice processes, the constraints they are likely to face, and their connections to other types of policy interventions.

Given the common structural problems and related grievances of societies in transition,<sup>86</sup> it is often argued that transitional justice processes should address those structural problems in addition to violence and repression

committed against individuals and groups. As Sandoval notes, while the 2004 UN Secretary General's report on the rule of law and transitional justice emphasized the importance of addressing root causes of conflict for preventing its recurrence, the 2010 UN guidance note on transitional justice contends that transitional justice measures should strive to take account of root causes of conflict and repression and address all rights violations.<sup>87</sup> Furthermore, the 2011 UN Secretary General's report on the rule of law and transitional justice also calls for transitional justice mechanisms to be part of the effort to realize economic and social rights.<sup>88</sup> At a minimum, the absence of structural change in the aftermath of massive violations undermines the ability of transitional justice measures to achieve even their most immediate objectives.

For example, as Sandoval explains, gender justice requires not just providing compensation for sexual or gender-based violence but changing the underlying conditions so that such violence does not recur and victims are not continuously stigmatized and are able to recover from the harms they suffered—hence, the Inter-American Court of Human Rights' articulation in its *Gonzalez et al. ("Cotton Field") vs. Mexico* case of the relevance of "the context of structural discrimination" and the need to award *transformative reparations* capable of addressing structural discrimination.<sup>89</sup> As it stands, however, writes Kerr, patterns of persistent gender-based violence provide evidence of continuing underlying social and economic injustice in post-conflict environments. In countries like Sierra Leone, the attention brought to gender-based violence, criminal justice, and truth telling may help to bring about a degree of gender-sensitive legal reform, "although there is still a long way to go."<sup>90</sup>

The relevance of accountability, acknowledgement, and reform for massive human rights violations to broader processes of development has been increasingly recognized.<sup>91</sup> The UN Special Rapporteur for truth, justice, reparation and guarantees of non-recurrence, for example, has argued that suffering massive rights violations can reduce people's capacity for agency and social coordination, both of which reduce their engagement with and claims on institutions, but that the recognition and trust that transitional justice may foster can help to reverse this, and not just for victims.<sup>92</sup> In its Sustainable Development Goal (SDG) 16, the UN's post-2015 Development Agenda highlights the need to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." SDG 16's emphasis on justice and institutions is relevant for transitional justice, especially with regard to the rule of law and access to justice; effective, accountable, and transparent institutions; and the reduction and prevention of violence—all of which can be among the objectives of transitional justice processes. SDG 16

also refers to the reduction of illicit financial flows and corruption, the return of stolen assets, and combating organized crime, to which transitional justice measures may contribute, depending on their mandates. Other SDGs relate to health, education, gender, decent work, and inequality, issues on which transitional justice also has a bearing.<sup>93</sup>

As Eric Wiebelhaus-Brahm explains in his chapter, the notion of resilience, which refers to a system's inherent stability or instability and its ability to return to stability after a crisis, is also relevant for transitional justice. Social resilience in peacebuilding contexts involves psychosocial recovery, shared systems of meaning, interdependence, social cohesion, and broad and inclusive governance. Development practitioners connect greater degrees of reconciliation, trust, and rule of law with more resilient societies.<sup>94</sup> Wiebelhaus-Brahm argues that transitional justice processes can promote or undermine resilience, depending on their design and implementation. Reparations, for example, which may be limited in their ability to affect material resources and the distribution of wealth at national levels, may have real effects at lower levels of aggregation: collective reparations can provide communities with support for health care and education, while individual benefits can increase household resilience. Reparations for marginalized populations may help to build vertical social capital, strengthening connections between citizens and state institutions. But transitional justice may also undermine resilience, he warns, if it ends up strengthening social capital only within groups, diverting attention and resources away from measures that could reduce vulnerability, reducing local- or national-level technical expertise, or empowering illegitimate power structures at the local level.<sup>95</sup>

The idea of *transformation* can also help us to examine transitional justice within social and economic structures. *Transformative justice* has been proposed as a concept that could incorporate, but at the same time be broader than, transitional justice, emphasizing local agency and resources, process (over outcomes), and "the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global levels."<sup>96</sup> It can be argued that the notion of transitional justice itself should prioritize local agency and process and that the notion of transformative justice to a certain extent conflates with development.<sup>97</sup> It is, as Sandoval contends, nevertheless important both to think about the transformative potential of transitional justice processes and to understand the limits and possibilities of the contribution that transitional justice can make to major social changes, such as the reduction of structural inequalities, discrimination, and poverty.<sup>98</sup>

Whether or not transitional justice contributes to transformation depends on its context. According to Sandoval, fundamental social change occurs where political, social, economic, and cultural changes result in the transformation of both the dominant ideology—“a set of beliefs about what is right and wrong that permeates everyday life”—and the structures that previously supported conflict and repression. Transitional justice processes can contribute to structural changes, but those must combine with other structural changes to help to change ideologies. Reparations measures, for example, cannot remove the root causes of violations, like gender discrimination, by themselves; however, they can contribute to, promote, or trigger the broader change that is needed, or at a minimum avoid reinforcing such discrimination through their design and implementation.<sup>99</sup>

It is important to remember that contexts of social and economic structural problems also create challenges for seeking accountability, truth, and reform just as institutions, violence, and political settlements do. As Wiebelhaus-Brahm points out, post-conflict societies are often limited in capacity and resilience, with violence having destroyed social capital and either destroyed or diverted resources, leading policymakers to prioritize low-cost justice measures or to seek the support or interventions of international donors or international institutions, which bring the associated risks mentioned above. Low levels of trust may also mean that groups are more likely to perceive transitional justice measures to be targeting them; and in more vulnerable countries shocks and crises may more easily disrupt, derail, or distract from transitional justice processes. In contrast, in societies where meeting basic needs is less difficult and there are more resources to invest, a government is likely to be in a stronger position to respond to justice claims and civil society is likely to be in a better position to participate and advocate.<sup>100</sup>

The connections between social and economic structures and the objectives of and challenges faced by transitional justice processes are relevant from a donor perspective. For international donors, transitional justice is often seen as a component of justice and rule-of-law programming, which is part of their development agenda.<sup>101</sup> Donors engage with transitional justice at least in part because it aligns with their institutional mission: they see transitional justice as a means to other ends. The United Nations Development Programme, for example, explicitly articulates its interest in transitional justice in for fragile and conflict-affected states in terms of its rule-of-law and capacity-building functions.<sup>102</sup> The Organization for Economic Cooperation and Development, European Union, the World Bank, the US Agency for International Development, and the Swedish International Development

Cooperation Agency have also all identified transitional justice as a critical element of development.<sup>103</sup>

While donors and transitional justice advocates often point to the contribution that transitional justice processes can make to addressing social and economic structural problems, some argue that efforts to seek justice for a narrow set of civil and political rights violations or atrocity crimes can, in fact, hinder broader efforts to change the structures that allowed those violations and crimes to happen, including national or global structures.<sup>104</sup> In practice, transitional justice has often been implemented too narrowly, and too legalistically, and without adequate exploration of the links to social and economic structures.<sup>105</sup> Imbalances between accountability for past crimes and social justice, supported by external donors and actors, may have shifted capacity and resources from broader social movements to more narrowly focused human rights NGOs.

In some countries, however, these processes have been deprioritized, with “a focus on economic or technical development issues to the detriment of attention to political and security concerns, as well as a near complete neglect of transitional justice.”<sup>106</sup> Furthermore, transitional justice processes should be designed and implemented so that they investigate and draw attention to, rather than obscure or distract from, the links between atrocities and social and economic structures—and many have attempted to do so.<sup>107</sup> In practice, this would ideally be done more frequently and effectively, but expectations that national processes aimed at accountability, acknowledgement, and reform can effectively address the responsibility or complicity of major power holders—global elites, military superpowers, and international economic structures—should be tempered so as to avoid underestimating the contextual constraints and consequent limitations of responding to massive violations.

## CONCLUSION

Transitional justice practitioners and policy makers are often called on to take context into greater consideration. This edited volume examines some of the main contextual factors for transitional justice: the institutional context, the nature of conflict and violence, the political context, and economic and social structural problems. These factors have important implications for those seeking accountability, acknowledgement, and reform for massive human rights violations.

*Defining transitional justice contexts:* Responses to massive human rights violations often depend on a context that is transitional to a certain extent, but those advocating such efforts should not wait for such contexts to be ideal before beginning. Transition is significant because it brings about some form of change, which is often necessary for there to be opportunities to develop and shape processes that may not have existed during ongoing armed conflict or repression. But transition should not be defined strictly around peace agreements and regimes changes, because change is pushed for and often begins before such events and persists long after them. Experience has shown that limited steps can be taken toward justice while conflict and repression are ongoing. Furthermore, even during immediate political transitions, continuity with the past as well as new challenges will create constraints on transitional justice efforts. In many cases, these constraints will persist for years or decades. Transitions mean both opportunity and constraints for addressing injustice, both of which are integral to the notion of transitional justice.

*Identifying and understanding contextual constraints:* Due both to continuities with the past and new challenges that accompany change, transitional contexts are “imperfect.”<sup>108</sup> Weak or nonexistent institutions, widespread corruption, massive numbers of victims and perpetrators, different types of violence, necessary political tradeoffs, a wide array of actors with different interests and organizational capacities, and broad structural problems such as poverty, inequality, and discrimination—all of these factors make for difficult contexts. Transitional justice processes, therefore, can be ambivalent, contested, and contingent, functioning necessarily in an “imperfect manner,” and should be understood in the long term.<sup>109</sup> Whether it takes place during conflict, as part of an immediate transition, or even decades afterwards, issues of scale and fragility will present challenges. Transitional justice processes that are out of sync with the institutional, security, political, social, and economic contexts are less likely to achieve their objectives.<sup>110</sup> Assessing these contexts, then, is necessary but difficult for external actors.<sup>111</sup> While this does not mean that advocates of justice should back down in the face of risk and instability, such constraints should inform expectations and assessments of transitional justice processes.

*Focusing on direct objectives and processes over measures:* Given the importance of context, it is important to promote the direct objectives of accountability, acknowledgment, and reform, and to understand and react to the different processes through which these objectives may be achieved. There may be good reasons to support measures such as criminal trials, truth commissions, reparations programs, and vetting, but in practice contextual factors

may sometimes make such measures unfeasible or inappropriate. Rather than promoting a formula, toolkit, or blueprint, it may be more effective to focus on process: look for opportunities to advance discussions, shape the ways in which past injustice is in fact being dealt with, keep the issues on the agenda, try to create spaces or entry points, and develop innovative ways of dealing with the legacies of past violations according to changing circumstances.<sup>112</sup> When specific measures are appropriate, sequencing in some form may be more appropriate than attempting a simultaneous implementation of multiple measures, given that different measures have different contextual preconditions.<sup>113</sup> Guarantees of non-recurrence are a promising and underemphasized notion that overlaps with transitional justice and combating impunity, but even that is often thought of in terms of specific measures, rather than general principles or objectives.

*Contributing to broader objectives according to context:* While objectives such as accountability, acknowledgment, and reform may be fairly consistent, the broader context in which these are sought will affect broader policy objectives, which will affect the processes that are most feasible and appropriate and the contribution they may make to change. Transitional contexts differ widely, with objectives that include vindication and protection of human rights, rule-of-law reform, peacebuilding, conflict resolution, conflict transformation, development, state-building, good governance, and democratization, among others. Transitional justice efforts can potentially contribute to or be in tension with these broader objectives in different ways. They should be shaped and assessed according to these objectives. Furthermore, however transitional justice processes play out, they should seek to complement other transitional interventions or at least to minimize the tensions between them, such as demobilization and reintegration programs for ex-combatants, humanitarian assistance and durable solutions for displaced persons, and development programming to reduce marginalization and poverty.<sup>114</sup> Context also affects the more direct goals and outcomes of justice processes—for example, in terms of whether they are meant to foster trust and reconciliation between citizens and state institutions and/or between citizens themselves and between groups.

*Supporting the actors, institutions, and conditions that can facilitate transitional justice:* Given the relevance of context, it may be possible to indirectly support or shape justice processes by supporting the actors, institutions, and conditions that more directly enable them. For example, rule-of-law reform may build the capacity and integrity of justice-sector institutions that carry out criminal prosecutions. Support to civil-society actors, particularly those working to

empower victims and groups, can help them to advocate for justice processes that are appropriate to local needs and political dynamics and that ensure the participation of victims and marginalized groups. However different processes unfold, they may be more likely to promote resilience when designed and implemented by local actors and in ways that accentuate the existing strengths of the social system, and those local actors may be more likely to support processes if they participate in their design. International interveners, in contrast, often lack the capacity, expertise, and legitimacy to make the right political judgments.<sup>115</sup> Support can also go towards increasing the likelihood that political parties facilitate, rather than hinder, legitimate transitional justice processes, through the creation of parties based on crosscutting interests and rooted in society and broad-based coalitions that can foster consensus.<sup>116</sup> Finally, reducing social and economic structural problems, like gross inequality, can be an important step towards ensuring that transitional justice processes both achieve their immediate objectives and contribute to long-term social change.<sup>117</sup>

## NOTES

- 1 Many thanks to Paul Seils, Marcie Mersky, Clara Ramírez-Barat, Clara Sandoval, and Lars Waldorf for their valuable input.
- 2 Leslie Vinjamuri and Jack Snyder, "Law and Politics in Transitional Justice," *Annual Review of Political Science* 18 (2015): 308.
- 3 The project commissioned a set of external studies on a wide range of contextual issues, 12 of which are included here. A fuller presentation of its findings is available as a research report: Roger Duthie, "Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies," New York, 2017.
- 4 See Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* 19, no. 2 (1997): 255–282; Leslie Vinjamuri, "Review of Kathryn Sikkink's *The Justice Cascade: How Human Rights Prosecutions are Changing the World*," *Journal of Human Rights* 11 (2012): 283–288.
- 5 On the importance of transitions to the notion of transitional justice, see Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–367; Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69–94; José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in *State Crimes: Punishment or Pardon* (Justice and Society Program of the Aspen Institute, 1989).



- 6 Lars Waldorf, "Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Context," in this volume, 46, referring to, among others, Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002).
- 7 Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," 326.
- 8 Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice* 9 (2014): 157.
- 9 United Nations, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence," UN Doc. A/69/518, 14 October 2014, para. 6, 13, cited in Waldorf, 54.
- 10 Waldorf, 43.
- 11 *Ibid.*, 42.
- 12 *Ibid.*, 44.
- 13 *Ibid.*, 53, Paul Williams, "Transitional Justice and Variations of Political Violence in Africa." See UN General Assembly, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence," A/68/345. Eduardo González, "Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict," in *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (New York: ICTJ, Kofi Annan Foundation, 2014), 4.
- 14 Juan E. Méndez, "Constitutionalism and Transitional Justice," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michael Rosenfeld and Andras Sajó (Oxford: Oxford University Press, 2012), 1272.
- 15 *Ibid.*, 1273.
- 16 Gabor Halmai, "The Role of Constitutionalism in Transitional Justice Processes in Central Europe."
- 17 Christine Bell, "Contending with the Past: Transitional Justice and Political Settlement Processes," in this volume, 92–93.
- 18 Halmai.
- 19 Lisa Denney and Pilar Domingo, "Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development are Reshaping the Field," in this volume, 209–210.
- 20 *Ibid.*, 204.
- 21 *Ibid.*, 221–225. See also Tim Allen and Anna Macdonald, "Post-Conflict Traditional Justice: A Critical Overview," Justice and Security Research Programme Paper 3, London: London School of Economics and Political Science, 2013.
- 22 James Cohen, "Addressing Corruption through Justice-Sensitive Security Sector Reform."
- 23 A report by the Folke Bernadotte Academy observes that "a state rests on the three central pillars of authority, capacity and legitimacy. These dimensions are interdependent

- but donors have focused mostly on authority and capacity, particularly in the rule of law field . . . Legitimacy, ‘whether citizens feel the government has the right to govern—and whether they trust the government’ has lagged behind in development and peace-building.” Richard Sannerholm, Shane Quinn, and Andreus Rabus, “Responsive and Responsible: Politically Smart Rule of Law Reform in Conflict and Fragile States,” Folke Bernadotte Academy, Stockholm, 2016, 21.
- 24 United Nations, “The Administration of Justice and the Human Rights of Detainees: The Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political). Revised Final Report Prepared by Mr. L. Joinet,” E/CN.4/Sub/1997/20/rev.1, October 2, 1997; United Nations, “Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” E.CN.4/2005/102/Add.1, February 8, 2005.
  - 25 UN Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005, Principles 35–38, at 17–19.
  - 26 UN General Assembly, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/67/368, September 13, 2012, 13–18.
  - 27 Waldorf, 57, citing others including: Ezequiel González-Ocantos, “Evaluations of Human Rights Trials and Trust in Judicial Institutions: Evidence from Fujimori’s Trial in Peru,” *International Journal of Human Rights* 20, no. 4 (2016), 445–70; Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (London: Routledge, 2013); Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006); and UN General Assembly, “Report of the Special Rapporteur,” A/67/368.
  - 28 Waldorf, 58, citing Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London: Routledge, 2011); Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge, 2011); González; and UN General Assembly, “Report of the Special Rapporteur, A/67/368.
  - 29 UN General Assembly, “Report of the Special Rapporteur, A/67/368, 20–21; Elizabeth Andersen, “Transitional Justice and the Rule of Law: Lessons from the Field,” *Case Western Reserve Journal of International Law* 47, no. 1 (2015): 310.
  - 30 Andersen, 311, 314–15; Waldorf, 57.
  - 31 Andrew G. Reiter, Tricia D. Olsen, and Leigh A. Payne, “Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts,” *Transitional Justice Review* 1, no. 1 (2013).
  - 32 Rachel Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and

- Challenges,” in this volume, 117, citing United Nations, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings, Report of the Secretary General,” S/2004/616, August 23, 2004.
- 33 See Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity, 2007); Wendy Lambourne, “Transitional Justice and Peacebuilding after Mass Violence,” *International Journal of Transitional Justice* 3 (2009): 28–48; Chandra Lekha Sriram, Olga Martin-Ortega, and Johanna Herman, “Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice,” JAD-PbP Working Paper Series 1, Center on Human Rights in Conflict (May 2009).
- 34 Williams. It is important not to conflate violence and war, or violence during war with violence during peace. See Stathis N. Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006), 19–23.
- 35 Williams; Kerr, 127; González; Clara Ramírez-Barat, “Transitional Justice and Conflict: Concept Paper,” prepared for ICTJ research project on Transitional Justice in Context, on file with author.
- 36 Williams; Kerr, 127; Ramirez-Barat; Sriram, Martin-Ortega, and Herman.
- 37 Annyssa Bellal, “Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict,” in this volume, 237; Williams.
- 38 Williams; Bell, 100–101; Bellal.
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CHAPTER 1

Institutional Gardening in Unsettled Times:  
Transitional Justice and Institutional Contexts

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“[R]eformers are often institutional gardeners more than institutional engineers.”

– James G. March and Johan P. Olsen<sup>2</sup>

“There is a concatenation of all events in the best of possible worlds; for, in short, had you not been kicked out of a fine castle for the love of Miss Cunegund; had you not been put into the Inquisition; had you not traveled over America on foot; had you not run the Baron through the body; and had you not lost all your sheep, which you brought from the good country of El Dorado, you would not have been here to eat preserved citrons and pistachio nuts.”

“Excellently observed,” answered Candide, “but let us cultivate our garden.”

– Voltaire<sup>3</sup>

The “New Institutionalism” emphasizes the importance of institutions—that is, “rules of the game”—in shaping political agency and horizons. It has been highly influential among economists and political scientists as well as policymakers. It lies at the heart of the political economy approach to both development<sup>4</sup> and state-building.<sup>5</sup> The *World Development Report 2011: Conflict, Security, and Development* repeatedly invoked the neo-institutionalist mantra that “institutions matter.”<sup>6</sup> While transitional justice theorists, policymakers, and practitioners have long stressed institutional accountability, they have been much slower to recognize the importance of institutional context and institutional change.<sup>7</sup> In particular, they have paid too little attention to “the institutional . . . preconditions of the effective implementation of the measures they advocate.”<sup>8</sup>

This inattention to institutional context when selecting, designing, implementing, and assessing transitional justice mechanisms was peculiar given that these mechanisms clearly aim to change the “rules of the game” from impunity to accountability. Several factors accounted for this neglect: the universalist, normative thrust of the transition paradigm and transitional justice caused an

inattention to scope conditions;<sup>9</sup> the dominant narratives of transitional justice over-emphasized the agency of norm entrepreneurs and human rights advocates;<sup>10</sup> and transitional justice's heavy emphasis on trials privileged individual over structural accountability.<sup>11</sup>

Recently, transitional justice scholarship, policy, and practice have begun paying greater attention to neo-institutionalist insights. First, the *World Development Report 2011* stimulated interest in how transitional justice mechanisms might contribute to building state institutions after conflict.<sup>12</sup> Second, growing interest in guarantees of nonrecurrence has prompted more focus on institutions and their reform.<sup>13</sup> Third, there is increasing awareness of how quantitative impact studies of transitional justice have largely ignored qualitative variation in institutional design and implementation.<sup>14</sup> Finally, more account is now being taken of scope conditions.<sup>15</sup>

This chapter asks two key questions: 1) How do weak institutional contexts affect transitional justice mechanisms? 2) How do transitional justice mechanisms affect weak institutional contexts? It finds first that institutional context matters: transitional justice mechanisms are very unlikely to function well in conflict-affected and weakly institutionalized settings.<sup>16</sup> While this is unsurprising, it challenges the conventional application of the “transitional justice tool-kit.” The chapter also finds very limited evidence that these mechanisms do in fact strengthen weak institutions or increase institutional trust. This should not be taken as cause for despair or as justification for doing nothing; rather, it points up the need to create the necessary institutional preconditions for transitional justice and to think about a more “progressive realization” of the rights to truth, justice, reparations, and nonrecurrence.<sup>17</sup>

The chapter is divided into four main sections. The first section provides an overview of the neo-institutionalist literature, focusing on the explanations for institutional creation, continuity, and change. The second situates institutional change in the context of post-authoritarian and post-conflict transitions with an emphasis on the link between state-building and institution-building.<sup>18</sup> The third section looks in more detail at the relationship between transitional justice and weak institutions, especially in conflict-affected contexts. Finally, the chapter concludes with some policy implications as well as suggestions for further research.

## AN OVERVIEW OF NEO-INSTITUTIONALISM

The variants of neo-institutionalism differ in their understanding of institutional creation, continuity, and change.<sup>19</sup> Still, there are important

commonalities that make it possible to apply neo-institutionalist insights without fully adopting a specific approach.<sup>20</sup> That said, this chapter largely draws on constructivist, historical, and feminist institutionalism. Constructivist institutionalism highlights institutional change and the role of ideas in prompting such change. As such, it explains how international norms helped to shift the rules of the game from impunity to accountability.<sup>21</sup> By contrast, historical institutionalism emphasizes critical junctures and path dependency.<sup>22</sup> Critical junctures include political transitions from authoritarianism to democracy and from war to peace. Path dependency helps explain how new transitional justice mechanisms are frequently hampered by pre-transition norms and practices. Feminist institutionalism combines elements of constructivist and historical institutionalism to explain why gender-sensitive reforms—including features of transitional justice—have not produced more gender equitable outcomes.

### DEFINING INSTITUTIONS

Institutions have long been defined as “the rules of the game” and distinguished from agents (individuals or organizations).<sup>23</sup> According to James March and Johan Olsen, an institution is “a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing circumstances.”<sup>24</sup> These institutions both enable and constrain social action by individual and collective actors. Institutions can be formal or informal. Formal institutions, sometimes called “parchment institutions,” are official rules and procedures, which range from constitutions to rules for judicial nominations.<sup>25</sup> Informal institutions are “socially shared rules, usually unwritten, that are created, communicated and enforced outside officially sanctioned channels.”<sup>26</sup> Examples of informal institutions range from clientelism (neo-patrimonialism) to corruption to gentlemen’s agreements. Informal institutions can be produced top-down by elites or bottom-up by society.<sup>27</sup> The latter are likely to be more independent of formal institutions and more resistant to change.<sup>28</sup>

Where formal institutions are weak,<sup>29</sup> informal institutions usually play a bigger role.<sup>30</sup> Informal institutions can relate to weak formal institutions in one of two ways. First, *competitive* informal institutions, such as systematic corruption, “trump their formal counterparts, generating outcomes that diverge markedly from what is expected from the formal rules.”<sup>31</sup> Second, *substitutive* informal institutions “achieve what formal institutions were designed, but failed, to achieve.”<sup>32</sup> In the Global South, informal institutions are more likely to be competitive with weak formal institutions.<sup>33</sup>

## CREATION, CONTINUITY, AND CHANGE

Neo-institutionalism explains institutional creation as being constrained by existing institutions. As Fiona Mackay puts it:

No institution—however new or radically reformed—is a blank slate: the capacity for new paths is profoundly shaped by its institutional environment no matter how seemingly dramatic the rupture with the past . . . In most cases, institutional creation is better understood as bounded innovation within an existing system.<sup>34</sup>

The existing institutional environment imposes several constraints. The first is legacies of power, material, and norms.<sup>35</sup> The second is existing institutions with which the new institution must interact.<sup>36</sup> The final constraint is isomorphic processes that lead towards institutional homogeneity: “mimetic (in which organizations copy each other in order to win legitimacy), coercive (in which the state obliges organizations to adopt particular practices), and normative (linked to the development of new rules and to professional networks, for example, through the spread of dominant templates of what constitutes good practice).”<sup>37</sup> Overall, it is this “nested newness” that explains why new institutions so frequently confound and disappoint their creators.<sup>38</sup>

Neo-institutionalism is best known for emphasizing historical continuities. It pointed up the “stickiness” of institutions in the face of change, and generated the notion of “path-dependency,” the idea that current and future options are limited by earlier, contingent events. Some neo-institutionalists explain change largely as the result of periodic, exogenous shocks. Wolfgang Streeck and Kathleen Thelen identified three problems with that “punctuated equilibrium” model:<sup>39</sup> it ignored endogenous sources of change;<sup>40</sup> it conceived of change narrowly as breakdown and replacement;<sup>41</sup> and it could not explain the large number of continuities in “unsettled” times and discontinuities in “settled” times.<sup>42</sup> In contrast to that model, Streeck and Thelen showed how “significant change can emanate from inherent ambiguities and ‘gaps’ that exist by design or emerge over time between formal institutions and their actual implementation or enforcement.”<sup>43</sup> They describe four forms of “gradual but nevertheless transformative change” within institutions: displacement, layering, drift, and conversion.<sup>44</sup> Displacement happens when institutional challengers garner sufficient power to displace (or replace) existing institutions with new institutions.<sup>45</sup> Layering is when challengers make “amendments, additions, or revisions . . . [which] over time, actively crowd out or supplant by default the old system.”<sup>46</sup> With drift, changing context and/or political inaction cause institutions to “remain formally the same but their impact changes.”<sup>47</sup> In

conversion, institutions again remain formally the same while being “adapted to serve new goals or fit the interests of new actors.”<sup>48</sup> Institutional challengers tend to choose layering and drift when defenders of the status quo have strong veto power.<sup>49</sup>

Steven Levitsky and Mariá Victoria Murillo argue that institutional change happens differently in weakly institutionalized contexts than in Streeck and Thelen’s European and American case studies. First, institutions tend to be weaker in the Global South because of the prevalence of “institutional borrowing” from abroad, disjuncture between those who write the rules and those who actually hold power, the limited capacity and reach of states, and high levels of social and economic inequality.<sup>50</sup> Second, considerable variation in institutional strength exists within the Global South, with African states typically having weaker formal institutions due in part to legacies of the colonial state.<sup>51</sup> Third, weak institutions have serious consequences for policy and the polity. Weak stability means that policymaking is “volatile” and plagued by short-term thinking.<sup>52</sup> Weak enforcement means

[a]ctors are less able to form stable expectations about others’ behavior, which narrows their time horizons and erodes trust. In this way, low enforcement limits cooperation and collective action, which can undermine the quality—and in some cases, the stability—of new democracies.<sup>53</sup>

Put differently, weak institutions exacerbate both principal-agent and collective-action problems.<sup>54</sup>

Finally, institutional change happens differently in weak institutional environments in the Global South: processes like layering, drift, and conversion, “in which actors seek to change behavior and outcomes while leaving the old rules formally intact[,] are less common,” because actors “do *not* necessarily expect existing rules to endure (and may expect them to fail).”<sup>55</sup> Instead, institutional change is frequently “*radical and recurrent*.”<sup>56</sup> They suggest that this institutional instability may be path dependent.<sup>57</sup>

In sum, neo-institutionalism has produced several key insights that are relevant for transitional justice mechanisms. First, institutions, especially informal institutions, are notoriously “sticky” or resistant to change. Second, institutions are path dependent.<sup>58</sup> Third, new formal institutions are ineluctably “nested” within existing institutional environments. Fourth, new formal institutions can be undermined by informal institutions or gradually subverted through layering, drift, and conversion. Fifth, formal institutions change more radically and more frequently in weak institutional contexts. Sixth, formal

institutions “function quite differently as they diffuse across countries in part because of variation in the degree to which the rules are actually enforced.”<sup>59</sup> Overall, neo-institutionalism helps “indicate when transitional justice mechanisms that are likely to produce the normatively desirable outcomes are strategically attractive options for the actors who are empowered to introduce them.”<sup>60</sup> It also explains why well-intentioned reforms frequently fail to produce their expected outcomes—even where there is good institutional design, political will, and organizational capacity.<sup>61</sup> In other words, it helps to elucidate the reasons for the implementation gap—a gap that is often wider in weakly institutionalized contexts.

## TRANSITIONS AND INSTITUTIONAL CHANGE

The term transitions comes weighed down with frustrated teleologies and disappointed expectations. Still, it is useful for describing “critical junctures” involving *attempted* democratization or *attempted* peacebuilding, which are typically initiated by extraordinary legal moments (such as new constitutions or peace agreements). The length of a transition will clearly vary from one country to the next, but transitional justice scholars have defined transition periods as lasting anywhere between three years and decades.<sup>62</sup> It makes sense to set an upper limit of 10 years for transitional periods based on methodological considerations,<sup>63</sup> as well as empirical evidence of conflict recurrence.<sup>64</sup> Furthermore, most transitional mechanisms are implemented within that 10-year window.<sup>65</sup> Finally, shorter transitional periods are more consistent with historical institutionalism’s definition of “critical junctures.”<sup>66</sup>

## DEMOCRATIZING TRANSITIONS

A political transition is “the interval between one political regime and another.”<sup>67</sup> The Third Wave of the 1970s and 1980s was marked by political transitions away from authoritarian rule, particularly in Eastern Europe, Latin America, and, to a lesser extent, Africa. The early optimism about democratic transitions, however, was quickly replaced by pessimism about democratic consolidation.<sup>68</sup> Thomas Carothers sounded the death-knell for the “transition paradigm” in 2002 after observing how many democratic transitions had dead-ended in electoral authoritarian regimes.<sup>69</sup>

Some scholars explain the failure of the transition paradigm in neo-institutionalist terms. During political transitions, institutional change is often

abrupt and discontinuous. There was an expectation that new institutional arrangements would “lock in” and persist after such “critical junctures.”<sup>70</sup> Yet, as Levitsky and Murillo observe, “institutions that emerge amid rapidly changing power constellations should—all else equal—be less likely to endure.”<sup>71</sup> They point to the “radical and recurrent” replacement of constitutions, electoral rules, decentralization reforms, and economic liberalization policies in Latin America since the Third Wave.<sup>72</sup> The causes are regime instability, electoral volatility, social inequality, institutional borrowing, and rapid institutional design.<sup>73</sup>

Feminist institutionalists have focused less on outright displacement and more on layering and drift.<sup>74</sup> Old, gendered “rules of the game” often carry over and are layered onto new or reformed institutions.<sup>75</sup> The inadequate funding of new institutions can cause them to drift, as has happened with Women’s Policy Agencies in South Africa.<sup>76</sup> Additionally, new informal institutions may hamper efforts at changing formal institutions. During Chile’s democratic transition, for example, “informal institutions grew up around the perceived need for consensus and negotiation between the ruling coalition and its opponents which impacted on efforts to create institutional change,” especially with respect to controversial issues like reproductive rights.<sup>77</sup>

## PEACEBUILDING TRANSITIONS

Political transitions are very different after conflict.<sup>78</sup> Post-conflict states usually experience multiple, attempted transitions at the same time: from war to peace, from authoritarianism to democracy, and from a war economy to a market economy. The new political regimes created by peace agreements or military victories usually inherit devastated formal institutions. Conflict also weakens the social capital that undergirds many informal institutions. Hence, in Latin America, post-conflict states lag behind post-authoritarian states in terms of democracy, legitimacy, and fragility.<sup>79</sup> For example, state weakness is a persistent problem in Colombia, Guatemala, and Peru.<sup>80</sup> Another pattern is that “when pre-existing democratic institutions are weak or nonexistent, postwar politics tends to reproduce the polarization and cleavages of the war; in addition, state institutions are more easily captured by partisan interests.”<sup>81</sup> Still, these Latin American states emerged from conflict with stronger institutions than their African counterparts,<sup>82</sup> which often started with weaker formal institutions and weaker economies, and had far more destructive conflicts.<sup>83</sup>

Since the mid-2000s, peacebuilding transitions have focused on (re)building state institutions to fulfill core state functions: monopolizing the legitimate



use of force, controlling state territory, collecting tax revenue, and delivering essential public goods. Recently, state-building efforts have moved away from a narrowly technocratic focus on capacity building to a more political emphasis on legitimacy building.<sup>84</sup> As Charles Call observes, “Without attention to legitimacy, capacity building can deepen illegitimacy and the likelihood of war by leaving a state better able to mistreat, exclude, or swindle its population.”<sup>85</sup> Legitimacy is a highly contested concept but it is often viewed as consisting of procedural (input) and performance (output) legitimacy.<sup>86</sup> In conflict-affected states, procedural legitimacy is hampered by poor governance, while performance legitimacy is made difficult by the lack of resources. The *World Development Report 2011* links capacity and legitimacy, stating, for example, that “low institutional capacity to deliver further reduces trust.”<sup>87</sup>

Neo-institutionalist thinking infuses the *World Development Report 2011*’s policy prescriptions. According to that Report, the first step in state-building is “the need to restore confidence in collective action before embarking on wider institutional transformation.”<sup>88</sup> Crucially, this includes “developing collaborative, ‘inclusive enough’ coalitions”<sup>89</sup> and sending “strong signals of a break with the past.”<sup>90</sup> Subsequent institutional transformation then needs to make “the priority transforming institutions that provide citizen security, justice, and jobs.”<sup>91</sup> State building also has to be driven by domestic elites and publics as “outsiders cannot restore confidence and transform institutions.”<sup>92</sup> Relatedly, institutional reforms must be context specific and hence “best-fit”—that is, “reforms of institutions in fragile contexts need to be adapted to the political context rather than be technically perfect.”<sup>93</sup> The *World Development Report 2011* also cautions against institutional borrowing from advanced democracies.<sup>94</sup> Finally, it stresses the time needed to achieve institutional transformation:

It took the 20 fastest-moving countries an average of 17 years to get the military out of politics, 20 years to achieve functioning bureaucratic quality, and 27 years to bring corruption under reasonable control .... This did not mean perfection, but rather adequacy . . . Portugal and the Republic of Korea are among the fastest institutional transformers of the 20<sup>th</sup> century, but both started their transformations with a foundation of extensive state institutional experience, and with literacy rates far higher than those in, say, the Democratic Republic of Congo or Haiti today.<sup>95</sup>

In other words, building formal institutions in historically weak states takes much longer than rebuilding such institutions in historically strong states.

Overall, post-conflict institution building is affected by three key factors: 1) the path dependency of weak institutions, 2) the existing political settlement (or elite bargain), and 3) the resource commitments of international donors (in terms of both time and money).<sup>96</sup> One comparative study suggests that the first factor is the most important: historically strong states that are “recovering from episodes of fragility due to conflict draw on a degree of institutional legitimacy and effectiveness that allows national leaders to systematically plan and implement reforms, and incorporate aid resources in a way that states that have never been minimally robust cannot.”<sup>97</sup> Still, the study observes that institution building in historically weak states is not doomed to failure.<sup>98</sup> While both Liberia and Sierra Leone have similar legacies of weak state institutions and conflict, the latter underwent much more successful security sector reform. The explanation for these divergent outcomes lies in the fact that “powerful local actors are less likely to hinder the implementation of reforms that they had been consulted on and that they had contributed to passing because these are more likely to be ones with which they can live.”<sup>99</sup> To put it in Levitsky and Murillo’s terms, there was less disjuncture between the rule writers and the rule implementers in Sierra Leone.

## TRANSITIONAL JUSTICE AND WEAK INSTITUTIONS

There is a large and contentious debate over the notion of transitional justice,<sup>100</sup> which has been variously conceptualized as a set of norms,<sup>101</sup> rights,<sup>102</sup> goals,<sup>103</sup> practices,<sup>104</sup> processes,<sup>105</sup> or tools.<sup>106</sup> It is perhaps more useful to view transitional justice as an institution, or “rules of the game,” for dealing with gross human rights violations (in other words, accountability) that emerges during the “critical juncture” of a transition. Such a neo-institutionalist approach has the advantage of seeing transitional justice as a mix of norms, practices, and processes. That puts the emphasis more squarely on function rather than form, and on implementation rather than goals.

There is growing concern that transitional justice mechanisms designed for post-authoritarian contexts in Eastern Europe and the Southern Cone are being implemented in conflict-affected contexts in Africa and Asia “with virtually no functional analysis.”<sup>107</sup> As the UN Special Rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, points out, these contexts can be radically different:

whereas in the authoritarian settings the violations typically involve significant abuse of State power, in many conflict settings, in which

institutions already find themselves under severe strain, the violations often come about as a result of generalized social conflict in which, among other factors, there is a plethora of violent agents. These settings, which are often marked not just by weak institutions but also by severe economic scarcity, generate challenges for the successful implementation of measures that were designed presupposing the feasibility of relatively easy attributions of responsibility and institutions that could plausibly administer those attributions and disclose the truth of what took place, that were strong enough to bear reform in the short term and that could feasibly avail themselves of the resources required to establish reparations programmes for victims.<sup>108</sup>

Next, the chapter looks at how these weak institutional contexts can be expected to affect transitional justice mechanisms and, in turn, how these mechanisms can be expected to affect weak institutional contexts.

#### HOW DO WEAK INSTITUTIONAL CONTEXTS AFFECT TRANSITIONAL JUSTICE?

Weakly institutionalized, conflict-affected contexts are likely to affect the design and implementation of transitional justice mechanisms in several ways. First, the mechanisms will be subject to rapid institutional design characterized by institutional borrowing. Such “isomorphic mimicry” (or the imitation of best-practice forms) persists despite calls to avoid “one-size-fits-all formulas and the importation of foreign models.”<sup>109</sup> The resulting lack of functionality makes these mechanisms vulnerable to modification or displacement. For example, Sierra Leone’s truth commission was undermined by local, informal institutions of “social forgetting” that promote public silences about violence.<sup>110</sup> Second, transitional justice mechanisms are prone to the weak stability and/or weak enforcement that affect other formal institutions. This encourages short term planning and a lack of cooperation between various actors and these mechanisms. Third, and relatedly, institutional challengers (such as spoilers) will cause the layering, drift, and conversion, if not outright displacement, of transitional justice institutions. For example, government leaders often allow truth commissions to drift without political or financial support if they fear revelations about themselves or their supporters. Finally, informal institutions, such as clientelism and corruption, will undermine implementation of transitional justice institutions.<sup>111</sup> In the Democratic Republic of the Congo, for example, positions within the truth commission were allocated on the basis of political power sharing and clientelism rather than merit or normative commitment.<sup>112</sup>

AMNESTIES<sup>113</sup>

Amnesty is an “extraordinary *legal* measure [designed] to remove the prospect and consequences of criminal liability for designated individuals” or groups.<sup>114</sup> There is a lively debate over whether domestic amnesties for gross human rights abuses (including serious international crimes) are transitional justice mechanisms or not,<sup>115</sup> given that international law in this area “is truly unsettled.”<sup>116</sup> The Belfast Guidelines on Amnesty and Accountability take a nuanced approach that looks partly to institutional design: “Amnesties are more likely to be viewed as legitimate where they are primarily designed to create *institutional and security conditions* for the sustainable protection of human rights, and require individual offenders to engage with measures to ensure truth, accountability and reparations.”<sup>117</sup> Legitimate amnesties are likely to have the following characteristics: public approval (whether through consultation or referendum), involvement of victims, distinctions between low-level and high-level perpetrators, conditions on beneficiaries, and independent administration processes.<sup>118</sup> By contrast, self-amnesties and unconditional (or blanket) amnesties are generally illegitimate.<sup>119</sup>

Various types of (legitimate and illegitimate) amnesties for gross human rights abuses figured prominently in both pacted and ruptured political transitions in Latin America,<sup>120</sup> ranging from authoritarian leaders’ blanket amnesties to promote impunity (for example, in Chile) to new democratic regimes’ conditional amnesties to prevent coups (for example, in Argentina). Amnesty laws for gross human rights abuses have been sticky institutions, frequently lasting for more than 15 years before being annulled or circumvented: Argentina (1987–2003); Brazil (since 1979); Chile (1978–1998); El Salvador (1993–2016); Uruguay (1986–2011).<sup>121</sup> Several factors account for this stickiness: government reluctance to undo complicated transitional bargains, the need for legislative and judicial agreement, and concerns about the retroactive application of changing amnesty laws.<sup>122</sup>

Hence, the circumvention or displacement of amnesties for gross human rights abuses usually requires some combination of four factors: “civil society demand, domestic judicial leadership, the absence of veto players and international pressure.”<sup>123</sup> Only in Argentina and Uruguay have amnesty laws been “democratically displaced,”<sup>124</sup> while in Chile and Peru they have been circumvented through layering by legal challengers and sympathetic judges.<sup>125</sup> In some Latin American states where amnesties were successfully challenged or circumvented there has been a dramatic surge in post-transitional human rights trials.<sup>126</sup> These prosecutions are due in part to the increased capacity and

independence of the justice sector (brought on by justice sector reforms) as well as pressure from the Inter-American Court of Human Rights.<sup>127</sup>

Since the mid-1990s amnesties for gross human rights abuses have shifted from democratizing to peacebuilding transitions.<sup>128</sup> Despite UN opposition, these amnesties continue to figure in some peace agreements,<sup>129</sup> although they exhibit considerable variation in terms of scope and intent.<sup>130</sup> So far, they have proven sticky, with few examples of the displacement or layering seen in South America.<sup>131</sup> Francesca Lessa et al. explain that the favorable combination of civil society demand, domestic judicial leadership, and international pressure is unlikely to be replicated in regions where there is less democratic history, less shared judicial culture, less influential regional human rights systems, and more social fragmentation.<sup>132</sup> In other words, amnesties are likely to be stickier in weakly institutionalized, conflict-affected contexts. Uganda provides an interesting example where a 12-year blanket amnesty for rebels was partially annulled in 2012 as a result of international pressure, but reinstated a year later in response to pressure from civil society actors, including traditional and religious leaders, who saw the amnesty as necessary to preserve the peace and encourage rebels to defect.<sup>133</sup>

#### TRIALS

Domestic trials were infrequent during the democratizing transitions of the Third Wave.<sup>134</sup> By contrast, trials have featured prominently in peacebuilding transitions thanks in part to several drivers: the “justice cascade” and norm localization; the complementarity regime of the International Criminal Court (ICC), which encourages states to prove their willingness and ability to hold domestic trials; and the desire of governments to impose victor’s justice on defeated opponents.

Domestic trials are hampered by the “credibility, capability, and resource constraints faced almost inevitably by [justice sectors] in the aftermath of repressions and/or conflict, particularly in weakly institutionalized contexts.”<sup>135</sup> A Burundian government committee, for example, noted that it would be impossible to prosecute perpetrators named by any future truth commission due to weak justice capacity.<sup>136</sup> Uganda’s domestic prosecutions have been hampered by a lack of political will, cooperation from the military, and witness protection.<sup>137</sup> In Côte d’Ivoire, the prosecutor has prioritized cases against supporters of the former president, thereby reinforcing its lack of independence from the executive branch.<sup>138</sup> The Democratic Republic of the Congo has not shown significant progress in prosecuting crimes against humanity

and war crimes despite large amounts of financial, technical, logistical, and political support from international donors and nongovernmental organizations.<sup>139</sup> While both political will and cooperation from the military are lacking,<sup>140</sup> there are also long-standing institutional weaknesses that international assistance cannot easily remedy:

The lack of organizational oversight in the national judiciary has undermined professional competence and the quality of performance at all levels of Congolese judicial institutions. The absence of a system of organizational incentives and oversight has been detrimental to professional motivation and morale, and has contributed to the judicial system's reliance on support from partners. As stated by several judicial authorities, there are no compensation or discipline mechanisms that would potentially encourage or reward due diligence.<sup>141</sup>

The result is “a culture of lethargy” in which “judicial actors feel allowed to perform the minimum amount of tasks required to secure their salaries.”<sup>142</sup>

#### TRUTH COMMISSIONS

State-led truth commissions were seen as a middle road between amnesties and prosecutions during post-authoritarian transitions in Latin America and South Africa. In those contexts, they focused largely on gross violations of physical integrity rights by state actors. Truth commissions have subsequently been transplanted to post-conflict states, including Kenya, Liberia, Peru, Sierra Leone, and Timor Leste. Over time, their mandates have expanded dramatically to cover longer time periods, a wider range of human rights violations and criminal activity, and a larger number of nonstate perpetrators.

As new, ad-hoc entities, truth commissions are less directly affected by institutional weakness than trials in existing justice systems. Nevertheless, their newness is nested within the larger institutional environment, which can negatively impact truth commissions in several ways. First, weak institutions cause implementation problems and administrative delays. Second, weak security institutions create disincentives for victims and witnesses to participate in public hearings. Third, weak political institutions make it more difficult to implement the recommendations in truth commission final reports.<sup>143</sup>

#### REPARATIONS

Large-scale administrative reparations were established as part of post-authoritarian transitions in Central and Eastern Europe, Latin America, and

South Africa. In peacebuilding transitions, truth commission recommendations for mass reparations are frequently ignored (as in El Salvador and Liberia) or grudgingly implemented under pressure from civil society organizations (as in Sierra Leone).<sup>144</sup> Special Rapporteur de Greiff blames this implementation gap of “scandalous proportions” on a lack of political will rather than the greater resource constraints or larger number of victims in these settings.<sup>145</sup> Indeed, the pace of implementation of Peru’s reparations declined after a change of government.<sup>146</sup> Yet, the implementation gap is also caused by “institutional challenges of capacity to provide services or distribute benefits to individuals” in weak institutional environments.<sup>147</sup> Alexander Segovia observes that “reparations are difficult to design and implement because in addition to requiring considerable amounts of public resources, they need the existence of qualified technical resources, public and private institutional resources, and reliable statistical data, all of which is not always available in transitional societies.”<sup>148</sup> He points out that fiscal capacity was higher in countries like post-authoritarian Chile than in many conflict-affected states,<sup>149</sup> and that one of the lessons of Haiti’s failed reparations effort is that “effectively implementing a reparations policy is intimately connected with structural factors, such as the functioning of State institutions.”<sup>150</sup> Matiangai Sirleaf similarly suggests that truth commission recommendations for reparations are less likely to be implemented in weaker states; in her comparative survey of Ghana, Liberia, and Sierra Leone, it was the weakest state (Liberia) which did not establish reparations.<sup>151</sup>

#### GUARANTEES OF NONRECURRENCE

Guarantees of nonrecurrence are forward-looking measures to prevent gross human rights abuses and to “restore or establish public trust in government institutions.”<sup>152</sup> Under UN soft law, these guarantees mostly focus on institutional reform, especially of the justice and security sectors.<sup>153</sup> In a 2015 report, Special Rapporteur de Greiff expanded the notion of guarantees of nonrecurrence to encompass a wide array of institutional, societal, and cultural interventions—from security sector reform to legal empowerment to theater performances to psychosocial counseling.<sup>154</sup> This conflates transitional justice with atrocity prevention. In my view, guarantees of nonrecurrence should remain focused on where transitional justice can add value to institutional reform—that is, with vetting to the justice and security sectors.<sup>155</sup>

Vetting typically involves revealing and sometimes removing public servants responsible for or complicit in gross human rights abuses.<sup>156</sup> Vetting was widely employed in the democratizing transitions in Central and Eastern

Europe as well as in several post-authoritarian transitions in Latin America. More recently, vetting has been attempted in a number of post-conflict states.

Vetting directly affects the distribution of power and spoils (especially in neopatrimonial regimes) and is frequently implemented “by the very institutions whose members are being vetted.”<sup>157</sup> Consequently, it often encounters political resistance (as in Nepal)<sup>158</sup> or political manipulation (as in Hungary).<sup>159</sup> Special Rapporteur de Greiff observes that vetting has a “lacklustre history,” pointing out that it “has lent itself more frequently to political manipulation” than any other transitional justice mechanism.<sup>160</sup>

Vetting is “significantly harder to implement” in weakly institutionalized, conflict-affected states.<sup>161</sup> For one thing, it requires state capacity in personnel management, information management, and due process. Such “institutional conditions for vetting were not in place” in Burundi, the Democratic Republic of the Congo, or Liberia.<sup>162</sup> For another, vetting is “hugely resource-intensive,”<sup>163</sup> which partly accounts for why Kenya’s vetting of police officers has proceeded so slowly.<sup>164</sup> Nevertheless, there are a few examples of successful vetting in weak institutional contexts, like the Kenyan judiciary.<sup>165</sup>

#### CONCLUSION: INSTITUTIONAL PRECONDITIONS

Trials, truth commissions, reparations programs, and guarantees of nonrecurrence “all rest upon certain institutional preconditions that are not satisfied in all settings.”<sup>166</sup> Jack Snyder and Leslie Vinjamuri argue that the rule of law is a precondition for effective transitional justice.<sup>167</sup> This section looks more closely at the specific institutional preconditions of effectiveness for the primary transitional justice mechanisms.

Amnesty requires little in the way of preconditions other than a government’s ability to pass amnesty legislation and ensure that prosecutors and courts do not contravene its provisions. Truth commissions have been saddled with ever-expanding mandates, but their primary tasks are truth seeking, data collection, and report writing.<sup>168</sup> The main institutional preconditions are meritocratic appointment systems and insulation from executive or military interference. Without these, truth commissions will quickly lose credibility with civil society, victims’ organizations, and independent media—as happened in Kenya.<sup>169</sup> For reparations, fiscal integrity and administrative competence is essential. Vetting clearly requires the most institutional preconditions, including independent personnel management systems.

For effective trials, the main institutional precondition is a democratic transition that produces independent justice institutions and activist civil society.



As Snyder and Vinjamuri note, “Where legal institutions are weak, domestic trials typically lack independence from political authorities, fail to dispense justice, and sometimes even fail to protect the security of trial participants.”<sup>170</sup> The Special Rapporteur recommends strengthening legal institutions through prosecutorial prioritization strategies.<sup>171</sup> Yet, as he recognizes, there are some necessary preconditions for prosecutors to design and implement effective strategies: political independence, budgetary autonomy, and meritocratic appointment procedures—precisely those “capacities that most countries in a transitional setting are unlikely to have.”<sup>172</sup> Some states have sought to bypass weak justice institutions by creating specialized prosecutorial units and specialized courts to provide meaningful accountability for gross human rights violations, but there is mixed evidence about whether this works.<sup>173</sup>

#### HOW DOES TRANSITIONAL JUSTICE IMPACT WEAK INSTITUTIONAL CONTEXTS?

In recent years, a surge of quantitative, qualitative, and mixed methods studies have begun to assess the impact of transitional justice mechanisms, primarily on democracy, human rights, and peace. Leaving aside methodological difficulties, these studies have produced inconclusive and often contradictory findings. For example, studies from both Tricia Olsen et al. and Eric Wiebelhaus-Brahm found that stand-alone truth commissions have a negative impact on human rights, while Hunjoon Kim and Kathryn Sikkink concluded that they have a positive impact.<sup>174</sup> To date, no quantitative studies have measured how transitional justice mechanisms impact institutional strength, institutional quality, or state fragility.<sup>175</sup>

There have been some tentative efforts to assess the impact of transitional justice on democratic institution-building. In a cross-national study of Latin America, Geoff Dancy and Eric Wiebelhaus-Brahm found that prosecuting state agents is “a necessary condition for democratic consolidation” but did not explain why that is.<sup>176</sup> Their study also showed that the timing and sequencing of transitional justice mechanisms had little effect on democratic consolidation.<sup>177</sup> In a smaller, cross-regional study, Valerie Arnould and Chandra Lekha Sriram hypothesized that transitional justice may impact democratic institution-building through three causal pathways: “delegitimation of past abusers and potential spoilers; promotion of reforms; and empowerment of previously marginalized actors.”<sup>178</sup> Arnould applied this framework to post-conflict Uganda and found little evidence that transitional justice mechanisms there promoted delegitimation, reform, or empowerment. While a commission

of inquiry and ICC intervention did prompt some rule-of-law reforms, these changes did not alter actual practice as political will was missing and new actors were afraid to challenge the military.<sup>179</sup>

Special Rapporteur de Greiff argues that transitional justice contributes to two proximate goals, civic trust and recognition of victims as rights holders.<sup>180</sup> Civic trust comprises interpersonal trust, trust in social institutions, and trust in state institutions.<sup>181</sup> Some studies suggest that transitional justice is more likely to contribute to the latter.<sup>182</sup> Trusting an institution means perceiving it to be legitimate and having shared expectations that its rules and norms are both stable and enforced.<sup>183</sup> One group of scholars found that trust in electoral and justice institutions is particularly important for regime support in democracies.<sup>184</sup> Transitional justice's potential for strengthening institutional trust aligns with the *World Development Report 2011* prescriptions for "restor[ing] confidence in collective action,"<sup>185</sup> although problems with the design or implementation of transitional justice mechanisms can also create distrust.<sup>186</sup>

#### AMNESTIES

The sheer variety of legitimate and illegitimate amnesties makes it difficult to gauge their impact. In post-authoritarian transitions, some amnesties apparently contributed to strengthening or consolidating democratic institutions, particularly judiciaries and human rights organizations.<sup>187</sup> For example, Brazil's blanket amnesty enabled left-wing opponents (like former president Dilma Rousseff) to return to the country, participate in politics, and receive reparations.<sup>188</sup> In a large-N study, however, Olsen et al. found that "amnesty alone has no significant effect on the quality of democracy."<sup>189</sup> In post-conflict transitions, such as those in Aceh and Colombia, amnesties may have helped to create conditions for institutional trust, particularly among ex-combatants.<sup>190</sup>

#### TRIALS

Domestic trials may contribute to the rule of law in several ways:<sup>191</sup> through delegitimizing past crimes, recognizing victims' rights, expressing norms (such as equality before the law),<sup>192</sup> producing demonstration effects (particularly around fairness), building justice-sector capacity, and strengthening trust in justice institutions.<sup>193</sup> As Special Rapporteur de Greiff states, "Judicial institutions . . . show their trustworthiness if they can establish that no one is above the law."<sup>194</sup> On the other hand, selective prosecutions and unfair trials, like those pursued in Côte d'Ivoire, the Democratic Republic of the Congo, Rwanda, and Uganda, are unlikely to have inspired trust. Overall, there is

not much empirical evidence on how domestic trials have impacted the rule of law. In one large-N, cross-national study, *de facto* amnesties appeared to have a more positive impact on rule of law than trials did.<sup>195</sup> Another such study found a positive correlation between trials and rule-of-law indicators in Latin American states but acknowledged that the direction of causality was unclear.<sup>196</sup>

#### TRUTH COMMISSIONS

There is some limited evidence that truth commissions can increase civic trust.<sup>197</sup> In addition, Laura Taylor and Alexander Dukalskis found that truth commissions with open hearings, widely disseminated reports, and the naming of perpetrators have a positive impact on democratization.<sup>198</sup> Further, truth commission reports and recommendations can form blueprints for institutional reform, especially “once electoral gains and democratic reform facilitated the development of coalitions supportive of human rights reform.”<sup>199</sup> Truth commission recommendations seemed to improve the justice and security sectors in Chile and El Salvador.<sup>200</sup>

Truth commission reports often diagnose institutional failures and prescribe institutional reforms. Recommendations typically focus on reforming the justice and security sectors to make them more human rights compliant and more democratically accountable.<sup>201</sup> Vetting is only infrequently recommended by truth commissions and rarely implemented as a result of their work. For example, truth commissions in Chad, El Salvador, Liberia, and Timor-Leste recommended vetting, but it only happened in El Salvador.<sup>202</sup> Governments have largely ignored recommendations for institutional reform—even where the mandates of truth commissions required implementation (as in Kenya, Liberia, Sierra Leone).<sup>203</sup> One important exception is Guatemala’s Commission for Historical Clarification (CEH), whose mandate’s prohibition on finding individual responsibility prompted it to focus on institutional structures, which “lent particular strength to recommendations for institutional reform.”<sup>204</sup>

#### REPARATIONS

It is difficult to gauge whether reparations change institutional contexts. Naomi Roht-Arriaza and Katharine Orlovsky contend that “reparations programs can spearhead change throughout a larger part of the state apparatus.”<sup>205</sup> They point to Peru, where the reparations program helped to make some local governments more consultative and better service providers, while strengthening

them vis-à-vis the state.<sup>206</sup> However, they do not analyze the factors that made this possible for some, but not other, local governments.

While a key aim of administrative reparations is to “foster trust in institutions that have either abused victims or failed to protect them,”<sup>207</sup> the implementation gap has left many victims dissatisfied in places such as Peru and South Africa.<sup>208</sup> Cristián Correa argues that Colombia’s “combination of unrealistic standards and inability to implement results in frequent frustration by victims.”<sup>209</sup> Such frustration is likely to mean that victims and the wider public do not have increased trust in state institutions.

#### GUARANTEES OF NONRECURRENCE

As argued above, guarantees of nonrecurrence should focus narrowly on institutional reform of the justice and security sectors. Even if done well, the removal of those who perpetrated or tolerated gross human rights abuses is not enough to produce reformed state agencies.<sup>210</sup> That requires the much-more-difficult task of changing the formal and informal institutions. Feminist institutionalist scholars have shown how new women entrants into reformed parliaments and new state agencies can find themselves hamstrung by the existing rules of the game.<sup>211</sup>

Vetting is meant to strengthen trust in institutions. Cynthia Horne found that lustration in Central and Eastern European states did improve trust in state institutions and targeted social institutions (such as unions and religious institutions), though it had no impact on inter-personal trust.<sup>212</sup> No similar studies have been done on vetting in conflict-affected states. In weak institutional contexts, vetting may lead to “further weakening of already fragile institutions, making it more difficult for them to deliver their services.”<sup>213</sup> That may then have a knock-on effect in terms of institutional trust.<sup>214</sup>

#### CONCLUSION: INSTITUTIONAL IMPACTS

Transitional justice is often assumed to strengthen the formal “rules of the game” (like the rule of law’s fundamental principle of equality before the law) as well as formal organizations (like the judiciary). As yet, there has been little effort to measure the impact of specific transitional justice mechanisms on the strength (that is, the stability and enforcement) of formal and informal institutions. Perhaps the most promising proxy measure for this is trust in the justice and security institutions, which are central to the rule of law.

Of all the transitional justice mechanisms, vetting can be expected to have the greatest impact on institutional trust, because it removes personnel who are deemed untrustworthy (due to their involvement or complicity in gross

human rights abuses). While vetting in Central and Eastern Europe did contribute to greater trust in institutions, the impact of vetting in conflict-affected, weakly institutionalized states that are ethnically divided (like Kenya) is not yet clear. To date, there is very partial and mixed evidence about whether amnesties, trials, truth commissions, and reparations have affected trust in formal justice and security institutions.<sup>215</sup>

## CONCLUSION

The concept of transitional justice has been divorced from the democratizing transitions where it was first theorized, designed, and implemented.<sup>216</sup> Its mechanisms are now promiscuously applied to all sorts of contexts: authoritarian and post-authoritarian; conflict and post-conflict; transitional, post-transitional, and even non-transitional. This expansionism has happened without reorienting expectations, redrawing pathways to impact, or rethinking theories of change. Unsurprisingly, transitional justice efforts in these contexts have mostly produced disappointing results. It would appear that truth, justice, reparations, and nonrecurrence are not likely to be realized in the absence of democratizing transitions, rule-of-law institutions, and strong civil-society advocacy for accountability.<sup>217</sup>

Creative thinking is needed on how and where transitional justice mechanisms might become “pockets of effectiveness”<sup>218</sup> or “audacious reforms”<sup>219</sup> in weakly institutionalized, conflict-affected contexts. Transitional justice could borrow from recent research on how to build capacity in fragile and conflict states.<sup>220</sup> A World Bank report examines how certain institutions succeeded in weakly institutionalized and difficult political environments such as Sierra Leone and Timor-Leste.<sup>221</sup> The authors define successful institutions as those that achieve results, public legitimacy, and durability.<sup>222</sup> They examine three pathways to institutional success: 1) where an institution’s objectives closely and consistently align with elite incentives, allowing for wide-ranging reforms; 2) where such an initial alignment allows for reforms to be locked in before the situation changes; and 3) where an institution with no elite support works with a range of stakeholders “to build credibility and, ultimately, mobilize support from elites to reinforce existing gains.”<sup>223</sup> Thus, successful institution building means paying attention to two context-sensitive variables: political settlements (“elite incentives”) and civil society (“a broader set of stakeholders”). Such political economy analysis has been largely missing from transitional justice policy and programming.<sup>224</sup>

While transitional justice scholars have focused heavily on the balance of political power between reformers and spoilers, they have paid much less attention to political bargaining among elites.<sup>225</sup> A political settlement is the overarching elite bargain for how to engage in political bargaining.<sup>226</sup> According to James Putzel and Jonathan Di John, “Formally designed institutions . . . which are out of step with the dominant political settlement in a polity are at best likely to be ineffective or at worst to provoke violent conflict.”<sup>227</sup> During democratizing and peacebuilding transitions, the political settlement is often still being hammered out and hence, as Levitsky and Murillo observed, there is a frequent disjuncture between those designing formal institutions and those holding power. In other words, transitional justice mechanisms that are out of sync with the political settlement are less likely to last or achieve their goals—unless they build support among other stakeholders (like international donors or civil society organizations) who can pressure the elites.

Transitional justice scholars and policymakers have come to recognize that civil society is a key player in ensuring effective implementation of transitional justice mechanisms.<sup>228</sup> In some cases, civil-society organizations have publicized truth-commission findings and advocated for follow-up on truth-commission recommendations.<sup>229</sup> Conversely, the implementation of transitional justice mechanisms can also spur civil-society activism.<sup>230</sup> This happens as victims and human-rights advocates form new organizations (like the Khulumani Support Group in South Africa) or use existing organizations (like KADEM in Tunisia) to make rights claims around transitional justice. However, it is important not to idealize civil society. For one thing, it is often weakened and divided by conflict. For another, it is often shaped by informal institutions, such as corruption and neo-patrimonialism. In Kenya, for example, “civil society actors had a difficult time countering the effects of ethnic loyalties and patronage and maintaining broad-based support for accountability once specific accused were named [by the ICC].”<sup>231</sup> Furthermore, human rights activists and victims’ organizations have also been affected by the global trend towards shrinking space for civil society.<sup>232</sup>

Even if the political-settlement and civil-society factors are favorable, the chances of effectiveness can also be improved through institutional design:

- Less rapid design will result in more sustainable institutions. This is partly because it gives the rule writers time to determine the preferences of the power holders.<sup>233</sup>
- Public consultation and participation at the design stage can help to bring important segments of civil society onboard.<sup>234</sup>

- Publicity and transparency will help to increase normative signaling. It will also enable greater engagement (for example, monitoring, advocacy, and outreach) by civil society in the crucial implementation phase. Taylor and Dukalskis found that “A public truth process . . . may help to compensate for some of the dubious motivations that elites bring to the commission’s formation and work, constraining future [elite] political decisions and enhancing democratization.”<sup>235</sup>
- Avoid institutional borrowing, as this sacrifices long-term functionality for short-term approval from the international community.
- Eschew “best practice” and go with “good fit.”<sup>236</sup> A recent World Bank report has pointed out that institutional fit “must be achieved in two dimensions—micro-organizational strategies must be chosen and supported on the basis of their ultimate function, *and* they must be implemented in light of the macro-sociopolitical context in which public agencies are embedded.”<sup>237</sup>
- Focus on “functional adequacy” rather than normative ambition.<sup>238</sup> For “when design gets so far ahead of possibilities and ignores so many constraints, the probabilities of success diminish.”<sup>239</sup>
- Consider creating specialized national agencies to develop, design, and implement transitional justice, as has been done in Colombia and Tunisia.

There are also lessons here for holism and sequencing. Several scholars have advocated a holistic approach on the basis of large-N studies showing that transitional justice mechanisms make a larger contribution to democratization and human rights when combined.<sup>240</sup> Special Rapporteur de Greiff has also argued for a “comprehensive approach” to prosecutions, truth seeking, reparations, and guarantees of nonrecurrence.<sup>241</sup> One difficulty with such holism is that different mechanisms have different institutional preconditions. It seems better to start with legitimate amnesties or truth commissions, which have fewer preconditions, with the hope that they may help to foster the conditions for other transitional justice mechanisms in the future.<sup>242</sup> This is an argument for pragmatic sequencing and gradualism<sup>243</sup>—accountability on the installment plan, to paraphrase Guillermo O’Donnell and Philippe Schmitter.<sup>244</sup>

Transitional justice can also learn from efforts to create analogous accountability mechanisms—such as national human rights institutions (NHRIs) and anti-corruption agencies—in weakly institutionalized contexts.<sup>245</sup> Some NHRIs (for example, the Indonesian Commission on Human Rights) were able

to transcend their institutional origins by holding accountable the illiberal regimes that had created them. Some scholars explain this in terms “of external factors such as shifts in democratic structures or political openings more generally.”<sup>246</sup> Others emphasize internal factors in an institution’s organization and practice such as “scaling up the legitimacy of the NHRI by building connections to civil society.”<sup>247</sup> In addition, some NHRIs were able to prevent their autonomy from being undermined by informal rules of clientelism. This had more to do with individual leaders rejecting patronage norms than with formal rules of operational autonomy.<sup>248</sup> Of course, an important difference between NHRIs and transitional justice mechanisms is that the former are subject to international monitoring and pressure for compliance with the Paris Principles through the International Coordinating Committee for National Human Rights Institutions.<sup>249</sup>

Transitional justice scholars, policymakers, and practitioners should pay greater attention to institutional preconditions—including the rule of law, overarching political settlement, and informal rules of patronage—especially in post-conflict contexts. While this chapter has set out a preliminary exploration of how institutional weakness may affect transitional justice mechanisms and how these mechanisms may affect institutional weakness (by affecting institutional trust), much more research is needed on these and related issues. First, in-depth, qualitative studies can elucidate how institutions—particularly informal rules—shape the implementation of transitional justice mechanisms.<sup>250</sup> Second, more qualitative research, like that done by Arnould for Uganda, can trace transitional justice’s pathways to impact on institutions, particularly those that make up the rule of law.<sup>251</sup> Third, there is a need for more quantitative studies like Horne’s on how transitional justice mechanisms impact trust in state and social institutions. Finally, there is a need to factor variations in institutional strength into existing quantitative studies of transitional justice. While these research paths will not produce the best of all possible worlds, they may just help us become better gardeners.

## NOTES

- 1 I want to thank Pablo de Greiff for inspiring this chapter, Paul Seils for thoughtful comments, and especially Roger Duthie for incisive and patient edits.
- 2 James G. March and Johan P. Olsen, “Elaborating the ‘New Institutionalism,’” in *The Oxford Handbook of Political Institutions*, ed. R.A.W. Rhodes et al. (Oxford: Oxford University Press, 2006), 15.



- 3 Voltaire, *Candide* (1988), 97, [www.esp.org/books/voltaire/candide.pdf](http://www.esp.org/books/voltaire/candide.pdf).
- 4 See, for example, United Nations Development Programme (UNDP), "Institutional and Context Analysis Guidance Note" (New York: UNDP, 2012); Thomas Carothers and Diane De Gramont, *Development Aid Confronts Politics: The Almost Revolution* (Washington, DC: Carnegie Endowment for International Peace, 2013), 58–60, 145–47.
- 5 See, for example, James Putzel and Jonathan Di John, *Meeting the Challenges of Crisis States* (London: London School of Economics, 2012).
- 6 World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington, DC: World Bank, 2011), 105, 112.
- 7 There are some exceptions, most notably Monika Nalepa, "The Institutional Context of Transitional Justice," in *Routledge Handbook of Comparative Political Institutions*, ed. Jennifer Gandhi and Rubén Ruiz-Rufino (Abingdon: Routledge, 2015), 389–403. See also Onur Bakiner, *Truth Commissions: Memory, Power and Legitimacy* (Philadelphia: University of Pennsylvania Press, 2016), 115–17; Geoff Dancy and Eric Wiebelhaus-Brahm, "Timing, Sequencing, and Transitional Justice Impact: A Qualitative Comparative Analysis of Latin America," *Human Rights Review* 16, no. 4 (2015): 321–42; United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Pablo de Greiff, UN Doc. A/HRC/21/46, 9 August 2012.
- 8 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, para. 50.
- 9 Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002): 8; Leslie Vinjamuri and Jack Snyder, "Law and Politics in Transitional Justice," *Annual Review of Political Science* 18 (2015): 306, 310, 320. See Oskar N.T. Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010): 344. Scope conditions are: "the parameters within which a given theory is expected to be valid . . . The need for scope conditions grows out of the fact that social scientists rarely formulate universal propositions that hold across all times and places; rather, they formulate conditional propositions that apply to specific contexts." Gary Goertz and James Mahoney, "Negative Case Selection: The Possibility Principle," in *Social Science Concepts: A User's Guide*, ed. Gary Goertz (Princeton: Princeton University Press, 2006), 193.
- 10 "Norm entrepreneurs" are individuals who transform ideas (such as accountability) into shared standards of appropriate (state) behavior. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (London: W.W. Norton & Company, 2011), 11. Sikkink explicitly embraces "agentic constructivism" in her account of transitional justice. For a friendly critique, see Hun Joon Kim and J.C. Sharman, "Account and Accountability: Corruption, Human Rights, and the Individual Accountability Norm," *International Organization* 68, no. 2 (2014): 417–48.
- 11 Jelena Subotic, "Review of Kathryn Sikkink's *The Justice Cascade*," *Journal of Human Rights* 11, no. 2 (2012): 296–300. To be sure, truth commissions and vetting have emphasized

institutional accountability for gross human rights abuses.

- 12 Pablo de Greiff, "Transitional Justice, Security, and Development," Background Paper for World Development Report 2011 (October 2010).
- 13 See United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Pablo de Greiff, UN Doc. A/HRC/30/42, 7 September 2015; United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005), 17–19.
- 14 See, for example, Eric Wiebelhaus-Brahm, "Goals and Processes: The Arab World and the Transitional Justice Impact Literature," *International Journal of Human Rights* 20, no. 3 (2016): 427; Thoms, Ron, and Paris, "State-Level Effects of Transitional Justice," 352–53. For a rare exception, see Laura K. Taylor and Alexander Dukalskis, "Old Truths and New Politics: Does Truth Commission 'Publicness' Impact Democratization?" *Journal of Peace Research* 49, no. 5 (2012).
- 15 For example, Thoms et al. state that "institutional capacity" needs to be factored into causal arguments about transitional justice. Thoms, Ron, and Paris, "State-Level Effects of Transitional Justice," 352–53.
- 16 The term "weakly institutionalized" is used throughout this chapter to denote weak formal institutions.
- 17 See Lars Waldorf, "'Good Enough' Transitional Justice" (forthcoming 2017).
- 18 This chapter uses the terms post-authoritarian and post-conflict as crude shorthand for attempted political transitions away from authoritarianism and conflict. These transitions are often incomplete. Some post-authoritarian states have electoral authoritarian regimes or contain authoritarian enclaves. Many post-conflict states experience conflict or exist in a limbo of "no peace, no war." See Paul Richards, ed., *No Peace, No War: An Anthropology of Contemporary Armed Conflict* (Oxford: James Currey, 2013).
- 19 For a concise overview, see Fiona Mackay, Meryl Kenny, and Louise Chapell, "New Institutionalism Through a Gender Lens: Towards a Feminist Institutionalism?" *International Political Science Review* 31, no. 5 (2010): 574–79. See also Kenneth A. Shepsle, "Rational Choice Institutionalism," in Rhodes et al., *The Oxford Handbook of Political Institutions*, 23–38; Elizabeth Sanders, "Historical Individualism," in Rhodes et al., *The Oxford Handbook of Political Institutions*, 39–55; and Colin Hay, "Constructivist Institutionalism," in Rhodes et al., *The Oxford Handbook of Political Institutions*, 56–74. For neat comparisons of rational institutionalism and historical institutionalism, see Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan* (Cambridge: Cambridge University Press, 2004), 24–26; Merilee S. Grindle, *Audacious Reforms: Institutional Invention and Democracy in Latin America* (Baltimore: The John Hopkins University Press, 2000), 19–36.
- 20 Mackay, Kenny, and Chapell, "New Institutionalism Through a Gender Lens," 573, 576. See also Anneliese Dodds, Jelena Obradovic-Wochnik, and Ahmed Badran, "The New

- Institutionalism in the Context of Kosovo's Transition: Regulatory Institutions in Contested States," *East European Politics* 30, no. 4 (2014): 436–457.
- 21 There is a clear affinity between constructivist institutionalism and constructivist international relations accounts of transitional justice. See, for example, Sikkink, *The Justice Cascade*.
  - 22 See, for example, Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, "Historical Institutionalism in Political Science," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 11–12. Path dependency is the idea that current and future options are limited by earlier, contingent events. See, for example, James Mahoney, "Path Dependence in Historical Sociology," *Theory and Society* 29, no. 4 (2000): 507–48.
  - 23 Douglass North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990), 3. In some of the literature, there is slippage between institutions as rules of the game and institutions as governmental organizations. This is partly because institutions and organizations are to some extent co-constitutive.
  - 24 March and Olsen, "Elaborating the 'New Institutionalism,'" 1.
  - 25 Gretchen Helmke and Steven Levitsky, "Introduction," in *Informal Institutions and Democracy: Lessons from Latin America*, ed. Gretchen Helmke and Steven Levitsky (Baltimore: The John Hopkins University Press, 2006), 5.
  - 26 Ibid., 5. Helmke and Levitsky caution against conflating informal institutions with weak formal institutions or shared cultural values. See Scott Radnitz, "Review Article: Informal Politics and the State," *Comparative Politics* 43, no. 3 (2011): 351–71.
  - 27 Helmke and Levitsky, "Introduction," 18–19.
  - 28 See Jared Bissinger, "Myanmar's Economic Institutions in Transition," *Journal of Southeast Asian Economies* 31, no. 2 (2014): 248.
  - 29 Formal institutions can be weak in terms of stability and/or enforcement. See Steven Levitsky and Mariá Victoria Murillo, "Variation in Institutional Strength," *Annual Review of Political Science* 12 (2009): 115–133.
  - 30 See Steven Levitsky and Maria Victoria Murillo, "Conclusion: Theorizing about Weak Institutions: Lessons from the Argentine Case," in *Argentine Democracy: The Politics of Institutional Weakness*, ed. Steven Levitsky and Maria Victoria Murillo (University Park: Pennsylvania State University Press, 2005), 282. By contrast, Anna Grzymala-Busse states: "Post-communist state development shows that in transitional settings, informal institutions can replace, undermine, and support formal institutions *irrespective of the latter's strength*." Anna Grzymala-Busse, "The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes," *Studies in Comparative International Development* 45, no. 3 (2010): 331 (emphasis added).
  - 31 Helmke and Levitsky, "Introduction," 15; Gretchen Helmke and Steven Levitsky, "Conclusion," in *Informal Institutions and Democracy: Lesson from Latin America*, ed. Gretchen

- Helmke and Steven Levitsky (Baltimore: John Hopkins University Press, 2006), 276–77. For a slightly different take on the relationship between formal and informal institutions, see Hans-Joachim Lauth, “Formal and Informal Institutions,” in Gandhi and Ruiz-Rufino, *Routledge Handbook of Comparative Political Institutions*, 60–61.
- 32 Helmke and Levitsky, “Introduction,” 16; Helmke and Levitsky, “Conclusion,” 277.
- 33 Helmke and Levitsky, “Conclusion,” 279–80.
- 34 Fiona Mackay, “Nested Newness, Institutional Innovation, and the Gendered Limits of Change,” *Politics & Gender* 10, no. 4 (2014): 552–53.
- 35 Ibid.
- 36 Ibid.
- 37 Fiona MacKay et al., “The Feminist Potential of Sociological Institutionalism,” *Politics & Gender* 5, no. 2 (2009): 258.
- 38 Mackay, “Nested Newness.”
- 39 Wolfgang Streeck and Kathleen Thelen, “Introduction: Institutional Change in Advanced Political Economies,” in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford University Press, 2005), 1. See Thelen, *How Institutions Evolve*, 8, 23–24. For a prominent example of the punctuated equilibrium model, see Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London: Profile Books, 2013), 106–07, 431.
- 40 James Mahoney and Kathleen Thelen, “A Theory of Gradual Institutional Change,” in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (Cambridge: Cambridge University Press, 2010), 7.
- 41 Ibid.
- 42 Thelen, *How Institutions Evolve*, 292.
- 43 Streeck and Thelen, “Introduction: Institutional Change in Advanced Political Economies,” 19.
- 44 Ibid. Thelen combines structure and agency by linking these four types of institutional change to specific features of actors, institutions, and political contexts. Mahoney and Thelen, “A Theory of Gradual Institutional Change,” 17, 28. For a good overview in the context of gender reforms, see Georgina Waylen, “Understanding Institutional Change from a Gender Perspective,” Working Papers in Gender and Institutional Change, No. 1 (December 2014), 12–18.
- 45 Streeck and Thelen, “Introduction: Institutional Change in Advanced Political Economies,” 20.
- 46 Id. at 24.
- 47 Ibid. See id. at 24–26.
- 48 Id. at 26.
- 49 Mahoney and Thelen, “A Theory of Gradual Institutional Change,” 28.

- 50 Levitsky and Murillo, "Variation in Institutional Strength," 124.
- 51 See Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000); Crawford Young, *The Postcolonial State in Africa: Fifty Years of Independence, 1960-2010* (Madison: University of Wisconsin Press, 2012).
- 52 Levitsky and Murillo, "Variation in Institutional Strength," 125.
- 53 Id. at 124–25. Soifer argues that "this measures the extent of enforcement, and not the extent of the capacity to enforce." Hillel David Soifer, "The Development of State Capacity," in Fioretos, Falleti, and Sheingate, *The Oxford Handbook of Historical Institutionalism*, 192 n. 12.
- 54 That said, weak state institutions may offer political opportunities for civil society organizations to mobilize and frame demands. See, for example, Greg Distelhorst, "The Power of Empty Promises: Quasi-Democratic Institutions and Activism in China," *Comparative Political Studies* (2015): 1–35. For an application of the principal-agent problem to transitional justice, see Jennifer Lee Miller, "Justice in Action: Assessing the Institutional Design and Implementation of Transitional Justice," PhD dissertation, University of Arizona, 2014.
- 55 Steven Levitsky and Mariá Victoria Murillo, "Building Institutions on Weak Foundations: Lessons from Latin America," 5–6. A later published version is Steven Levitsky and Mariá Victoria Murillo, "Building Institutions on Weak Foundations," *Journal of Democracy* 24, no. 2 (2013): 93–107.
- 56 Levitsky and Murillo, "Building Institutions on Weak Foundations: Lessons from Latin America," 5–6.
- 57 Id. at 20.
- 58 Onur Bakiner found that truth commissions are highly path-dependent: those created on a more inclusive basis tend to produce greater political and social impact. Bakiner, *Truth Commissions*, 148–84.
- 59 Levitsky and Murillo, "Conclusion: Theorizing about Weak Institutions," 276.
- 60 Nalepa, "The Institutional Context of Transitional Justice," 390.
- 61 As one scholar observes, "actors are rarely able to produce the institutions they intend." Soifer, "The Development of State Capacity," 185.
- 62 For Cath Collins, the period of transition in Chile is three years (1990–1993) and that in El Salvador is four years (1989–1993). Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park: Pennsylvania State University Press, 2010), 73–76, 158–66. By contrast, Naomi Roht-Arriaza states that "in practice 'transition' may cover many decades, and may last longer for some issues than for others." Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 1. These different definitions of

- transition make it harder to compare findings across the quantitative impact literature.
- 63 Tricia Olsen et al. initially dispense with the notion of a transition period but then apply a 10-year period for methodological reasons. Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace Press, 2010), 11–12, 137.
  - 64 If a post-conflict state reaches the 10-year mark without further conflict, then the likelihood of conflict recurrence diminishes dramatically. See Paul Collier, Anke Hoeffler, and Mans Soderbom, “Post-Conflict Risks,” Working Paper Series #WPS/2006–12, Centre for the Study of African Economics, University of Oxford (2006).
  - 65 Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 107.
  - 66 See Fioretos, Falleti, and Sheingate, “Historical Institutionalism in Political Science,” 10–11.
  - 67 Kathryn Stoner et al., “Transitional Successes and Failures: The International-Domestic Nexus,” in *Transitions to Democracy: A Comparative Perspective*, ed. Kathryn Stoner and Michael McFaul (Baltimore: The John Hopkins University Press, 2013), 6.
  - 68 See Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Baltimore: Johns Hopkins University Press, 1996), xiii.
  - 69 Carothers, “The End of the Transition Paradigm.”
  - 70 Levitsky and Murillo, “Building Institutions on Weak Foundations: Lessons from Latin America,” 5.
  - 71 Ibid., 15. See Grindle, *Audacious Reforms*, 25.
  - 72 Levitsky and Murillo, “Building Institutions on Weak Foundations: Lessons from Latin America,” 7–8. Similarly, Grindle observed that “audacious” institutional reforms in Argentina, Bolivia, and Venezuela did not lock in but rather “remained contested and unstable.” Grindle, *Audacious Reforms*, 25, 213.
  - 73 Levitsky and Murillo, “Building Institutions on Weak Foundations: Lessons from Latin America,” 13–19.
  - 74 See, for example, Mackay, “Nested Newness”; Mackay, Kenny, and Chapell, “New Institutionalism through a Gender Lens.”
  - 75 See, for example, Louise Chappell, “Gender and the Hidden Life of Institutions,” *Public Administration* 91, no. 3 (2013): 599–615.
  - 76 Georgina Waylen, “Gendering Politics and Policy in Transitions to Democracy: Chile and South Africa,” *Policy & Politics* 38, no. 3 (2010): 343.
  - 77 Georgina Waylen, “Informal Institutions, Institutional Change, and Gender Equality,” *Political Research Quarterly* 67, no. 1 (2014): 220.
  - 78 Stewart Patrick, “Commentary: Democratic Consolidation in Postconflict States in Latin America: Insights from the Peace Building and Fragile States Literature,” in *In the Wake of War: Democratization and Internal Armed Conflict in Latin America*, ed. Cynthia J. Arnson (Washington, DC: Woodrow Wilson Center Press, 2012), 72.

- 79 Dinorah Azpuru, "Democracy and Governance in Conflict and Postwar Latin America: A Quantitative Assessment," in Arnson, *In the Wake of War*, 35–70; Cynthia J. Arnson, "Conclusion," in Arnson, *In the Wake of War*, 387–88.
- 80 Edelberto Torres-Rivas, "The Limits of Peace and Democracy in Guatemala," in Arnson, *In the Wake of War*, 133; Marco Palacios, "A Historical Perspective on Counterinsurgency and the 'War on Drugs' in Colombia," in Arnson, *In the Wake of War*, 178–80, 201; Carlos Basombrío Iglesias, "Peace in Peru, but Unsolved Tasks," in Arnson, *In the Wake of War*, 234.
- 81 Arnson, "Conclusion," 388.
- 82 Patrick, "Commentary: Democratic Consolidation in Postconflict States in Latin America," 72.
- 83 Ibid.
- 84 See Charles T. Call, *Why Peace Fails: The Causes and Prevention of Civil War Recurrence* (Washington, DC: Georgetown University Press, 2012), 222. For a similar emphasis on legitimacy, see Katia Papagiani, "Participation and State Legitimation," in *Building States to Build Peace*, ed. Charles T. Call (Boulder: Lynne Rienner Publishers, 2008), 49–72; M. Anne Brown et al., "Challenging Statebuilding as Peacebuilding – Working with Hybrid Political Orders to Build Peace," in *Palgrave Advances in Peacebuilding: Critical Developments and Approaches*, ed. Oliver P. Richmond (Basingstoke: Palgrave Macmillan, 2010), 107–09; Nicolas Lemay-Hébert, "Trying to Make Sense of the Contemporary Debate on State-building: The Legitimacy and the Institutional Approaches on State, State Collapse, and State-building," Paper presented at the Political Science Association Annual Conference, Edinburgh, March 30, 2010.
- 85 Call, *Why Peace Fails*, 222.
- 86 Id. at 41–47. See World Bank, *World Development Report 2011*, xvi, 84; Kylie Fisk and Adrian Cherney, "Pathways to Institutional Legitimacy in Postconflict Societies: Perceptions of Process and Performance in Nepal," *Governance: An International Journal of Policy, Administration, and Institutions* (2016).
- 87 World Bank, *World Development Report 2011*, 100. Institutional trust is a component of state legitimacy. Id. at xvi. See Steinar Askvik, Ishtiaq Jamil, and Tek Nath Dhakal, "Citizens' Trust in Public and Political Institutions in Nepal," *International Political Science Review* 32, no. 4 (2010): 417–437. There is evidence that strong formal institutions correlate with the inter-personal trust among strangers that enables collective action. See, for example, Viktoria Kaina, "Why Do We Trust Strangers? Revising the Institutional Approach to Generalized Trust Creation," *West European Politics* 34, no. 2 (2011): 282–95.
- 88 World Bank, *World Development Report 2011*, 103.
- 89 Id. at 104. These coalitions should include civil society as well as traditional leaders. Id. at 122–23. However, the report does not say much "about how external actors can build inclusive coalitions." Call, *Why Peace Fails*, 222.

- 90 World Bank, *World Development Report* 2011, 104.
- 91 *Id.* at 103.
- 92 *Id.* at 106. Still, international actors play an important supporting role. *Id.* at 106–07.
- 93 *Id.* at 106.
- 94 *Id.* at 107.
- 95 *Id.* at 108–09. It also notes that “International assistance needs to be sustained for a minimum of 15 years to support most long-term institutional transformations.” *Id.* at 193.
- 96 See Rachel M. Gisselquist, “Aid and Institution-Building in Fragile States: What Do We Know? What Can Comparative Analysis Add?” *Annals AAPSS* 656 (2014). For a discussion of political settlements, see below.
- 97 *Id.* at 17. By contrast, Lisa Denney and Pilar Domingo note that it is hard to separate out political settlements and institutional strength as they are mutually constitutive. Lisa Denney and Pilar Domingo, “Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Changing Transitional Justice,” in this volume.
- 98 Gisselquist, “Aid and Institution-Building in Fragile States,” 17.
- 99 Ato Kwamena Onoma, “Transition Regimes and Security Sector Reforms in Sierra Leone and Liberia,” *Annals AAPSS* 656 (2014): 142. This suggests that Putzel and Di John may be correct when they identify political settlements as the most determinative factor in institution-building. Putzel and Di John, *Meeting the Challenges of Crisis State*, 4.
- 100 Christine Bell, “The Fabric of Transitional Justice: Binding Local and Global Political Settlements,” University of Edinburgh School of Law Research Paper Series No. 2016/22 (2016); Christine Bell, “Transitional Justice, Interdisciplinarity, and the State of the ‘Field’ or ‘Non-Field,’” *International Journal of Transitional Justice* 3, no. 1 (2009): 5–27.
- 101 See, for example, United Nations, *Report of the Special Rapporteur*, A/HRC/21/46; Sikkink, *The Justice Cascade*.
- 102 United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.
- 103 Bronwyn Anne Leebaw, “The Irreconcilable Goals of Transitional Justice,” *Human Rights Quarterly* 30, no. 1 (2008): 95–118.
- 104 Jelena Subotic, “The Transformation of International Transitional Justice Advocacy,” *International Journal of Transitional Justice* 6, no. 1 (2012): 106–25.
- 105 A. James McAdams, “Transitional Justice: The Issue That Won’t Go Away,” *International Journal of Transitional Justice* 5, no. 2 (2011): 304–12.
- 106 United Nations Secretary General, *The Rule of Law and Transitional Justice in Conflict and Conflict-Affected Societies: Report of the Secretary-General*, UN Doc. S/2004/616 (2004).
- 107 United Nations, *Report of the Special Rapporteur*, UN Doc. A/HRC/30/42, paras. 28–29.
- 108 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, paras. 15–16.
- 109 United Nations, “Guidance Note of the Secretary-General: United Nations Approach to



- Transitional Justice" (2010), 5. Some transitional justice mechanisms also may be deliberately designed to fail.
- 110 Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone" (Washington, DC: United States Institute of Peace, 2005).
  - 111 See Lauth, "Formal and Informal Institutions," 63–65.
  - 112 Elena Naughton, "Democratic Republic of Congo: Case Study," in International Center for Transitional Justice, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (New York: ICTJ, 2014), 49–59; Laura Davis, "Power Shared and Justice Shelved: The Democratic Republic of Congo," *International Journal of Human Rights* 17, no. 2 (2013): 289–306. Cronyism also partly undermined efforts at setting up a truth commission in Nepal. Elena Naughton, "Nepal: Case Study," in International Center for Transitional Justice, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* 77–87.
  - 113 Amnesties are discussed first because they frequently precede—and constrain—other transitional justice mechanisms, especially prosecutions.
  - 114 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2010), 13. For a similar (though more thorough) definition, see Louise Mallinder, "Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012), 76.
  - 115 The UN takes the position that they are antithetical to transitional justice. United Nations Secretary General, *The Rule of Law and Transitional Justice in Conflict and Conflict-Affected Societies*, para. 10; Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Conflict-Affected States: Amnesties*, UN Doc. HR/PUB/09/1 (2009), 27–29. By contrast, some scholars and policymakers treat such amnesties as transitional justice mechanisms. See Renée Jeffery, *Amnesties, Accountability, and Human Rights* (Philadelphia: University of Pennsylvania Press, 2014), 3; Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 31, 35–36; Dancy and Wiebelhaus-Brahm, "Timing, Sequencing, and Transitional Justice Impact." Others see these amnesties as potential "enablers" of transitional justice rather than transitional mechanisms in their own right. Freeman, *Necessary Evils*, 19. For an overview of the different positions, see Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, "Amnesty in the Age of Accountability" in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability*, 336–45.
  - 116 Mark Freeman and Max Pensky, "The Amnesty Controversy in International Law," in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability*, 64.
  - 117 *Belfast Guidelines on Amnesty and Accountability* (Belfast, Transitional Justice Institute: 2013), Guideline 4(b) (emphasis added). Renée Jeffery also distinguishes among amnesties based on their political purpose. Jeffery, *Amnesties, Accountability, and Human Rights*, 39. The drafters of the Guidelines clearly "declined to articulate an absolute rule on

- excluding any categories of offences”—even for international crimes. Louise Mallinder, “Explanatory Guidance on the Belfast Guidelines on Amnesty and Accountability,” *Belfast Guidelines on Amnesty and Accountability*, 46.
- 118 *Belfast Guidelines on Amnesty and Accountability*, Guidelines 8(c)–(e), 9(a), 11, 12, 14(b) and (c), 15(c), and 16.
- 119 *Id.* at Guidelines 4(b) and 14(e).
- 120 On Brazil, see Jeffery, *Amnesties, Accountability, and Human Rights*, 172–74. For a comparison of Chile and El Salvador, see Collins, *Post-Transitional Justice*, 68–76, 164–67. For a comparison of Argentina and Uruguay, see Sikkink, *The Justice Cascade*, 76–83.
- 121 Hence, they are a notable exception to the pattern of “radical and recurrent” change of institutions observed by Levitsky and Murillo after Latin American transitions.
- 122 Collins, *Post-Transitional Justice*, 32–33. See Jeffery, *Amnesties, Accountability, and Human Rights*, 170. Amnesties “entrenched within constitutions are harder to amend or annul.” Mallinder, “Explanatory Guidance,” 56.
- 123 Francesca Lessa et al., “Overcoming Impunity: Pathways to Accountability in Latin America,” *International Journal of Transitional Justice* 8, no. 1 (2014): 76. See Jeffery, *Amnesties, Accountability, and Human Rights*, 169.
- 124 Olsen, Payne, and Reiter, “Amnesty in the Age of Accountability,” 348–50; Lessa et al., “Overcoming Impunity,” 93–95.
- 125 Lessa et al., “Overcoming Impunity,” 90–93. See Olsen, Payne, and Reiter, “Amnesty in the Age of Accountability,” 350–51.
- 126 Collins, *Post-Transitional Justice*. Like Collins, I see these trials as post-transitional justice rather than transitional justice given that they are taking place decades after political transitions.
- 127 Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Basingstoke: Palgrave-Macmillan, 2011), 189; Par Engstrom and Gabriel Pereira, “From Amnesty to Accountability: The Ebb and Flow in the Search for Justice in Argentina,” in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability*, 120–21. By contrast, Ezequiel González-Ocantos emphasizes ideational factors, human rights activism, and informal institutions. Ezequiel González-Ocantos, “Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina,” *Comparative Politics* 46, no. 4 (2014): 479–98. In his book, he draws on sociological institutionalism to explain changing norms and practices within some domestic judiciaries. Ezequiel González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (Cambridge: Cambridge University Press, 2016).
- 128 Jeffery, *Amnesties, Accountability, and Human Rights*, 44–48.
- 129 *Id.* at 3–4, 36–37; Mallinder, “Amnesties’ Challenge to the Global Accountability Norm?” 82–95; Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 103–04; Leslie Vinjamuri and Aaron Boesenecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to*

- 2006 (Geneva: Centre for Humanitarian Dialogue, 2007), 27–29. Mallinder surmises that amnesties to end conflicts may be seen as more acceptable than amnesties to end authoritarian rule. Mallinder, “Amnesties’ Challenge to the Global Accountability Norm?” 85.
- 130 Post Lomé peace agreements that provide amnesty or immunity for international crimes include: Bougainville (2001), Burundi (2006), Chad (2007), Indonesia/Aceh (2005), Mozambique (1987), Republic of the Congo (2003), Senegal (2004), and Uganda (2002). Those that do not amnesty international crimes include: Burundi (2000), Central African Republic (2015), Cote d’Ivoire (2007), Democratic Republic of the Congo (2009), Liberia (2008), Libya (2015), and South Sudan (2015). Some peace agreements are ambiguous, such as Philippines (2014), Somalia (2007), and Sri Lanka (2007). This information is derived from the UN’s Peacemaker Database (<http://peacemaker.un.org/document-search>), INCORE’s Amnesty Law Database (<http://www.incore.ulst.ac.uk/cgi-bin/Amnesty/agree.pl?list=all>), and Vinjamuri and Boesenecker, *Accountability and Peace Agreements*, Appendix 1.
- 131 On the durability of amnesties in post-conflict Central America compared to post-authoritarian South America, see Emily Braid and Naomi Roht-Arriaza, “De Facto and De Jure Amnesty Laws: The Central American Case,” in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability*, 182–209. Among other factors (for example, weak civil society, weak justice sectors, and powerful veto players), the authors point to the fact that Central American victims were mostly poor and marginalized peasants and indigenous peoples. Id. at 184. In mid-2016, El Salvador’s Supreme Court finally overturned the 1993 blanket amnesty law. See International Center for Transitional Justice, “With Amnesty Law Overturned in El Salvador, Prosecutors Must Work with Victims to Investigate Civil War Atrocities,” July 21, 2016.
- 132 Lessa et al., “Overcoming Impunity,” 96–97.
- 133 Michael Otim and Kasande Sarah Kihika, “On the Path to Vindicate Victims’ Rights in Uganda: Reflections on the Transitional Justice Process Since Juba” (New York: ICTJ, 2015), 3–4, 8.
- 134 This chapter does not look at the International Criminal Court, ad hoc international tribunals for Rwanda and the Former Yugoslavia, or hybrid (international-domestic) tribunals as they were more insulated from institutional weakness in the affected states.
- 135 United Nations, *Report of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence*, Pablo de Greiff, UN Doc. A/HRC/27/56, 27 August 2014, para. 33.
- 136 Stef Vandeginste, “Burundi’s Truth and Reconciliation Commission: How to Shed Light on the Past While Standing in the Dark Shadow of Politics?” *International Journal of Transitional Justice* 6, no. 3 (2012): 363 (citing an October 2011 government report).
- 137 Kasande Sarah Kihika and Meritxell Regué, “Pursuing Accountability for Serious Crimes

- in Uganda's Courts: Reflections on the Thomas Kwoyelo Case" (New York: ICTJ), January 2015). See Otim and Kihika, "On the Path to Vindicate Victims' Rights in Uganda."
- 138 International Center for Transitional Justice, *Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire* (New York: ICTJ, 2016), 30–31.
- 139 Sofia Candeias et al., *The Accountability Landscape in Eastern DRC: Analysis of National Legislative and Judicial Response to International Crimes (2009–2014)* (New York: ICTJ, 2015), 34. For a discussion of international assistance, see id. at 23–26.
- 140 Id. at 29.
- 141 Id. at 26.
- 142 Id. at 28.
- 143 Matiangai V.S. Sirleaf, "The Truth about Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies," *Cardozo Law Review* 35 (2014): 2292–96. See Eduardo González, "Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict," in International Center for Transitional Justice, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* 4.
- 144 Onur Bakiner, "Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society," *International Journal of Transitional Justice* 8, no. 1 (2014): 21, 23.
- 145 United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/69/518, 14 October 2014, para. 6, 13. See Alexander Segovia, "The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2010), 157, 159, 161; Christopher J. Colvin, "Overview of the Reparations Program in South Africa," in de Greiff, *The Handbook of Reparations*, 189, 192–93, 200–03.
- 146 Cristián Correa, "Reparations in Peru: From Recommendations to Implementation" (New York: ICTJ, June 2013), 29.
- 147 Cristián Correa, Julie Guillerot, and Lisa Magarrell, "Reparations and Victim Participation: A Look at the Truth Commission Experience," in *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity*, ed. Carla Ferstman, Mariana Goetz, and Alan Stephens (Leiden: Martinus Nijhoff Publishers, 2009), 385, 407. See Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 127.
- 148 Alexander Segovia, "Financing Reparations Programs: Reflections from International Experience," in de Greiff, *The Handbook of Reparations*, 652.
- 149 Id. at 668.
- 150 Segovia, "Reparations Proposals of the Truth Commissions in El Salvador and Haiti," 167.
- 151 Sirleaf, "The Truth about Truth Commissions," 2325–28.

- 152 United Nations, *Updated Set of Principles to Combat Impunity*, Principle 35. For a good overview of how these guarantees have been defined in international law, see Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?” in *From Transitional to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge University Press, forthcoming 2017).
- 153 United Nations, *Updated Set of Principles to Combat Impunity*, Principles 35–38.
- 154 United Nations, *Report of the Special Rapporteur*, UN Doc. A/HRC/30/42.
- 155 The Special Rapporteur has argued that there has not been enough attention paid to other guarantees of non-recurrence aside from vetting. United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Pablo de Greiff, UN Doc. A/70/438, 21 October 2015, para. 17. In fact, there is already a wealth of scholarship, policy, and practice on institutional reform (for example, judicial reform, electoral reform, education reform, security sector reform, etc.). It is difficult to see what transitional justice can add to these policy arenas other than vetting and tailored human rights education.
- 156 The Special Rapporteur would expand the remit of vetting to deal with criminality and cronyism. United Nations, *Report of the Special Rapporteur*, A/70/438, paras. 19, 22.
- 157 *Id.* at para. 25.
- 158 *Id.* at para. 27.
- 159 Elizabeth Barrett, Peter Hack, and Agnes Munkasci, “Lustration as Political Competition: Vetting in Hungary,” in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Alexander Mayer-Rieckh and Pablo de Greiff (New York: SSRIC, 2007), 261–307. According to Monika Nalepa: “Ironically, it is precisely the democratic features of post-authoritarian regimes that allow transitional justice institutions to be used strategically. The uncertainty of remaining in office associated with elections provides incumbents with incentives to tailor lustration laws to their advantage.” Nalepa, “The Institutional Context of Transitional Justice,” 393. See Monika Nalepa, *Skeletons in the Closet: Transitional Justice in Post-Communist Europe* (Cambridge: Cambridge University Press, 2010).
- 160 United Nations, *Report of the Special Rapporteur*, A/70/438, paras. 20, 25.
- 161 *Id.* at para. 17.
- 162 *Id.* at paras. 31, 37, and 38.
- 163 Alexander Mayer-Rieckh, “Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia-Herzegovina,” in Mayer-Rieckh and de Greiff, *Justice as Prevention*, 212.
- 164 United Nations, *Report of the Special Rapporteur*, A/70/438, para. 40. See Christopher Gitari Ndung’u, “The National Police Service Vetting Process Explained: Enhancing Accountability and Reform of the Kenya National Police Service” (Nairobi: ICTJ, 2015).
- 165 United Nations, *Report of the Special Rapporteur*, A/HRC/30/42, para. 55.
- 166 *Id.* at para. 29.

- 167 Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principles and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003): 12.
- 168 Truth commissions are not responsible for follow-through on their recommendations for reparations or institutional reform.
- 169 See Thomas Obel Hansen and Chandra Lekha Sriram, "Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies," *International Journal of Transitional Justice* 9 (2015). However, Manuel Cardenas et al. contend that "A TRC can only be successful if the population firmly believes that it can do a serious and honest job, and this is only possible in a climate of institutional trust. If institutions are discredited, TRCs have no chance of being supported." Manuel Cárdenas, Maitane Arnoso, and Darío Páez, "Predictors of Beliefs in Intergroup Forgiveness in a Chilean General Population Sample," *Spanish Journal of Psychology* 18 (2015): 6.
- 170 Snyder and Vinjamuri, "Trials and Errors," 14–15, 25.
- 171 United Nations, *Report of the Special Rapporteur*, A/HRC/27/56, para. 41(a).
- 172 Id. at para. 88. See id. at paras. 77, 89.
- 173 For example, there is a debate over whether specialized mechanisms for prosecuting sexual violence have positive impacts. See, for example, Olympia Bekou, "Special Mechanisms to Investigate and Prosecute International Sex Crimes: Pro and Contra Arguments," in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Torkel Opsahl Academic EPublisher, 2012), 233–50. One set of researchers found the mobile courts that try sexual violence cases in the eastern Democratic Republic of the Congo to be "biased towards producing rape convictions while the rights of suspects are severely breached." Nynke Douma and Dorothea Hillhorst, "Fond de Commerce? Sexual Violence Assistance in the Democratic Republic of Congo," *Wagenigen Disaster Studies Research Brief No. 4* (2012), 11. Another researcher noted that these mobile courts have had several unintended, negative consequences. Milli Lake, "Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood," *International Studies Quarterly* 58, no. 3 (2014): 1–12. Despite specialized police and prosecution units in Kenya, Liberia, Sierra Leone, and Uganda, there have been few, if any, prosecutions of sexual violence in domestic courts. Berkeley Human Rights Center, *The Long Road: Accountability for Sexual Violence in Conflict and Post-Conflict Settings* (Berkeley: University of California, 2015), 3–4, 50–61.
- 174 Tricia D. Olsen et al., "When Truth Commissions Improve Human Rights," *International Journal of Transitional Justice* 4, no. 3 (2010): 457–76; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54, no. 4 (2010): 953.
- 175 There are several data sets that attempt to measure institutional quality. For examples, see Aljaz Kunčič, "Institutional Quality Data Set" (2013); Jan Teorell, Stefan Dahlberg, Sören Holmberg, Bo Rothstein, Anna Khomenko, and Richard Svensson, "The Quality of Government Standard Dataset" (2016).

- 176 Dancy and Wiebelhaus-Brahm, "Timing, Sequencing, and Transitional Justice Impact," 323.
- 177 *Id.* at 340.
- 178 Valerie Arnould and Chandra Lekha Sriram, "Pathways of Impact: How Transitional Justice Affects Democratic Institution-Building," TJDI Paper 1 (October 2014), 1 (emphasis added). For further discussion, see Valerie Arnould, "Transitional Justice and Democracy in Uganda: Between Impetus and Instrumentalization," *Journal of Eastern African Studies* 9, no. 3 (2015): 357–59. See Anja Mihr, "Transitional Justice and the Quality of Democracy," *International Journal of Conflict and Violence* 7, no. 2 (2013): 298–313; Bakiner, *Truth Commissions*, 101–03.
- 179 Arnould, "Transitional Justice and Democracy in Uganda." What is absent from Arnould's account is the role of civil society.
- 180 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, 21. He also contends that these can contribute in turn to the rule of law. *Id.* at para. 41.
- 181 Cynthia M. Horne, "Assessing the Impact of Lustration on Trust in Public Institutions and National Government in Central and Eastern Europe," *Comparative Political Studies* 45, no. 4 (2012): 412–446. The Special Rapporteur leaves out trust in social institutions. United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, para. 32.
- 182 Horne, "Assessing the Impact of Lustration on Trust in Public Institutions and National"; Cynthia M. Horne, "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries: Repairing or Wresting the Ties that Bind?" *Europe-Asia Studies* 66, no. 2 (2014): 248.
- 183 See United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, para. 33; Levitsky and Murillo, "Variation in Institutional Strength," 124–25. As one group of scholars note, trust in institutions is mostly about trust in the rules of the game of a specific organization: "Trust in parliament or even more obviously trust in the police, does not emerge from trust in a specific deputy or policeman, but from trust in the correct functioning of parliament or the police." Aadne Aasland, Åse Berit Grødeland, and Heiko Plaines, "Trust and Informal Practice among Elites in East Central Europe, South East Europe and the West Balkans," *Europe-Asia Studies* 64, no. 1 (2012): 116 n. 3.
- 184 Stefan Dahlberg and Soren Holmberg, "The Importance of Electoral and Judicial Trust for Regime Support," *Review of Public Administration and Management* 4, no. 1 (2016).
- 185 World Bank, *World Development Report* 2011, 103.
- 186 Horne, "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries," 233.
- 187 Collins, *Post-Transitional Justice*, 59.
- 188 Arnould and Sriram, "Pathways of Impact," 5. See Paula Abrão and Marcelo D. Torelly, "Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice," in Lessa and Payne, *Amnesty in the Age of Human Rights Accountability*, 152–181.

- 189 Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 144.
- 190 On Aceh, see Jeffery, *Amnesties, Accountability, and Human Rights*, 190–91. On Colombia, see Enzo Nussio and Ben Oppenheim, “Trusting the Enemy: Confidence in the State among Ex-Combatants,” Households in Conflict Network Working Paper 144, April 2013.
- 191 The rule of law can be seen as “a bundle of institutions.” Jennifer Gandhi and Rubén Ruiz-Rufino, “Introduction,” in Gandhi and Ruiz-Rufino, *Routledge Handbook of Comparative Political Institutions*, 8. It combines both formal procedural rules (such as due process) and formal substantive rules (such as respect for key human rights). See, for example, Rachel Kleinfeld, “Competing Definitions of the Rule of Law,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006). Some neo-institutionalist scholars view the rule of law as an institution or “bundle of institutions” while others view it as a product of multiple institutions. Compare Levitsky and Murillo, “Conclusion: Theorizing about Weak Institutions,” 270 and Milan W. Svolik, “Equilibrium Analysis of Political Institutions,” in Gandhi and Ruiz-Rufino, *Routledge Handbook of Comparative Political Institutions*, 74 with Acemoglu and Robinson, *Why Nations Fail*, 43.
- 192 If we view transitional justice as the rules of the game for accountability for gross human rights abuses, then it necessarily contributes to equality before the law—the central rule in the rule of law.
- 193 See Ezequiel González-Ocantos, “Evaluations of Human Rights Trials and Trust in Judicial Institutions: Evidence from Fujimori’s Trial in Peru,” *International Journal of Human Rights* 20, no. 4 (2016), 445–70; Muna B. Ndulo and Roger Duthie, “The Role of Judicial Reform in Development and Transitional Justice,” in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: SSRIC, 2009), 265–71; Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (London: Routledge, 2013), 112; Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006), 254; United Nations, *Report of the Special Rapporteur*, A/67/368, para. 57.
- 194 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, para. 34.
- 195 However, the authors cautioned that they lacked confidence in these results. Olsen et al., *Transitional Justice in Balance*, 138 n. 12.
- 196 Brigitte Weiffen, “The Forgotten Factor – The Impact of Transitional Justice on the Development of the Rule of Law in the Process of Democratization,” *Zeitschrift für Vergleichende Politikwissenschaft/Comparative Governance and Politics* 5 (English Supplement 1) (2011).
- 197 See for example, James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004).



- 198 Taylor and Dukalskis, "Old Truths and New Politics," 681–82.
- 199 Wiebelhaus-Brahm, *Truth Commissions*, 103.
- 200 Id. at 147. Somewhat surprisingly, truth commissions do not appear to have had much impact on citizen access to state archives. See, for example, Verne Harris, "Archives," in *Truth and Reconciliation in South Africa: 10 Years On*, ed. Charles Villa-Vilencio and Fannie du Toit (Claremont: David Phillip, 2006), 57–58.
- 201 See Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London: Routledge, 2011), 26. Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge, 2011), 192–93.
- 202 Bakiner, *Truth Commissions*, 101.
- 203 Eduardo González, "Risks and Opportunities in a Truth Commission," in International Center for Transitional Justice, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* 22. As the Special Rapporteur notes, "proclaiming recommendations obligatory offers no guarantee for their implementation." United Nations, *Report of Special Rapporteur*, A/HRC/24/42, para. 75. In addition, this practice raises serious political concerns around the separation of powers. *Ibid.*
- 204 Félix Reátegui, "Guatemala: Case Study," in International Center for Transitional Justice, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* 31. This underscores Subotic's concern about transitional justice over-emphasizing individual accountability at the expense of state accountability. Subotic, "Review of Kathryn Sikkink's *The Justice Cascade*."
- 205 Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development," in de Greiff and Duthie, *Transitional Justice and Development*, 183.
- 206 Id. at 184.
- 207 United Nations, *Report of the Special Rapporteur*, A/69/518, para. 47.
- 208 See, for example, Correa, "Reparations in Peru," 14.
- 209 Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (New York: ICTJ, 2015), 9.
- 210 The Special Rapporteur recognizes this. United Nations, *Report of the Special Rapporteur*, A/HRC/30/42, paras. 57, 60.
- 211 See, for example, Mackay, "Nested Newness."
- 212 Horne, "Assessing the Impact of Lustration on Trust in Public Institutions and National Government," 438–40; Horne, "Lustration, Transitional Justice, and Social Trust in Post-Communist Countries," 248.
- 213 United Nations, *Report of the Special Rapporteur*, A/70/438, para. 58.
- 214 See World Bank, *World Development Report 2011*, 100.
- 215 This could potentially be measured using data on institutional trust from perception surveys like Afrobarometer.

- 216 See Paige Arthur, "How 'Transitions' Reshaped Human Rights," *Human Rights Quarterly* 31, no. 2 (2009): 321–367.
- 217 See Wiebelhaus-Brahm, "Goals and Processes," 439.
- 218 David K. Leonard, "Pockets of Effective Agencies in Weak Governance States: Where Are They Likely and Why Does It Matter?" *Public Administration and Development* 30, no. 2 (2010): 91–101.
- 219 Grindle, *Audacious Reforms*.
- 220 There are several large research projects in this area, including Princeton's Innovations for Successful Societies (<http://successfulsocieties.princeton.edu/>) and Harvard's Building State Capability (<http://buildingstatecapability.com/>). For a brief literature review, see Lorena Vinuela, Naazneen H. Barma, and Elisabeth Huybens, "Institutions Taking Root: Building State Capacity in Challenging Contexts," in *Institutions Taking Root: Building State Capacity in Challenging Contexts*, ed. Naazneen H. Barma, Elisabeth Huybens, and Lorena Vinuela (Washington, DC: World Bank, 2014), 3–6.
- 221 Vinuela et al., "Institutions Taking Root." The authors point up the need for further research on justice and security institutions. *Id.* at 28.
- 222 *Id.* at 6.
- 223 *Id.* at 9 (emphasis added).
- 224 See Waldorf, "'Good Enough' Transitional Justice"; Pilar Domingo, "Dealing with Legacies of Violence: Transitional Justice and Governance Transitions" (London: Overseas Development Institute, 2012).
- 225 For a notable exception, see Christine Bell, "Contending with the Past: Transitional Justice and Political Settlement Processes," in this volume.
- 226 See, for example, Christine Bell, "What We Talk About When We Talk About Political Settlements: Towards Inclusive and Open Political Settlements in an Era of Disillusionment," Political Settlements Research Programme, Working Paper 1 (2015); Putzel and Di John, *Meeting the Challenges of Crisis States*, 4. See also Douglass C. North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge: Cambridge University Press, 2009).
- 227 Putzel and Di John, *Meeting the Challenges of Crisis States*, 1.
- 228 See Onur Bakiner, *Truth Commissions: Memory, Power and Legitimacy* (Philadelphia: University of Pennsylvania Press, 2016); David Becker, "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects," *Journal for Human Rights* 2, no. 3 (2003): 297–313; Aaron P. Boesenecker and Leslie Vinjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," *International Journal of Transitional Justice* 5, no. 3 (2011): 345–65. This partly explains the impetus for greater civil society participation in institutional design, implementation, and evaluation.
- 229 Bakiner, "Truth Commission Impact," 23–24. Civil society disengagement and opposition prevented the Kenyan truth commission from successful "normative signaling."

- Lydia Kemunto Bosire and Gabrielle Lynch, "Kenya's Search for Truth and Justice: The Role of Civil Society," *International Journal of Transitional Justice* 8, no. 2 (2014): 276.
- 230 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, para. 42.
- 231 Hansen and Sriram, "Fighting for Justice (and Survival)," 426.
- 232 See Thomas Carothers and Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire* (Washington, DC: Carnegie Endowment for International Peace, 2014).
- 233 Levitsky and Murillo, "Variation in Institutional Strength," 124.
- 234 See Thomas Pegram, "National Human Rights Institutions in Latin America: Politics and Institutionalization," in *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions*, ed. Ryan Goodman and Thomas Pegram (Cambridge: Cambridge University Press, 2011), 225.
- 235 Taylor and Dukalskis, "Old Truths and New Politics," 682. Bakiner also notes that persistent civil society activism can compensate for weak truth commissions. Bakiner, "Truth Commission Impact," 30.
- 236 World Bank, *World Development Report 2011*, 106.
- 237 Vinuela et al., "Institutions Taking Root," 24–25.
- 238 United Nations, *Report of the Special Rapporteur*, A/70/438, note 16.
- 239 Id. at para. 35.
- 240 Olsen et al., *Transitional Justice in Balance*, 153–60.
- 241 United Nations, *Report of the Special Rapporteur*, A/HRC/21/46, paras. 22–27.
- 242 While Dancy and Wiebelhaus-Brahm found no path dependency of transitional justice mechanisms in their study of Latin American democratic consolidation, they suggested that Africa may be different. Dancy and Wiebelhaus-Brahm, "Timing, Sequencing, and Transitional Justice Impact," 340–41.
- 243 See also Clara Ramirez-Barat and Roger Duthie, *Education and Transitional Justice: Opportunities and Challenges for Peacebuilding* (New York: ICTJ-UNICEF, 2015), 33–34.
- 244 Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: John Hopkins University Press, 1986), 39.
- 245 Similarly, Nalepa observes that "One...benefit of studying transitional justice in an institutional context is that this kind of analysis allows us to cut through the thicket of normative considerations accompanying regime transitions and see the similarity between lustration mechanisms and other processes used by states and organizations to screen their members for undesirable characteristics [such as transparency laws]." Nalepa, "The Institutional Context of Transitional Justice," 400.
- 246 Ryan Goodman and Thomas Pegram, "Introduction: National Human Rights Institutions, State Conformity, and Social Change," in Goodman and Pegram, *Human Rights, State Compliance, and Social Change*, 19.

- 247 Ibid.
- 248 Pegram, "National Human Rights Institutions in Latin America," 217.
- 249 There is perhaps an argument for making NHRIs the focal point for transitional justice.
- 250 For an example of this type of research in a very different context, see Steve Leach and Vivien Lowndes, "Of Roles and Rules: Analyzing the Changing Relationship between Political Leaders and Chief Executives in Local Government," *Public Policy and Administration* 22, no. 2 (2007): 183–200.
- 251 See McAuliffe, *Transitional Justice and Rule of Law Reconstruction*, 111.

CHAPTER 2

# Contending with the Past: Transitional Justice and Political Settlement Processes

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This chapter addresses the difficulties in designing and implementing transitional justice in societies attempting to move on from conflict. It does so in part to show how transitional justice mechanisms in transitions from conflict differ from those in transitions from authoritarianism, particularly with regard to the strategic choices that are involved. I argue that transitional justice in post-conflict settings needs to be understood as part of the broader political settlement process in which domestic and international actors are engaged. This process attempts to (re)construct the state to reconfigure how power is held and exercised so as to include previously excluded actors and groups in ways that will end violent conflict. Centrally, peace processes involve negotiations between states and their non-state opponents, with a view to including the latter in new or revised state structures. Political bargaining occurs through both formal, usually elite-level, talks and other less visible informal processes.

Formal processes such as peace talks aim to establish a new or revised set of political and legal institutions for states focused on inclusion. The choice, design, and implementation of the mechanisms to deal with the past are often negotiated as part of the overall package of institutional revision. Beyond formal talks, informal political bargaining processes, including the threat and use of violence, are equally vital in shaping the contours of the resulting political settlement. If a peace deal is reached, the involved parties often view it less as a vehicle for compromise and more as a new way to pursue their old conflict goals. Often international actors invest heavily in the formal peace process and attempt to support and implement any agreement that emerges, without fully understanding how the parties understand the deal they have signed. They are therefore unable to adequately support and build it.

A central inquiry driving this collection concerns where and why transitional justice mechanisms with similar features play out quite differently in different contexts. In this chapter, I suggest that transitional justice mechanisms that appear to be similar connect differently with ongoing political bargaining over access to power in ways that shape and constrain their effectiveness.

They operate against very different underlying political bargaining dynamics in different conflict contexts, not all of which will be easily visible to outside interveners. The very label of transitional justice for mechanisms to deal with the past has perhaps created a sense of a unitary practice across authoritarian and conflict contexts, in ways which have led to a coherent study of mechanisms such as trials and truth commissions but which have at the same time obscured the very different political contexts in which such mechanisms are agreed, institutionalized, and implemented.

The first part of this chapter considers the relationship of transitional justice debates to formal peace processes and their underlying political bargains, with a view to understanding the ways in which transitional justice operates in conflict situations and peace processes, drawing out the distinctiveness from more straightforward transitions from authoritarianism to democracy of the early 1990s. The second part of the chapter sketches out how these challenges of context affect institutional design and implementation. The third part considers the consequences for external interveners, suggesting how those who hope to support both human rights accountability and conflict resolution processes might move from a “lessons learned” approach that focuses on institutional design to an approach that focuses more attention on understanding how political bargaining processes are likely to determine the design and implementation of transitional justice mechanisms.

## **INTRASTATE CONFLICT, POLITICAL BARGAINING, AND “DEALING WITH THE PAST”**

Intrastate conflicts involve conflicts between the state and nonstate armed opposition actors and sometimes also violence between those armed actors. While traditionally known in international law as “internal” armed conflicts, over time they increasingly have been recognized as having transnational dimensions, including regional instability, as external states support rebel groups in neighboring states, and cross-border refugee flows. From the 1990s and the end of the Cold War onwards, formal peace processes involving negotiation, often underwritten and assisted by the international community, became one of the main strategies for terminating these conflicts.<sup>2</sup> Typically, peace processes involved state and armed state actors negotiating (often face-to-face or sometimes through mediators) over how to end the conflict, in processes with a state-building dimension. Provisions and institutions specifically to deal with the past have been a persistent feature of peace settlement terms

and have come to fall under the rubric of “transitional justice.” The mechanisms used, however, remain varied and may include the use of international criminal justice courts, truth and reconciliation commissions, and other special forms of investigation.

When parties move to end conflict, the need to deal with the past inevitably penetrates negotiations at several points, as much for practical reasons as for principled ones. International interveners often speak of transitional justice in terms of societal choices that can be shaped and influenced—that is, as a choice over whether to deal with the past or not and, if the former, a further choice over which institutional design to adopt. In practice, however, the past is continually being dealt with in all aspects of the negotiations. From a political bargaining perspective, some sort of approach to the past is an inevitable part of getting parties to the table, and prior to the design of any specific transitional justice institution a set of choices will already have been made with regard to particular accountability and impunity demands, as a necessary part of constructing a peace process. Particular elements of the past will be dealt with in a fragmented way, as a peace process develops. Each past-focused initiative will initiate a transitional justice chain reaction, opening up broader debates about the need to deal with the past, provoking new forms of resistance to accountability, galvanizing new constituencies around justice claims, and prompting new legal strategies. All of these come to be part of the informal tapestry of political bargaining over both the past and the type of peace that is under construction. This dynamic can be illustrated by considering further the types of issues relating to the past that arise at different stages of a peace process, and why.

#### **PRE-NEGOTIATION BARGAINING AND THE PAST**

The beginning of a formal negotiation process involves a set of pre-negotiations over how to get the parties to the table: who is going to negotiate, over what, and with what status? For face-to-face or proximity negotiations to take place, each party must be assured that its attempts to engage in dialogue will not be used by the other side to gain military advantage. Issues that touch on “the past” are immediately implicated. To get everyone to the negotiating table, agreement must be reached on matters such as the return of negotiators from exile or their release from prison; safeguards as to their future physical integrity and freedom from imprisonment; and limits on how the war is to be waged while negotiations are taking place, such as through a form of ceasefire, usually temporary and conditional.



Reaching agreement on these matters implicates the state's existing mechanisms of accountability and their legitimacy, but it may also implicate international criminal law, with conflict protagonists suspected of or indicted for war crimes. Typically, in conflicts falling short of the civil war threshold where the state has a functioning legal system, nonstate actors will have been pursued through the domestic criminal justice system. States often seek to avoid defining the violence as "a conflict," in part with a view toward resisting the legal characterization of the conflict as one in which humanitarian law applies.<sup>3</sup> A part of this strategy involves extensive use of emergency legislation that limits the application of human rights and enables their restriction. For nonstate armed opposition groups to enter negotiation processes in such cases, their key negotiators at least will need exemptions from the state's criminal law processes, to get to the negotiating table and guard against the state's using their participation in talks as a means to pursue arrest and detention in a strategy of military victory. On the other side, the state itself will often be using violence under cover of law as part of its "legitimate monopoly on the use of force."

In return for a ceasefire, therefore, nonstate actors often seek to limit or suspend what is understood as the illegitimate use of state force, through the use of emergency legislation and so end the human rights violations that go hand-in-hand with it. To ensure these commitments are kept, the parties to the negotiations may push for special monitoring and investigations to document and uncover human rights violations. The Goldstone Commission in South Africa, discussed below, and the extensive human rights agreements and monitoring associated with the Guatemala and El Salvador peace processes are examples.<sup>4</sup> These types of human rights investigation may also be used as confidence-building measures. One or both sides may seek investigations into particular patterns or incidents of conflict to build the credibility of the process among their constituents. The Bloody Sunday Tribunal in Northern Ireland, dealing with the shooting deaths of Nationalist/Catholic civilians by the British toward the start of the conflict, was agreed to by the UK government during talks as critical to building the trust of that community in the peace process.<sup>5</sup> These mechanisms, arising at an early state of a peace process, play an essentially "in-conflict" accountability role by limiting forms of conflict to enable a climate in which peace talks can take place. However, they also begin to shape how the past is to be dealt with, both by providing accountability for some conflict acts in ways that affect the balance of power in any ongoing negotiation and by adding impetus to calls to deal with the past more substantively in the peace process.<sup>6</sup>

In addition to these process-drivers for contending with the past, the attempt to set out a substantive agenda for peace talks will also begin to implicate the past. Some sort of agreement on an agenda is crucial to establishing formal negotiations, and here parties begin to bargain and sound out each other's positions on the substantive issues at the heart of the conflict. Often bargaining takes the form of attempts to set preconditions on the negotiating agenda, in which questions of the status, legitimacy, and public authority of state and nonstate parties to negotiate are paramount. The past is implicated in these discussions because the "rights and the wrongs" of the conflict are indirectly negotiated through debates on such questions as who are terrorists, who are legitimate democratic actors, what preconditions should apply to participation in talks, and who has suffered most in the conflict and therefore may require concessions to enter talks.

The dynamic way in which "the past" is bound up with the process of political settlement can be illustrated using the case of South Africa.<sup>7</sup> At a very early stage of pre-negotiation, guarantees against conviction had to be given for exiles to return to participate in the talks. Prisoners, including Nelson Mandela, who had been tried and sentenced, also had to be released through pardons or other extraordinary criminal law measures to participate.<sup>8</sup> Different phases of prisoner release operating also as confidence-building measures dealt with different categories of "political" prisoners. Designing these forms of prisoner release required the state to grapple with criteria to determine what constituted a "political offender" (as opposed to an "ordinary criminal"), what the time scale for an offense to qualify as political was, and which groups the classification should apply to.<sup>9</sup> These negotiations all began to tell a story about the nature of the past conflict and create a pathway dependency for how the past would be dealt with as the process unfolded. The question of prisoner release opened up, for example, persistent arguments and attempts by the South African government to provide amnesty to state human rights violators and on-going resistance to amnesty from the African National Congress (ANC). Pursuant to the National Peace Accord,<sup>10</sup> which attempted to create a climate for talks and was signed by forty different parties, including elements of civil society, the then-National Party South Africa government agreed to set up a Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (the "Goldstone Commission") to investigate political violence, as a mechanism for stabilizing the country during the talks process.<sup>11</sup> This investigation placed questions of state accountability center stage, particularly when it concluded that a "third force," comprising clandestine state and ex-state forces, was at work, sometimes in collusion with rightwing activists

and/or members of the Inkatha Freedom Party (IFP), conclusions which reinforced pressure to deal with the past. As modalities of prisoner release were agreed on and questions of amnesty for state actors came to the fore, the ANC commenced an investigation into its own past abuses in an attempt to combat amnesty and underline its commitment against impunity—another partial investigation into the past.<sup>12</sup> All of these initiatives began to shape understandings of forms both of amnesty and accountability as important to transition, and in so doing they shaped the parameters for the negotiation of these issues downstream. Approaches to the past were also shaped by the particular state-transformation dynamic in South Africa, where negotiations came to revolve around how to achieve a peaceful transfer of power from the then white minority South African government to a democratically elected ANC, rather than any sort of compromise over the nature of the state that was to result. This agreement on the nature and direction of transition was also to determine the contours of the key holistic transitional justice mechanism, the Truth and Reconciliation Commission, which was explicitly understood to be a necessary “bridge” between old and new regime, as discussed further below.

In conflicts involving much larger-scale mass violence, dealing with the past will also be essential to any attempt to state-build.<sup>13</sup> The dynamics can be quite different from those of armed insurrection. In the early 1990s some level of amnesty was often understood as necessary to bring politico-military elites, essentially operating as private actors, into projects of public power and was built into peace agreements involving mass violence.<sup>14</sup> More recently, however, as confidence in negotiated settlements began to wane, and faith in international accountability began to rise, a move towards criminal justice (usually international) has been paramount. From a political bargaining perspective, it is possible to understand the move to international criminal law not just in accountability terms, but as tied up with a more strategic instrumentalist role for international actors who use it to impact on the balance of power in conflicts. International justice has come to be used as a tool to “punish” recalcitrant individuals who have reneged on peace settlements, such as former president of Liberia Charles Taylor (indicted before the Special Court for Sierra Leone) and the Revolutionary United Front (RUF) in Sierra Leone, and so try to remove them from the conflict fray and positions of power. International criminal law can be used against violent actors who resist the transition from war and private gain to peace and public good. This was the case with the International Criminal Court’s (ICC’s) indictments of members of the Lord’s Resistance Army in Uganda and president Omar Al-Bashir in Sudan, the International Criminal Tribunal for the Former Yugoslavia (ICTY)’s

indictment of former president of Serbia and of the Republic of Yugoslavia Slobodan Milošević, and the pursuit by the United States of de-Ba'athification and criminal trials in Iraq.

#### REACHING FORMAL AGREEMENT AND THE PAST

Dealing with the past is also inevitably implicated in the reaching of any substantive agreement on how to end a conflict. As the South African process illustrated, from a political bargaining perspective the choice as to whether to put into place a transitional justice mechanism, or do something else with the past, or kick it into the long grass of “outstanding implementation issues,” is determined by the state-building project on which the parties to the conflict agree. This link arises because of the close connection between discussion of “the past” and political bargaining over how to end a conflict. John McGarry and Brendan O’Leary have usefully argued that intrastate conflict often involves two conflicts: the conflict itself and a “meta-conflict”—that is, a conflict over what the conflict is about.<sup>15</sup> The latter is important and necessary to resolve, if the conflict itself is to be resolved. Parties are often in dispute over the causes of the conflict: is it about competing ethnic identities or nationalisms that need accommodated; authoritarianism and a need for democratization; a need to combat terrorism; or external interference? This meta-contestation drives the conflict itself and must equally be addressed in any conflict resolution process because each meta-conflict position presupposes a different set of solutions to the conflict. Ending the conflict therefore requires some accommodation of competing conceptions of what the conflict was about capable of sustaining agreement to a common approach to what ending the conflict will require. Therefore mechanisms relating to the past are never just about accountability, but also create narratives of state legitimacy and illegitimacy which feed into attempts to reconstruct it.

From this political bargaining perspective, it is therefore important to understand how the past is *always* being negotiated as parties negotiate how to end the conflict. If the past is understood always to be “in play” in peace negotiations, then the question of how to provide for transitional justice should be reframed away from asking whether and how peace negotiations should provide for transitional justice, towards understanding how talking about the future always takes place against the background of arguments regarding both the conflict and the state’s legitimacy and morality in the past. Substantive peace agreements couple commitments to end violence to providing for how power will be held and exercised. Agreements typically revise political and

legal institutions to incorporate contenders for power into state structures, along with safeguards against abuse of power in the form of human rights measures. Discussion of the past and its rights and wrongs is central to balance-of-power struggles over which political bargaining outcome will prevail and how it will be reflected in political and legal institutional design. In other words, dealing with the past is vital to the design of all the political and legal institutions of the revised state for the future, and not just a discrete question over appropriate provision for transitional justice. Any resultant transitional justice mechanism or commitment can be better understood, and its implementation difficulties pre-assessed, if it is understood as part of the tapestry of tradeoffs made as part of the agreement as a whole.

To return to South Africa to illustrate: while the establishment of the Truth and Reconciliation Commission (TRC) is often seen as the key transitional justice mechanism, a broader view of the process reveals it to be in a complex relationship both with the ad hoc approaches to the past that needed to be established for the talks to move forward, and with the meta-bargain at the heart of the transition itself. Ultimately, a clause was added to the peace agreement (in the form of South Africa's interim constitution) that contemplated amnesty and, interestingly, explicitly narrated the past as connected to the "meta-bargain." When read in full, the clause—standing unnumbered at the end of the constitution—linked any process for amnesty to the idea of the constitution's being itself a bridge from the past to the future in a project of state building. It traced a direct line from the past to the future by providing a mechanism which could acknowledge gross human rights violations, but approached their remedy in part as the delivery of a different future through processes of constitutionalism and therefore provided for reparation and *ubuntu* (a form of forgiveness) rather than punishment. In the words of the Constitution itself:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of

humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.<sup>16</sup>

The story of the TRC's establishment is often told as an innovative tradeoff between justice and peace, negotiated against the backdrop of Nuremberg-style trials as the alternative. South Africa is still viewed as a key reference point for truth-commission practice. The TRC, however, can also be understood from a political bargaining perspective to have been context specific and shaped by the negotiation goals of the parties to the conflict as an integral part of a broader set of compromises necessary to peaceful transition. The ANC aim in entering a negotiation process was to try to achieve, first and foremost, a negotiated transition rather than a violent revolution that might be successful but would lay the country to waste. In not holding out for a "victory" that seemed possible but instead opting to enter peace negotiations, the ANC acted on a political calculation that the price of victory in terms of the violence needed to achieve it and the consequences for any stable democratic future was too high. The price of negotiated transition was trading with the enemy, and a part of the tradeoff was the language on amnesty in the interim constitution. This concession was mitigated by leaving its implementation to the post-election period, when the ANC was likely to hold power (albeit initially in a power-sharing government). Accordingly, the ANC knew it would be able to shape the provision of amnesty and even link it to accountability at this later stage, and it did, indeed, eventually tie amnesty to truth telling in a form of compromise.

A similar relationship between political bargaining and the past can be seen in Northern Ireland, but in this case with a quite converse result. Here, the balance of power dynamics at the time of the peace agreement, together with

a central meta-bargain which focused on an “agreement to disagree” about the causes of and solutions to the conflict, meant that during the talks consensus was insufficient regarding the need for, and role of, any transitional justice mechanism. Instead, discrete issues were provided for relating to prisoner release and victims’ rights in a piecemeal way rather than through any holistic transitional justice mechanism.<sup>17</sup> This approach evaded the difficult question of the rights and wrongs at the heart of the war, while enabling discrete issues, such as victim’s compensation, to be dealt with at least partially. The approach also had the merit of being immediately implementable, because discrete measures could be implemented without the need for a long, complex, and contested truth process. It had, however, the drawback of leaving the question of state human rights abuses suspended in never-ending legal processes, issues of state collusion almost completely unexplored, and society more generally lacking any common narrative as regards culpability in conflict. The past still needs to be dealt with and continues to haunt attempts to build and sustain the political and legal institutions centrally reformed by the peace agreement in ways that keep a holistic approach on the implementation agenda.<sup>18</sup>

#### IMPLEMENTING AGREEMENTS AND THE PAST

Implementing peace agreements is very difficult. A peace agreement does not resolve or end political bargaining over the nature of the state; at best, this bargaining enters a new, less violent terrain. While transitions in Eastern Europe were fairly straightforward transitions from authoritarianism to a form of democracy, conflict situations often lead to a more complex form of multiple and yet partial transition. The first transition is from conflict to peace (or, at least, “ceasefire”); the second is from forms of authoritarianism to multicultural liberal democracy, in which elections are often coupled with complicated forms of political and territorial power sharing that focus as much on group rights and outcomes as on individual liberal rights protections.<sup>19</sup> In this world of compromise, the political and legal institutions agreed to are crafted not merely to deliver “democracy,” as in elections and rule of law, but to enable a tapestry of power dividing between the conflict’s antagonists. Rather than viewing peace agreements as creating transfers of power, or even genuine compromises in pursuit of peace, it is better to understand them as operating to contain the conflict, largely by persuading parties that they can continue to pursue the political aspirations that drove the conflict through the agreement’s new institutional provision. This dynamic can be evocatively captured in the idea of “Clausewitz in reverse”—that is, where Clausewitz evocatively

described politics as “war with the admixture of other means,” so peace agreements are war as “politics with the admixture of other means.”<sup>20</sup>

In peace process outcomes, ancient and new regimes are entangled in ways that make it unclear whether the status quo, reform, or transformation are at play. Indeed, the outcome of the process is likely to remain contingent on the continuation of the balance of power that produced the incentive to negotiate. Rather than being eliminated or resolved, the conflict is translated into the new political and legal institutions, which aim to provide a nonviolent context in which the conflict can be continued. The hope is that the conflict, rather than being “resolved,” will at least be “transformed” into less violent forms, and that in the future new opportunities to transcend it might become possible.

### COMPLEX TRANSITIONS AND PATH DEPENDENCIES

As the case of Northern Ireland illustrates, in many transitions from conflict there is little consensus domestically as to conflict resolution goals and outcomes, and indeed domestic and international actors may understand the goals and outcomes of the peace process very differently. Understanding the contours of the transitional justice mechanisms to be shaped by the attempted state-building project and the political bargaining that takes place between elite actors as to the nature of the new state is helpful to understanding the mechanisms that emerge. Increasingly a negotiated settlement is looked on as the beginning of a process rather than its end. Transition is understood as an ongoing process, involving ongoing contestation over its nature and direction. Mechanisms to deal with the past, therefore, have to be understood both as a response to contestation and as vehicles for the ongoing contestation that comprises an integral part of political bargaining over the nature of the state.

### STATE-BUILDING PROJECTS AND TRANSITIONAL JUSTICE CHOICE AND DESIGN

How, then, do political bargaining dynamics relating to state building affect the design and implementation of transitional justice mechanisms? If the contours of transitional justice institutions in transitions from authoritarianism are at least partly set by a consensus on the normative end-goal of democracy, transitional justice mechanisms in intrastate conflict settings are shaped by navigating a *lack of consensus* as to the state’s endpoint and nature. I suggest that five factors have been key in influencing the design and effectiveness of



transitional justice mechanisms and therefore must be considered by anyone seeking to influence how the past is dealt with post-conflict: (1) the balance of power and nature of the political-military deal; (2) the internationalization of the conflict and post-conflict environment; (3) the regional human rights system in which the conflict arises; (4) the mobilization and political power of civil society (including victims' groups); and (5) the scale, nature, and context of conflict including its relationship to law.

#### **BALANCE OF POWER AND THE NATURE OF THE "DEAL"**

The balance of power between the main antagonists at the point of an agreement is, as the South African example illustrates, very important to conflict and post-conflict settings. First, it controls the interrelationship of the tradeoffs across the agreement as a whole. While academic writings and tool kits tend to deal with transitional justice mechanisms as distinct institutions whose design and internal tradeoffs (for example, between truth and justice) can be compared across contexts, each is located in a quite different relationship to a state-building project. Often what is perhaps more useful—although methodologically difficult—is to compare how transitional justice mechanisms are located in and shaped by a package of tradeoffs across and between issues in particular political settlements. Depending on the political bargaining dynamics, tradeoffs may take place between, for example, prisoner release and the scope of political bodies' power; prisoner release and reform of police; democratic accountability of armies (including vetting); mechanisms for joint control or military power sharing; or accountability for the past and, say, power sharing for the future. In fact, these issues are all typically linked in a complex set of tradeoffs, which together reflect the balance of power and in which transitional justice can lose out to other imperatives.

Even more crucially, for the parties to agree to any sort of compromise, they will have had to reach some sort of "meta-bargain," as explained above, on the question of "what the conflict was about." Often this is a very partial bargain, with the parties agreeing to disagree as to the nature of the state, but agreeing to create political institutions that enable them to govern together and continue to work out that disagreement more peacefully than before. This embryonic constitutional understanding can move the parties from the battlefield to some sort of new governmental arrangement. The meta-bargain is essential to how the past will be dealt with. It may put into place a form of separation between protagonists in different state or substate formations, as settlements in the Israel–Palestinian conflict or in Bosnia or East Timor (with

Indonesia) have done, and this often means it is difficult to create any shared institutions across jurisdictions relevant to the conflict, including transitional justice mechanisms. Or the meta-bargain may result in forms of sharing which, in essence, divide power, as in Bosnia Herzegovina or Northern Ireland, meaning that concerted action and agreement to establish joint institutions for addressing the past will remain politically difficult because the new political settlement will depend on those at the heart of the conflict. Any attempt to deal with the past will risk undoing the careful negotiation of an “agreement to disagree,” which will be destabilized by any attempt to find some sort of societal accounting of the past rights and wrongs of the conflict in a truth commission or similar mechanism.

#### **INTERNATIONALIZATION OF THE CONFLICT AND POST-CONFLICT ENVIRONMENTS**

The degree and nature of the internationalization of the conflict also influences the feasibility and shape of transitional justice mechanisms. It influences the types of carrots and sticks external actors may use to ensure parties accept transitional justice institutions in cases where the meta-bargain presents mutual amnesty as an attractive proposition for both sides. International mediators may get otherwise recalcitrant parties to accept certain terms to gain international approval and financial and political support. Most importantly, perhaps, the degree of internationalization will determine whether international criminal processes are employed. Only the UN Security Council has the power to establish international criminal tribunals and it can also refer cases to the ICC, while other international actors can often work to link peace settlement terms to the prohibition of amnesty. It is unlikely, for instance, that Milošević or Croatian president Franjo Tudjman wanted to agree to the ongoing operation of the International Criminal Tribunal for the former Yugoslavia in the Dayton Accords, which ended the war, but the international community was able to exert leverage to ensure they did so.<sup>21</sup> More subtly, the shadow of the ICC has formed an important backdrop to peace negotiations in the very different contexts of Colombia and Uganda, shaping and constraining negotiations as parties try to craft compromises that will settle the conflict with a measure of criminal prosecution without provoking an ICC intervention.<sup>22</sup>

International organizations can also sometimes change the terms of a deal—essentially unilaterally—later, albeit with political risks. The United Nations, for example, added a “rider” to the Lomé Agreement in Sierra Leone stating it did not support the amnesty the agreement had included.<sup>23</sup> After

renewed violence, the UN Security Council instituted the Special Court for Sierra Leone,<sup>24</sup> alongside the truth commission,<sup>25</sup> which the peace agreement had established as a corollary to the amnesty. The court later indicted Charles Taylor as he arrived for Liberian peace talks in Ghana, critically affecting the balance of power in Liberia, even though the Liberian authorities had not (at that point) sought to put him on trial. In this case, an international court played a role in reopening an accountability compromise produced by a peace settlement.

Where international interveners, from donor states to interstate organizations to the ICC, may have the capacity to influence and to some extent force a transitional justice mechanism to be put into place, the operation and effectiveness of the outcome may depend on the extent to which the international pressure under which it was secured is maintained. Human rights institutions—transitional justice ones included—are not neutral; they operate to constrain power and hold it to account, which in post-conflict contexts has a redistributive function that will often be resisted.<sup>26</sup> Where international actors have “induced” parties to establish a transitional justice mechanism, they must often continue to support it. If their support is to be effective, and they are to anticipate potential resistance, they must understand the power dynamics of the deal and where its pressure points lie.

#### REGIONAL HUMAN RIGHTS STANDARDS

Connected to the question of internationalization is the regional dimension of conflict, including the relevant regional human rights system (if one exists). Regional human rights courts are increasingly significant to the implementation both of peace agreements and any transitional justice mechanisms.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, for example, have regularly ruled on amnesties and sometimes successfully forced changes in transitional justice initiatives.<sup>27</sup> In the 2012 ruling in the case of the *Massacre of El Mozote v. El Salvador*, the president of the court explained in a concurring opinion that it had never previously had to face the justice-versus-peace dilemma head-on when adjudicating on amnesties, never having dealt with one “created in the context of a process aimed at ending, through negotiations, a non-international armed conflict.”<sup>28</sup> He indicated, however, that were the court to do so, it would have to take the imperative to end the conflict seriously and balance it against individual rights.<sup>29</sup> This decision, together with others, has recently been used by the El Salvador Supreme Court to annul an amnesty granted subsequent to the truth

commission, and largely negating its findings, in 1993.<sup>30</sup> As this decision shows, the purchase of regional human rights instruments can be shaped by the politics in country, and the rulings of the apex court in the country in question, even as it seeks to shape them.

The strong and binding European Court of Human Rights has also developed a significant transitional jurisprudence.<sup>31</sup> In post-authoritarian conflicts it has influenced vetting processes, and in Northern Ireland it has been vital to the establishment of a proactive duty to investigate state killings and collusion with Loyalist paramilitaries that took place during the conflict, keeping victims' claims alive where political interventions alone would not have.<sup>32</sup>

#### **MOBILIZATION AND POLITICAL POWER OF CIVIL SOCIETY, INCLUDING THE VICTIMS' CONSTITUENCY**

Another key factor in the design and operation of transitional justice mechanisms is the political power of civil society—in particular, the victims' constituency and its capacity to influence elite-level political bargaining. Given that parties may have a powerful self-interest in mutual amnesty, the pursuit of a justice agenda may depend not just on international actors but on a politically active victims' constituency with the capacity to influence debate. This constituency may have its demands backed by the international community or even by some of the main protagonists to the conflict where particular groups of victims may be a core constituency.

While international actors often talk of “victims” as an inevitable force for good whose interests must be heard and responded to, in most transitions from conflict, victim constituencies are themselves divided along conflict lines and have different demands of the peace process. Like all groups, their political views will not be limited to transitional justice institutions, which they will see as part of the entirety of “the deal.” At different times, victims may be “used” by political actors in strategically instrumentalist ways to try to influence political bargaining outcomes. As Kieran McEvoy and Kirsten McConnaghie point out, the role of victims' groups is not always “pro-peace,” and their demands regarding accountability should not be automatically privileged in political discourse.<sup>33</sup> While certain victims' needs and rights, such as those regarding reparation, can and should be prioritized, their other political demands may need to be treated as part of a broader socio-political negotiation. Although victim demands are often strategically used by political elites when it suits them, this does not mean they can be put back into a box at will, and victims, particularly where they form a core constituency for one party to the negotiations, may

have power to affect and constrain negotiating positions. Like international actors, therefore, victims, while often officially outside the political bargaining process, may find themselves with the capacity to influence it.

#### **SCALE, NATURE, AND CONTEXT OF THE CONFLICT AND ITS RELATIONSHIP TO LAW**

The nature and scale of the conflict and its atrocities complicate recourse to transitional justice in a number of ways. First, they affect the scale of the redress and accountability that will be needed and the types of mechanisms that will be practical. In situations of mass atrocity, even if functioning national courts are available, simple matters of scale will prevent the prosecution and punishment of individual killings—never mind the broader tapestry of abuses. Only attenuated, selective, or symbolic prosecution, or some sort of alternative mechanism, is possible. Often judges and legal professionals may have fled the country, courts and legal institutions may have failed to function for a very long time, and the state may have little legitimacy left. Here the dilemma for transitional justice institutions is how to establish rule-of-law institutions at all. Such cases may point to a practical need for international criminal justice measures of some sort, coupled with an attempt to build capacity at the national level.

Smaller-scale conflict constrains transitional justice mechanisms in other ways. Fionnuala Ní Aoláin and Colm Campbell, for example, draw out a number of distinct issues facing “conflicted democracies,” such as Northern Ireland, Sri Lanka, and Basque Country.<sup>34</sup> Notably, conflicted democracies assume that a reform agenda is required, rather than a transformation agenda, because they take their own legitimacy for granted. The state’s formal commitment to liberal democracy and its formal commitments to accountability can, in a sense, blind it from seeing the ways in which the conflict was related to problems with both, leading it to rule out special forms of post-conflict accountability, particularly where they are to focus on its own actions. Yet, the rule of law may be particularly degraded precisely because the state had espoused a commitment to it and people believed it should prevail. As Ní Aoláin and Campbell suggest, establishing any sort of mechanism for dealing with the past in such circumstances is often very difficult because it involves the state addressing human rights abuses it should have prevented in the first place, and because the state will argue that “ordinary criminal justice” was and remains sufficient to deal with the accountability issues that arise.

Second, the nature of the conflict also affects which international legal regimes are implicated and, therefore, which legal standards on accountability

are applicable. Different levels of conflict are governed by different legal regimes. Lower-scale conflicts may be governed entirely by human rights law, but, as higher conflict thresholds are met, humanitarian and international criminal law also apply. Their accountability requirements are not entirely coterminous, and difficulties determining the appropriate legal regime can help shape transitional justice mechanisms. In practice, transitional justice mechanisms may be advocated as a technical solution capable of applying all three regimes to cover both state and nonstate abuses.<sup>35</sup> They can, in effect, create new composite legal regimes to govern accountability and enable examination of both state and nonstate atrocities and patterns of conflict. A difficulty remains, however: this approach may come to be challenged by international or regional courts related to a particular regime, such as human rights law. These regimes often have no explicit jurisprudential means of addressing the peculiarities of the post-conflict terrain or the need for past-focused mechanisms that provide justice to individual victims as regards the past and that also serve broader social needs as regards a peaceful future. Regional human rights courts, for example, have no jurisprudential frame within which to balance an individual's rights to truth and accountability against broader societal needs relating to the past—for example, the need to provide as much truth and accountability to as many victims as possible—in cases where these two imperatives conflict.

Third, the scale of the conflict can affect its internationalization. Mass atrocity that spills beyond borders can potentially elicit the intervention of the UN Security Council in the name of international peace, including referral to the ICC or the creation of international tribunals of inquiry. Situations of mass atrocity often happen where the state is weak—where, almost by definition, little normal state apparatus remains—meaning that international intervention is more likely to be seen as necessary and the state less likely or able to resist. In contrast, fairly functional and powerful states with lower levels of armed-opposition violence, such as South Africa, Sri Lanka, and the United Kingdom, are able to resist internationalization of the conflict more easily.

#### **A COMPLEX MATRIX OF POLITICAL BARGAINING**

The five factors addressed above do not stand in a hierarchy of importance. Rather, they interact in complicated ways. The balance of power between political and military elites may be shaped by the wider engagement of civil society or the leverage of the international community. International interveners may be prepared to support certain forms of political and legal institutions,

including transitional justice mechanisms and forms of power sharing, which regional human rights courts may later attempt to revise or undo. Considerations of “international tutelage” of failed domestic legal systems may interact with questions of accountability, international political will, financial cost, and international legitimacy to produce hybrid courts, as they did in Sierra Leone. The point remains that transitional justice mechanisms emerge from processes of domestic and international contestation, related to different priorities for the state-building project to which they are connected.

## **POLITICAL BARGAINING AND THE POLICIES OF EXTERNAL INTERVENERS**

So far, this chapter has argued that transitional justice mechanisms following conflict emerge from, and are shaped by, the complex political bargaining processes of political elites, which can sometimes be influenced by other domestic and international constituencies. I have also suggested five key factors that shape and determine the design and effectiveness of a transitional justice mechanism under such conditions. This section now considers what this analysis means for external intervention in support of accountability and peace.

International interveners increasingly doubt that transitions from authoritarianism or conflict track evenly toward democracy or peace.<sup>36</sup> They are also aware that even where compelling the adoption of particular political or legal institutions by the parties to a conflict is possible, it does not ensure that such institutions will achieve the goals the international actors ascribe to them. As Gerhard Anders and Olaf Zenker point out, transitional justice after conflict is now understood to be much less about “new beginnings” than new battlegrounds. Its promise of transformation seems to fall far short of its messy delivery, and the need for context-specific approaches seems to stand in tension with the international blueprinting that drives the process.<sup>37</sup>

These types of concerns about the effectiveness of post-conflict (or, more correctly, post-settlement) interventions extend beyond transitional justice across a range of development and peacebuilding settings.<sup>38</sup> Whereas for several decades external interveners responded to failures by focusing on “better institutional design” and “lessons learned,” increasingly they are questioning whether they have paid sufficient attention to the political context, and in particular to elite and societal political bargaining processes. International interveners are coming to understand the need to pay more attention to the complex and often hidden dimensions of the political bargaining that determines the outcomes of individual institutions and entire transitional processes.<sup>39</sup>

Yet, how to understand political bargaining processes, and how to navigate through them to achieve such goals as justice and accountability, remains under-theorized and under-researched. The injunction to avoid blueprints or standardized approaches does not, on its own, point the way to more effective forms of intervention. Some recent attempts to step back from a focus on institutional design to question the conditions under which truth commissions have been effective provide a useful starting point.<sup>40</sup> However, even this approach has found generalizing about those conditions difficult. Unsurprisingly, case studies illustrate the specificity of each conflict's political bargaining dynamics around what are essentially different state-building projects.

I suggest that the core challenge for those seeking effective transitional justice mechanisms is to engage further with their state-building dimension. This engagement requires a careful assessment of political context with a view to understanding how transitional justice mechanisms relate to political bargaining between powerful domestic actors over the nature of the state.

Such an assessment has a key difficulty: international interveners seeking effective transitional justice institutions are called on to exercise political judgments they often lack the capacity, expertise, and/or legitimacy to make. Moreover, while it is easy in hindsight to see that the preconditions for an effective truth commission, for example, were not present, making that judgment in the moment is much more difficult. Furthermore, in such cases, a normative institution like the United Nations will not necessarily be able to "do nothing" and walk away from trying to ensure some place in the process for accountability even if they have decided that the moment is unpropitious.

Given these observations, I make preliminary suggestions for framing and understanding interventions as an important starting point.

#### **NEGOTIATING ENDS TO CONFLICT AS PROTECTION OF HUMAN RIGHTS**

An important starting point for designing more effective transitional justice in transitions from conflict is to understand negotiated ends to conflicts as centrally concerned with more inclusive and peaceful state formations, and therefore as important human rights projects in their own right. The complexities of transitions from conflict in comparison to transitions from authoritarianism have led to much more ambiguous transitions in human rights terms, meaning that the importance of ending conflict for human rights needs to be better understood.



Transitional justice mechanisms in authoritarian transitions have been based on consensus among the parties and the international community regarding the nature and direction of transition (from authoritarianism to democracy) but also on acceptance of this type of transition as a normative good. As Paige Arthur writes, what initially differentiated transitional justice from the straightforward application of human rights was the addition of the “normative aim of facilitating a transition to democracy.”<sup>41</sup> To the extent that transitional justice mechanisms in transitions from authoritarianism have been imperfect, a level of compromise can be tolerated as long as the mechanism is understood as contributing to combatting impunity and establishing the rule of law.<sup>42</sup> To put it briefly, in transitions from authoritarianism a link between transitional justice and state building has been understood to exist, but state-building imperatives (linked to democratization) have been those understood to require accountability and the vindication of human rights. In these transitions, transitional justice is a relatively straightforward assertion of a human rights project.

In contrast, processes of negotiating transitions from conflict appear to be built on fundamental compromises regarding the immediate democratic and human rights outcomes of any state-building project. They create new state structures in which those who have most opposed democracy often retain a level of power, without having conceded their core conflict goals. From this perspective, understanding transitional justice to be linked to state building requires understanding it to be shaped by a very ambivalent, contested, and contingent process. Transitional justice, rather than reinforcing human rights imperatives, can be often understood to compromise them, as the framing of a “peace vs. justice” dilemma bears witness to. Negotiated outcomes to conflict and the compromises they produce—including compromises over accountability—are often seen, at best, as necessary evils.

Yet negotiated settlements are often one of the few ways to end protracted social conflict. Only two alternatives appear possible. The first is to let the conflict continue indefinitely, to “give war a chance” to produce a more just solution or a better balance of powers, as has essentially been tried in Syria.<sup>43</sup> Wars, however, tend to reward the party (or parties) who are stronger militarily and politically, rather than those with the most just cause, and they often lead to forms of chaos and unintended consequences. The second alternative is to marshal forms of international intervention to determine who wins and loses; but here the international community has no capacity for consistent or convincing adjudication of the situations in which it should intervene and tends

to be not very good at leaving behind a more peaceful and just country where regime change is achieved.

In practice, the problematic moral and legal compromises of negotiated ends to conflict are often—rightly—more palatable to human rights advocates and democratizers than either of these alternatives. As Justice Diego García-Sayán put it in *El Mozote*, “Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and the State must achieve it.”<sup>44</sup>

Many criticisms of transitional justice mechanisms in post-conflict contexts as imperfect focus on how the balance-of-power compromises of a peace agreement frustrate them. These criticisms in essence bemoan the peace-justice tradeoff that has taken place, and offer little in terms of a constructive response beyond wishful thinking that some other *realpolitik* had prevailed.<sup>45</sup> While the concerns are well founded and useful to articulate, it is also important to remember that the pursuit of peace has a normative imperative: it meets human rights concerns relating to the right to life and physical integrity, and it meets victims’ and society’s need for violations not to be repeated.

Without a ceasefire, constructing a rule-of-law future is impossible, and at best very partial forms of accountability can be achieved. In-country balances of power are real, and the international community has only limited tools, will, capacity, and legitimacy to affect them. Therefore, the starting point for any strategy for developing effective intervention must be to be realistic about the task and the related constraints and dilemmas. This involves understanding better the linkages between transitional justice and the complex nature of state reconstruction attempted by peace settlements.

#### **CREATING POSITIVE “CHAIN REACTIONS”: ENGAGING ACCOUNTABILITY OPPORTUNITIES**

On the positive side, understanding this linkage can lead to better recognition of opportunities for advancing debates about accountability. Trying to figure out a formula for “which transitional justice mechanism works when” is perhaps less useful than to identifying the ways in which peace negotiations will be forced to engage with the past and considering how these can be shaped so as to move questions of justice and accountability forward rather than backwards. Discussions about responsibilities for and causes of conflict will create path dependencies: even the crudest of amnesties involve decisions as to the time period covered, types of persons exempt from prosecution, and types of

offenses to be covered, which open up possibilities for residual accountability but can also initiate broader justice debates and claims and galvanize victim constituencies. In other words, singular transitional justice events can trigger “chain reactions” which have unintended consequences in both good and bad directions; they can prompt new justice initiatives and attempts to keep accountability agendas on the table, or trigger other counter-claims. To a large extent, the development of transitional justice “toolkits” has been as much an attempt to support creative ways to deal with a past that keeps raising its head at key moments in diverse conflicts, by encouraging communities to define their own justice agendas and pursue them whenever the opportunity arises, as it has been an attempt to produce global diffusion of particular tools and mechanisms.

#### **FROM BLUEPRINTS TO “HOOKS”: TRANSITIONAL JUSTICE AS A “BATTLEFIELD”**

International interveners also need to recognize that in conflict contexts what the transition is “from” and “to” remains much more contested than in many post-authoritarian cases. They must be aware of how technical decisions about institutional design have different consequences in terms of power.<sup>46</sup> Decisions that appear technical—such as the time period a transitional justice mechanism covers, the definition of the wrongs it deals with, and whether human rights law or humanitarian law standards are used—all have highly political consequences as regards who will be held accountable. Time periods may capture some phases of the conflict but not others in ways that are biased between actors in the conflict; whether wrongs are framed in terms of human rights or humanitarian law will determine the extent to which the accountability of state or nonstate actors is contemplated; and definitions of crimes as “political,” conflict related, or merely criminal will involve judgments about the nature of the conflict and the parties’ motivations that are closely linked to meta-conflict negotiations. International actors may not always be aware of these linkages, but conflict parties will be, and they will be negotiating transitional justice mechanisms with a high degree of awareness of their impact on the balance of power. Conflict parties will always have greater knowledge of where responsibility for atrocities lies and which technical approaches evade which forms of accountability.

The difficulty with international blueprints and toolkits for conflict-related transitional justice is that they often appear to contemplate transitions as linear, accountability as synonymous with criminal process, and “truth” as

simple and unitary. From this perspective, choices about institutional design can appear stark and permanent. Transitional justice mechanisms are assumed at the point of creation to be providing the last word on accountability; amnesties are assumed to be putting a full stop to trials, when we now know that, over time, new mechanisms and trials are likely to find ways to emerge. Instead, modest approaches may be useful. Transitional justice mechanisms or amnesties should be understood not as once-off “events” that operate as an “end of (domestic) history” moment, as either “good or bad,” but as part of a political settlement process that can be influenced to move the protection of human rights forwards rather than backwards. Investing in events as singular and final may lead to a failure to consider in advance what should happen with amnesties or truth commissions to which parties commit in peace agreements in the event they renege and return to war, leaving institutions stranded and creating problematic tasks (such as prisoner recall). As a result, opportunities can be missed with regard to nuancing particular past-focused mechanisms in ways that might anticipate and enable different choices about accountability in the future. From this perspective, the important focus of international and domestic actors with relatively little influence should be less on accepting or condemning particular institutions and language on accountability, and more on working to ensure the appropriate “hooks” that can be inserted at each stage of an imperfect process to enable rather than inhibit new forms of accountability at a later stage when more accountability may be possible, and even desirable and required.

International interveners could also be more prepared to take a longer view of how the past will need to be contended with, and work creatively with a number of simultaneous transitional justice mechanisms, some of which they will have sought and some of which they will have tolerated, that pull in slightly different directions with little coordination. Viewing different mechanisms as “different horses for different courses” might be useful for creating different pathways for different issues in ways that avoid some of the straightforward compromises of unitary holistic mechanisms, even if some of the pathways seem imperfect and the resultant transitional justice landscape a little chaotic. So, for example, multiple different transitional justice mechanisms operating with a level of inter-institutional pluralism while appearing to tell complicated and contradictory stories can, in fact, usefully serve to “complicate” the past, so as to disrupt the ways in which parties to the conflict rely on it to underwrite claims to power. Failure to recognize the messiness of transitional justice mechanisms as reflecting, in part, the messy realities of the conflict can result

in a loss of opportunities to move away from a focus on ideal institutions. Such a change in focus is needed if the parties are to contemplate how to provide for ongoing processes in which they can continue a national deliberation process over accountability issues that are seldom black or white and truth that is seldom simple and unitary.

#### UNDERSTANDING POST-CONFLICT TRANSITIONAL JUSTICE AS META-BARGAIN

The search for a societal narrative that limits “permissible lies” about the past is important to moving the new power map from particularistic bargain to constitutional framework. It is important for international interveners to understand that transitional justice mechanisms do not just serve individual accountability requirements, but often also play a key role with regard to stabilizing and extending the fragile meta-bargain by providing a shared narrative of the rights and wrongs of the conflict capable of underwriting a new political and constitutional settlement. This is a complicated area for international intervention, as societal narratives are closely bound up with attempts to define and create a concept of political community at the heart of the state—in some senses a preeminently domestic political project. For international interveners to attempt to shape the narrative is therefore difficult, and even inappropriate and counterproductive. However, external interveners sometimes tend to see narratives as a “soft” alternative to individual accountability and underinvest. By at least recognizing this dimension of transitional justice to be legitimate, necessary, and instrumental in enabling the state to function, it can perhaps be better supported as an important contribution to building the type of political consensus that must underlie constitutionalism and other projects of state reform. The attempt to define and create a political community operating in a frame of public power is a project of constitutionalism that always involves both particularistic power bargains born of the balance of power at the moment of agreement and the aspiration to a longer-term, value-driven basis for government.<sup>47</sup>

In summary, a need exists for recognition of the distinctness of conflicts, their particular conflict resolution imperatives, and the ways in which transitional justice language and mechanisms are strategically deployed by parties, including international intervenors. This recognition can be useful in enabling the design and pursuit of transitional justice initiatives that take account of the power dynamics that will give them meaning or constrain their operation, but understand that those dynamics will change over time. Such a conclusion appears frustratingly at odds with worthy international attempts to provide

guides and blueprints. However, it sits with the recognition that not all truth commissions are the same, not all serve human rights purposes, and, conversely, not all are “second best” to human rights trials. Context is everything.

## **CONCLUSION: REFRAMING TRANSITIONAL JUSTICE AS “CONTENDING WITH THE PAST”**

In conclusion, it may be best to understand post-conflict transitional justice not as the pursuit of accountability but, rather, as a process of “contending with the past” in ways that help society move beyond it. Where transitions from authoritarianism sought a form of justice that could enable the move to democracy, transitions from conflict have sought ways of dealing with the past that enable the move to peace. The need to deal with the past involves accountability but crucially also nonrepetition. Both ending the conflict and accountability have human rights dividends and must be regarded as to some extent indivisible. Designing and assisting transitional justice mechanisms in such contexts requires thinking beyond the criminal accountability box. Rather than focusing on achieving particular mechanisms to particular specifications, it may be useful to focus more on how to create political and legal spaces in which societies can contend with the past in ways that keep justice agendas on the negotiating table to exert pressure on the political bargaining, while viewing a successful bargaining outcome as vital to nonrepetition.<sup>48</sup>

Peace processes are forward-looking state-building projects of providing political and legal institutions capable of serving as an alternative route to gaining access to power than that of violence. The transition is a project at once of justice and state building, which go hand in hand and, at different points, create dilemmas that can be managed but never entirely eliminated, and certainly not pretended away. This chapter has sought to argue that a key part of that context is the nature of political bargaining over the settlement or power map that will emerge, in which any turn away from violence is often only contingent, and will need to be consolidated rather than undermined by transitional justice approaches.

While the term “transitional justice” has been useful for capturing and creating a common discussion about how to deal with the past across very different contexts using a common suite of mechanisms, it can also obscure and cloak important differences of context and motivation in choice of transitional justice mechanism in different types of transition.<sup>49</sup> Interestingly, the special rapporteur position created in the area of transitional justice has avoided the

term transitional justice, instead using a title that speaks to multiple needs and functions relating to the past: the special rapporteur on “truth, justice, reparation and guarantees of non-recurrence.”<sup>50</sup> These are needs that will not always be perfectly reconcilable at each moment in a peace process, but which all need pursued over time.

Sometimes societies begin to contend with the past through the very act of debating what their specific transitional justice mechanisms should look like and be used for. The debate over when and how to deal with the past may initially be one of the key ways in which the past is contended with. The key question for institutional design can be reframed from how to arrive at an end of history communal moment, to how to find spaces in which to contend with the past in ways that will enable different institutional responses, with different relationships to law, at different stages of conflict and peace processes. The past will need to be contended with on an ongoing basis, and it will indeed be contended with, come what may. Failure to provide constructive spaces in which to contend with it will not postpone contending with the past but will, rather, displace it to other arenas where it may be disruptive of political progress.

Better acceptance of the inevitable link between past and future might lead to more coherent institutional design focused on providing a useful space for contending with the past at any one time, rather than ideal-type institutional blueprints to resolve issues for all time. It might lead to more modest ambitions for some institutions in some situations; to toleration of a slightly chaotic landscape of multiple pluralist transitional justice mechanisms in others. It might also lead to evaluation of mechanisms less in terms of ambitious and inevitably on-going end-goals such as peace, democratization, accountability, or reconciliation, and more in terms of the simple question of whether an institution provided a useful and important space in which issues relating to the past could be fairly deliberated in ways that enabled the country to move further away from its past. On this measure, some of the early truth commissions in El Salvador and Guatemala and South Africa could be celebrated for what they were—important processes that enabled contending with the past in ways that bolstered the move towards democratic peace, in a form appropriate to their moment. They were of course imperfect, because the past in all those countries still needs to be contended with, still requires dedicated institutional space, now in different forms—because it remains a difficult and contested past that continues to affect the future.

## NOTES

- 1 This piece was supported in part by the Political Settlements Research program funded by UK Department for International Development. Views remain the author's own.
- 2 See further Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008), 305–344, for the numbers of peace settlements and peace agreements.
- 3 See further Fionnuala Ní Aoláin and Oren Gross, *Law in Times of Crises: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), 328–9, 359–63.
- 4 See El Salvador's San Jose Agreement on Human Rights, 1990, [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/pa\\_es\\_07261990\\_hr.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/pa_es_07261990_hr.pdf); and Guatemala's Comprehensive Agreement on Human Rights, 1994, [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/guat\\_hr\\_940329.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/guat_hr_940329.pdf)
- 5 See further the Inquiry website for its remit, "The Bloody Sunday Inquiry," [www.bloody-sunday-inquiry.org.uk/](http://www.bloody-sunday-inquiry.org.uk/); and Angela Hegarty, "Truth, Law and Official Denial: The Case of Bloody Sunday," in *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth*, ed. William A. Schabas and Shane Darcy (Dordrecht: Kluwer Academic Publishers, 2004), 199–246, for an account of the process.
- 6 See further Leonardo Franco and Jared Kotler, "Combining Institution Building and Human Rights Verifications in Guatemala: The Challenge of Buying in Without Selling Out," in *Honoring Human Rights: From Peace to Justice*, ed. Alice Henkin (Washington, DC: The Aspen Institute, 1998), 39–70, for an account of how human rights related to balance of power issues in Guatemala.
- 7 See further Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), 273–8.
- 8 See further Peter Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting," *Human Rights Law Journal* 17 (1996): 1–13, 2.
- 9 See further Indemnity Act 36 of 1990.
- 10 National Peace Accord, 14 September 1991.
- 11 For information about the Commission and a copy of its reports, see African National Congress, "Goldstone Commission," [www.anc.org.za/themes.php?t=Goldstone](http://www.anc.org.za/themes.php?t=Goldstone) Commission.
- 12 See African National Congress, Skweyiya Commission, *Report of the Commission of Enquiry into Complaints by the Former African National Congress Prisoners and Detainees, August 1992* (Bellville: Centre for Development Studies, 1992), <http://www.anc.org.za/show.php?id=95>; and Mostuenyane Commission, *Report of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members, 20 August 1993*.



- 13 Cf. Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3 (2009): 28–48.
- 14 See, for example, Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996, [https://peaceaccords.nd.edu/site\\_media/media/accords/Abidjan\\_Peace\\_Plan\\_1996.pdf](https://peaceaccords.nd.edu/site_media/media/accords/Abidjan_Peace_Plan_1996.pdf); Peace Agreements between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lome, 7 July 1999, <http://www.sierra-leone.org/lomeaccord.html>.
- 15 John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Oxford: Wiley-Blackwell, 1995), 1.
- 16 Act No. 200 of 1993, Parliament of South Africa.
- 17 See Christine Bell, "Dealing with the Past in Northern Ireland," *Fordham International Law Journal* 26 (2002): 1095–1147.
- 18 For one of the recent attempts to provide for a transitional justice mechanism, see Proposed Agreement 31 December 2013, "An Agreement Among the Parties of the Northern Ireland Executive, on Parades, Select Commemorations and Related Protests; Flags and Emblems; and Contending with the Past," [www.northernireland.gov.uk/haass.pdf](http://www.northernireland.gov.uk/haass.pdf) (this document was the fruit of an attempted negotiation between the parties by US Special Envoy Richard Haass, see further <http://panelofpartiesnie.com/>).
- 19 But there may be important differences between whether power-sharing is "corporatist" or "liberal," see Brendan O'Leary, "Debating Consociational Arguments: Normative and Explanatory Arguments," in *From Power-sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies*, ed. Sid Noel (Montreal: McGill-Queen's University Press, 2006), 3–43.
- 20 Carl Maria Von Clausewitz, *On War* (Princeton: Princeton University Press, [1873] 1976), 75.
- 21 General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM (1996) [hereafter DPA], [http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380).
- 22 See Uganda: Annexure to Agreement on Accountability and Reconciliation, 29 June 2007, [http://www.iccnw.org/documents/Annexure\\_to\\_agreement\\_on\\_Accountability\\_signed\\_today.pdf](http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf); Colombia: Ley 975 de 2005, *Justicia de Ley y Paz* (julio 25), Diario Oficial No. 45.980 de 25 de julio de 2005, [http://www.fiscalia.gov.co:8080/Documentos/Normativa/LEY\\_975\\_250705.htm](http://www.fiscalia.gov.co:8080/Documentos/Normativa/LEY_975_250705.htm); and measures on the past in the more recent Acuerdo Final (final peace accord) 24 August 2016 in Colombia (agreed by the parties but subsequently rejected by a narrow majority in a public referendum), (in Spanish) <https://www.mesadeconversaciones.com.co/sites/default/files/acuerdo-final-1473286288.pdf>.
- 23 See U.N. Security Council, 54th Year, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone* 1999 (New York: Official Record S/1999/836, 1999), para 7.

- 24 The Special Court for Sierra Leone, "The Residual Special Court for Sierra Leone," [www.rscsl.org/](http://www.rscsl.org/).
- 25 Sierra Leone Truth and Reconciliation Commission, "Witness to Truth," [www.sierraleonetrc.org/](http://www.sierraleonetrc.org/).
- 26 Eva Bertram, "Reinventing Governments: The Promises and Perils of United Nations Peacebuilding," *Journal of Conflict Resolution* 39 (1995): 387–418.
- 27 See, e.g., Inter-American Digest, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, <http://www.cidh.oas.org/pdf%20files/Colombia-Demobilization-AUC%202008.pdf>. See also *Gustavo Gallón Giraldo y Otros v. Colombia* Sentencia C-370/06, Corte Constitucional de Colombia, 2006.
- 28 Inter American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of October 25, 2012 (merits, reparations and costs), Concurring Judgment of Diego García-Sayán, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_252\\_ing1.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf), para 9.
- 29 Ibid., see in particular paragraph 37.
- 30 See further "Court Throws Out El Salvador Civil War Amnesty Law," BBC News, July 15, 2016, <http://www.bbc.co.uk/news/world-latin-america-36800699>. See *Amnestía Sentencia 44-2013*, <http://ow.ly/d/51gl>.
- 31 For review of this jurisprudence, see Antoine Buyse and Michael Hamilton, eds., *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: Cambridge University Press, 2014).
- 32 *Jordan v UK* (2003) 37 EHRR 2 (ECtHR).
- 33 Kieran McEvoy and Kirsten McConnaghie, "Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy," *European Journal of Criminology* 9 (2012): 527–538.
- 34 Fionnuala Ní Aoláin and Colm Campbell, "The Paradox of Transition in Conflicted Democracies," *Human Rights Quarterly* 27 (2005): 172–213.
- 35 See further Christine Bell, "Of *Jus Post Bellum* and *Lex Pacificatoria*: What's in a Name?" in *Jus Post Bellum: Mapping the Normative Foundations*, ed. Carsten Stahn, Jennifer Easterday, and Jens Iverson (Oxford: Oxford University Press, 2014), 181–206.
- 36 See, for example, Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13 (2002): 5–21; Volker Boege et al., "On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility," *Berghof Handbook for Conflict Transformation* 8, Online Version (2008); Roger MacGinty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Houndmills, Basingstoke, UK: Palgrave Macmillan, 2011); Roger MacGinty, "Hybrid Peace: The Interaction between Top-down and Bottom-up Peace," *Security Dialogue* 41 (2010): 391–412.
- 37 Gerhard Anders and Olaf Zenker, "Introduction," in *Transition and Justice: Negotiating the Terms of New Beginnings in Africa*, ed. Gerhard Anders and Olaf Zenker (Bognor Regius:

- Blackwell-Wiley, 2014). See also Christine Bell, "The Fabric of Transitional Justice: Binding Local and Global Political Settlements," in *Transitional Justice*, ed. Christine Bell (New York: Routledge, 2016).
- 38 See, for example, Guidance Note of the Secretary-General, "United Nations Approach to Transitional Justice," March 2010, [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf), which sets out need to take account of political context and unique country context, and a need to address "root causes of conflict."
- 39 Ibid., but see also similar conclusions of other external interveners: e.g., "The Politics of Recovery: Elites, Citizens and States. Findings from ten years of DFID-funded research on Governance and Fragile States 2001-2010. A Synthesis Paper," London, UK Department for International Development, 2010; Jonathan Di John and James Putzel, "Political Settlements: Issues Paper," Governance and Social Development Resource Centre, June 2009; Edward Laws, "Political Settlements, Elite Pacts, and Governments of National Unity, A Conceptual Study," Development Leadership Program: Background Paper 10, August 2012.
- 40 International Center for Transitional Justice and Kofi Annan Foundation, "Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?" (New York: ICTJ, 2014). See also Mاتيנגاي V.S. Sirleaf, "The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-conflict Societies," *Cardozo Law Review* 35 (2014): 2263–2347.
- 41 Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–367.
- 42 Two of the key proponents of post-conflict accountability in Latin American transitions, Naomi Roht-Arriaza (in "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," *California Law Review* 78 (1990): 449–513) and Diane Orentlicher (in "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal* 100, no. 8 (1991): 2537–2615) argued, for example, that while wholesale amnesty could not be justified, neither was comprehensive prosecution required, and that some sort of focus on the most serious offenders and most serious abuses might satisfy requirements of accountability, concomitant with working with the "constraints commonly faced by transitional governments" (quote from Orentlicher, 2612).
- 43 Some do indeed argue that this results in a better balance of power and more stable settlement; see Edward N. Luttwak, "Give War a Chance," *Foreign Affairs* 78 (1999): 36–44.
- 44 See *El Mozote*, para 37.
- 45 Cf. Laura Davies, "Power Shared and Justice Shelved: The Democratic Republic of Congo," *International Journal of Human Rights* 17 (2013): 289–306; Andrea Armstrong and Gloria Ntegeye, "The Devil is in the Details: The Challenges of Transitional Justice in Recent African Peace Agreements," *African Human Rights Law Journal* 6 (2006): 1–25.

- 46 Cf. Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1 (2007): 23–44.
- 47 See Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2009).
- 48 The phrase "contending with the past" is artfully used in the Haas review in Northern Ireland 2013.
- 49 See further Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-field,'" *International Journal of Transitional Justice* 3 (2009): 5–27.
- 50 For mandate and work, see United Nations Office of the High Commissioner for Human Rights, "Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence," [www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx](http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx).

CHAPTER 3

# Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges

*Rachel Kerr*

The past several decades (since the end of the Cold War) ushered in significant change in the conduct of international relations, in particular with respect to the relationship among values of order, justice, and security and how these play out in an interconnected global commons. This change manifested in an increased tendency to intervene in situations that would previously have been deemed beyond the purview of an outside entity—whether a state or an international organization—and a vast increase in the number and scope of peace-building activities. The emergence of transitional justice as a discrete area of practice and discipline of study should be seen against this background.

Most striking in this regard has been the expansion of transitional justice—hitherto understood as the way in which a state deals with past abuses as it transitions from dictatorship or conflict—*geographically* across borders, challenging sovereignty, and *conceptually*, to include different types of transition, not least from war to peace. The “justice cascade” identified by Kathryn Sikkink and Ellen Lutz in relation to Latin American transitions from authoritarian to democratic rule in the late 1980s and early 1990s morphed by the mid-2000s into a “revolution in accountability” (as Chandra Lekha Sriram called it) involving, at its apex, international judicial intervention in post-conflict settings in Africa, Asia, and Europe.<sup>1</sup>

As a result, transitional justice is now regarded as a critical element of the United Nations’ post-conflict reconstruction and peacebuilding agenda. The U.N. secretary-general’s 2004 report on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” formally acknowledged the need for some form of transitional justice mechanism as crucial for societies emerging from violent conflict. The question was not whether to pursue some form of transitional justice, but rather how? Peace, justice, and democracy were recognized to be “mutually reinforcing imperatives.”<sup>2</sup> This was further reinforced in the secretary-general’s 2011 report, which focused on the integration of transitional justice with related development and peacebuilding activities, such as judicial and security sector reform and rule of law and human

rights promotion. In this way, transitional justice was seen not just as a tool for addressing past abuses, but as a means of building a better future.<sup>3</sup>

The integration of transitional justice into peacebuilding activities was accompanied by a significant expansion and recasting of the goals ascribed to it, as well as an expansion of the mechanisms through which transitional justice was pursued. It also led to considerable conceptual and analytical muddiness, where goals of transitional justice associated with its conception as a tool of transition to democracy were conflated with goals associated with a transition to peace. This created a dilemma, in which inflated expectations of what transitional justice might realistically accomplish contrasted with the ever-more challenging settings in which it was implemented: societies riven by decades of conflict and underdevelopment, with urgent security and development needs. The aim of this chapter is to unpick this dilemma.

The key question is, what are the main opportunities and challenges for implementing transitional justice in post-conflict settings? To help answer this question, this chapter first considers opportunities and challenges in light of the potential benefits and pitfalls of implementing transitional justice in post-conflict settings, as opposed to transitions to democracy. Then, it proposes a framework or (loose) typology of four sets of cross-cutting variables that ought to be taken into consideration and discusses how these might affect transitional justice implementation in specific post-conflict contexts, based on experience to date. The variables are:

1. *Historical factors* relating to the nature of the conflict, the type and scope of abuses, and the main protagonists
2. *Pragmatic factors* relating to the peace agreement, the post-conflict reconstruction and peacebuilding agenda, and the security environment
3. *Cultural and societal factors*, including local norms and expectations and the needs of vulnerable groups
4. *Political factors*, including the respective involvement of domestic and international actors and the perceived legitimacy of transitional justice initiatives

The argument presented is that it is not only important to consider opportunities and challenges in context; it is also important to recognize that both transitional justice and peace-building are processes of highly contingent and imperfect transition. Just as there is no one-size-fits-all solution, there is also no perfect solution to the problem of how to deal with a legacy of abuses, however context specific. Dealing with past abuses in a delicate post-conflict setting

can be at best complicated and at worst calamitous.<sup>4</sup> The task is to ensure that we err on the side of the former, not the latter. Above all, we need to be realistic about what transitional justice can achieve, and honest about what it cannot.

## OPPORTUNITIES (GOALS)

In order to identify the opportunities presented by transitional justice, we must begin by defining what it is, and what or whom it is for. A good starting point is, of course, ICTJ's definition of transitional justice as "the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses [including] criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms."<sup>5</sup> While this definition implies a broad understanding of the concept of *justice* in transitional justice as encompassing more than criminal justice, how far should we stretch it? Does it, for example, include wider processes of social repair encountered in the everyday lives of victims and survivors of atrocities, as some have argued,<sup>6</sup> or wider practices of memorialization and education? And what of the situation in which implementation is not by countries seeking redress, but international organizations, with or without the consent of state authorities?

Some have also questioned the context in which transitional justice applies, asking, in particular, what form of *transition* is implied. Processes of transitional justice are undertaken today in contexts vastly different from those originally associated with transitional justice, namely, transitions from authoritarian to democratic rule in Latin America and from apartheid in South Africa. Either the terms *transitional justice*, *post-conflict justice*, and *international criminal justice* are used interchangeably, or transitional justice is used as a blanket term to apply to all of these situations. Does this matter? Should mechanisms for addressing the legacy of historical abuses relating to violations of the human rights of aboriginal peoples in Australia, Canada, and the United States be included under the same umbrella of transitional justice? Should mechanisms used in post-conflict and even conflict settings where *international judicial intervention*<sup>7</sup> has occurred be included?

The approach taken here is that it is justifiable to continue to use the blanket label *transitional justice* for all of these types of situations on the basis that there is as much variation among the different measures that we might refer to as *transitional justice* as in *post-conflict justice* or *international criminal justice*, and most, if not all, cases of transitional justice societies are dealing with levels of



violence and conflict, whether or not it they have reached the threshold of war; so imposing a differentiation creates a somewhat arbitrary grouping anyway. Instead, we should perhaps rethink and recast goals in light of different contexts and experiences, particularly in relation to specific post-conflict settings.

So, what are the broad goals of transitional justice? And are they the same in the context of peacebuilding as they are in the context of transition to democracy? With regard to the latter, Pablo de Greiff argued that the different elements of transitional justice, including criminal prosecutions, truth telling, reparations, and institutional reform share two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and democratization).<sup>8</sup> Conceptualizing goals in this way, as mediate and final, is a useful way of approaching the dilemma of identifying what transitional justice is for. The mediate goals of providing recognition to victims and fostering civic trust apply equally to post-conflict contexts as they do to post-authoritarian contexts, but the final goals require some amendment. Rather than think in terms of seeking final *goals* of reconciliation and democratization, we might think in terms of the opportunities for transitional justice to contribute to ongoing *processes* of reconciliation and peacebuilding in post-conflict settings, via these and other mediate goals.

Elsewhere, goals of transitional justice have been cast in terms of moral, legal, pragmatic, political, sociological, and psychological imperatives.<sup>9</sup> In post-conflict settings, we might translate these imperatives into the various opportunities for transitional justice to contribute to restoring peace by:

- Establishing individual accountability
- Deterring future violations by demonstrating an end to impunity
- Establishing a historical record that cannot easily be denied
- Promoting reconciliation at a societal and/or individual level
- Providing victims with a forum and means of redress
- Removing and/or sidelining perpetrators who may become spoilers
- Reinforcing and building respect for the rule of law
- Building capacity<sup>10</sup>

The goal of accountability is linked to the oft-quoted desire to end impunity for massive human rights abuses. It operates in two ways. The first, stressed by proponents of criminal trials, focuses on the goal of establishing individual criminal responsibility, thus making an individual (and not a group) accountable. Individualizing guilt removes responsibility from the collective, which can be helpful, proponents argue, in situations where blame might be placed on, for example, an entire institution, nation, or ethnic group, leading to cycles

of violence. The concept of accountability is also important in the context of truth commissions, although in a different way. Here, the focus is on establishing patterns of abuse and ensuring institutional or collective responsibility rather than necessarily targeting named individuals. Both concepts are linked to a wider goal of ending impunity, which serves not only as a means of demonstrating enforcement of particular laws, but of shoring up the rule of law more generally.

Ensuring accountability and ending impunity are also closely linked to the purported deterrent function of transitional justice. Proponents of criminal trials, in particular, argue that they can play an important role in deterring future abuses. Although some anecdotal evidence suggests that investigations and prosecutions underway in some cases may have had a deterrent effect,<sup>11</sup> there is little to show that it has had any more than a very marginal impact, which is not surprising, given the huge gaps in enforcement.

Another claim made of transitional justice is that it contributes to the establishment of a historical record, or a shared narrative, which can comprise a detailed account of the pattern of abuses and causes of the conflict. Creating a shared narrative will, it is argued, help to draw a line under the past: according to Archbishop Desmond Tutu, “We must deal effectively, penitently with our past or it will return to haunt our present and we won’t have a future to speak of.”<sup>12</sup> Unearthing the truth about lost loved ones can contribute to the process of coming to terms with the past (or reconciliation with one’s own narrative), not least by allowing for proper burial and/or memorial and a sense of closure.

Criminal trials construct this record through the introduction of evidence and in the final judgment, but this form of creating history is deeply problematic, as Richard Ashby Wilson has shown, especially because the goal of a trial is to determine the guilt or innocence of the accused, which does not always translate well, especially if narratives are contested.<sup>13</sup> As is clear from cases in the former Yugoslavia, different groups are wont to interpret trial proceedings to suit their narratives, rather than the other way around.

The capacity of transitional justice to promote reconciliation is regarded as one of its key contributions to peacebuilding, if, as John Paul Lederach suggests, sustainable peacebuilding requires a transformation in relationships between people.<sup>14</sup> Reconciliation may be cast as, in de Greiff’s terms, a proximate goal, in the sense of civic trust, or a final goal. Or, it may be both, in the sense that it might be viewed as an ongoing process in post-conflict settings. However, reconciliation, like justice and peace, is a contested concept. It could be taken to mean individual reconciliation with one’s own past or with others’, or group and/or societal reconciliation. It may require active repentance

from perpetrators seeking forgiveness, or it may occur in the absence of such acts, as a result of processes of reintegration and reformation. James Gibson's concept of reconciliation, as living with manageable discord, is useful.<sup>15</sup> Like peace, which is also cast as both a proximate goal (of ending violent conflict) and a final one (establishing sustainable peace), it is not an end state but, rather, a point on a spectrum. Seen in those terms, the opportunity for transitional justice to contribute to reconciliation might be viewed in two ways: first, as a product of the outcome of transitional justice mechanisms; and second, as embedded in the process of transitional justice as it unfolds.

The notions of retribution or redress stand in contrast to the notion of forgiveness as a goal of transitional justice. Proponents of criminal trials, in particular, argue that they represent one of the main functions of transitional justice that contributes to peace by meting out punishment, thus providing some form of retribution, and redress for victims. Redress might also be sought in the form of reparations, which have become a key concern for truth commissions and international courts alike.

A significant practical contribution of a transitional justice process is to identify, stigmatize, and even physically remove certain individuals or potential spoilers from positions of responsibility, whether by indictment, conviction, and punishment, naming and shaming, or formal processes of lustration. Although attempting thus to neutralize such individuals can have the opposite effect of making them "heroes" or "martyrs" (see "Challenges," below), relying on such people as the guarantors of peace is a risky strategy.

Finally, if transitional justice is to help lay the foundations for sustainable peace, we should consider its ability to help build capacity in the judicial system and respect for the rule of law as a means of contributing to wider goals of sustainable peacebuilding, focused on institutional development and judicial and security sector reform. Going further, some have argued that transitional justice should address structural violence rather than focus on its legal and political manifestations.<sup>16</sup> Rama Mani asks whether transitional justice could really afford *not* to concern itself with addressing patterns of social and economic injustice that are the root causes of conflict. The most pressing of these patterns in the types of post-conflict settings in which transitional justice has been implemented to date are evidenced in patterns of gender-based violence and economic crimes, including corruption.<sup>17</sup>

Wendy Lambourne shares a wider conception of the relationship between transitional justice and peacebuilding. She suggests a model of transformative justice involving a syncretic approach to restorative and retributive justice and recasting it as part of a long-term process of transformation in the political,

psychosocial, and economic realms.<sup>18</sup> Her model involves using what she terms legal justice (as manifested in criminal trials or other forms of accountability), truth, knowledge and acknowledgement (restorative justice), socioeconomic justice (reparations and distributive justice), and political justice (combating corruption). There is, of course, an inherent danger in stretching the goals of transitional justice too far, but I fully agree that we ought to “recognise and accommodate multiple and apparently contradictory perspectives,”<sup>19</sup> as well as her and others’ desire to find ways to address elements of structural violence.

### CHALLENGES (OBSTACLES)

The challenges to implementing transitional justice in post-conflict settings are, of course, considerable. Foremost is the potential for destabilizing or derailing a peace process, the risk that pursuing justice might heighten tensions and reignite conflict, and the considerable challenge of navigating a highly politicized and insecure post-conflict environment.

All transitional justice mechanisms carry with them significant risk of destabilization, especially if they highlight past abuses and identify perpetrators who may still have a grip on power, formally or informally. For a new regime, addressing the past could upset a relatively fragile new order. In that sense, new leaders face what has been termed a “Hobson’s choice between their very survival and the principles on which their existence was founded.”<sup>21</sup> In post-conflict settings, the dilemma is acute in situations where the very people being pursued to account for their crimes are those on whom a nascent peace agreement depends. This dilemma was cast in stark terms in the former Yugoslavia, where one critic warned that pursuing justice “risks making today’s living the dead of tomorrow.”<sup>20</sup> In a country engaged in negotiating the end of a conflict, especially one that has raged for years or even decades, the threat of prosecution might prolong or even reignite conflict. This was the crux of the criticism leveled at the International Criminal Court (ICC) when it refused to lift its indictment of Lord’s Resistance Army leader Joseph Kony to facilitate the 2008 Juba peace talks. More recently, trade-offs between justice and peace have been at the core of efforts to finally bring an end to the conflict in Colombia.<sup>22</sup>

The second major risk is that of drawing attention to abuses, thereby either retraumatizing victims, who would prefer simply to forget and move on, or heightening tensions and delaying reconciliation. Seeking justice for past abuses requires, to some extent, reliving them. Rather than being cathartic for

victims, testifying before courts and truth commissions can lead to a sense of revictimization.

A third major challenge is politicization. This can be perceived or actual, but either can be damaging to transitional justice's ability to deliver on its goals. In criminal proceedings, prosecutorial discretion is politically charged, even if not exercised on political grounds, and it can be difficult to avoid criticism, from all sides, of selectivity and victors' justice.

Transitional justice also arguably diverts resources from other pressing needs. In a post-conflict setting with many urgent priorities and pressing needs, some may view justice as a "luxury"<sup>23</sup>—especially if it comes at a high monetary cost. A trenchant criticism of transitional justice—international criminal justice in particular—is that it does not represent good value for money. It ought to cost less and deliver more.<sup>24</sup>

## TRANSITIONAL JUSTICE IN CONTEXT: POST-CONFLICT SETTINGS

Advocates and critics of transitional justice have discussed the range of opportunities and challenges it faces, debating the relative merits and disadvantages of different approaches and setting retributive processes, like trials, up against restorative processes, like truth commissions—and international mechanisms up against domestic/local ones, often underpinned by the conviction that traditional approaches are somehow inherently superior.<sup>25</sup> The crucial question for many, however, is, what is the evidence to support any of these claims and critiques?

In 2008, the Centre for International Policy Studies (CIPS) at the University of Ottawa conducted a comprehensive review of the field and found that, to date, there was insufficient evidence to support any strong claims about positive or negative impacts of transitional justice.<sup>26</sup> Moreover, most of what was known about the effects of transitional justice came from countries that had experienced political transitions from authoritarianism to democracy. Very few cross-comparative studies have been carried out of transitional justice in post-conflict settings, although some do exist.

In 2005, Jack Snyder and Leslie Vinjamuri published the results of a comparative study of 32 post-conflict countries. They were skeptical of the claims made by advocates of transitional justice and found little evidence that any of them was justified; but, as the CIPS report noted, some of their case reviews were themselves fairly cursory. Another major comparative cross-case study was conducted by Tove Grete Lie et al in 2007, which used statistical analysis

to assess the impact of various transitional justice mechanisms (trials, purges, reparations, truth commissions, and amnesties) on the duration of peace in 200 post-conflict settings from 1946–2003.<sup>27</sup> They found no statistically significant impact of transitional justice; rather, variables correlating with lasting peace were predominantly political and military related. The study did find, however, a correlation between reparations and truth commissions on the one hand and durable peace on the other, although this may suggest no more than that the conditions for both are endogenous.

Another approach is to examine concrete linkages in policy and strategy between transitional justice initiatives and peacebuilding activities. In this vein, Sriram et al conducted a wide-ranging survey focusing on three areas: security sector reform (SSR), disarmament, demobilization, and reintegration (DDR) of ex-combatants, and development of the rule of law.<sup>28</sup> All three raised potential clashes with transitional justice initiatives. An example was the view expressed by some in the victim community that DDR programs were essentially “rewarding” ex-combatants for their crimes with financial or material assistance.<sup>29</sup> Rather than devise a framework for integrating transitional justice with these activities, the study identified cross-cutting issues to be taken into account in individual cases, namely, the regional dimension of conflict; peacebuilding and accountability; the position of vulnerable populations, including women and children; coercion and consent in the operative environment; perceptions of the local population; and timing, sequencing, and prioritization. These issues might be considered applicable across the spectrum of transitional justice and peacebuilding activities.

The challenge is to strike a balance between generalizability and specificity in a way that is meaningful. This presents significant methodological and analytical challenges associated with choices about case selection, methods, and frameworks for analysis. The handful of existing quantitative studies of transitional justice mechanisms are useful in identifying trends, but capturing complex social phenomena—such as reconciliation, healing, respect for human rights, and the rule of law—in numerical terms is notoriously difficult, if not impossible.<sup>30</sup> In situations where different sets of causal relationships may be at work in individual cases and at different points in time, a qualitative approach, using thick description, seems more appropriate. Transitional justice in this sense is, like strategy, more of an art than a science.

Another complicating factor is that processes of transitional justice, and their impacts, are not neat and straightforward. Nor should the enterprise be viewed in teleological terms as a trajectory of progress for “good.” They are,

rather, complex and messy, involving a disparate range of political, social, emotional, and psychological factors, all operating at different levels—individual, familial, group, societal, state and regional—and their record of success is mixed. Moreover, pinning meanings on core concepts of justice and peace is difficult, embedded as they are in particular social, cultural, and political contexts. Concrete findings are, therefore, self-consciously tentative. And yet, while a one-size-fits-all solution is untenable and inappropriate, lessons from past endeavors can help to provide a framework through which we might at least ask the right questions.<sup>31</sup>

The aim here is not to generalize findings and create a blueprint, but rather to consider a range of key variables that might influence the implementation of transitional justice. They can be characterized in terms of historical, practical/pragmatic, cultural/societal, and political factors. The remainder of the chapter discusses these four factors in terms of the opportunities and challenges they present for transitional justice in post-conflict settings, providing concrete examples from past and current practice.

#### **HISTORICAL FACTORS: CONFLICT TYPE, SCOPE OF ABUSES, ACTORS**

Clearly, the nature of the conflict and the type, scope, and spread of abuses, as well as the characteristics of the main protagonists, is both hugely significant and subject to wide variation. Although no two conflicts are the same, it is possible to identify categories of conflict based on shared characteristics. Drawing on the Uppsala Conflict Database, Paul Williams offers a useful typology of seven different categories of conflict in Africa: intrastate armed conflict; interstate war; nonstate armed conflict; military coups; electoral violence; one-sided violence/massacres; and combinations of one or more of these.<sup>32</sup> We might add to this list foreign (possibly including humanitarian) intervention; revolution (like the Arab Spring); colonial and postcolonial wars; wars of independence; ethnic conflict; genocide; terrorism; and counter-terrorism, all of which fall somewhere on the spectrum of war.

The problem with a typology, however, is that most wars fall into the category of one or more of the above types. With this in mind, in order to obtain an understanding of the conflict that will inform transitional justice policies rather than shoehorn it into a category, it might be useful to focus instead on understanding where a particular conflict sits on the spectrum in relation to a set of variables that will likely have an impact on the implementation of transitional justice. These include the level of violence; the role of the state; regional and international dimensions; the characteristics of the main protagonists and

their primary motivation (greed or grievance); the type and scope of abuses; and the impact on the civilian population.

As noted elsewhere, a key difference between the situations in which transitional justice was implemented in transitions from authoritarian to democratic regimes and the kinds of post-conflict settings of concern here is in the level of violence and the role of the state. Although one could argue that in these cases structural violence was endemic,<sup>33</sup> actual violence was relatively localized and predominantly horizontal (meted out by the state on the people), unlike the widespread horizontal, diffuse, and peripheral violence witnessed in many modern conflict settings. In many cases (such as Sierra Leone, the Democratic Republic of the Congo, and the former Yugoslavia), war was the result of weak, collapsing, or failed states, not an instrument of state repression, although in others (such as Rwanda, Cambodia, and Sudan), the state remained intact and was responsible for a large number of atrocities.

The regional and international dimension is also significant. Degrees of international involvement determine whether or not a conflict is classified as international, which can be hugely problematic in terms of attributing legal responsibility and establishing jurisdiction. In the case of the former Yugoslavia, the war was, at different stages, an international conflict, a civil war, and an internationalized civil war. It started in Slovenia in June 1991, following the declarations of independence by that country and Croatia that year from the Socialist Federal Republic of Yugoslavia (SFRY), moved swiftly to Croatia, and entered its bloodiest and longest phase in Bosnia in April 1992, by which time the SFRY had formally dissolved. The involvement of first the government of the rump Yugoslavia and then Serbia and Croatia in the war in Bosnia has created challenges for the attribution of direct criminal responsibility, in addition to the political issues discussed below.

The issue of responsibility relates to a further consideration about the range of actors involved. Did the conflict involve organized armed groups, with a coordinated military strategy, as in the former Yugoslavia, or weak and diffuse organization, as in Sierra Leone? Was there a cadre of leaders for whom trials would be appropriate (“those bearing the greatest responsibility”) and a mass of rank and file, where the line between victim and perpetrator might be difficult to determine, and who might be better served by a restorative and rehabilitative approach? In recent conflicts in Africa in particular, children were conscripted, many forcibly, which led to questions about whether at trial they should be treated as villains (with respect to the crimes they are alleged to have committed) or victims.<sup>34</sup>



The approach taken by international tribunals has been to target those who bear the greatest responsibility. After its first few years, in which it indicted anyone it could, the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted a more concerted strategy of targeting the big fish. As of July 2016, the tribunal had concluded proceedings against all but seven of its 161 accused. Among those it indicted were individuals at the highest levels of political and military responsibility, including the Bosnian Serb political and military leaders Radovan Karadžić and Ratko Mladić, and the former president of Serbia (and the SFRY), Slobodan Milošević.

Meanwhile, the Special Court for Sierra Leone focused from the start on a small group of individuals whom it deemed to have borne “the greatest responsibility.” In total, the court brought cases against 13 accused. The trials of three former leaders of the Armed Forces Revolutionary Council (AFRC), two members of the Civil Defence Forces (CDF), and three former leaders of the Revolutionary United Front (RUF) were completed in Freetown. The trial of former Liberian president Charles Taylor was completed in September 2013 and he is currently serving out a fifty-year term in a UK prison. In April 2012, Taylor was convicted on all 11 counts of aiding and abetting the commission of crimes against humanity and war crimes in Sierra Leone from 1996–2002. The judgment in the Taylor case puts on record the litany of crimes committed by the RUF and the AFRC, both of which received material support from Taylor as leader of the National Patriotic Front of Liberia (NPFL) and as president of Liberia. They include murder; rape; sexual slavery; outrages on personal dignity; conscription and enlistment of child soldiers; violence to life, health, and physical or mental well-being; and other inhumane and cruel treatment. Although the court had jurisdiction for people over the age of 15, no child was ever indicted, in part because of the “greatest responsibility” criterion; in that context those were the individuals who enlisted child soldiers.

Motivation is also a significant factor. Strong arguments have been made that in many of the conflicts in Africa, such as in Angola, the DRC, and Sierra Leone, economic incentives were a primary motivation; if they did not supersede ethnic and other grievances, they certainly accompanied them.<sup>35</sup> Economic motivation was a central theme in the Taylor trial, concerning diamond exploitation. This raises the key question of whether, and how, it should address economic crimes and corruption, in addition to direct violation of human rights. Doing so is both an opportunity and a challenge—an opportunity to the extent that transitional justice provides a means to draw attention to the ways in which indirect support (for example, by foreign governments

and corporations) may play a role in fueling a war in which abuses are committed, and a challenge in terms of establishing both the legal basis for jurisdiction and the evidential basis for conviction.

The other significant factors are the type and scope of abuses and the impact on civilians, which are obviously linked. In the former Yugoslavia, the impact was widespread, and horrific. A defining element of the war in the Croatian and Bosnian theaters was the practice of ethnic cleansing, which involved mass forced displacement and population transfers to detention centers, in which detainees were subjected to torture, sexual assault, and other inhumane treatment. In Bosnia alone, the war claimed over a quarter of a million lives—seven thousand to eight thousand of those in a matter of days in Srebrenica in July 1995. A further 11,000 people were killed in Kosovo in the final act of the Yugoslav War in 1998–9. The war in Sierra Leone (1991–2002), meanwhile, was characterized as one of the most brutally violent conflicts of its time;<sup>36</sup> in a decade of conflict, it is estimated that as many as 75,000 civilians were killed and 500,000 were displaced.<sup>37</sup> Civilians were directly targeted with tactics such as amputations of hands, arms, legs, and feet, sexual violence, mutilation, forced marriage, forced recruitment of children, and wanton destruction of villages and towns.

Such violence can lead to widespread traumatization. In East Timor, following the 1999 referendum violence, over a third of East Timorese were found to be exhibiting symptoms of post-traumatic stress disorder.<sup>38</sup> In Sierra Leone, the nature of the abuses, involving widespread amputation and sexual violence, created the necessity to address the needs of specific groups of victims who were especially vulnerable. The Taylor verdict, in particular, provided some form of redress for the victims of those crimes, particularly for victims of gender-based crimes. According to one observer, the Special Court's judgments (and the Taylor trial in particular), together with the work, final report, and legacy of the Sierra Leone Truth and Reconciliation Commission (TRC), have helped to raise awareness in Sierra Leone about the forms of gender-based violence that took place during the conflict. This increased attention, coupled with local nongovernmental activism, has helped in efforts to secure gender-sensitive law reform, although there is still a long way to go.<sup>39</sup>

#### **PRACTICAL/PRAGMATIC FACTORS: PEACE AGREEMENT, POST-CONFLICT RECONSTRUCTION TASKS, SECURITY ENVIRONMENT**

The first practical or pragmatic factor to consider is where the country sits on the spectrum of post-conflict reconstruction. As Graham Brown et al. make

clear in constructing their typology of post-conflict environments, the label post-conflict does not denote a single bounded period but is perhaps best understood as a process involving the achievement of various peace milestones, including the cessation of hostilities; signing of a peace agreement; DDR; refugee return; establishment or restoration of functioning state institutions; reconciliation and social integration; and economic recovery.<sup>40</sup> Where on the transition continuum a state lies is an important variable in determining transitional justice policies.

In Bosnia, the tribunal was established while the war was still ongoing, and it may be seen as having made a pragmatic contribution to ending the violence through the indictment of certain key individuals (including the Bosnian Serb political and military leadership). Ensuring their removal from political and public life made room for change.<sup>41</sup> Elsewhere, such as in Uganda and Sudan, it was suggested that the threat of prosecution would be detrimental not only to efforts to secure and maintain a peace agreement (Uganda), but also to efforts to bring relief to a civilian population (Sudan).<sup>42</sup>

A second question is whether local infrastructure is in place to deal with transitional justice through trials or the establishment of a truth commission. Are domestic courts able and willing? If they are unable, do opportunities exist to contribute in practical ways to building their capacity? If unwilling, should the international community step in? In the former Yugoslavia in 1993, with Bosnia in the midst of war, there was little appetite or capacity to hold people accountable, and the international community took over, establishing the ICTY. In Rwanda, there was appetite, but little capacity, as would be the case in Sierra Leone; the outcome was the establishment of an ad hoc hybrid (domestic-international) court. In East Timor, Kosovo, and Sierra Leone, various hybrid arrangements were established, but in the end these represented a missed opportunity to contribute to capacity building.<sup>43</sup>

The other side of the question is whether, if a country lacks capacity, it is the job of transitional justice to help build it. The ICTY, arguably, had some impact on rule of law and judicial reform in the region, acting as a catalyst for the creation of specialized war crimes courts in Bosnia, Croatia, and Serbia and transferring evidence and disseminating knowledge and jurisprudence to those courts, but its primary function was to prosecute those responsible for violations of international humanitarian law in the context of the Bosnia and Yugoslav wars.

In post-conflict settings, some have argued that transitional justice can capitalize on opportunities to address structural inequalities and grievances. In

these cases, truth commissions, while not particularly good at addressing individual needs, may be better at addressing societal and structural grievances. In Sierra Leone, for example, wider socioeconomic problems became intertwined with transitional justice issues. In a country ranked as the second poorest in the world, where literacy levels were low, corruption was endemic, the justice system was defunct, and the demands on international donors and civil society organizations were high. Socioeconomic inequality and corruption, as well as a lack of faith in the rule of law, were at the root of the conflict, but transitional justice can only contribute to the solution to these problems; it lacks capacity to solve them alone. Indeed, although the truth commission made a number of very far-reaching recommendations addressing socioeconomic inequality and corruption, most of them have yet to be followed up.

#### **CULTURAL/SOCIAL FACTORS: LOCAL NORMS AND EXPECTATIONS, NEEDS OF VULNERABLE GROUPS**

Cultural and social factors are paramount to designing transitional justice policies. Although allegations of Western imperialism (expressed by the African Union with respect to the ICC's investigations in Africa) are overstated, the record of international judicial intervention suggests that more account needs to be taken of local preferences, and more effort made to engage and empower local populations in transitional justice initiatives. It is patronizing to suggest that developing countries are not suited to criminal trials and incorrect to say that they do not want them. A recurrent theme among victims, noted by Diane Orentlicher in her research on the former Yugoslavia, is that, while there may be dissatisfaction with the form transitional justice takes and criticisms of certain aspects of it, there is a keen emphasis on the necessity for some form of accountability.<sup>44</sup> In that respect, transitional justice may correctly be seen as essential, though hardly sufficient.

But there is a need to recognize different expectations of transitional justice—what justice means in different contexts, and to different people—and to engage the populations that are most affected. International trials, such as those at the ICTY and ICC in The Hague (including that of Charles Taylor, which took place at the Special Court but in a special chamber in The Hague, not in Freetown), and at the International Criminal Tribunal for Rwanda (ICTR) in Arusha provided a lesson in how not to do this. They were far removed not only geographically from the site of suffering, but also psychologically (resulting in one description of the ICTY as essentially “space-capsule” justice).<sup>45</sup>

One clear lesson for transitional justice processes and mechanisms, especially courts, then, is that outreach aimed at fostering real critical engagement with the process, as well a sense of ownership of it, must be made a priority early on and pursued consistently and forcefully throughout, even though it may not yield immediate and overwhelming results. For example, in Sierra Leone, in spite of the court's having expended much effort on outreach (especially compared to the early stilted efforts of the ICTY and ICTR), many Sierra Leoneans did not report a sense of engagement with, or ownership of, the process.<sup>46</sup> Part of the problem was that the court did not chime with local, culturally specific approaches to justice, accountability, and agency.<sup>47</sup> Also, its ability to communicate knowledge and understanding about its mandate and processes was somewhat stymied by relatively hostile and, in some cases, sensationalist domestic news coverage. All of this contributed to considerable dissonance between local and international expectations.<sup>48</sup>

Even greater dissonance occurred in the former Yugoslavia between the ICTY's judicial record and the way in which its work was perceived, which was largely polarized along ethnic lines. While some small signs of progress existed, narratives of denial and victimhood remained deeply entrenched among Serbs and Croats, and attitudes and perceptions of the tribunal remained largely negative.<sup>49</sup> According to Janine Clark, the situation was little better in Croatia, where negative perceptions of the ICTY were based on its perceived failure to address crimes against Croats (in particular, the November 1991 siege of Vukovar).<sup>50</sup>

Among Bosnian Muslim victims, initial enthusiasm for the ICTY gave way to a sense of disconnection, disillusionment, and disappointment.<sup>51</sup> In part, ambivalence toward the tribunal can be attributed to inherent shortcomings associated with the relationship of retributive justice to the needs of victims. The tribunal was simply not equipped to satisfy the myriad expectations placed on it (nor was it the appropriate mechanism to do so). Attention has now shifted toward finding alternative, but complementary, restorative justice approaches aimed at addressing more directly the needs of victims and, in particular, their expressed desire for compensation.<sup>52</sup> This is long overdue.

In spite of all this negativity, room for cautious optimism perhaps remains. In particular, the scope of the tribunal's outreach program has transformed radically from its first faltering steps, so it now has real potential to change attitudes. (This is particularly true among the younger generation, on whom it is focusing much of its efforts and resources.)<sup>53</sup> These efforts deserve support as a means of utilizing and leveraging the record of the tribunal and fostering real critical engagement with its work. Such a result is essential because unless

perceptions of it shift over the course of the next few years, its legacy will suffer the consequences.

What all of this also shows is that, for many, justice does not only mean criminal trials; although they may be necessary, they are hardly sufficient. It is important, therefore, to recognize, acknowledge, and listen to different sectors that may favor alternative routes to accountability. Traditional justice practices may also offer opportunities to address the past in a culturally sensitive way and better meet the needs of victims. In East Timor, for example, there was greater public engagement with the Commission for Reception, Truth and Reconciliation than with trials conducted in the court in Dili. These local or traditional approaches have drawbacks, too, however, especially if misapplied (as Tim Allen has shown in Uganda, with regard to practices of *Mato Oput*, and Phil Clark with regard to *gacaca* courts in Rwanda).<sup>54</sup>

#### **POLITICAL FACTORS: INVOLVEMENT OF INTERNATIONAL/DOMESTIC ACTORS, LEGITIMACY**

Finally, political factors, including the respective involvement of international and domestic political actors and issues of legitimacy can present enormous challenges to transitional justice. One aspect that is often overlooked is the extent to which transitional justice is bounded in domestic and international politics. It can be instrumentalized to serve certain political goals, usually domestically, or delegitimized through the perception that it is being instrumentalized in an international context, which has been a recurring criticism of the ICC, in particular with regard to its relationship to the UN Security Council.<sup>55</sup>

In the former Yugoslavia, the record of the ICTY was hijacked by domestic, ethnically driven politics.<sup>56</sup> Cooperation with the ICTY was cast as a necessary evil rather than an avenue for dealing with a legacy of past abuses. In Croatia, Republika Srpska, and Serbia, media coverage of the tribunal tended to focus on a handful of high-profile cases concerning crimes committed against Croats or Serbs, respectively, and indicted persons who surrendered to the custody of the tribunal were treated as heroes.<sup>57</sup> Of course, this was not entirely the fault of the tribunal, but its failure early on to engage in effective outreach caused it to lose the initiative in communicating its work and establishing its legitimacy.

Potential also exists for political infighting among transitional justice actors and mechanisms. This occurred in Sierra Leone with the Special Court and the TRC—a lesson in how not to conduct supposedly complementary processes

in tandem. The clash between the two bodies was both personal and institutional and manifested in suspicion of both institutions among the population (not helped by the media inflaming the story). In Rwanda, meanwhile, the efforts of the ICTR to investigate any former Rwandan Patriotic Front members, thwarted by the government of Rwanda, were seen as highly politicized by all sides, in different ways. All of these examples illustrate, in different ways, the delicate balancing act that transitional justice mechanisms must perform among competing political, legal, and social imperatives, and the role of the media in fostering negative or positive perceptions of their success in this regard.<sup>57</sup>

## CONCLUSION

What recommendations can be drawn from all of the above? The first is to set realistic expectations. We should keep in mind “what the measures were designed for and what they are good for [or not].”<sup>58</sup> Second, transitional justice is only one part of a complex process of transformation and post-conflict reconstruction, some of which may be copasetic with strategies of transitional justice, and some of which may not. Understanding and fully acknowledging the role and function of transitional justice as just one element in the complex and multidimensional process of peacebuilding—conceptually and materially and in both the short and long terms—offers the best chance for it to achieve a measure of success as a tool of peace. Third, due consideration must be given to alternative paths to reconciliation and how they interact with the process of doing justice. In particular, there is a pressing need to consider how better to manage inherent tensions arising from overlapping and/or contested interests, values, and expectations of justice.

Finally, we would do well to remember that transitional justice is no more than an expression of justice in a very imperfect, as opposed to just an imperfect, world. It is important fully to understand and take account of the nature of this imperfect world, and to take into account the range of historical, pragmatic, cultural, and political factors discussed in this chapter. Building sustainable peace, like reconciliation, is a dynamic process; the impacts of transitional justice should be assessed in those terms, in context, and at recurrent intervals, rather than in zero-sum terms of success and failure. Dealing with past abuses in a post-conflict situation is at best complicated, and it is a long-term process with no quick-fix, but it matters—normatively, pragmatically, psychologically, and structurally—so we should strive for the best possible outcome.

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## CHAPTER 4

# After Shocks: Exploring the Relationships between Transitional Justice and Resilience in Post-Conflict Societies

*Eric Wiebelhaus-Brahm*<sup>1</sup>

Violent conflict creates major stresses for individuals, households, communities, and countries. Among other hardships, individuals face the psychological trauma of being victims and/or perpetrators of violence. Households must deal with displacement, the loss of breadwinners, and the destruction of property. Communities and countries experience the destruction of infrastructure and the erosion of political institutions. Although infliction of the damage can be swift, recovery is a lengthy process that may take decades and is not guaranteed.<sup>2</sup> If resources are sufficient—which is a big if—property can be repaired or replaced. Social and psychological damage, by contrast, is long lasting and difficult to repair. Violent conflict often reduces individuals' trust in authorities and in one another. People learn to live in fear and avoid making long-term plans. Social norms and institutions may break down in the face of persistent conflict, hampering the ability of societies to deal with future crises, making them less resilient to shocks.

The notion of resilience has attracted significant attention in development circles in recent years. Development scholars and practitioners are interested in understanding why capacities to respond to natural and human-made crises are widely divergent among communities, and among societies more broadly. Most recently, in 2014, the *Human Development Report*, produced by the United Nations Development Programme (UNDP), and the World Bank's *World Development Report* both devoted considerable attention to resilience.<sup>3</sup> The World Bank emphasized the reactive dimensions of resilience, characterizing it as “the ability of people, societies, and countries to recover from negative shocks, while retaining or improving their ability to function.”<sup>4</sup>

Development specialists would like to introduce measures beyond the provision of emergency relief to reduce communities' vulnerability to future shocks. Given UNDP's reported view of existing definitions as too fixated on reaction to crises,<sup>5</sup> the significant emphasis placed by the 2014 *Human Development Report* on preparation and prevention is perhaps unsurprising. By comparing different responses to disasters across societies, UNDP's goal was

to identify factors and policy interventions that might improve the resilience of communities in the future. Ultimately, by promoting resilience, it hoped to reduce their vulnerability to shocks and help them better manage risk.

While increasingly prevalent, resilience is a tricky notion. Originating in materials science, the term has been adopted by psychologists, ecologists, and development scholars, among others. Its slipperiness has led some to call for standardizing its use. In reality, this is highly unlikely to happen. Indeed, as Ken Menkhaus argues, “Resilience is not a concept—it is a conceptually loaded word, one that carries many potential meanings from a variety of fields. This gives it very interesting potential, but also carries risks of misapplication and miscommunication.”<sup>6</sup> In recognition of this, resilience is defined for the purposes of this chapter as the ability of a social system to “absorb disturbance and re-organize while undergoing change so as to still retain essentially the same function, structure, identity and feedbacks.”<sup>7</sup> Resilient societies may adapt to or absorb shocks, but this does not mean they are necessarily unchanged by them, or that they will ever return to their pre-shock condition.

Intentionally or not, transitional justice is one policy intervention that likely affects the resilience of human societies. Societies have devised a variety of transitional justice measures, including criminal prosecutions, truth commissions, and reparations programs among others, that seek to redress human rights violations and the effects of widespread violence. The focus on transitions results from the reality that the opportunity to pursue justice often arises in situations in which there is at least the prospect of a transition from conflict and/or state repression. Some of the earliest transitional justice experiments in Latin America were rooted in the notion of *nunca mas* (never again)—in other words, the idea that transitional justice could prevent future violations. Although earlier efforts tended to deal with repression by authoritarian regimes, transitional justice measures since the 1990s have increasingly focused on confronting the legacies of violent conflict as well. While they do not use resilience language, proponents claim transitional justice processes can promote such outcomes as reconciliation, trust, and the rule of law, which development practitioners associate with more resilient societies. Nonetheless, some observers caution that claims about the effects of transitional justice warrant greater scrutiny.<sup>8</sup> In fact, as I will argue, whether transitional justice promotes or undermines resilience likely depends on how particular transitional justice measures are implemented. Moreover, levels of resilience will also likely shape transitional justice processes in important ways.

This chapter considers the potential relationships between transitional justice and resilience in post-conflict settings. Because explicit empirical

treatments of this relationship are lacking,<sup>9</sup> the piece is necessarily exploratory. It begins by reviewing the uses of the concept of resilience in policy and academic literatures. Next, the potential connections between resilience and transitional justice are outlined, and empirical work that may have relevance to this question is examined, with special emphasis on post-conflict settings. The chapter concludes with some thoughts on opportunities to bring these policy and academic discussions together more explicitly. To be sure, many aspects of resilience have little connection to transitional justice, at least as it is typically practiced. Nonetheless, while transitional justice is only one of many possible policy interventions, it holds the potential to promote or undermine the resilience of post-conflict societies. Although much depends on the particular circumstances before, during, and after the conflict, transitional justice seems most likely to promote resilience when it is designed and implemented primarily by local people and in ways that accentuate existing strengths of the social system. At their best, transitional justice may help promote government responsiveness and empower marginalized populations.

## **THE CONCEPT OF RESILIENCE AND ITS RELEVANCE TO POST-CONFLICT SOCIETIES**

The concept of resilience was first used in materials science; its initial application to humans was in the field of psychology. Psychologists are interested in the resilience of individuals to trauma, aging, and other life changes.<sup>10</sup> Interest in psychological resilience emerged in the mid-twentieth century, as psychologists considered why some individuals, particularly children, and families exposed to trauma were able to persevere and function effectively, while others were not. Research has found that even the most psychologically troubled families and communities possess some mechanisms that enable resilience.<sup>11</sup> The most effective way to promote psychological resilience, then, is to utilize endogenous relationships and support services.

In recent years, psychologists have examined the psychological effects of civil conflict and mass atrocity. As conflicts escalate, psychological changes can result. People may develop greater hostility toward the outgroup, as their perceptions of “the other” become dominated by fear and blame. Relatedly, whether or not it is justified, people often increasingly view themselves as victims.<sup>12</sup> This psychological context may provide more fertile ground for militant leaders, thereby escalating conflict further. Societies differ in their capacities to resist these appeals. Where communities succumb to violent rhetoric,



some policy interventions, like transitional justice measures, may help boost the society's resilience to violence.

The resilience idea has now been applied to a range of systems (political, social, economic, and environmental) to assess their vulnerability to shocks. In practice, resilience has often been used to refer to both the inherent (in)stability of a system and the relative amount of time it takes for a system to return to stability after a crisis. In the natural sciences, one of the earliest uses of resilience was in a 1973 paper by ecologist C. S. Holling.<sup>13</sup> Holling was dissatisfied with the field's overly static view of ecosystems, which, he argued, inhibited an understanding of how environmental systems respond when thrown out of equilibrium. In fact, Holling argued that it would actually be quite rare for a system to be in equilibrium. The effect of humanity on natural ecosystems was particularly profound:

As man's numbers and economic demands increase, his use of resources shifts equilibrium states and moves populations away from equilibria. The present concerns for pollution and endangered species are specific signals that the well-being of the world is not adequately described by concentrating on equilibria and conditions near them. Moreover, strategies based upon these two different views of the world might well be antagonistic. It is at least conceivable that the effective and responsible effort to provide a maximum sustained yield from a fish population or a nonfluctuating supply of water from a watershed (both equilibrium-centered views) might paradoxically increase the chance for extinctions.<sup>14</sup>

Changes are regularly introduced into systems, which eventually shift the system from one stable domain to another in which a different set of dominant mechanisms and feedbacks becomes operative. Holling's concept of resilience was agnostic about what a system normatively *should* look like. A polluted lake populated with algae blooms and trash fish may actually be highly resilient, for example, but still undesirable.<sup>15</sup> From this research, the notion of "ecological social resilience," with its emphasis on the interconnectedness of people and the natural world, was born. It has gained more attention in recent years, as the problem of climate change has been increasingly recognized.

While the broader application of resilience to human societies has only recently attracted the attention of academics and policymakers, interest in the concept has a long history. One of the earliest articulations of the notion of social resilience—though it did not use this language—was in analysis of the human response to the 1755 earthquake and tsunami that killed at least

70,000 people and destroyed the city of Lisbon, Portugal. For many European intellectuals at the time, the catastrophe provided further evidence of humanity's helplessness in the face of natural disasters. By contrast, Jean-Jacques Rousseau recognized that human action could have reduced the city's vulnerability. He argued that "nature did not construct twenty thousand houses of six to seven stories there, and that if the inhabitants of this great city had been more equally spread out and more lightly lodged, the damage would have been much less and perhaps of no account."<sup>16</sup> Moreover, an evacuation plan and a more timely response to the disaster would have saved countless lives. In other words, to an extent, the dire effects of the disaster were preventable. At minimum, policies could have been enacted to make the city more resilient in the face of the disaster.

Beginning in the 1990s, social scientists began using the concept of resilience in a range of disciplines, including economics,<sup>17</sup> political science,<sup>18</sup> sociology,<sup>19</sup> and planning.<sup>20</sup> In this literature, resilience is typically viewed as an aggregate measure: it is a characteristic of societies, communities, or households. As the resilience literature has developed, several divisions have emerged. First, resilience scholarship has increasingly taken on normative dimensions as researchers have outlined what social systems *should* look like.<sup>21</sup> Whereas efforts to promote ecological resilience may imply a "natural state" to which interventions might be directed, it is less clear what the ideal state of a social system is or should be. Even if one could create a perfect model of a community, unique cultural attributes and other characteristics make prescriptions for designing more resilient systems elsewhere potentially problematic.

Second, epistemological debates surround the question of whether one can actually measure all the variables at a level adequate to reliably make policy prescriptions for improving the resilience of a society. Scholars have explored how factors such as levels of trust, access to social resources, and perceptions of the legitimacy of social and power structures, among others, affect social systems' resilience to shocks. Common indicators used to measure resilience have included changes in humanitarian assistance needs, the depth of poverty, and hunger and malnutrition. These dimensions may reflect differing levels of resilience, but, arguably, they are not direct measures of it.

More generally, there is ontological disagreement over whether one can objectively assess whether or not a system is resilient, and whether it is possible to discretely alter complex systems. Similar critiques have been leveled regarding the suitability of transplanting transitional justice forms to different contexts and about measuring the effects of transitional justice processes.

As a result, no broad consensus exists among policymakers and academics as to what resilience is.<sup>22</sup> With its narrower focus on the environment, the Intergovernmental Panel on Climate Change describes resilience as “the amount of change a system can undergo without changing state.”<sup>23</sup> By contrast, acknowledging that change is an ongoing process, the United Nations International Strategy for Disaster Reduction defines it as “the ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner.”<sup>24</sup> Meanwhile, the United Kingdom’s Department for International Development views resilience as “the ability of countries, communities and households to manage change, by maintaining or transforming living standards in the face of shocks or stresses . . . without compromising their long-term prospects.”<sup>25</sup> Most recently, the 2014 *Human Development Report* introduced the notion of human resilience, the promotion of which involves “removing the barriers that hold people back in their freedom to act. It is also about enabling the disadvantaged and excluded groups to express their concerns, to be heard and to be active agents in shaping their destinies.”<sup>26</sup>

Like transitional justice, the malleability of resilience as a concept has opened it up to criticism.<sup>27</sup> A concept this broad can mean everything and nothing. As a result of this lack of definitional consensus, practitioners and academics frequently talk past each other. The problem is that, when analyzing and attempting to improve a system, there are multiple points of potential intervention, with generally little agreement on which would be the most effective. At the same time, this wooliness can be useful. Resilience can be defined and applied in different ways to suit diverse ideological perspectives and material interests. Indeed, if the various actors consistently worked to enhance resilience in all its forms, ultimately the system would likely be in much better shape, although tradeoffs and unintended consequences may decrease resilience in the short term.

Nonetheless, policymakers, activists, and academics have devised a variety of models to illustrate the factors that shape resilience. In peacebuilding contexts, five components are critically important:<sup>28</sup>

- **The psychosocial recovery of individuals and communities facilitates resilient social systems.** Suffering needs to be acknowledged, and collective, if not individual, responsibility for the trauma experienced must be accepted.
- **Resilient societies are those with shared systems of meaning.** The

more a community can draw on accumulated knowledge and experience, the better able it will be to respond to crises.<sup>29</sup> Communities shattered by violence need to engage in rituals that facilitate the creation of narratives about the conflict that bridge social divisions and generate ideas for addressing the underlying issues that gave rise to the violence.

- **Resilient societies are those in which individuals from different social groups live and interact in close proximity.** Day-to-day interaction can facilitate familiarity and understanding. Sharing services and resources can also generate a sense of common destiny. All things equal, more resources promote greater resilience. When a community has a variety of shared resources adequate to allow for some redundancy and suitable to the function for which they are employed, community resilience benefits.<sup>30</sup>

Yet, in societies beset by conflict, groups often socially, physically, and economically separate. In such cases, increasing resilience entails (re)creating interdependence. UNDP emphasizes how resilience is strengthened by ensuring universal access to social services, some measure of social protection, and full employment.<sup>31</sup> Much depends on community attitudes toward resources and their utilization.<sup>32</sup> In general, more resilient communities seek to build on local resource strengths and diversify their resources.

- **Integrated communities with higher levels of trust are more resilient.** Development experts have increasingly used the term *social cohesion* to refer to integration and trust within communities. While definitions of social cohesion, like definitions of resilience, vary considerably, most focus on the extent to which community members have an equal sense of belonging and attachment to the group and a shared vision of the future.<sup>33</sup> Where these crosscutting relationships remain durable, societies tend to be more resilient to violent conflict.<sup>34</sup>

Social cohesion is shaped in important ways by social capital, among other factors. For many scholars, social capital is a characteristic of individuals referring to the networks of social relationships among people in a social system.<sup>35</sup> In general, higher levels of social capital should produce greater social cohesion. However, research has shown that this is not necessarily the case. Some scholars draw distinctions between *bonding* and *bridging* social capital.<sup>36</sup> Whereas the latter indicates connections

across social groups (ethnic, racial, religious, and so on), the former indicates the strengthening of intragroup connections. Thus, building bonding social capital may lead to intergroup antagonism if it comes at the expense of building bridges. Developing bridging social capital is challenging where bonding social capital has been built in the context of conflict.<sup>37</sup> As a result, one challenge for societies emerging from conflict is to (re)build crosscutting ties that help societies recover from natural and human-caused disasters more rapidly.<sup>38</sup>

- **Public and private organizations promote resilience when they facilitate broad and inclusive governance.** Representative, inclusive, and proactive leadership promotes resilience.<sup>39</sup> In addition, resilience is enhanced when institutional rules and procedures are effective and legitimate. Legitimate institutions are those that are responsive to constituents.<sup>40</sup> In particular, community processes that consist of participatory planning and implementation promote resilience. The resilient community continually takes steps to achieve its goals and undertakes regular evaluations of progress in attaining them. Yet, cross-national studies of the poor find significant distrust of local and national government, as well as security forces.<sup>41</sup> As a result, according to the 2011 *World Development Report*, “Countries with weak institutions are disproportionately vulnerable to external shocks.”<sup>42</sup>

Societies emerging from significant periods of civil conflict will differ considerably along these five dimensions. People may disengage from their communities out of fear as they lose connections to each other and to their communities. Alienation also may be prevalent before the conflict. By contrast, individuals may strengthen their ties to their own groups but simultaneously reduce intergroup interaction in the context of escalating sectarian or xenophobic rhetoric. Resources are often destroyed or diverted to fuel conflict. Although conflict almost invariably saps communities of material resources, societies begin periods of conflict at very different levels of economic development. Legitimate, responsive authority may erode as social and political institutions collapse or are coopted by particular groups. Unaccountable government also may have preceded the outbreak of conflict. Addressing these problems is a long-term process, where multifaceted intervention is necessary. The next section focuses on the connections between resilience and transitional justice.

## POTENTIAL RELATIONSHIPS BETWEEN TRANSITIONAL JUSTICE AND SOCIAL RESILIENCE

The following consideration of the ways in which transitional justice and resilience can influence each other in societies emerging from periods of civil conflict draws on anecdotes from several countries and many types of transitional justice measures. Given the range of global transitional justice experiences and the tremendous diversity in human societies, the plausibility of diverse relationships between transitional justice and resilience is perhaps unsurprising. Low levels of social resilience, for instance, may result in a greater need for transitional justice but a lack of capacity to conduct a transitional justice process effectively, while communities with high levels of resilience may be better situated to conduct transitional justice but less likely to actually need it. Conversely, depending on how it is designed or implemented, the effect of transitional justice on resilience theoretically may be either to promote or undermine it. Each of these potentialities is discussed below.

It also is important to note that levels of resilience vary over time and space and are undoubtedly sensitive to the dynamics of the conflict cycle. For example, communities and societies will vary in terms of pre-conflict levels of resilience. Conflict escalation may erode resilience as physical assets are destroyed and diverse communities are torn apart by extremists. Conversely, conflict may increase resilience as intragroup bonds strengthen to resist the enemy. Violence may have actually emerged because a marginalized group mobilized in response to external threats.

This leads to another important observation: levels of resilience will vary considerably across a country, from region to region and social group to social group. They will not over the course of a conflict shift uniformly across groups or regions. Some parts of a country may be relatively unscathed by human rights violations. In the fairly simplistic sketch of these relationships presented below, the four configurations outlined are not mutually exclusive after a given conflict. Two or more types of relationships between transitional justice and resilience may characterize parts of a country at particular points in a conflict cycle.

### SOCIETIES LACKING RESILIENCE AND THE PURSUIT OF TRANSITIONAL JUSTICE

Societies contemplating transitional justice measures in the aftermath of civil war may have low levels of resilience, primarily due to the conflict itself and its root causes. Low levels of resilience may create multiple obstacles to pursuing transitional justice in almost any form, and post-conflict societies are likely to have low levels of resilience because widespread violence destroys social

capital, undermines political institutions, and destroys or diverts resources. Such societies may prioritize other pro-resilience policies, outlined in figure 1 below, viewing transitional justice as a luxury good they cannot afford at that time. The situation in Afghanistan was perceived in this way; some transitional justice initiatives were explored following the U.S. invasion in 2001, but U.S. and Afghan officials feared they would undermine the stability and security gains that had been made.<sup>43</sup> In a more resilient society, policymakers may have less reason to exhibit this fear.

Furthermore, resource issues may hamper a society's ability to deliver on transitional justice goals. In post-conflict societies as diverse as East Timor, Nepal, Northern Ireland, and South Africa, there is often high demand from victims for individual reparations.<sup>44</sup> Moreover, community members and academics alike frequently lament the lack of redistributive justice in these contexts.<sup>45</sup> However, with few material resources, low-resilience societies are often limited in their capacity to deliver on those demands, which may lead to the prioritization of lower-cost transitional justice measures.

To an extent, as transitional justice is increasingly conducted in poor, conflict-ridden societies, international donors sometimes step in to provide resources.<sup>46</sup> If donors decide to fund transitional justice measures, they are likely to make choices based upon their own interests rather than those of the society in question. Even more altruistic donors may not be good at identifying in what ways a society may be resilient, and therefore what types of transitional justice should be supported.<sup>47</sup> Where few material resources exist for transitional justice, local, "traditional" processes may be a more cost-effective, but not necessarily a less effective, approach to dealing with the past. Where devised in a more participatory manner, the use of such traditional measures may be a sign of substantial levels of resilience already being present.

Finally, international intervention in transitional justice processes seems more likely to occur in low resilience societies. The International Criminal Court (ICC), for example, operates under the complementarity principle, which means that it will investigate violations of international law—namely war crimes, crimes against humanity, and genocide—only when domestic judicial systems prove unwilling or unable to do so themselves. A weak or corrupt judiciary may be a symptom of a lack of resilience. In fact, a judiciary administering the law in a biased fashion might undermine resilience further by reducing trust in political institutions. The likelihood of universal jurisdiction cases in foreign courts should also be higher in scenarios involving low resilience societies. Universal jurisdiction is a legal principle that legitimates domestic courts' prosecution of the most heinous crimes such as crimes against humanity, war crimes, genocide,

and torture regardless of where the crimes occurred or the nationality of victim or accused based upon the notion that such crimes do harm to the international community. The prosecution of Rwandan *genocidaires* by several jurisdictions in Europe is an example of this phenomenon. Given the relative inability of external judicial intervention of any type to substantially change circumstances on the ground in societies emerging from conflict, these activities are unlikely to significantly boost resilience.

Where they do not forestall transitional justice, low levels of resilience can have consequences that influence the form it takes. Where judicial institutions are not perceived as effective or legitimate—which the literature suggests is a sign of a lack of resilience<sup>48</sup>—prosecutions of gross human rights violations are unlikely to be viewed as free and fair. After the U.S. invasion of Iraq in 2003, for example, the George W. Bush administration, its Iraqi allies, the United Nations, and international human rights activists all agreed that the country's domestic legal system was incapable of providing justice for crimes committed during Saddam Hussein's rule.<sup>49</sup> They differed, however, as to how to achieve justice in light of this reality.

More generally, because less resilient societies are characterized by institutions that lack accountability and legitimacy and by low levels of bridging social capital, transitional justice processes are more likely to be devised in biased ways. In addition, when levels of trust in government are low—another characteristic of societies that lack resilience<sup>50</sup>—all groups in the society are more likely to see transitional justice processes as unfairly targeting them and/or disproportionately benefiting other groups.

Transitional justice measures, as typically designed, may also be poorly suited to meet the needs of less resilient societies. Structural inequality, which has been identified as an important cause of conflict and human rights violations,<sup>51</sup> may be a significant source of vulnerability for social systems. Transformation from this type of inequality is, however, a long-term task that requires major commitment. Moreover, whether the goals typically articulated for transitional justice processes are transformational in this sense is not clear. Transitional justice measures are largely a product of late-twentieth-century efforts to promote civil and political rights globally,<sup>52</sup> which has led to significant skepticism as to whether it can adequately address, let alone adequately rectify, structural violence and violations of socioeconomic rights more generally.<sup>53</sup>

Even assuming transitional justice processes could be designed in such a way as to better address structural inequality, this would be difficult to achieve in practice. First, as much as in any other society, individuals in low-resilience societies have diverse needs and priorities. Meeting those diverse demands,



particularly with limited resources, may be challenging. Perhaps more importantly, victims in low resilience societies may be less able to advocate for their vision of justice. One legacy of structural inequality is likely to be that major segments of the population feel disempowered and resources are not distributed equitably or through participatory deliberation. In other words, in societies lacking in resilience, victims will likely be less able to articulate and press their transitional justice demands.

Finally, because less resilient societies are more vulnerable to shocks, crises may more easily derail or distract from transitional justice processes. In mid-1980s Argentina, approximately 2,000 military officers, including the leaders of the military junta, faced trial for alleged human rights violations committed during the military dictatorship.<sup>54</sup> A series of military uprisings ensued to demonstrate the military's displeasure with this turn of events. At the same time, the country was in the midst of a dire economic crisis brought on by soaring government debt. Although his predecessor enacted amnesty laws protecting most members of the armed forces, in order to soothe the financial markets and remove the distraction of military unrest, President Carlos Menem pardoned the generals not covered by the Due Obedience Law and his administration emphasized in its rhetoric that the past was in the past.<sup>55</sup> It was nearly two decades before those amnesty laws were abrogated, thereby reopening the floodgates for criminal prosecution.

Societies emerging from conflict suffer from deep distrust and often contain powerful spoilers who can disrupt fragile peace processes. For example, crises have interfered with transitional justice processes in several countries in the post-2011 Middle East. Processes in Egypt, Libya, and Yemen have been stillborn as a result of ongoing instability. In Libya, for instance, the government's inability to provide security has made a mockery of its claims to be able to provide fair trials to officials from Muammar Gaddafi's government. Social organization in post-Gaddafi Libya has been dominated by tribal militias that have generally pursued their own narrow parochial interests.

## RESILIENT SOCIETIES AND TRANSITIONAL JUSTICE

A high level of social resilience is likely a boon to the pursuit of transitional justice. In such an environment, basic needs are less likely to be a distraction, and society will have a greater ability to invest in transitional justice measures. In general, the government will be in a stronger position to respond to demands for justice by victims' loved ones and survivors. Even if a government is reticent, civil society actors, which are a significant element of the networks

scholars see as important in promoting resilience,<sup>56</sup> may step in to document abuses, conduct their own investigations, and continue to pressure the government, and perhaps the international community, to enact transitional justice measures. Several studies have highlighted the importance of civil society in instigating transitional justice processes.<sup>57</sup> In more resilient societies, which have higher levels of social capital and more accountable governance structures, transitional justice processes are more likely to be devised in an inclusive manner and to be implemented in a more balanced way.

Having said all this, societies emerging from long periods of widespread violence are not likely to possess inclusive governance arrangements and healthy state–society relations. Certain elements of resilience may allow for certain forms of transitional justice, though. When resilience is high before or during a conflict, it is likely built on bonding rather than bridging social capital. Depending on how they are constructed, truth commissions may be suitable in these situations. South Africa's Truth and Reconciliation Commission (TRC), for instance, has been widely praised for the inclusiveness of its creation and operation. It has been credited with effectively balancing demands for retribution and amnesty and ultimately promoting reconciliation.<sup>58</sup> While Tunisia's comprehensive transitional justice law was held up for nearly a year by a constitutional crisis and the assassinations of two prominent secular politicians, the effort was sustained by a relatively broad coalition of civil society groups, including labor unions and Islamist organizations, which shared a vision of the importance of transitional justice for the country's future. The vitality of civil society in Tunisia is a sign of relatively high levels of social capital and, by extension, resilience.

A shock may be necessary to create opportunities for pent-up transitional justice demand to be met, thereby revealing higher levels of resilience than was previously thought to exist. The 2004 Indian Ocean earthquake and tsunami, for example, led to significant cooperation between the Indonesian government and the Free Aceh Movement (*Geurakan Acèh Meurdèka*, or GAM), which had been fighting for independence for the Aceh region of the Indonesian island of Sumatra since 1976. Collaboration on disaster relief ultimately brought about successful peace negotiations. As part of the deal signed in 2005, GAM agreed to disarm, while the government agreed to withdraw nonlocal security forces and enable the formation of political parties. The two sides also agreed to an amnesty to facilitate demobilization and to the establishment of a truth and reconciliation commission to examine human rights violations committed during the insurgency. The commission never got started, however, as the negotiators envisioned it as part of a larger nationwide truth commission that was then in the process of being organized following

the passage of a 2004 law.<sup>59</sup> Since Indonesia's Constitutional Court ruled the law unconstitutional, the fate of an Aceh commission has remained at an impasse.<sup>60</sup> Meanwhile, observers credit the amnesty provisions with helping to promote democracy and human rights in Indonesia.<sup>61</sup> While ultimately victims' desire for justice has gone unfulfilled in Aceh, the shock of the tsunami did induce significant discussion of transitional justice.

#### THE POTENTIAL OF TRANSITIONAL JUSTICE TO PROMOTE RESILIENCE

How can transitional justice processes build resilience in post-conflict societies? To begin with, although material resources can enhance resilience, transitional justice generally seems limited in its ability to affect this dimension. Some research has found that transitional justice can encourage the inflow of foreign direct investment by sending costly and credible signals of the government's commitment to reconstruction.<sup>62</sup> Similarly, transitional justice appears to have a marginal ability to affect the distribution of wealth in society, which can be a source of grievance and vulnerability for people in the lower economic strata.<sup>63</sup> Some see a potential in truth commissions to identify structural causes of violence and to prompt measures to address inequality.<sup>64</sup> Critics, by contrast, argue that truth commissions have rarely lived up to this potential. In fact, some believe that transitional justice's blindness to violations of socio-economic rights will lead to processes to ignore, if not inflame, tensions over resource distribution.<sup>65</sup> Still others argue that the relationship between transitional justice and a society's material resources is too weak and indirect to be readily observable.<sup>66</sup> This may be true of society writ large, but there may be very real, measurable effects at lower levels of aggregation. Collective reparations that invest in health and education, for example, may help to build capacity and reduce vulnerability at the community level. Drilling down further, reparations programs may have dramatic effects on household resilience. Although it could be true that most transitional justice measures matter little for all aspects of resilience at the aggregate level, it is more plausible that they positively influence the governance structures and the prevailing norms through which resource allocation decisions are made.

Transitional justice may also promote resilience by enhancing the effectiveness and legitimacy of institutional rules and procedures, thereby (re)building connections between authorities and the masses. Nested layers of governance that are managed inclusively and on the basis of the rule of law are better able to provide the kinds of public goods that enhance resilience.<sup>67</sup> Measures like trials and vetting may improve the legitimacy of institutions by removing the

“bad seeds” who undermined institutions and used their positions to exploit others. In addition, several transitional justice measures have been connected with the promotion of the rule of law. For example, some argue that holding high-profile perpetrators criminally accountable for human rights violations sends a message to society that no one is above the law and that extralegal behavior is not acceptable.<sup>68</sup> Vetting procedures also may advance the rule of law by removing individuals who have abused their power and by signaling that such behavior will be unacceptable going forward.<sup>69</sup> Truth commissions, too, may promote the rule of law by drawing society’s attention to the consequences of its absence and by recommending institutional reforms that would enhance it if implemented.<sup>70</sup> Finally, reparations that are targeted toward marginalized populations may help to build vertical social capital—a term that refers to hierarchical connections to individuals in positions of power.

Transitional justice also may promote resilience by helping to restore a sense of community in post-conflict societies. One way in which it might do so is by helping to (re)build horizontal social capital. Debates surrounding whether and how to address the past can be a powerful instigator or sustainer of civil society activity. Pablo de Greiff has linked transitional justice, if done credibly and effectively, to the cultivation of social capital through its ability to increase trust in fellow citizens and the government.<sup>71</sup> Truth-telling exercises, for example, may help to overcome group divisions and create a sense of shared destiny within a society. Truth commissions in places like Chile and South Africa have been credited with creating new, unifying narratives on which an emerging, post-transition nation can be founded.<sup>72</sup> Commissions and local initiatives also may contribute to reconciliation at the individual and group levels by promoting empathy and forgiveness. Through all these means, bridging social capital may be built. Finally, truth commission reports may be a means through which collective memory about past crises and how to respond to them can be passed on.

A second means by which transitional justice can enhance society’s cohesiveness is through propagating new norms and values. The prosecution of human rights violations, for example, challenges the normative acceptability of violence,<sup>73</sup> while trials may satisfy demands for retribution,<sup>74</sup> thereby curtailing demands for revenge. Shocking truth commission revelations and the implementation of truth commission recommendations are credited with promoting human rights in South Africa, several Latin American countries, and in cross-national statistical studies.<sup>75</sup> In short, transitional justice processes may be beneficial in promoting empathy and preferences for peaceful means of resolving disputes. These factors, in turn, will help societies be resilient in the face of shocks.

If transitional justice can promote resilience, chances are the effect will be

very gradual. (Re)creating credible institutions and (re)building trust in them and in fellow citizens takes time. In fact, research has found that institutional transformation takes at least a decade, even in more ideal circumstances than is typical of societies emerging from conflict. In the twentieth century, the twenty countries creating effective governments fastest took an average of thirty-six years to do it; creating the rule of law took four decades.<sup>76</sup> The World Bank argues that, to reduce the chance of the recurrence of conflict and help promote trust, security, promoting justice, rooting out corruption, and job creation must be prioritized.<sup>77</sup> In theory, transitional justice has the potential to contribute at least to the first three.

### THE POTENTIAL OF TRANSITIONAL JUSTICE TO UNDERMINE RESILIENCE

Evidence also exists that transitional justice has the potential to undermine social resilience. Some argue, for example, that retributive measures can generate instability, particularly if conducted in environments where institutions are fragile or lack legitimacy.<sup>78</sup> Trials and vetting processes may strengthen bonding social capital, rather than bridging social capital, as group leaders who are targeted by such measures rally group members to their defense. Reparations programs and other transitional justice processes may direct attention and resources away from measures that would be better able to reduce vulnerability.<sup>79</sup> Reparations may also create resentment among those individuals and communities who do not benefit.

Moreover, transitional justice may not be a long-term boon for civil society. Given the growing prominence of donors in the Global North in funding transitional justice, the survival of local civil society organizations may rely heavily on outsiders,<sup>80</sup> leading to civil society's advocating transitional justice processes that fit donors' conceptions of justice but fail to resonate with local demands. As a result, civil society organizations may wither over time as they fail to connect with local demands and external donor interest wanes. More generally, depending on how they are conducted and/or perceived, transitional justice measures may reinforce divisions within society.

Moreover, transitional justice processes have the potential to further weaken institutional effectiveness and legitimacy. Retributive justice that is effectively victor's justice can undermine a government's legitimacy. Trials and vetting may remove from positions of authority people who, whether or not they were guilty of human rights violations, have valuable technical expertise that helps to maintain some level of resilience. In Iraq, for example, the politicized way in which the United States and its Iraqi allies purged the government of Ba'athists resulted in the dismissal of thousands of people with essential skills for maintaining

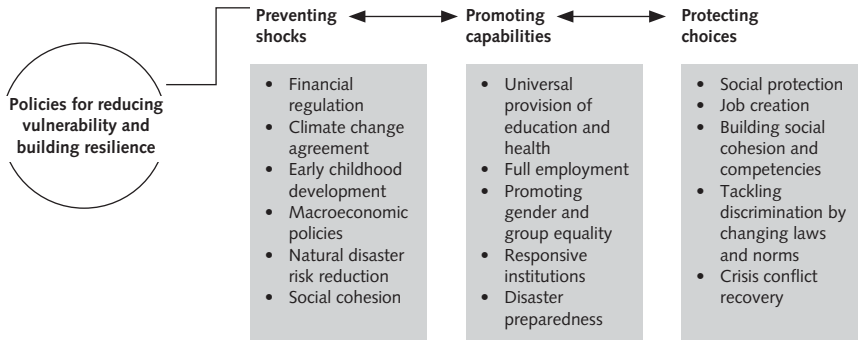
security and keeping the lights on and water flowing. Dismissal was based solely on membership in the Ba'ath Party (though Ba'ath Party membership was mandatory for government employees) and/or being in the upper echelons of the public sector, without considering evidence of actual wrongdoing.<sup>81</sup> The legacy of transitional justice efforts in Iraq continues to alienate the Sunni population and helps to explain the dramatic advances of the Islamic State of Iraq and Syria (ISIS) in mid-2014.

Finally, the use of customary practices as a means of transitional justice has attracted growing attention from scholars and policymakers as the standard forms of transitional justice have been criticized as too legalistic and Western. Various called customary law, traditional or indigenous practices, or local justice initiatives, processes that incorporate practices of conflict resolution and justice that resonate with communities emerging from conflict have been embraced with growing enthusiasm.<sup>82</sup> In societies emerging from conflict, customary law may be better able to address the scale of atrocities than the formal justice system and may possess greater legitimacy. Nonetheless, the romanticization of indigenous practices should be avoided. As with other forms of transitional justice, much depends upon the content of these traditional practices and how they are implemented. In particular, traditional measures may reinforce the power of male elders.<sup>83</sup> For example, Sierra Leone's truth commission facilitated reconciliation rituals that were adaptations of traditional practices. The practice, however, reinforced generational resentment among young people that had been a cause of the civil war itself.<sup>84</sup> Rwanda's *gacaca* process was a clever adaptation of traditional practices that enabled the central government to tightly control the transitional justice process.<sup>85</sup> Thus, traditional transitional justice processes also have the potential to undermine resilience by reinforcing patriarchy and further empowering illegitimate, ineffective power structures at the local level.

## CONCLUSION

The 2014 *Human Development Report* and the *World Development Report* devote considerable attention to resilience. Both emphasize strategies that promote resilience to reduce communities' vulnerability to external shocks and improve their ability to manage risk. Figure 1 outlines UNDP's understanding of how vulnerability can be reduced and resilience promoted. As the graphic makes apparent, transitional justice is only one of many policy interventions that potentially promote resilience. Nonetheless, as has been outlined here, transitional justice can be a significant element, for better or worse.

Figure 1: Policies for Reducing Vulnerability and Building Resilience



Source: 2014 Human Development Report, 26.

This chapter has articulated potential relationships between resilience and transitional justice. Much depends on the unique characteristics of the society, the conflict from which it is emerging, and the way in which transitional justice is debated and implemented. Simply put, more research is needed on how resilience and transitional justice can be made more self-reinforcing.<sup>86</sup> There are, however, several obstacles standing in the way of doing this. Indeed, the respective literatures dealing with resilience and transitional justice share two key similarities.

First, both wrestle with highly abstract ideas, including the very concepts themselves. Scholars and practitioners disagree on definitions of resilience and transitional justice. What characteristics are relevant to include in one's conception of resilience? What activities and policies constitute transitional justice? The scope of study is contested in both realms. Similarly, measurement challenges bedevil both fields. Empirically observing levels of resilience or its typical component parts, such as institutional legitimacy and social capital, is just as difficult as measuring other concepts such as justice, reconciliation, and healing, that are important to the transitional justice field. With respect to promoting resilience, as the 2014 *World Development Report* puts it, "Research tends to be stronger on the diagnostics—the nature of shocks, their impacts, and the ways people cope—than on the particular policies to address vulnerability and ways they might promote opportunity."<sup>87</sup>

Second, both literatures confront what international relations scholars call

a “level of analysis” problem. What unit of analysis should be used? Is resilience a characteristic of individuals, households, communities, and/or nation-states? Are the effects of transitional justice best observed at the individual, community, or societal level? In reality, there is no right or wrong answer to these questions. Great care is, however, needed in interpreting the findings and policy recommendations of particular pieces of research in light of these differences. In short, while empirical research that explores the relationship between transitional justice and resilience is desirable, doing it will not be easy.

Transitional justice and studies of social resilience also share concerns about the role of outside actors. Transitional justice scholars and practitioners have drawn our attention to the dangers of transitional justice processes being driven by external interests and perceptions.<sup>88</sup> Where this happens, transitional justice will likely fail to meet the needs of victims and the broader community affected by violence. Given divergent expectations, foreigners are likely to evaluate transitional justice processes differently than locals. Likewise, external observers and locals may reach different assessments about levels of resilience and about the adaptations that could increase it.<sup>89</sup> Applying resilience to conflict and post-conflict situations reveals not only that an array of factors are involved in promoting resilience, but also that its promotion is a long-term process.<sup>90</sup> This fits with understandings of transitional justice goals, like healing and reconciliation.

In other words, it is most appropriate to think of the promotion of resilience and transitional justice as gradual, complex transformations that require long-term commitment. In the promotion of both, it is important to be context-sensitive, to understand the capacities that individuals, households, communities, and societies already possess, in order to effectively prescribe policy interventions that will address local needs.

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## CHAPTER 5

# Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition

*Clara Sandoval*<sup>1</sup>

Transitional justice is a relatively new field of policy intervention in states moving from conflict to peace, or from repression to democracy. In transitions from dictatorship to democracy in countries like Chile and Argentina, it mainly focused on unveiling the truth about atrocities that had occurred in the context of primarily violations of civil and political rights. But it has been applied in states with very different political and economic landscapes and post-conflict situations, such as Liberia, Nepal, and East Timor, where demands for transition have extended beyond the spheres of truth seeking, accountability, reparation, reconciliation, and institutional reform. In these states, there have been strong calls for social justice transformations to address structural inequalities, poverty, and social exclusion, and transitional justice principles, processes, and mechanisms have, to a certain extent, been seen as vehicles to those ends.<sup>2</sup>

Such calls are partly a response to a perceived failure of transitional justice, to date, to address many of the key causes or consequences of repression or conflict—for example, the failure of the South African Truth and Reconciliation Commission to fully address racial discrimination and its devastating consequences.<sup>3</sup> Similarly, important literature on peacebuilding has put forward the idea that a “just peace” should be sought, meaning “a dynamic state of affairs in which the reduction and management of violence and the achievement of social and economic justice are undertaken as mutual, reinforcing dimensions of constructive change.”<sup>4</sup> The perceived failures of past transitional justice efforts, coupled with this literature, have had a significant impact on the field.

Some believe that transitional justice processes and mechanisms constitute tools to deal with these other dimensions of conflict, such as inequality, poverty, and social exclusion, regardless of whether they are root causes or consequences of violence. This has forced policy makers, practitioners, and academics to consider how, and if, transitional justice can contribute to such ends.

Some of the literature supports either the enlargement of transitional



justice to deal with violations of economic, social, and cultural rights or the widening of possible perpetrators to include certain types of nonstate actors like corporations.<sup>5</sup> Others have tried to create synergies and linkages between transitional justice and parallel interventions, like development or peacebuilding,<sup>6</sup> while still others have even suggested an alternative agenda for the field under the concept of “transformative justice.”<sup>7</sup>

While the debate is growing, it does not always shed light on the transformative potential of transitional justice. The meaning of *transformative justice* remains vague and unclear, as are its desired goals and the ways to achieve them. Equally, the role of context—for example, in situations of ongoing conflict, failed states, new states, new forms of conflict, and cross-border conflicts—as a key variable for understanding the field’s transformative potential is often overlooked. Further, the preconditions for bridging the gap between what is feasible in a transitional justice context and what is normatively desirable from a transformative justice point of view have not been given proper attention.

These shortcomings need to be addressed. It is essential to understand the limits and possibilities of transitional justice’s role in achieving major social change such as the reduction of structural inequalities, discrimination, and poverty. This is important if creating false expectations among victims and societies undergoing transition is to be avoided. It will also help to focus the work that transitional justice processes and mechanisms can and should do in the future.

This chapter constitutes a contribution to this ongoing debate by changing the terms of the discussion. It argues that transitional justice has the potential to contribute, albeit in a modest way, to how societies could address some pervasive problems through structural social changes that are part and parcel of its remit, but it disagrees with those who see this field as a magic solution to the problems of structural inequality, discrimination, and poverty. To this end, it shows the importance of answering fundamental questions, such as: What is transformative justice? How can transitional justice measures have a transformative effect? What are the preconditions for transitional justice to be transformative? And what is the nature of social change in periods of transition?

## **THE TRANSFORMATIVE POTENTIAL OF TRANSITIONAL JUSTICE: TRACING ITS ORIGINS AND MAKING DISTINCTIONS**

Transitional justice has been traditionally understood as “the set of measures implemented in various countries to deal with the legacies of massive human rights abuses. These measures usually include criminal prosecutions, truth

telling, reparations, and different forms of institutional reform.”<sup>8</sup> While this definition does not contain a promise to deliver social justice,<sup>9</sup> many see in the field a unique opportunity to achieve significant social transformations, including poverty reduction and the elimination of discrimination.<sup>10</sup> This view has gained so much momentum that the United Nations has even changed its institutional approach to transitional justice. An important development in this area is evident in the contrast between the UN Secretary-General’s 2004 report on the rule of law and transitional justice in conflict and post-conflict societies and the 2010 *Guidance Note of the Secretary-General: The United Nations Approach to Transitional Justice*. While the 2004 report recognized the problematic issue that very little was being done to address the root causes of conflict,<sup>11</sup> the 2010 Guidance Note went a step further by stating that the United Nations should “strive to ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights,”<sup>12</sup> with the understanding that these actions could include dealing with discrimination, exclusion, poverty, and violations of economic, social, and cultural rights, if applicable.<sup>13</sup> The Guidance Note implies that transitional justice mechanisms and processes have the capacity to deliver on these issues, which are deemed to be central for significant social transformations to occur.<sup>14</sup>

This shift is not without controversy, as transitional justice has had a much more limited remit in practice and many of its advocates consider it to be an inadequate means to deal with social transformation. For example, Lars Waldorf argues that “transitional justice in its current form is ill-suited to addressing socio-economic wrongs,” as it “struggles to deliver on its original promises of truth, justice and reconciliation.”<sup>15</sup> Its mechanisms are too weak to deal with these issues because budgets are already tight and those working on transitional justice are sometimes less knowledgeable about how to tackle social justice issues.<sup>16</sup> Nevertheless, the call for social justice is supported by key stakeholders, including civil society organizations and victims, as well as the academic literature.

## TRANSFORMATIVE REPARATION

It is unsurprising that the first discussions of the idea of *transformative justice* appear in the context of reparation. From very early on, practitioners and academics alike have rightly argued that reparation is the most victim-friendly, or victim-focused, transitional justice measure.<sup>17</sup> The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007) asserts that “reparation must drive post-conflict transformation of socio-cultural injustices,

and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation."<sup>18</sup> This call for gender justice (or full gender equality and equal enjoyment of rights) means, for example, that a woman who is raped would not be adequately redressed if she is merely provided with access to mental and physical health services or is awarded compensation for the harm she suffered, if the enabling conditions themselves have not changed. This is because she will continue to suffer the stigma of being a rape victim, while the conditions that made the sexual violence possible continue, preventing her from recovering from the harm she suffered or potentially leading to her suffering further harms. Reparations should therefore aim to not only address the violation and ongoing harm suffered but also transform the conditions that initially made them possible, such as cultural stereotypes and stigma surrounding sexual violence.

Guarantees of nonrepetition, a core aim of transitional justice, would be a useful tool to this end and remain crucial to realizing the transformative potential of transitional justice. Such measures are required in a state that is transitioning from dictatorship to democracy or from conflict to peace, to ensure that gross human rights violations and serious breaches of humanitarian law do not recur.<sup>19</sup> As Pablo de Greiff states, this component of transitional justice is not like the other measures as it refers to a function that can be carried out by diverse preventive measures; some of these will overlap with truth seeking, criminal justice, and reparation but will also go beyond them.<sup>20</sup>

For example, the Inter-American Court of Human Rights had to decide in *González et al. "Cotton Field" v. Mexico* whether Mexico was internationally responsible for failing to prevent the sexual abuse and murder of a woman and two girls in a case emblematic of the *feminicidios* (gender-related killings) that have ravaged Mexico and other Central American countries. The court found the state responsible for various violations, but, more importantly, for the first time in its ground-breaking jurisprudence on reparation, it stated that the redress should be transformative:

Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State . . . the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.<sup>21</sup>

The argument here was that it would be wrong simply to return the victims to the same situation they were in before the violation took place—*restitutio ad integrum*—because that situation was one of structural discrimination. In adopting this position, the court sought to strike a balance between *corrective justice*, which is achieved through reversing the harm done, and *distributive justice*, which not only rectifies the previous situation but also takes measures to address issues related to the distribution of resources, benefits, and burdens of victims as well as any systemic discrimination. The court also outlined some criteria to assess the request for reparations—for example, stating that the forms of reparation requested should aim to restore the victim to the status quo ante (“the way things were before”) “to the extent that this does not interfere with the obligation not to discriminate” or that the reparations “are designed to identify and eliminate the factors that cause discrimination.”<sup>22</sup> Despite the importance of these new criteria, the court did not apply them to the reparations it ordered in this case, so questions remain about the best way for the state to provide transformative reparations.<sup>23</sup>

While the *Cotton Field* case did not deal with violations committed in the context of conflict or repression, the move toward transformative reparations converged with similar ideas developed in the context of transitional justice, particularly in the area of gender justice. Indeed, gender experts like Ruth Rubio-Marín have argued that reparations for women could have transformative potential.<sup>24</sup> Specifically, she contends that the design and implementation of reparations should avoid formal gender discrimination, find ways to ensure “that patriarchal norms and sexist standards and systems of values are not leaked into reparations,” and explore ways “to optimize the (admittedly modest) transformative potential of reparations programs so that they serve to advance toward the ideal of a society altogether free of gender subordination.”<sup>25</sup>

The idea that reparations should be transformative has been incorporated into UN policy and operational guidance as requested by the UN Secretary-General in his 2014 *Guidance Note on Reparations for Conflict-Related Sexual Violence*.<sup>26</sup> Indeed, the document establishes, as a key guiding principle for operational engagement, that “reparations should strive to be transformative, including in design, implementation and impact.” However, it acknowledges that reparations cannot, by themselves, remove the root causes of conflict or repression, though they can contribute to promote, and trigger change.<sup>27</sup>

Rodrigo Uprimny also has made a call for reparations to be transformative, emphasizing the importance of challenging unjust economic and power structures. When providing reparations in a transitional society, he argues,

“we are making efforts to correct past harms but in an unjust society, with deep inequalities and widespread poverty.”<sup>28</sup> Therefore, “states should make a deliberate effort to harmonise reparation efforts with poverty reduction policies and development strategies.”<sup>29</sup> Again, Uprimny attempts to reconcile and balance corrective and distributive approaches to justice when awarding reparations in transitional societies. In his view, policy makers could achieve this through their selection of beneficiaries and benefits, procedural designs, and the inclusion of reparation efforts focused on the provision of social and welfare services.<sup>30</sup> An example would be to provide significant material reparations to the most vulnerable victims, while minimizing them for those who are less vulnerable and more affluent.<sup>31</sup> Certainly, taking context into account, as suggested by Uprimny, could conflict with victims’ equal right to adequate, prompt, and effective reparation. Yet, for Uprimny, “a transformative concept, far from weakening the right of victims to reparation, makes it more meaningful, because it shows that compensation of victims is compatible with the pursuit of a more just society for all.”<sup>32</sup>

It is important to note, however, that while both Rubio-Marín and Uprimny appear optimistic about the important transformative potential of reparations, they also recognize that the contribution of such an approach remains modest overall. This point is crucial because they do not see reparations as a panacea with the potential to solve deep-seated inequalities and poverty. In fact, Rubio-Marín considers that gender reparations have an important preventive role, as they can prevent the perpetuation of patriarchal hierarchies and ideologies and help to empower women. For Uprimny, reparations can “deepen democracy and improve distributive justice.”<sup>33</sup>

#### **ENLARGING THE FIELD OF TRANSITIONAL JUSTICE: TRANSITIONAL JUSTICE AND THE ECONOMIC AND SOCIAL DIMENSIONS OF CONFLICT OR REPRESSION**

The claim that reparations should be transformative is one of the current transitional justice conceptual challenges, but it is not the only one. Other conceptual views could be classified as follows, transitional justice should: 1) deal with the economic and social dimensions of conflict or repression; 2) deal with violations of economic, social, and cultural rights and the root causes of conflict or repression, not just with violations of civil and political rights; and 3) tap into development and other policy interventions that occur in parallel with it. Given the interrelatedness of these issues, they are presented here under the broad heading of the “economic and social dimensions of conflict

or repression.” These challenges may affect distributive-justice issues but not to the same extent and not necessarily as a result of a deliberate choice. For example, it is possible to advocate for the need to investigate and prosecute corporations, and to secure reparation from them, for their involvement in the commission of serious international crimes, simply because this is a natural consequence of pursuing accountability and redress for violations and not because it will achieve distributive justice.<sup>34</sup> There is nothing inherently transformational in these challenges, although they may still prove to be the trigger for important social change in transitional societies.

Some practitioners and academics have challenged traditional transitional justice discourse, arguing that a key opportunity to deal with the economic and social dimensions of conflict or repression is being missed when transitional justice mechanisms have not addressed violations of economic, social, and cultural rights as well as economic crimes, poverty, economic policies, development, structural discrimination, corruption,<sup>35</sup> and/or the responsibility of nonstate actors like corporations. They believe that

in many instances economic and social conditions and policies are closely linked to human rights abuses and might constitute a cause, means and/or consequence of conflict and authoritarianism [and that] ignoring potential links might then mean to ignore an important side of past injustices and could, at worst, lead to the recurrence of conflict and abusive practices.<sup>36</sup>

They also argue that

the failure to include economic concerns in transitional justice mechanisms tends to make transition into a political rather than an economic story, limiting knowledge of the economic underpinnings of conflict, narrowing the story of regime change and quelling discussion of development plans by quarantining them within the state and the executive rather than making them part of the transitional justice conversation.<sup>37</sup>

In short, there is a wide range of views supporting the expansion of what transitional justice commonly addresses, but not all are based on the same assumptions. For some, transitional justice should be enlarged to deal with violations of economic, social, and cultural rights as they believe that doing so would allow justice to “contribute as it should to societies in transition.”<sup>38</sup> Indeed, they assert that some degree of distributive justice is implicit in the respect, protection, and fulfillment of economic, social, and cultural

rights.<sup>39</sup> As the preamble to the International Covenant on Economic, Social and Cultural Rights states, these rights “establish the minimum conditions required for people to live in a dignified way, to ensure freedom from fear and want, and the continuous improvement of these conditions.”<sup>40</sup> According to Louise Arbour,

Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social and cultural rights.<sup>41</sup>

Addressing violations of economic, social, and cultural rights through transitional justice mechanisms has also been understood by some as a key way to restore capabilities of diverse sectors of society and promote the meaningful participation of historically marginalized groups.<sup>42</sup>

While discussion continues about the extent to which these rights should be included within the field of transitional justice,<sup>43</sup> their inclusion in the work of various recent truth commissions, such as Timor-Leste’s, Kenya’s, and Tunisia’s or the truth commission discussed in Colombia,<sup>44</sup> have demonstrated the need and inclination to address them in certain situations.<sup>45</sup> Even the United Nations has moved toward operationalizing this inclusion.<sup>46</sup>

Others have advocated for linking transitional justice and development through issues such as poverty reduction, land redistribution, universal education, health care, good governance, and human rights,<sup>47</sup> with the potential to at least, to some degree, “improve the socioeconomic conditions of people.”<sup>48</sup> However, different views exist about the type of relationship that should be fostered between the two fields.<sup>49</sup> Some have suggested one possible angle would be via the concept of human development, given that a failure to address past atrocities would hinder the development and exercise of victims’ capabilities and thereby prevent them from being and doing what they choose.<sup>50</sup> But most of the literature addressing this connection looks at particular transitional justice measures and the way they can coexist harmoniously with development, or the way that development tools, such as aid or conditionalities (pursuing certain policies or achieving certain results), should be managed.<sup>51</sup>

Those looking at reparations, for example, contend that efforts to redress serious harm should be done from a development angle, as Uprimny has proposed.<sup>52</sup> Instead of providing monetary compensation, for instance, which might be used to pay victims' debts or be distributed among family members, some argue that compensation could take the form of shares in microfinance institutions because this practice might empower victims in the future.<sup>53</sup> Others argue that development packages and aid could include the financing of reparation programs.<sup>54</sup> By understanding guarantees of nonrepetition as a reparation measure with both forward- and backward-looking dimensions, they could be used to prevent corruption and other financial crimes and setbacks that both hamper development and spark conflict or repression.<sup>55</sup>

But enlarging the field of transitional justice—that is, extending its scope to include development issues (such as poverty and marginalization), corruption, or violations of economic, social, and cultural rights—is not the same as claiming that transitional justice is or could be synonymous with transformative justice. Indeed, as has been argued, these matters may be addressed by transitional justice mechanisms because they are either a root cause or consequence of conflict or repression, and/or because not dealing with them would prevent transitional justice from achieving its goals. Certainly, if a serious attempt is made to tackle a conflict's root causes or consequences it will inherently constitute a transformational effort; however, that is not the same as saying that transitional justice is, by itself, transformational of social conditions. Therefore, it is vital to understand that while commonalities exist between the transformative justice discourse in the field of transitional justice and the views of those appealing for the enlargement of the field, they do not necessarily have a common transformative agenda. To understand more about the differences between these two strands, it is important to examine the literature on transformative justice.

#### **"TRANSFORMATIVE JUSTICE": BEYOND ENLARGING THE FIELD OF TRANSITIONAL JUSTICE**

The term *transformative justice* frequently appears in the writings of practitioners and scholars working on transitional justice issues and related fields. Indeed, and just by way of illustration, a search for these words in the leading journal on the subject, *The International Journal of Transitional Justice*, highlights the importance of the concept in current literature. Of the more than 300 articles published by the journal between 2007 and the first issue of 2016,<sup>56</sup> the term *transformative justice* or alternative terms such as *transformative change*,



*transformative transitional justice*, or *transformative* as an adjective appear in almost every single article. This reflects the perception among both practitioners and academics that the transformative dimension of transitional justice is a key area of inquiry, even if disagreements remain over the extent to which transitional justice could be transformational, how much transformation could be achieved, and how to operationalize it.

Two such articles are of particular note. The first, “Transitional Justice and Peacebuilding After Mass Violence,” written by Wendy Lambourne in 2009, shows the impact of peacebuilding literature on transitional justice. It aims to “develop a model of *transformative justice* that supports sustainable peacebuilding.”<sup>57</sup> While Lambourne explicitly identifies some conditions for transformation—such as civil society participation; transdisciplinary, long-term, and sustainable processes; the inclusion of different cultural approaches to justice; and the transformation of social, economic, and political structures<sup>58</sup>—she does not flesh out the concept or provide an agenda for change. Indeed, her article is an attempt to diagnose the problems of the field in order to claim that “what is needed is a revolution in thinking that challenges the dominance of western legal discourse and creatively and inclusively develops new ways of conceiving of accountability mechanisms that provide a more comprehensive and holistic experience of justice.”<sup>59</sup>

The second article, “From Transitional to Transformative Justice: A New Agenda for Practice,” written by Paul Gready and Simon Robins in 2014, was one of the journal’s most-read articles as of July 2016. The authors build on Lambourne’s analysis but go further in their attempt to outline a concept of *transformative justice* that involves “transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.”<sup>60</sup> They also support enlarging the field of transitional justice to address issues such as development and violations of economic, social, and cultural rights. However, they believe that existing attempts in this direction have “fall[en] short of a transformative approach”<sup>61</sup> because they have prioritized civil and political rights; dismissed the value of positive peace<sup>62</sup>; taken a top-down, state-centered approach controlled by an elite of professionals and donors, which undermines local participation and empowerment; and failed to address the ongoing and changing violence that persists well after a transition has “ended.”<sup>63</sup> They argue for a different approach, developed in close cooperation with peacebuilding and conflict-transformation efforts,<sup>64</sup> that would emphasize the process through which victims are empowered, rather than just outcomes.

Articles calling for transformative justice share some underlying assumptions.<sup>65</sup> First, transitional justice should and could deal with structural inequality and discrimination, including gender power relations. This implies enlarging the field to deal with, among other issues, development questions and violations of economic, social, and cultural rights but also to work in tandem with other peacebuilding and conflict-transformation activities. Accordingly, dealing with these areas is not only about enlarging the field but also about transforming social conditions. Second, a different type of response is needed, one that prioritizes process, context, participation, and needs over outcomes and that adopts a bottom-up approach to addressing violations and providing redress, one that is not state-centered and that is driven by victims and for victims.<sup>66</sup> Third, transitional justice is not just a legally driven field; a transformative approach would also involve drawing on other disciplines beyond law, such as politics or economics.

Collectively, these common assumptions denote a change in approach to transitional justice that goes beyond merely enlarging the scope of the field; they emphasize the form and the process through which the field is enlarged. In a way, they put forward a victim-centered approach to transitions. While the literature on transformative justice has yet to provide concrete tools to fulfill these ambitions, it nevertheless constitutes a radical attempt to change the field of transitional justice.

#### **PRELIMINARY CONSIDERATIONS REGARDING THE SEARCH FOR TRANSITIONAL JUSTICE'S TRANSFORMATIVE POTENTIAL**

Missing from the transformative justice literature is a detailed examination of the capacity and potential for the field to be truly transformative. Such an inquiry would require consideration of the meaning of transitional justice and its goals, the context in which transitional justice processes and mechanisms are used (the types of conflict and/or repression to which it responds, along with other variables, like state fragility or failure), the meaning of social change, and the nature of the field of transitional justice itself.<sup>67</sup> These essential building blocks frame the limits and opportunities for any type of transformation. What follows are some reflections on the *capacity* of transitional justice to be transformative.

## THE TRANSITIONAL JUSTICE CONTEXT

Transitional justice processes take place in a context where, as a general rule, a political rupture in the continuum of violent conflict or repression has occurred. The rupture results from a new configuration of political forces that is able to challenge the dominant system.<sup>68</sup> For instance, in Argentina, the 1982 embarrassing defeat in the Falklands War and economic stagnation that followed helped to bring about the fall of the military junta in 1983 and the end of the so-called Dirty War, which then led to the restoration of democracy.<sup>69</sup> In Liberia, international pressure against the rule of President Charles Taylor during the Second Liberian Civil War (which began in 1999) brought the country to a political breaking point, leading Taylor to step down and paving the way for a peace agreement to be signed in 2003 and a transitional government to be installed until new elections were held in 2005.<sup>70</sup>

Such ruptures represent a break from the old system and from the ideology (political, legal, social, cultural, and so on) that allowed atrocities to occur. These breaks have multiple causes, often related to the loss of political power and legitimacy of one of the sides and/or the need to address the root causes of the conflict or political repression. They give rise to unique opportunities for the reconfiguration of politics and power that allow transitional justice mechanisms and processes to be deployed. Nevertheless, the social, political, economic, and cultural contexts behind the atrocities, including their root causes and perpetrators, tend to vary greatly between countries, particularly between countries transitioning from a repressive regime and those transitioning from conflict. One constant, however, is the gross nature of the violations that have taken place, even if the scale of the atrocities and damage differs from one place to another.

In Liberia, for example,

the country's infrastructure was destroyed: there were no electrical grids, public running water, sewage, or other utilities . . . Bullet holes adorned the buildings, lampposts, and street signs. Hundreds of thousands of internally displaced Liberians fled to Monrovia, a city that could accommodate far fewer, resulting in massive slums of tin shacks, garbage, human waste and disease.<sup>71</sup>

There was "devastation of both the people and state institutions, denoting the collapse of both state and society."<sup>72</sup>

The nature of the violence in Argentina was very different. There, the government and right-wing death squads carried out violence against very

specific groups of people targeted because they were seen as political or economic threats: left-wing activists and militants, political dissidents, and those suspected of supporting socialism, including trade unionists, students, and journalists.

Those responsible for violations were mainly state servants, members of the police or the military, under the command of four different military juntas that were in power from 1976 to 1983, or the *Montoneros*, a leftist rebel group. As in Liberia, other states also played a role, as illustrated by Operation Condor, a campaign of political repression and state terror involving intelligence operations and assassination of opponents, carried out in the Southern Cone of South America.<sup>73</sup>

In Argentina, poverty was far less widespread than in Liberia. State institutions used by the junta to carry out atrocities needed to be purged, not built from scratch. The challenge at the time mainly related to how to turn repressive institutions into rights-respecting ones and to improve the economy.<sup>74</sup> In Liberia, perpetrators of atrocities included government officials, members of various militias and rebel groups, such as the National Patriotic Front of Liberia, the Independent National Patriotic Front of Liberia, Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia, and the Revolutionary United Front, as well as powerful political figures like Samuel Doe and Charles Taylor. All of these individuals and groups had control over different parts of the country and, in some cases, even enjoyed the support of neighboring states. The root causes of conflict in Liberia included competition for resources, tribal and ethnic tensions, poverty, and inequality. In terms of the types of violations and their scale, it is calculated that in Liberia between 1989 and 2003 over 250,000 persons were killed, over one million were internally displaced, and hundreds of thousands were made refugees.<sup>75</sup> These numbers are particularly high if we consider that, in 2000, Liberia had approximately 2.9 million inhabitants.<sup>76</sup> This means that approximately 50 percent of the population were victims of the conflict.

In Argentina, on the other hand, an estimated 10,000-30,000 individuals went missing and were likely forcibly disappeared during the Dirty War.<sup>77</sup> Many others were tortured, detained, and denied civil and political rights, with certain political parties being banned—and their family members and friends intimidated. At the height of the repression 26 million inhabitants lived in the country, meaning the percentage of victims in Argentina was significantly lower than in Liberia. This is in line with the state's targeted use of violence.

Different contexts, root causes, perpetrators, and scales of violence mean not only different challenges for transitional justice mechanisms but also

different opportunities for social change. While social change was and is possible in both Argentina and Liberia, it is important to clarify the nature of the type of potential social change in each country. The deployment of transitional justice mechanisms constitutes a unique, if small, window of opportunity to contribute to the transformation of dominant ideologies and structures that permitted or consented to atrocities. Nevertheless, the transformative potential of transitional justice depends highly on the capacity of its mechanisms to respond to and deal with challenging conditions that predate their work.

#### THE MEANING AND FORMS OF SOCIAL CHANGE: ORDINARY, STRUCTURAL, AND FUNDAMENTAL

The idea that transitional justice can be transformative relies on the assumption that social change is possible. In other words, one must believe that it is possible to remove the social, political, economic, and cultural conditions that allowed for the repression or conflict to take place—and to move toward the realization of certain desired social goals, such as human rights protection, democracy, and rule of law.

However, the potential for social change is often taken for granted, while the capacity of the social system to remain unchanged is usually overlooked.<sup>78</sup> The degree of “fixity” of those elements of the social system that prevent transformations from taking place should be carefully scrutinized to understand whether these preexisting conditions can be changed in a transformative manner.<sup>79</sup> One key aspect in this regard is the existence of a dominant ideology, that is, a set of beliefs about what is right and wrong that permeates everyday life and that exists and is reproduced, reinforced, and perpetuated using law, education, politics, media, culture, and religion. Dominant ideologies can facilitate or permit atrocities—when, for example, they are supported by those with political and economic power to persuade others of what is right and wrong.

We may distinguish between three different types of social change: *ordinary change*, *structural change*, and *fundamental change*. These types of change can apply in any type of social context, but the key to distinguishing between them is the impact each has on dominant ideologies and social structures. In the case of transitional justice, it is important to understand whether, when, and why these changes are possible.

When political, social, economic, and/or cultural changes result in a transformation of *both* the ideologies *and* the structures that supported the conflict or the repressive regime, then they will constitute fundamental social change. If they do not, they constitute ordinary social change or structural social

change alone. Structural change on its own does not amount to fundamental change even if it can contribute to ideological change.

*Ordinary social change* refers to everyday changes that align with dominant ideologies and structures in society. For example, during the so-called Global War on Terror, security concerns in many countries have been prioritized over human rights considerations. It may even be said that people in general believe that strong security measures are needed to fight terrorism. This belief is not new but simply builds on existing ideologies and structures reproduced through law, education, media, and other means.

Equally, the enactment of an amnesty law or a statute of limitation in a given country could constitute, depending on the context, a form of *ordinary change* common during transitional periods, even if it also represents a legal change. While these laws, as well as antiterrorist views, could be seen as extraordinary measures because they are adopted under exceptional circumstances, they are generally put in place or enacted to maintain the ideologies that facilitated atrocities or to arrive at a compromise with them. Though they may emerge as a result of a significant political struggle and face significant resistance, ultimately they do not necessarily threaten or transform the dominant ideology or structures. They either perpetuate them or, at most, weaken them without transforming their foundations.

*Structural change* is a bit more complex; it can sometimes give the illusion that fundamental social change is at stake. A good example is the adoption of a new constitution. Such a change is often considered to be fundamental, given that the very foundations of the legal system have been overhauled. However, this type of change is, in fact, structural because, while it may be necessary, it is insufficient to transform the dominant ideologies and structures. The adoption of a new constitution, while an important guarantee of nonrepetition, will not constitute, in and of itself, a fundamental change.

The case of South Africa illustrates this point. The 1991 National Peace Accord provided for the creation of a multiparty democracy and the promotion of social reconstruction and development.<sup>80</sup> Subsequently, the post-apartheid interim constitution of 1993 and the constitution of 1996 established civil, political, economic, social, and cultural rights, along with various remedies for individuals and important social institutions to transform the status quo established by the apartheid regime. Even so, despite the existence of these legal documents and the work carried out by institutions like the South African Constitutional Court to protect rights, deep inequalities that became entrenched in South African society under apartheid remain present.

Therefore, important aspects of the apartheid ideology persist in South African society today, even if structural transformation has taken place.<sup>81</sup> It is undeniable that the right to racial equality has gained currency in South Africa, but more work needs to be done to ensure that people truly believe in and cherish this right. Equally, ideological change is insufficient if it does not penetrate and transform all the preexisting conditions that facilitated apartheid, such as access to land or basic living conditions.

The establishment of transitional justice mechanisms, such as truth commissions, commissions of inquiry, civil and criminal tribunals, and reparations programs, during moments of crisis or change would, in principle, constitute structural changes if they help to transform the ideologies that made the atrocities possible. They do so, in particular, by providing truth to counter harmful, destructive narratives, justice and reparation to restore the rights and dignity of victims, and institutional reform that removes repressive policies and practices.

Nevertheless, there is nothing intrinsic to any of these mechanisms that makes them structural changes per se. Indeed, they could be created merely to give the impression that the dominant ideology is changing, when in reality, the objective is to maintain the status quo. Where this is the case, such measures are elements of ordinary change because they are built on the foundations of the previous regime, and their tasks will be driven by dominant ideologies that permitted atrocities. Therefore, it is not the presence of transitional justice mechanisms themselves that determines the nature of the change but rather other factors, such as the powers the mechanisms are given (human, financial, legal) to achieve their aims, the seriousness with which the state takes their decisions/recommendations, and the impact they have on dominant ideologies.

*Fundamental social change* occurs when various structural changes provide foundations for new dominant ideologies inspired by radically different values to those evident during the repression or conflict to flourish. Furthermore, these values must be respected, endorsed, adopted, and articulated by different political sectors and ideologies of society and be given life through different norms, institutions, education, and culture, so that they are ultimately able to affect the economic, social, political, and other conditions that permitted the conflict or repression. In the words of Erin Daly, “part of the process of transformation, therefore, entails inculcating new values in the society.”<sup>82</sup>

While transitional justice mechanisms can contribute to the transformation of dominant ideologies, they do not lead to such changes on their own but rather only in combination with other structural changes. In cases like Liberia

where competition for resources, poverty, and tribal and ethnic conflicts were at the heart of the conflict, transitional justice mechanisms cannot alone transform such social conditions. They can certainly contribute to change but not in isolation; it is recognized that such measures work better when instituted comprehensively. Structural changes to overcome poverty in post-conflict situations include the design of a poverty-reduction strategy that takes due account of the conflict and local context but also include a good aid policy and, among other things, the involvement of entities other than transitional justice mechanisms and stakeholders like development actors.<sup>83</sup>

Furthermore, ideological transformation is intergenerational. It does not happen within a short period of time and would be highly unlikely to occur within the brief lifespan of most transitional justice mechanisms, which by their very nature are meant to be transitory,<sup>84</sup> though they should leave a lasting legacy (including by making recommendations for needed fundamental and structural changes). Cases like Chile and Argentina illustrate this point. It is only now—more than two decades after the transitions began in those states—that structural changes, including those implemented through multiple transitional justice mechanisms, such as criminal accountability for past crimes of major perpetrators, have gained force.

Transitional justice happens, as already indicated, during a rupture where a particular configuration of political forces gives rise to opportunity for change, though within constraints. Therefore, the majority of changes taking place in processes of transitional justice are ordinary or structural. This does not mean that change in states undergoing transitions is not important. Indeed, transitional justice principles and mechanisms can be meaningfully deployed only in states where dominant ideologies have been weakened, are under threat, and have lost legitimacy (as happened with the apartheid regime in South Africa or with the dictatorships in the Southern Cone). This situation constitutes a unique, if small, window of opportunity to contribute to social transformation. If transitional justice mechanisms and processes are deployed under the right conditions, then they offer important opportunities for triggering or contributing to fundamental change.

#### THE NATURE OF TRANSITIONAL JUSTICE MECHANISMS AND PROCESSES

It is equally important to understand the nature of transitional justice processes and mechanisms, as this frames the possibilities for ordinary, structural, and fundamental social change within and outside the field. The following variables influence the work of these mechanisms and the way they bring



about social change.

First, transitional justice mechanisms have *preestablished aims* that are regulated by a normative framework that sets limits and offers opportunities. Four branches of public international law drive the mechanisms: international human rights law, international humanitarian law, refugee law, and international criminal law.<sup>85</sup> Driven by this framework they aim to achieve as much truth seeking, criminal justice, reparation, reform, and prevention as possible, but to do so, important policy choices must be made. As a result of these decisions, the investigation of some crimes is prioritized above others, the parameters for classifying who does and does not count as a victim are set, the areas of truth to be elucidated are established, and forms of institutional reform and guarantees of nonrepetition are negotiated. While bound by this normative framework, the mechanisms are also *extraordinary*. They deal with serious atrocities that happened in a systematic manner, causing irreparable harm to victims and society. They do not deal with everyday crimes but with complex situations. They are also extraordinary in the sense that they deal with such atrocities in a distinctive way that takes due account of context and the magnitude of the challenges faced.

Second, because these mechanisms (like the societies in which they are implemented) are relatively *weak and fragile*, their work faces constraints. They often lack important political leverage to carry out their mandates and are contingent on the specific circumstances of their post-repression or post-conflict context. Institutional settings, political support, and availability of human and economic resources all affect the role that transitional justice mechanisms can play during the transition.<sup>86</sup> For example, the final report of Kenya's Truth, Justice and Reconciliation Commission was altered by several of the commissioners before it was officially handed to the government because it contained allegations of wrongdoing by President Uhuru Kenyatta and members of his family.<sup>87</sup> Likewise, because of a lack of political will or financial resources, reparations—and many of the other recommendations made by truth commissions—remain a promise rather than a reality for the majority of victims, including in states like South Africa, Sierra Leone, Liberia, and East Timor. A consequence of being *weak and fragile*, and contingent on outside variables, is that these mechanisms work in an *imperfect* manner.<sup>88</sup>

Third, as already mentioned, these mechanisms are also *transitional*. They are established to operate for a particular period of time. Therefore, institutional continuity, sustainability, and capacity building are all challenges because the mechanisms are set up to deal with a particular situation for only a

brief period of time and then cease to exist.

In most cases, however, expectations for transitional justice do not account for these features and inherent limitations and therefore fail to provide ways to overcome them. Transitional justice mechanisms have not been designed to achieve social justice, development, democracy, rule of law, or peace in themselves, but they can contribute toward the realization of some of these goals. It is best to be realistic about the field of transitional justice. In such terms, transitional justice is about reckoning with a legacy of mass atrocities and achieving as much justice, truth, reparation, and prevention as possible given existing constraints. These can be meaningful structural changes that are meant to contribute to a fundamental transformation of the ideologies that allowed such atrocities to occur. These are goals that transitional justice can work toward, using the various forms of change already indicated. This is not to set the bar too low. Indeed, transitional justice has struggled for decades to deliver even on these terms. There are also compelling moral reasons for remaining realistic, such as to avoid raising the hopes of victims, which could potentially lead to their revictimization, and to ensure that scarce resources are used in the best possible way.

From the above analysis, it follows that fundamental social change cannot be achieved exclusively during a transitional moment. During such moments, ordinary and structural social changes could, and often do, take place. Multiple structural changes can combine to bring about fundamental social changes, but these must occur both within and outside of transitional justice measures, affecting key areas where repressive ideologies and structures used to dominate. As a result, these changes can take a great deal of time to happen. While transitional justice cannot deliver fundamental change on its own, it can contribute to it by way of structural social changes. Indeed, as de Greiff has said, we cannot neglect the “significance of transitional moments for the articulation and establishment of norms, values, and institutions, including those that both sustain and are sustained by legal systems of justice.”<sup>89</sup> Such changes could have a lasting impact on the future of states ravaged by repression or conflict.

## **MAXIMIZING THE TRANSFORMATIVE POTENTIAL OF TRANSITIONAL JUSTICE**

An important question remains about how to reconcile a realistic approach to transitional justice with a more normative approach to transformative justice. In other words, how can we maximize the transformative potential of transitional justice? How do we get transitional justice to deliver on its stated goals,

those of dealing with a legacy of mass atrocities while paving the way for a rule-of-law system where human rights protection is possible, while also contributing to broader social change? This section identifies essential conditions to this end. Context is an important and constant variable. The transformative potential of transitional justice will be, as already indicated, partly determined by the context in which it happens—post-conflict or post-repression, for example—and there will be striking differences even within and across conflict situations, for example, that will determine the possibilities for social change.

There is broad consensus that transitional justice is meant to deal with the legacy of mass atrocities through four pillars: truth seeking, criminal justice, reparation, and institutional reform.<sup>90</sup> Seen from this perspective, transitional justice is not only about dealing with violations that occurred and their consequences; it also has a significant preventive dimension that requires addressing the root causes of conflict or repression and the empowerment of victims as much as possible. Bearing this in mind, the following conditions would be necessary to maximize transitional justice's transformative potential.

First, it should be recalled that ideally transitional justice will not be seen as a menu of processes from which states can pick and choose.<sup>91</sup> Transitional justice mechanisms should be seen as complementary and interdependent,<sup>92</sup> which means that their success in achieving their aims and maximizing the transformative potential of the field depends strongly on their capacity to coexist and reinforce each other. If they are seen and used as a package, structural changes are more likely to take place. As de Greiff puts it, there is "convincing empirical evidence that they work best, as justice measures, when designed and implemented in a comprehensive fashion rather than in isolation from one another."<sup>93</sup>

In practice, however, states have been very selective about the processes they are ready to engage in, and those they do implement face various limitations (political, financial, legal, and human). For example, truth seeking is sometimes prioritized by those in power as a means to obviate the need for criminal trials, as was the case in El Salvador. Reparation is often nothing more than an undelivered promise. Indeed, few examples exist of states that have taken seriously the obligation to redress victims. Guarantees of nonrepetition are also lacking in almost every state pursuing transitional justice. Persuading states to consider the aggregate value of all transitional justice processes and mechanisms is not just a political challenge. Various questions remain about how to link the mechanisms in a way that enhances their potential to

achieve their corrective and distributive aims and about whether sequencing is necessary.

However, as the field of transitional justice evolves and new experiences emerge, we continue to learn about the added value of using all of these measures together. Colombia is a good example of a country attempting to do this. Indeed, during the peace negotiations in Havana, the state, the Revolutionary Armed Forces of Colombia—People’s Army (FARC) and other actors supported justice, truth, reparation, and guarantees of nonrepetition through a package called the Victims’ Agreement. While, arguably, more work could be done on the prevention side, Colombia is not picking and choosing among mechanisms. Moreover, it has accepted that transitional justice is not only backward- but also forward-looking. The peace deal endorsed by Congress in November 2016 looks at the root causes of conflict and includes a distributive dimension. Indeed, in Colombia, the Victims’ Agreement would set up an Integrated System of Truth, Justice, Reparation, and Non-Repetition,<sup>94</sup> complemented by other measures that have been agreed on at the negotiating table. For example, in the agreement on the Integrated Agrarian Development Policy, the government and the FARC “establish the foundations for the structural transformation of rural land” through the Rural Comprehensive Reform (Reforma Rural Integral) and create better living conditions for those living in those areas.<sup>95</sup> They equally acknowledge that land was a root cause of conflict or, at the very least, was a condition that facilitated the persistence of violence.<sup>96</sup> Therefore, a key aspect of the Colombian negotiations has been rural reform with a territorial approach. At the same time, the FARC and the government have agreed on the establishment of a truth commission with a broad mandate that includes looking into root causes of conflict; determining the impact of the conflict on economic, social, and cultural rights and the environment; and clarifying the responsibility of different actors, not only armed actors.<sup>97</sup> The Special Jurisdiction for Peace, the justice element of the peace negotiations, is also envisaged to have jurisdiction over more than just armed actors,<sup>98</sup> and the new agreement contains important provisions on reparations for victims, including from the FARC.<sup>99</sup>

A holistic strategy linking the various transitional justice measures, including guarantees of nonrepetition, requires action at various social levels. The lack of one of the measures could be an indication that the state is adopting ordinary social change, in the form of individual mechanisms, as opposed to structural change. Indeed, the will of states to reckon with the past can be measured by their acceptance of criminal justice, truth seeking, reparation,

and guarantees of nonrepetition as necessary parts of a successful transition. The less states are willing to work toward those aims together and implement structural change, the more questions will be raised about their will to deal with the legacy of mass atrocities and the more elusive fundamental social change will be.

Second, transitional justice processes cannot be designed in isolation from other interventions. Planners should instead find ways to complement and enhance such measures, including development projects; the protection and fulfillment of economic, social, cultural, and environmental rights; the work of disarmament, demobilization, and reintegration (DDR) and other peacebuilding programs; and humanitarian aid initiatives. They must always aim to maximize their lasting and distributive impact,<sup>100</sup> particularly in post-conflict states. As stated by Lambourne, if “sustainable peace building requires pursuit of the twin objectives of preserving ‘negative peace’ (absence of physical violence) and building ‘positive peace’ (presence of social justice), as well as alleviation, if not elimination, of the underlying causes of conflict,”<sup>101</sup> then transitional justice can contribute to such objectives. For example, in a post-conflict situation, a truth-seeking mechanism can shed light on the root causes of conflict so that they can then be targeted by other measures to prevent the recurrence of war. The recommendations of a truth commission in this area could be particularly useful, as could its proactive work of communicating its findings to relevant actors.

Third, dealing with the legacy of mass atrocities is a long-term undertaking. The task of entirely expunging the ideology and structures that allowed and consented to such atrocities takes more than just a few months or years. This is particularly true in post-conflict or failed-state situations, where almost everything, including institution building, may require starting from scratch. It takes time to build new institutions and establish legal frameworks, but it takes even longer to change ways of thinking about humanity, right and wrong, and the goals that society should pursue. Unfortunately, transitional justice continues to be thought of in the short term. States emerging from repression or conflict usually support such processes for only a brief period of time. Sustained investment (human and financial) in reckoning with the past, however, is essential to maximize the transformative potential of transitional justice. It is not only that structural and fundamental social changes take time to materialize but also that states engaging with transitional justice have to constantly adjust their policy interventions in this area.

Chile’s experience with this process presents a good example of the decades

it can take to move forward and transform ideologies. Though more than a quarter of a century has now passed since Augusto Pinochet left power and Patricio Aylwin became president of the country, the country's constitution is still the one instituted under Pinochet in 1980 (although it has been amended on various occasions), and the amnesty law of 1978 (Decree 2191/1978) that prevents those suspected of committing human rights violations between 11 September 1973 and 10 March 1978 from being tried in court, remains part of the legal system. Even today, crimes committed by Pinochet and his followers are still being investigated. This is not to suggest that ordinary and structural changes have not taken place. Without a doubt, Chile has made significant advances in a transitional justice process that has included providing reparations, memorialization, truth seeking, and criminal justice measures. However, it did not deliver on these rights immediately after the state returned to democratic rule. Indeed, while its Truth and Reconciliation Commission, to clarify the truth about enforced disappearances and killings and related violations such as torture,<sup>102</sup> was established in 1990, it was not until September 2003, 13 years later, that the National Commission on Political Imprisonment and Torture (Comisión Nacional Sobre Prisión Política y Tortura, "Valech Commission") was created to identify the victims of detention and torture for political reasons.<sup>103</sup> In Chile, transitioning from a repressive to a democratic regime remains an ongoing project. Nevertheless, support for its transitional justice efforts, from both within the state and the international community, has slowly dissipated.

Fourth, transitional justice processes should always focus on empowering victims and those most vulnerable as a consequence of the conflict or repression, aiming to transform their lives as much as possible. Empowerment in this context must be understood as "the process of enhancing an individual's or group's capacity to make purposive choices and to transform those choices into desired actions and outcomes."<sup>104</sup> Emphasis on empowering victims is important because only if they feel and understand that they matter to society, and that they are agents of social change, will they help to transform repressive ideologies and social structures that permitted and promoted violations. Otherwise, victims will remain marginalized and victimized.<sup>105</sup>

Empowerment requires removing the barriers that hinder victims' active participation in society, on the one hand, and the active promotion of their social inclusion and participation in transitional justice measures, in particular, and society in general, on the other. For example, structural discrimination is a key barrier that needs to be removed and transitional justice mechanisms

could contribute toward this, even if they cannot overcome it on their own. They can help to explain how discrimination has permitted or promoted violence, through the work of a truth commission, for example, while a reparations program can take such barriers into account and provide communities who have suffered discrimination with some forms of financial empowerment through micro-credits or investment projects. Transitional justice mechanisms can also design or recommend affirmative action measures. Equally, institutional reform could transform the laws and policies that facilitated structural discrimination. An additional obstacle to overcome relates to the effects of mass atrocities on victims' mental and physical well-being. If victims do not have access to adequate health services and medicines to facilitate their recovery, they are unlikely to be able to exercise their rights and be a positive contributor to social change. Here, rehabilitation as a form of reparation is essential.

Empowering victims also implies promoting their active inclusion in society. Transitional justice measures can also contribute to that end, by providing victims with information on the process and their rights and allowing them to participate in the design and operation of those processes. Education is a key tool for this process, especially for children, youth, and those who missed out on schooling as children due to violence or repression; it is also a form of rehabilitation. It is not only a human right but also crucial to promoting victims' recovery. It can help them to prepare for the future by developing their creative and critical thinking that facilitates their engagement in society and help them better realize their potential.<sup>106</sup>

Legal empowerment of victims is also crucial to enhance the transformative potential of transitional justice. It implies providing victims with access to and knowledge of the law so that they can exercise and protect their rights.<sup>107</sup> Waldorf shows how difficult it is to link transitional justice and legal empowerment given that both have developed in "separate policy silos."<sup>108</sup> Moreover, transitional justice mechanisms are often understaffed, lacking relevant skills, and underperforming.<sup>109</sup> However, if an overall transitional justice strategy is designed to maximize its transformative potential, legal empowerment should be seen as a key tool for all transitional justice mechanisms. All of the mechanisms can be used to raise victims' legal awareness and to let them experience the law as a tool to vindicate themselves as human beings.

Fifth, guarantees of nonrepetition remain the missing piece of the transitional justice puzzle. These promises represent structural changes that contribute to transforming the ideologies that permitted the violence and influence people's behavior. While they seem relevant in policy parlance and in

the literature, very little has been done in countries undergoing transitions to actually implement an overall strategy that addresses the root causes of conflict and repression or to effectively prevent the recurrence of violations. This is not to suggest that the same strategy should be implemented in all contexts because each situation requires a tailored approach that draws on different measures. But designing such a strategy requires first correctly identifying the root causes of conflict or repression and taking context into account.

Transitional justice measures should help to strengthen the new foundations (legal and institutional) that are established after conflict or repression. However, in contrast to transitions from repressive regimes, in post-conflict situations an even greater potential exists to change the legal and institutional foundations, given that states are devastated after conflict and in need of reconstruction. Undoubtedly, there are fewer available resources (both financial and human) to achieve this, but such situations also offer a unique opportunity to start (almost) from scratch. Transitional justice mechanisms should seize this opportunity.

Guarantees of nonrepetition need to work at various levels to address the root causes of conflict or repression.<sup>110</sup> They should target various state sectors, such as the security and justice sectors, in accordance with the particular local context, but they should also go further when required and address, for example, the country's socioeconomic structure. The measures required would include, but not be limited to, legal reform, prosecutions, vetting or lustration, and the establishment of new institutions or the reform of existing ones. Equally important, any reform of the establishment needs to go hand in hand with a transformation of the dominant ideologies that allowed violence to flourish.

Some could argue that guarantees of nonrepetition would enlarge the field of transitional in a way that blurs its normative boundaries. Yet this is far from the case. Indeed, an overall prevention strategy must be designed in a state emerging from conflict or repression, and transitional justice mechanisms can make important recommendations or carry out important work in this regard given the insights they have previously gained or the mandates they aim to fulfill. A different issue is who should take responsibility for delivering on the various guarantees of nonrepetition. Here, the state is obliged to carry out with due diligence the identification and implementation of guarantees of nonrepetition. Such guarantees take years, if not decades, to fully implement and effect significant social change. The responsibility for delivering them falls not only on state institutions engaged in the transition but also on other state



institutions, the international community, and nonstate actors, such as civil society or corporate actors.

## CONCLUSION

While transformative justice might be seen in some circles as morally desirable, its advocates have yet to explain what is transformative about the notion or to provide a working agenda for transformative praxis that clearly addresses how, why, and when to establish a different and more radical form of intervention to deal with the past and the future of states ravaged by war or repression. The proponents of transformative justice need to provide more reliable evidence that such forms of intervention would work better and be more transformative than the ones currently in use. For example, the view that transitional justice should be a bottom-up approach needs to be further discussed. We need more evidence that it would work in a way that would generate structural change in society. Surely, empowering victims is crucial and could constitute a structural change, but how to best deliver on this requires careful consideration.

Criticisms of traditional transitional justice approaches often fail to see these methods as a field of political contestation where victims have agency—even if it is limited and asymmetric in comparison to other actors. Important examples exist in this regard, such as the Abuelas de Plaza de Mayo in Argentina, who in their own terms have called for abuses “never [to happen] again” and have achieved some of their claims for justice. It is important to balance out criticisms of transitional justice with an understanding of the power of agency in these processes and their capacity to contribute to social change.<sup>111</sup>

Yet, this chapter has aimed to reflect not only on the transformative justice discourse and the challenges that lie ahead, but, more importantly, offer a framework for understanding the relationship between social change and transitional justice, making explicit the types of changes that can be expected from the latter—namely, ordinary and structural changes. It has argued that transitional justice faces various limitations in its capacity to effect social change, which should be acknowledged, such as the context of recent conflict or repression, the nature of its mechanisms and processes, and the enormous challenge of transforming dominant ideologies and structures that allowed atrocities to take place.

The discussion about social change and transitional justice should be framed in terms of the transformative potential of transitional justice, rather than on alternative forms of justice. This seems a better approach, as it makes

an explicit acknowledgment of the difficulties faced by transitional justice mechanisms when trying to achieve their objectives and contribute to achieving broader social change, while recognizing the opportunities that exist within the confines of transitional justice to bring about structural change.

In this regard, some conditions have been identified as essential to inform any debate about the transformative potential of transitional justice, among them using transitional justice measures in a holistic manner, recognizing the need for long-term investment, empowering victims, and building synergies between parallel policy interventions such as humanitarian aid, peacebuilding measures, and development. More importantly, transitional states continue to underperform with respect to guarantees of nonrepetition, despite the huge opportunities for structural social change that a transitional justice approach provides. An argument has been put forward for them to take center stage in transitional justice processes, if prevention and social change are the objectives. Without guarantees of nonrepetition, both will remain elusive. The advocates of transformative justice discourse need to consider how best to deliver on guarantees of nonrepetition to rebuild societies and provide victims with an entirely different experience of justice.

## NOTES

- 1 I would like to thank in particular Roger Duthie, Diana Guzman, Sabine Michalowski, Tuba Turan, and Clara Ramirez-Barat for their helpful comments on this chapter, as well as to the experts present at the ICTJ meeting in The Hague in June 2015 where I shared an earlier version and received valuable feedback.
- 2 Makau Mutua, "What is the Future of Transitional Justice?," *International Journal of Transitional Justice* 9, no. 1 (2015): 1–9, at 1.
- 3 Mamdani Mahmood, "Reconciliation without Justice," *Southern African Review of Books* 46 (1996): 3–5, [http://web.uct.ac.za/depts/sarb/Xoo45\\_Mamdani.html](http://web.uct.ac.za/depts/sarb/Xoo45_Mamdani.html).
- 4 John Paul Lederach and R. Scott Appleby, "Strategic Peacebuilding: An Overview," in *Strategies of Peace: Transforming Conflict in a Violent World*, ed. Daniel Philpott and Gerard F. Powers (New York: Oxford University Press, 2010), 19–44, at 23. See also John Paul Lederach, "Justpeace: The Challenge of the 21<sup>st</sup> Century," in *People Building Peace* (Utrecht: European Centre for Conflict Prevention, 1999).
- 5 Sabine Michalowski, ed., *Corporate Responsibility in the Context of Transitional Justice* (London: Routledge, 2013); Office of the High Commissioner for Human Rights (OHCHR), *Special Issue on Transitional Justice and Economic, Social and Cultural Rights*, 2014; Evelyne Schmid and Aoife Nolan, "Do No Harm? Exploring the Scope of Economic and Social

- Rights in Transitional Justice,” *International Journal of Transitional Justice* 8, no. 3 (2014): 362–282.
- 6 Paul Gready and John Ensor, eds., *Reinventing Development? Translating Rights-based Approached from Theory into Practice* (London/New York: Zed Books: 2005); Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009); Dustin N. Sharp, *Justice and Economic Violence in Transition* (New York: Springer, 2013); Gaby O. Aguilar and Felipe G. Isa, eds., *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (Belgium: Intersentia, 2011); Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Basingstoke: Palgrave Macmillan, 2011); and Oliver Richmond, *A Post-Liberal Peace* (London: Routledge, 2011).
  - 7 Paul Gready and Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice,” *International Journal of Transitional Justice* 8, no. 3 (2014): 339–361.
  - 8 Pablo de Greiff, “Theorizing Transitional Justice,” in *Transitional justice*, NOMOS 51, ed. Melissa Williams, Rosemary Nagy, and Jon Elster (New York: NYU Press, 2012), 31–77, at 34.
  - 9 The meaning of social justice is contested. For the purposes of this chapter, social justice should be taken to mean all social changes aimed at providing people in a state with opportunities to live in a world free of poverty, marginalization, and discrimination and where they are able to exercise their rights and live with dignity.
  - 10 Mutua, 1; Rama Mani, “Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development,” *International Journal of Transitional Justice* 2 (2008): 253–256.
  - 11 United Nations, *Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616\*, August 23, 2004, para. 4.
  - 12 United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 2010, principle 9, [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf).
  - 13 The commentary to Principle 9 of the Guidance Note clearly states that “Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.” See principle 9, at 7.
  - 14 Peacebuilding literature also makes constant reference to “root causes of conflict,” a concept which has permeated UN work on peacebuilding and the rule of law. By the time of the 1992 Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, the UN Secretary General already believed it was essential to address the root causes of conflict. See A/47/277 – S/2411, June 17, 1992, paras. 15, 23 and 25.
  - 15 Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,” *Social and Legal Studies* 21, no. 2 (2012): 171–186, at 179.

- 16 Ibid., 171–172 and 186.
- 17 Ruben Carranza, “The Right to Reparation in Situations of Poverty,” International Center for Transitional Justice Briefing (New York, September 2009), at 4.
- 18 Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007), para. 3, [https://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf). This view also influenced the work of the UN Special Rapporteur on sexual violence, who argued in a special report on reparations that “adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strive to have a transformative potential. Reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after the conflict.” United Nations, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, A/HRC/14/22, April 19, 2010, para. 31.
- 19 United Nations, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, E/CN.4/2005/102/Add.1, February 8, 2005, Principles 35–38.
- 20 United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, A/70/438, October 21, 2015, paras. 5–9.
- 21 Inter-American Court of Human Rights, *Cotton Field v. Mexico*, November 16, 2009, preliminary objections, merits, reparations and costs, para. 450.
- 22 Ibid., para. 451.
- 23 Ruth Rubio-Marín and Clara Sandoval, “Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment,” *Human Rights Quarterly* 33, no. 4 (2011): 1062–1091.
- 24 There are those who disagree with the idea that gender reparation should be transformative. Margaret Walker, for example, claims that aiming to transform social structures through gender reparations is not only politically and practically difficult, it additionally “threatens to bypass or displace reparative justice as a distinct and distinctly victim-centered ideal in favour of a different kind of justice agenda.” See Margaret Urban Walker, “Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations,” *International Journal of Transitional Justice* 10 (2016): 108–125, at 110.
- 25 Ruth Rubio-Marín, “The Gender of Reparations in Transitional Societies,” in *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, ed. Ruth Rubio-Marín (Cambridge: Cambridge University Press, 2009), 66.
- 26 United Nations, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, June 2014, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>
- 27 Ibid., 8–9.
- 28 Rodrigo Uprimny, “Transformative Reparations of Massive Gross Human Rights

- Violations: Between Corrective and Distributive Justice,” *Netherlands Quarterly of Human Rights* 27, no. 4 (2009): 638, 635–647.
- 29 Ibid., 643.
- 30 Ibid., 644.
- 31 Ibid.
- 32 Ibid., 646.
- 33 Ibid., 647.
- 34 Clara Sandoval, Roberto Vidal, and Leo Filippini, “Linking Transitional Justice and Corporate Accountability,” in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (London: Routledge, 2013).
- 35 Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?,” *International Journal of Transitional Justice* 2 (2008): 310–330.
- 36 Lisa Hecht and Sabine Michalowski, “The Economic and Social Dimensions of Transitional Justice,” 2014, 1, <https://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf>
- 37 Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2 (2008): 266–291, at 280. See also Ismael Muvingi, “Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies,” *International Journal of Transitional Justice* 3 (2009): 163–182.
- 38 Louise Arbour, “Economic and Social Justice in Transition,” *International Law and Politics* 40, no. 1 (2007): 1–27, at 1.
- 39 Uprimny.
- 40 Preamble to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Res. 2200A (XXI), December 16, 1966.
- 41 Arbour, 3.
- 42 Thomas Bundschuh, “Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity,” *International Journal of Transitional Justice* 9 (2015): 10–32.
- 43 OHCHR, *Special Issue on Transitional Justice and Economic, Social and Cultural Rights*.
- 44 CAVR, *Chega: The Report of the Commission for the Reception, Truth and Reconciliation in Timor-Leste*, Part II; Kenya Truth, Justice and Reconciliation Commission, 2013, Vol. IIB.
- 45 United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, A/HRC/21/46, August 9, 2012, para. 17.
- 46 OHCHR, *Special Issue, Transitional Justice and Economic, Social and Cultural Rights*.
- 47 Roger Duthie, “Toward a Development-sensitive Approach to Transitional Justice,” *International Journal of Transitional Justice* 2 (2008): 292–309.
- 48 Roger Duthie, “Introduction,” in *Transitional Justice and Development*, 17.
- 49 Duthie, “Toward a Development-sensitive Approach,” 309.
- 50 Pablo de Greiff, “Articulating the Links Between Transitional Justice and Development:

- Justice and Social Integration,” in *Transitional Justice and Development*, 48–55.
- 51 Marcus Lenzen, “Roads Less Travelled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice,” in *Transitional Justice and Development*, 77–99.
- 52 See the section on transformative reparation in this chapter.
- 53 de Greiff, “Articulating the Links,” 37.
- 54 Mani, 256.
- 55 de Greiff, 38.
- 56 The count includes all components of any single published journal: the editorial notes, the articles, notes from the field, and book reviews.
- 57 Wendy Lambourne, “Transitional Justice and Peacebuilding after Mass Violence,” *International Journal of Transitional Justice* 3 (2009): 284–8, at 28. Emphasis added.
- 58 Ibid., 30.
- 59 Ibid., 47.
- 60 Gready and Robins, 340.
- 61 Ibid., 340 and 360.
- 62 Ibid., 341.
- 63 Ibid., 348.
- 64 Ibid.
- 65 Other articles on transformative justice that look at particular dimensions include Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194; and Dustin N. Sharp, “Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,” *International Journal of Transitional Justice* 9, no. 1 (2015): 150–169.
- 66 Gready and Robins, 358.
- 67 Other considerations are also important such as the relationship between serious human rights violations and breaches of humanitarian law, and the root causes and consequences of conflict or repression.
- 68 Michelle Parlevliet, “Rethinking Conflict Transformation from a Human Rights Perspective,” Research Center for Constructive Conflict Management, 13, [http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/parlevliet\\_handbook.pdf](http://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/parlevliet_handbook.pdf)
- 69 Thomas Carothers, *In the Name of Democracy: U.S. Policy Toward Latin America in the Reagan Years* (Berkeley, CA: University of California Press, 1991), 147.
- 70 UN Security Council, *Report of the Secretary-General to the Security Council on Liberia*, S/2003/875, September 11, 2003, paras. 3–19.
- 71 John Blaney, Jacques Paul Klein, and Sean McFate, “Wider Lessons from Peacebuilding: Security Sector Reform in Liberia,” Policy Analysis Brief, The Stanley Foundation, June 2010, <http://www.stanleyfoundation.org/publications/pab/LiberiaPAB610.pdf>.

- 72 Adedeji Ebo, "The Challenges and Opportunities of Security Sector Reform in Post-Conflict Liberia," Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper no. 9, December 2005, 6, <http://www.dcaf.ch/Publications/The-Challenges-and-Opportunities-of-Security-Sector-Reform-in-Post-Conflict-Liberia>.
- 73 Peter Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* (New York: The New Press, 2003), 323.
- 74 Javier Lewkowicz, "La Herencia Económica que Dejo Videla," Página 12, May 18, 2013, <http://www.pagina12.com.ar/diario/economia/2-220300-2013-05-18.html>.
- 75 Liberia, Truth and Reconciliation Commission, Preliminary Findings and Determinations, December 19, 2008, Vol. I, at 44.
- 76 See <http://www.worldmeters.info/world-population/Liberia-population/>.
- 77 Human rights groups in Argentina estimate approximately 30,000 persons were disappeared during the repression. El Clarín, "Una duda histórica: no se sabe cuántos son los desaparecidos," October 6, 2003, <http://edant.clarin.com/diario/2003/10/06/p-00801.htm>. According to the findings of CONADEP, the National Commission on the Disappearance of Persons, 8,960 people went missing. *Nunca Mas*, Part IV, Recommendations and Conclusions, September 1984. The real number of disappeared and executed people is considered to be higher.
- 78 Robert Nisbet develops a powerful argument to show the priority of fixity over change in the social sphere. He claims that "change is, however, not 'natural', not normal, much less ubiquitous and constant. Fixity is." He then continues: "In the realm of observation and common sense, nothing is more obvious than the conservative bent of human behaviour, the manifest desire to preserve, hold, fix and keep stable. Common sense tells us that, given the immense sway of habit in individual behaviour and of custom, tradition, and the sacred in collective behaviour, change could hardly be a constant, could hardly be ubiquitous." Robert Nisbet, *Social Change and History* (New York: Oxford University Press, 1969), 271.
- 79 Consider, for example, how difficult it is to enact a new political constitution, especially when inside rigid legal systems, or to enact a new treaty in the international arena. Most of the changes in the law are gradual changes that have to follow certain patterns in order not to violate the essence of the system in which they take place.
- 80 South Africa's National Peace Accord, <http://www.anc.org.za/show.php?id=3967>.
- 81 Bundschuh, 11–12.
- 82 Erin Daly, "Transformative Justice: Charting a Path to Reconciliation," *International Legal Perspectives* 12, no. 73 (2001): 81.
- 83 For more on the needed reforms in such contexts, see Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What can be Done about It* (Oxford: Oxford University Press, 2008), 175–192.
- 84 Transitional justice mechanisms have been defined as transitory in nature, meaning that

they are created to act in an extraordinary manner in a particular situation and then cease to exist. This has been the rule for truth commissions, for example, with the lifespan of these mechanisms ranging from eight months in Haiti to slightly over two years in Peru or Uruguay. Nevertheless, this remains a contentious issue. Transitional justice mechanisms are taking longer to carry out their work, as demonstrated by Colombia under the Justice and Peace Law and the likely upcoming experience under the Special Jurisdiction for Peace, or by what has happened in countries like Argentina where trials were reopened. Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006), 318–325. See also Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University, 2010).

- 85 UN Secretary-General, *United Nations Approach to Transitional Justice*, 3.
- 86 See the caveats expressed by de Greiff when considering the possible links between development and transitional justice mechanisms in de Greiff, “Articulating the Links.”
- 87 ICTJ Briefing, “Lessons to Be Learned: An Analysis of the Final Report of Kenya’s Truth, Justice and Reconciliation Commission,” May 2014, 1–3, <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>.
- 88 de Greiff, “Theorizing Transitional Justice,” 36.
- 89 Ibid.
- 90 As exemplified by the UN Secretary General, *United Nations Approach to Transitional Justice*, 3, and by the almost 80 member states of the Human Rights Council which voted by consensus HRC Res. 18/7 creating the Special Rapporteur on the promotion of truth, justice, reparations, and guarantees of non-repetition. Both of these documents show the consensus that exists across these issues.
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CHAPTER 6

Local Transitional Justice: How Changes in  
Conflict, Political Settlements, and Institutional  
Development Are Reshaping the Field

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In recent years, transitional justice has been deployed in an ever-wider variety of contexts as a way to deal with legacies of conflict and violence. Its practices have evolved to include local justice and reconciliation processes that may be more meaningful and tailored to the community, as opposed to national or international approaches that can be short of community-level significance. Features such as the nature of conflict as well as differing trajectories of negotiating political settlements, the shifting balance of power between social and political actors during transition, and levels of institutional development have shaped transitional justice practices.

The influence of these features, combined with a deeper understanding of legal pluralism,<sup>1</sup> helps to explain why local transitional justice processes that integrate traditional or customary practices have become more prominent since the late 1990s. Legal pluralism describes the existence of multiple legal and normative—formal and informal—systems within one population and/or geographic area. How these systems manifest and interact varies at national and sub-national levels, as does the degree of tension and complementarity between them.

Here, *local transitional justice practices* refer to what are variously known as traditional, customary, indigenous, informal, nonstate, or community practices that are used or adapted to respond to large-scale or severe human rights violations.<sup>2</sup> Such practices are less informed by models of transitional justice oriented toward national-level or international mechanisms of accountability, including criminal justice and prosecution. Importantly, they are not located at the level of national government or capital-city political life, but rather emerge largely endogenously within communities. As a result, their legitimacy premise (and indeed, it is in some cases only a premise) is that they have their roots in local-level community beliefs, norms, and traditions, rather than national legislation or international humanitarian or criminal law. Of course, these practices and the norms they are rooted in change over time, as tradition

is not static, and, like all norm systems, changes and is renegotiated over time. There is also a degree to which local transitional justice processes (re)invent tradition as a legitimizing and unifying trope to serve contemporary purposes. These features are apparent in the local transitional justice practices examined in this chapter.

Since the late 1990s, local transitional justice practices have played a more prominent role in a number of post-conflict transitions, notably in Rwanda (2002-2012), but also in places as diverse as Burundi (from 2005), Mozambique (from 1992), Sierra Leone (from 2000), Timor-Leste (2001-2005), and northern Uganda (from 1995).<sup>3</sup> This is not to suggest that they are altogether new—indeed, many draw on long-standing customary practices. However, the “hype”—as one author has referred to it—now surrounding local transitional justice has emerged more recently.<sup>4</sup>

Local processes offer an additional route to achieving the objectives of truth, justice, reconciliation, reparations, and nonrecurrence. Drawing on local mechanisms and narratives of truth, justice, and reconciliation, they are in certain contexts more appropriate to the nature of conflict, levels of institutional development, and trajectories of political settlement in many contemporary conflict-affected settings where legal pluralism is prevalent. They offer, moreover, alternative modalities of addressing legacies of conflict and violence to models that emerged under very different conditions and in response to different experiences of conflict and different political-institutional settings. They have thus avoided the risks of transplanting external remedies that can be discredited as impositions from abroad.<sup>5</sup>

Further, security and justice institutions and other mechanisms that constitute conventional transitional justice models—such as criminal justice, reparations, or truth telling—often have limited reach in contexts where legal pluralism is a prominent feature, where affected populations live far from the capital and state services that cluster near to them, and where the state has limited reach or relevance in modes of dispute resolution.<sup>6</sup> For conflicts that center in primarily rural areas, conventional transitional justice processes can face the challenge of reaching affected communities, particularly given time and budget constraints. For local transitional justice practices, geographic reach is not a problem because the practices occur in the community, carried out by community members.

This is not to idealize local models. Like all transitional justice approaches, it is important to recognize their limitations and potential, including their ability to reinforce the position and views of the most powerful within a community, including in ways that can diminish the voices of victims. They are equally

susceptible to being instrumentalized by national (or international) elites—or the victors of a conflict. As with all transitional justice processes, it is important to be conscious of the values and interests that are implicitly prioritized, and who wins and loses from this. However, in spite of these constraints, local approaches offer an important alternative or complementary path that conventional processes have tended to neglect.

In making this argument, this chapter begins by exploring how local transitional justice has gained greater prominence in recent years as well as how this has been shaped by different experiences of violence, context-specific political settlements, and levels of institutionalization. This chapter focuses on the experiences of transitional justice in countries where legal pluralism is an important feature of the socio-political landscape, in particular Sierra Leone and northern Uganda. It considers the nature of justice, trust, and reconciliation supported by local transitional justice and what this tells us about the broadening scope of processes that are more “fit for purpose,” as opposed to “one-size-fits-all.” Finally, it concludes with some implications for transitional justice more broadly, both as a set of practices applied in post-conflict and post-authoritarian contexts and as a field of study.

## THE PURPOSE OF TRANSITIONAL JUSTICE

Transitional justice includes the range of mechanisms and processes that societies have developed to deal with legacies of conflict or systemic human rights violations.<sup>7</sup> Importantly, its boundaries have changed over time, reflecting both analytical developments and evolving practices, as its range has broadened from criminal justice and the search for the disappeared to include alternative modalities of truth telling, accountability, prevention, reconciliation, and restitution—often in widely variant post-authoritarian or post-conflict settings.<sup>8</sup>

While such measures predate the twentieth century, the International Military Tribunals at Nuremburg and Tokyo following the Second World War and the experiences of transitional justice in Latin America during processes of democratization in the 1980s and 1990s set the tone for establishing principles of justice for addressing systemic human rights abuses.

Transitional justice now features as a matter of course in many political transition and post-conflict peace processes. Taking different forms, its mechanisms broadly encompass four different objectives. First is the objective of setting the record straight. Truth-telling exercises aim to record and provide

an account of the scope and nature of abuses that allegedly occurred. This has included establishing the facts about past violence and repression (including in some cases to support investigative processes), in addition to giving a platform for victims to speak out and be recognized. Variably, truth commissions have also been oriented toward identifying the root causes of violations and providing recommendations aimed at a second objective: preventing the recurrence of abuse, which can include recommendations for institutional reform (for instance, of the military, police, and judiciary). Such institutional reform has included a number of mechanisms to vet public institutions and remove individuals associated with human rights abuses from office.

Third, retributive justice often is a recurrent transitional justice objective, focusing on criminal prosecution and formal judicial investigation of those accused of committing human rights violations. Criminal justice mostly takes place at the national or international level and through varying combinations of domestic, regional, and international processes of investigation and prosecution. The focus is on establishing the responsibility of perpetrators for alleged crimes.

Fourth, the notion of reparative justice has evolved to provide a different response to victims' experience of loss and grievance. This has included official initiatives aimed at providing material or symbolic reparations to victims and their relatives (such as financial compensation or official state apologies) and memorialization activities (such as museums and memorials to preserve the memory of victims).

Increasingly, restorative justice has come to take into account local forms of transitional justice that are discussed in this chapter. A distinctive feature of the logic of restorative justice is the objective to create conditions that enable reconciliation. Siri Gloppen asserts that those processes are "about individuals forgiving each other; about societies torn apart by conflict mending their social fabric and reconstituting the desire to live together, and about peaceful coexistence and social stability."<sup>9</sup> Restorative justice involves acts or processes of reconciliation between victim and perpetrator, in the form of pardons or acknowledgement of wrongdoing.<sup>10</sup>

Reconciliation refers to a complex process—rather than a clearly defined endpoint—by which communities and individuals at the national and sub-national level find ways of coming to terms with each other after traumatic experiences of violence. This includes finding avenues for reintegrating former combatants, perpetrators, and victims into community life in ways that enable at least nonviolent coexistence (a "thin" understanding of reconciliation) or at

best a shared vision of a common future (a “thick” understanding of reconciliation).<sup>11</sup> Local forms of transitional justice reflect different approaches to reconciliation and provide avenues of healing and forgiveness that are grounded in a community’s own forms and narratives of justice, memory, and truth. At this level the emphasis is on creating conditions for pathways of reconciliation and rebuilding trust to enable communities to move on with their lives.

In terms of process, modalities in relation to these objectives have broadened, reflecting the different contexts in which transitional justice is attempted. For example, there have been an increasing number of questions about the degree to which it can contribute to addressing the root causes of conflict and to what degree it can shape emerging post-conflict political settlements. (In this chapter, *political settlement* refers to the “formal and informal rules of the game” or the ways in which power and resources are divided in society, usually among elites.<sup>12</sup>) Transitional justice modalities also increasingly reflect the nature of the sociopolitical and institutional context they are embedded in, the diversity of types of conflict they respond to, the types of perpetrators (state and nonstate) they deal with, and the range of relationships that exist between perpetrators and victims.

There is no “best practice” model. Indeed, the role and impact of transitional justice in post-conflict and other transitional settings remain deeply contested, with differing opinions about what it should include in terms of scope, mandate, and normative intent as well as varying assumptions about what it can realistically achieve.<sup>13</sup> More ambitious lines of inquiry seek to assess its impact on democracy, rule of law, and development, while others focus more on concrete objectives, such as the four mentioned above.

Importantly, earlier simple analytical dichotomies relating to “peace versus justice” have been, for the most part, left behind in order to take stock of the need for a more nuanced understanding of the complexities and challenges associated with addressing the past. In practice, political narratives during transition processes may still articulate the peace versus justice trade-off. In large measure this increasingly reflects a recognition of the fact that transitional justice modalities are the political outcome of how societies—and relevant (domestic and international) actors—are able to negotiate the terms on which legacies of abuse are addressed, whose interests are protected, and whose perspectives and experiences are given visibility. At the same time, the relevance, legitimacy, and acceptance of different practices have a bearing on how different sectors of the population are able to confront their individual and collective experiences of conflict and trauma. The challenge lies in identifying



the implications of these experiences for emerging political settlements.

It should be emphasized that local transitional justice mechanisms are a particular mode of response to violations within different levels and forms of conflict and patterns of institutional development and political settlement. On the one hand, they are the outcome of sociopolitical choices about what is politically possible given the features of prevailing balances of power in a transition setting; and on the other hand, they mirror normative preferences located in customary, traditional, and community-level belief systems and narratives of justice. The question becomes, how can local justice contribute to processes of redefining the reigning political settlement, including in ways that touch on the causes of conflict?

### THE EMERGENCE OF LOCAL TRANSITIONAL JUSTICE

Notwithstanding earlier manifestations, local transitional justice really took off in the late 1990s. Rwanda, in the wake of the 1994 genocide, is one of the early experiences of the formally sanctioned use of such practices. In 1996, a report by the United Nations High Commissioner for Refugees (UNHCR) noted the potential usefulness of local *gacaca* (literally “justice in the grass”) courts as a mechanism for dealing with the past.<sup>14</sup> However, the proposal was not pursued until 1999, when a commission appointed by the Rwandan president proposed modernizing *gacaca* as part of efforts to deal with the incredibly large numbers of accused perpetrators (approximately 130,000) who were languishing in overcrowded prisons and overwhelming the formal justice system.<sup>15</sup> Between 2002 and 2012, it was rolled out across Rwanda, with nearly two million people tried by such courts.<sup>16</sup>

In 2004, the UN Secretary-General released a report titled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* that explicitly recognized the value of local transitional justice, noting:

Due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition.<sup>17</sup>

By 2007, the first reference to local transitional justice processes in a peace negotiation was achieved in northern Uganda in a preliminary pact on accountability and reconciliation signed by the government of Uganda and the Lord’s Resistance Army (LRA) in Juba, South Sudan. It noted that:

Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.<sup>18</sup>

The increasing interest in local transitional justice processes has also been spurred by growing attention to customary justice processes in many conflict-affected contexts.<sup>19</sup> Researchers have questioned whether “universalistic assumptions about the benefits of justice accord with what people think on the ground”<sup>20</sup> and whether “adequate account is taken of non-western cultures and beliefs and local practices of justice.”<sup>21</sup>

In addition, within peacebuilding processes more broadly, security and justice reforms beyond transitional justice that have conventionally focused overwhelmingly on state security and justice practices started paying greater attention to legal pluralism in the mid- to late-2000s.<sup>22</sup> The need to engage with concepts of legal pluralism and multicultural citizenship were already surfacing in donor discourse in the 1990s and early 2000s, with early expressions of this in Latin America through international support for security and justice reforms that began to take account of community-level modes of dispute resolution.<sup>23</sup> The broader shift in focus among many donors stemmed from a recognition that the effectiveness of reform programs focused solely on formal state security and justice was constrained.<sup>24</sup> Thus, engaging with the legal pluralism that characterizes most societies—and can play a particularly strong role in conflict-affected settings—was given greater attention as a way to root reforms in the local context and thereby legitimate them. This can be seen in policy and research from a number of influential international development and donor organizations (although a substantial body of academic research recognized the importance of local justice processes much earlier).<sup>25</sup>

The United Kingdom’s Department for International Development acknowledged the importance of local justice in 2004, noting it is “critically important in the context of DFID’s pro-poor approach to security and justice,” given that such processes “are widely used in rural and poor urban areas, where there is often minimal access to formal state justice.”<sup>26</sup> This was followed by a 2006 *Doing Justice* report by the United Nations Development Programme that stressed the importance of working with local justice systems to ensure better development outcomes.<sup>27</sup> In 2007, a report by the Organisation for Economic Co-operation and Development indicated that “research in many fragile states suggests that non-state systems are the main providers of justice and security

for up to 80–90% of the population. Non-state systems may often be more effective, accessible, fairer, quicker, cheaper and in tune with people's values."<sup>28</sup> More recently, the World Bank's 2011 *World Development Report* signaled the importance and relevance of local justice processes.<sup>29</sup>

Transitional justice, as one of many features of wider rule-of-law programming in post-conflict societies,<sup>30</sup> has increasingly been informed by this heightened awareness of legal pluralism, with an emphasis on how local justice processes could be leveraged for reconciliation and healing functions. Such processes have been seen as especially relevant to transitional justice because of their perceived foundations in local beliefs and norms that bind communities together, thus providing a more locally grounded foundation for reconciliation.<sup>31</sup> This is in contrast to the distance at which formal transitional justice processes can be perceived to function—in capital cities or foreign countries, shrouded in the formalism of legal procedures that can seem alien to many people. Indeed, the:

complaint regarding formal legal approaches is that transitional justice and peacebuilding more broadly fail sufficiently to grasp or respond to the lived experiences of atrocity and conflict. Traditional mechanisms, in contrast, offer ordinary persons greater involvement in and access to transitional justice than that provided by remote, formal institutions or technocratic reforms. Anchored in local rituals and indigenous practices, traditional mechanisms promise deeper cultural legitimacy and local ownership. They provide alternate paths to justice, including restorative justice, in broadly participatory forums that aim to reintegrate combatants/perpetrators, victims, and communities.<sup>32</sup>

The ascendance of local approaches also reflects three important features of the contexts in which such processes are increasingly deployed. It is these features that we argue have played a critical role in broadening the types of approaches of transitional justice, and which deserve greater analytical examination to understand how they will continue to influence it in the future. The three features, to be discussed in turn, are:

1. Changing nature of conflict
2. Different types of political settlement
3. Different levels and trajectories of institutional development (and consequently, different ideas of legitimate institutions)

It is useful to highlight how these features are different from those of the

early contexts in which transitional justice was deployed. In practice, the features are not mutually exclusive but instead interact with each other. For instance, the nature of a political settlement (likely to be a key factor driving conflict) and features of institutional development are, in part, constitutive of each other. Both are likely to evolve and be influenced by experiences of conflict and different histories of contestation and political change. Crucially, therefore, it is important to understand transitional justice in the context of the political economy of conflict, contestation, and cycles of renegotiation of political settlements. Recourse to violence manifests in different and often complex ways in conflict and histories of authoritarianism. Also of note, local transitional justice practices are informed by and interact with international discourses of transitional justice in ways that are also iterative and mutually constitutive, creating an evolving and unpredictable dialogue over time. Local processes have been influenced by wider processes, and transitional justice as a field has been influenced by local practices.

#### CHANGING NATURE OF CONFLICT

Transitional justice processes emerged during a period of democratization in Eastern Europe and Latin America, after the Cold War, in response to authoritarian and oppressive governments. Violence and repression under these regimes was largely experienced by citizens at the hands of the state. The violence was mostly “vertical”—emanating from the center, and in most cases from the state, toward the population. Much of the focus of transitional justice measures during these democratization processes was initially on truth telling and the political possibility of creating a mechanism for establishing criminal responsibility for violations.

There was a perceived need to establish the facts about the form and scale of the violence through different forms of truth-telling exercises. In contexts such as Chile and Argentina, where transitions were being made from military to civilian regimes, this involved giving visibility to the forcibly disappeared and analyzing the nature of the repression.<sup>33</sup> Truth-telling exercises have since evolved to accommodate a range of purposes associated with giving voice to victims and establishing different spaces for memorialization, in some cases in the form of re-enactment of experiences of violence.<sup>34</sup> There was also a desire to hold government officials and state bodies accountable in order to bring an end to impunity. Over time, trials were seen to be “necessary to lay a foundation for the rule of law and justice in new democracies.”<sup>35</sup> In reality, trials and prosecution procedures have been limited in scope, because of both

the practical constraints of putting all perpetrators on trial and the balance of power between perpetrators and new pro-democracy governing elites.

Transitional justice processes are now more commonly used after armed conflict, in contexts where the nature of violence is of a different kind. In many conflicts of the 1990s and 2000s, “horizontal violence” (that is, violence between citizens) dominated, and while state forces have been a party to the fighting, abuses were committed by all sides. This muddles the “victim” and “perpetrator” categories, where, for instance, child soldiers can be victims-turned-perpetrators and the tenuous combatant-civilian divide can mean that perpetrators also suffer violations.<sup>36</sup> This was apparent in the conflict in Colombia, where the complexity of the range of armed actors involved meant that negotiating peace included detailed discussion of how to establish the scope of responsibility and criminal liability. The concept of “intimate violence” or “intimate enemies” has emerged to capture the degree to which violence becomes a feature of deeply personal relationships within the community and even the household.<sup>37</sup>

These more recent experiences of conflict do not fit so easily with earlier transitional justice processes, which “divided the universe into a small group of guilty parties and an innocent majority, which was thereby cleansed of wrongdoing.”<sup>38</sup> In many civil wars since the 1990s, intimate violence has been used as a tool for rending the social fabric: from forcing children to rape and kill adults to forcing incestuous rape to impregnating women from “enemy communities.” Such violence in places such as Colombia, the Democratic Republic of the Congo, Guatemala, Liberia, Mozambique, Peru, Sierra Leone, South Africa, and northern Uganda has been instrumentalized so that the act itself not only causes immediate harm but also has longer-term effects that undermine respect for wider social norms.<sup>39</sup> Transitional Justice processes pursued after such experiences require a focus on rebuilding the community-level social fabric and trust as much as it requires national-level reconciliation between the state and citizens.

In such contexts of horizontal violence, recourse to criminal processes and formal trials also becomes especially problematic given the sheer numbers of those accused of being perpetrators.<sup>40</sup> This was a primary reason for the use of *gacaca* courts in Rwanda.<sup>41</sup> Finding alternative or complementary modes of accountability has thus also been a practical need prompted by the specific nature of the conflicts to be resolved.

## DIFFERENT POLITICAL SETTLEMENTS

Connected to the different manifestations of violence that transitional justice now seeks to address, more recent contexts have often exhibited different political settlements to those in which transitional justice originally took hold. In contexts where governments were authoritarian in nature and characterized by military rule, transitional justice surfaced mostly following processes of democratization in which, with varying levels of resistance, negotiation, or consent, military rulers stepped down (or were forced out) and civilian politics emerged or re-emerged.<sup>42</sup>

In more recent post-conflict contexts, political settlements often have been markedly different. While there have been oppressive governments in some cases, the focus has primarily been on maintaining elaborate patronage networks that instrumentalize the state to serve “the shadow state.”<sup>43</sup> The formal state has thus been essentially hollowed out, with restricted government budgets to fund services and a weak demarcation between public and private elite interests. In contexts such as Liberia and Sierra Leone, for instance, patron-client networks extended from the lowest levels of the household (for example, between a young man and his maternal uncle) through customary structures, like the chieftaincy system, to politicians, to national elites. Conflict in these countries stemmed, in part, from the social exclusion that such networks meant for particularly poor young men.<sup>44</sup> Yet the political orders that have replaced the preconflict governments have not made as clean a break with the past as they did in some Latin American transitions, where the shift from military to civilian rule was more evident (although it is important to note that in many Latin American cases the underlying political settlement has not always changed in fundamental ways in terms of the resilience of social and economic structures and elite interests<sup>45</sup>). Post-conflict political settlements in more recent transitional justice contexts have retained the neopatrimonialism and social exclusion of the previous order—albeit with a stronger legal-rational state.

In addition, the emerging political agreements in recent post-conflict countries have not been the result of bottom-up contestation or popular mass protest for the most part (although there has, of course, been important local civil-society advocacy around issues of governance, inclusion, and human rights). Rather, they are often the outcome of partly national and partly international forces. At a national level, a tacit agreement between political elites means that political parties accrue wealth and patronage during their term in power and then accept that others will do the same if and when they are elected. This division of spoils is captured by the phrase, “It’s our turn to eat,” which also

reflects a more widespread philosophy in some post-conflict settings.<sup>46</sup>

At the international level, by requiring partner governments to undertake a variety of post-conflict reforms to improve transparency, accountability, the rule of law, and human rights, the international donor community contributes to forging dominant narratives about the emerging formal rules of political engagement and elite bargains.<sup>47</sup> This often mirrors international scripts about peace and state-building objectives. In practice, of course, donors have not transformed the way that power is regulated within their partner countries—partner governments are far too adept at subverting, co-opting, or resisting donor agendas for that—but they have set in place standards that partner governments must comply with to receive aid. What this means is that governance changes have not been driven by democratic demand that might otherwise foster accountability of the state to its people, so much as by foreign donors holding the purse strings. In Sierra Leone, for instance, there was little popular support for setting up the Truth and Reconciliation Commission (TRC), with many preferring a “forgive-and-forget” approach and some communities collectively agreeing not to give statements.<sup>48</sup>

In many of the more recent conflicts, political settlements have not changed so dramatically as to allow for greater accountability to the populace in the vein that enabled (to varying degrees) popular demand for justice in Latin America. Rather, a continuity of many features of the preconflict political settlements have made it unlikely that political elites will be held accountable for their roles in conflict and more likely that the space for transitional justice will emerge mostly at the local or international level.

#### **DIFFERENT LEVELS OF INSTITUTIONAL DEVELOPMENT (AND CONSEQUENTLY, DIFFERENT IDEAS OF LEGITIMATE INSTITUTIONS)**

Finally, experiences of transitional justice also differ in terms of the maturity of available institutions in the countries in question. Notwithstanding the low public standing of national judiciaries in most of Latin America, for example, in comparative terms they have more territorial reach and presence than in many countries that have undergone civil war since the 1990s, notably those in Sub-Saharan Africa.<sup>49</sup> For instance, in 2002, the year Sierra Leone’s civil war officially ended, the total payroll of the judiciary was approximately USD \$215,000.<sup>50</sup> Even by 2011, Sierra Leone spent USD \$8–10 million per year on its police, prisons, and judiciary combined.<sup>51</sup> There remain an insufficient number of judges and magistrates across the country, resulting in lengthy trial delays.<sup>52</sup> Indeed, a considerable amount of post-war international aid since the

1990s has been aimed at strengthening key justice, human rights, and anticorruption institutions, to ensure that the rule of law is strong enough to prevent conflict from recurring. Understandably, such institutional weaknesses pose constraints on the shape of transitional justice processes.

In contrast, in Latin America transitional justice benefitted from an emerging regional normative and organizational framework, embodied in the strong Inter-American System of Human Rights, which has played a pioneering role in forging a community of states with enforceable standards of justice.<sup>53</sup> Again, this has not been the case in more contemporary settings (although the International Criminal Court is arguably attempting to play this role, though with challenges, given its perceived Western bias).

This is not to argue that the settings in which transitional justice has more recently been deployed lack long-standing institutions. Rather, these institutions do not manifest in the form of legal-rational states that the international community prefers to pursue justice through. In many African settings, customary structures have a stronger connection to populations than the formal state.<sup>54</sup> This is particularly true where the state has been largely absent from the lives of many citizens. In such cases, it is these customary structures, rather than the state, that may accrue more popular legitimacy and provide a stronger sense of identity. This may include chiefs, secret societies, elders, and trade associations.<sup>55</sup> As such, conflict-affected states should not be depicted as void of capacity and institutional strength, a characterization that has justified the export of skills and models of government and justice from more developed countries to these contexts, often regardless of their appropriateness. Rather, it should be highlighted that institutional maturity often does not exist within the “go-to” institutions of the international community (such as formal justice systems and police forces), but resides elsewhere, in levels of governance much closer to people’s day-to-day lives.<sup>56</sup> Such institutions may not appear particularly mature in terms of the latest innovations in organizational efficiency, IT systems, and professionalized staff, but they can represent intricate systems of social responsibility and order. For transitional justice processes, it is these local justice practices, rather than the national judiciary, that may be the most appropriate and relevant forum for establishing accountability and pursuing justice for victims and affected communities.

These features help to explain the broadening of the field to include local practices that can connect with the particular nature of violence, political settlement, and levels of institutional development that characterize many contemporary contexts.



## INTERROGATING LOCAL MODELS THROUGH EXPERIENCES IN SIERRA LEONE AND UGANDA

Local transitional justice covers a wide variety of practices across different country contexts, varying even within countries from village to village, depending on the local cultural practices and experience of conflict.<sup>57</sup> The experiences in Sierra Leone and northern Uganda are especially relevant given the presence of formal transitional justice processes that existed side-by-side with the use of local reconciliation processes. The cases thus offer instances in which transitional justice can be thought of as hybrid. The literature on Sierra Leone and northern Uganda do not purport to cover the diversity of practices used in these settings as part of transitional justice processes. Local practices remain a burgeoning area of research and what exists to date tells only partial stories of their diversity

### SIERRA LEONE

Sierra Leone's 11-year civil war between the government, the Revolutionary United Front (RUF), and civil defense forces officially ended in 2002, resulting in 75,000–200,000 deaths, 12,000 amputee survivors, 2 million displaced persons, and 72,500 demobilized combatants.<sup>58</sup> The country can be viewed as a transitional-justice-heavy context. It hosted the Special Court for Sierra Leone (set up by agreement between the United Nations and the Government of Sierra Leone to try those bearing the greatest responsibility for crimes committed) and established the TRC to establish an impartial record of violations and their root causes in addition to carrying out a myriad of local practices to promote reconciliation.<sup>59</sup>

The Special Court was important, among other reasons, in establishing the precedent of trying defendants for the crimes of enlisting child soldiers and forced marriage.<sup>60</sup> However, while it invested substantially in community outreach, it failed to resonate with many Sierra Leoneans—not least because proceedings took place in the capital of Freetown, in English, and in a compound surrounded by 15-foot walls with razor wire and armed guards.<sup>61</sup> While the TRC undertook more widespread consultations in the provinces, these were limited to the 12 district headquarter towns, with the commission spending just a week in each. The retributive jurisdiction of the Special Court also jarred with the restorative approach of the TRC. While there were attempts to harmonize the two processes,<sup>62</sup> the effectiveness of the TRC in encouraging open and truthful testimony was limited by the court simultaneously issuing indictments and seeking witnesses.<sup>63</sup>

Much less documented are the local practices that Sierra Leonean communities undertook, often with the support of local and international organizations, to reintegrate perpetrators (both children and adults) back into their communities and promote reconciliation. These were variously a part of reconciliation, restorative justice, and reintegration programs (the final stage of disarmament, demobilization, and reintegration programs). Reintegration was seen as a key component of reconciliation given the displacement of so many people during the conflict—victims and perpetrators. By reintegrating people back into communities, parties confronted the abuses and violence committed and were able to attempt to achieve forgiveness and move towards reconciliation.

Restorative justice was used with the goals of reintegrating those displaced from communities throughout the war and achieving reconciliation within communities. Practices included spiritual ceremonies involving animal sacrifice, bathing in consecrated water to “cool the heart” of a perpetrator, pouring libations, and the perpetrator displaying remorse.<sup>64</sup> The term *reconciliation* is itself translated as *kol at* (“cool heart”) in Krio—the country’s most widely spoken language. As Rosalind Shaw explains:

When the heart (the center of feelings, thoughts, and intentions), is “cool,” it is not angry (“warm”) or resentful. It does not cause one to “think too much” about painful memories . . . A “cool heart” is, then, a necessary precondition for proper social relationships with others and forms the basis for life in a community.<sup>65</sup>

These ceremonies, conducted by local elders, chiefs, secret societies, spiritual leaders, and community-based and nongovernmental organizations, have resulted in widespread forgiveness and reconciliation according to ethnographic accounts.<sup>66</sup> The best documented have been the “cooling of the heart” ceremonies. Local organizations often acted as the conduit between someone wanting to return to their community and the receiving community.<sup>67</sup> Once they had gained agreement from the community for the individual to return, traditional ceremonies led by the community took place involving bathing the returnee (symbolizing rebirth), confession, and offering food, libations, and animal sacrifice to ancestral spirits, followed by a celebration within the community.<sup>68</sup>

While these reconciliation ceremonies often focused on the perpetrator, similar ceremonies have reportedly been used for survivors of wartime rape to restore their status in the community. Again, local organizations often

approached community leaders on behalf of survivors, then secret societies conducted the ceremonies:

There are variations in the style of reintegration for girl victims of rape: some ceremonies involve boiling roots and leaves for the girl to breath in the steam to be “fumigated”, while other practices involved the eating of roots and leaves to be cleansed from the inside. Others involve washing the girl in a stream. Still others, conducted by “Juju men” might involve writing verses of the Qur-an on a slate, washing the slate, followed by using the slate water to wash the girl. The objective of the reintegration of rape victims is for the community to accept the girl who has been damaged as a result of (the criminal act of) sexual abuse.<sup>69</sup>

Another local process, *Fambul Tok* (“family talk”) emerged at the end of 2007, the brainchild of Sierra Leonean human rights activist John Caulker, with international support.<sup>70</sup> *Fambul Tok* draws on community-based reconciliation strategies used before the war to repair social ties in a post-conflict period. It involves facilitated ceremonies in which *Fambul Tok* facilitators and local leaders encourage truth telling and confessions, resulting (in theory) in forgiveness within the community. Such ceremonies have now been held across the country with *Fambul Tok* becoming the name of an established local nongovernmental organization and even exporting its model to other African contexts—an example of local transitional justice itself becoming internationalized.

While there was no formal relationship between local transitional justice practices and the Special Court or the TRC, the TRC did attempt to integrate local reconciliation and conflict-resolution approaches into its work.<sup>71</sup> It did so by holding libation-pouring ceremonies at the end of its hearings in each district, for their potential reconciliatory effect, not for any justice-related function.<sup>72</sup> Of course, justice and reconciliation are closely related—particularly when understood through the lens of Sierra Leonean customary law—but the point is that the TRC selected a component of customary justice practice to complement its wider truth-telling process, rather than embracing the wider justice mechanisms involved in customary law. As a result, libations ceremonies were a thin application of custom, used to imbue the TRC process with the legitimacy of customary practices, rather than embracing the full extent of those practices. Harder-edged elements of customary law, like swearing one’s innocence against the threat of a curse, were not embraced.<sup>73</sup>

Local processes can thus be incorporated into other transitional justice

processes, but as to whether they will reflect genuinely local practices remains an open question. As Tim Allen and Anna Macdonald argue, “Selective support for traditional justice here provides a sort of indigenous anchor: a means by which the broader, donor supported accountability agenda can be grounded, authenticated and legitimized.”<sup>74</sup>

#### NORTHERN UGANDA

The conflict in northern Uganda, which has been ongoing in fits and starts between the government of Uganda and the Lord’s Resistance Army (LRA) since 1986, has resulted in mass dislocation as families fled the violence and the government forced them into camps for the internally displaced, purportedly for their own protection. At one point, it was estimated that 90 percent of the population had been dislocated.<sup>75</sup> In addition, by 2006, up to 75,000 children and adults were estimated to have been abducted by the LRA and an unknown number recruited into the Ugandan army and local militia groups.<sup>76</sup> Abductions continue and have also spread to the Central African Republic, the Democratic Republic of the Congo, Sudan, and South Sudan. As Erin Baines describes:

The methods of violence employed in this conflict – forcing children and youth to join armed groups and often to exercise power, control, and brutality against families and neighbours – couple with the breakdown of ‘traditional’ kinship networks and relations in camps, have resulted in the erosion of social trust and morality.<sup>77</sup>

While Joseph Kony, the leader of the LRA, is wanted by the International Criminal Court for crimes against humanity and war crimes, transitional justice efforts have largely been pursued through local practices as part of reintegration and reconciliation efforts. This has occurred alongside protracted attempts to indict alleged members of the LRA within Uganda (while LRA commander Thomas Kwoyelo is now facing charges of war crimes and crimes against humanity in the International Crimes Division of Uganda’s High Court, the long-awaited trial was delayed twice in 2016). These local practices “resonate with local cosmological beliefs about morality, social responsibility, and norms regarding appropriate behaviour.”<sup>78</sup> A central focus is on ancestral spirits linked to particular clans and locations that oversee the moral order. When social transgressions occur, these ancestral spirits can send misfortune until the clan restores unity. During the conflict, such misfortune—or curses—became more common as families have been unable to bury the dead

appropriately or visit and pay respect to their ancestors' graves.<sup>79</sup> In addition, more transgressions—and more severe transgressions—took place during the conflict, as people were killed and raped, for example.<sup>80</sup> When such transgressions occur, all interactions between the families of perpetrators and victims and their communities cease and cannot be resumed until reconciliation is achieved.<sup>81</sup> Critically, “As the whole clan is afflicted, it becomes a collective responsibility to address the transgression and restore the moral order.”<sup>82</sup>

In order to reconcile communities and appease ancestral spirits, a range of cultural practices can be used. The most documented and often used as an overarching term to capture wider reconciliation process in which social harmony is restored through confession, apology, and forgiveness and by which ancestors and spirits are appeased is *mato oput* (“to drink the bitter root”).<sup>83</sup> This involves the aggrieved parties meeting on neutral ground, slaughtering a cow/bull and goat to share a meal, and both victim (or victims' family members) and perpetrator drinking the bitter oput root from the same bowl, symbolizing swallowing one's anger.<sup>84</sup> These ceremonies are conducted with the entire clan present as a collective reconciliation process.

*Nyono-ton gweno* (“stepping on the egg”) is a ceremony used to welcome home family members who have been absent for a long time. During their time away, the family members may have attracted spirits that can bring misfortune to the home if not properly cleansed. Stepping on an egg symbolizes the acceptance of the local order and a commitment to live in harmony with others in the home. While it was conventionally conducted at the family or clan level, the practice has been utilized as part of returnee-reintegration ceremonies, with estimates that over 12,000 returnees have undergone the ceremony, sponsored by United States Agency for International Development (USAID) and civil society.<sup>85</sup>

*Gomo tong* (“to bend the spears”) is a practice especially relevant to inter-clan disputes. Spears from each party are “bent and made useless, and then passed on to the former enemy as a proof that fighting can never again be allowed between the two groups.”<sup>86</sup> These, and other, practices have not emerged in direct response to the conflict but have long been used to deal with disputes, homicides, and unnatural deaths.<sup>87</sup>

While these constitute some of the best documented “traditional” practices of reconciliation in northern Uganda, there are also debates about the extent to which their revival as part of transitional justice processes is locally meaningful and endogenously generated.<sup>88</sup> Like all norms, local customs develop according to the interests of the most powerful within a community and thus can hold in place the very inequalities and exclusions that underlie much

conflict. Many of these local justice practices have been supported by international organizations, in particular the Northern Ugandan Peace Initiative, funded by USAID, which is a mechanism for social healing in conflict-affected communities. This, again, reflects how local transitional justice processes can be applied by national or international actors, but also that the extent to which they will translate as locally meaningful is a matter of debate and needs to be carefully considered within each context.

Northern Uganda thus represents the clearest mandating of local transitional justice, with the use of such practices explicitly embraced in the country's amnesty law as well as in the 2007 Agreement on Accountability and Reconciliation between the Government of Uganda and the LRA. Yet this greater complementarity may not mean better outcomes. It may be the case that in order to have a genuinely reconciliatory effect local transitional justice must emerge in a manner that prevents its co-option by other processes happening at the national or international level or by other normative agendas. Additionally, local transitional justice is likely to only be as effective at reconciliation and justice as the content of the customs and principles of justice that underlie it and the degree of acceptance that these have in the community. Where those customs and principles are exclusionary—for instance where principles of due process, fairness of procedure, or equality before the law are (perceived to be) eroded by considering the reputation and status of persons within a community—it is likely that so too will be the transitional justice processes that they inform. The difficulty lies in the fact that in war-torn societies there is often weak consensus around principles of justice at the national and sub-national levels.

#### **UNDERSTANDING LOCAL TRANSITIONAL JUSTICE PRACTICES**

With this more tangible explanation of what local transitional justice can involve in mind, what do these practices reveal about the nature of the trust that they aim to build and their potential advantages and disadvantages vis-à-vis other forms of transitional justice? Returning again to the two case studies, Sierra Leone and northern Uganda, weak institutional development characterizes both contexts, arguably contributing to the need for local level responses to conflict in the absence of the state filling this role. And yet these various forms of local transitional justice exist in spite of the presence of a number of formal transitional justice mechanisms, suggesting that local transitional justice processes offer something distinct, or additional, to other transitional justice mechanisms.

Centered primarily on truth telling and fostering forgiveness between victims and perpetrators, local transitional justice is more about building trust *among* citizens than building civic trust between citizens and the state. This reflects the particular contexts in which transitional justice is increasingly being deployed today, where communities and/or individuals fought against each other, rather than necessarily against the state. Reconciliation between individuals is often understood to require wider community involvement, which derives in part from the fact that transgressions by an individual are believed to have community-wide repercussions.<sup>89</sup> Thus, reconciliation at the community level is essential. In Sierra Leone, for instance, if individuals have sexual intercourse in the sacred bush where ancestors are believed to reside and where cultural ceremonies are often conducted the crops of the entire community will fail unless appeased.<sup>90</sup> The actions of individuals affect the community and thus require a community-wide response. This does not necessarily require, however, “remembering and assessing every detail of a long and violent conflict. Rather, it is about finding a consensual understanding about what the conflict essentially was about, and how to now coexist.”<sup>91</sup>

Local transitional justice is also about reaffirming trust in the community as a whole and its norms and beliefs as an order-making entity. For this reason, there is a strong emphasis in local practices on the traditions that link communities together. Using traditions to reconcile also revalidates those traditions as important and as signifiers of group identity. While this can help to repair the social fabric in the wake of conflicts that have divided communities, traditions can also be used as a tool by the powerful to reassert their control within the community.<sup>92</sup> Such control is often disrupted during or after conflict (as was the case in Sierra Leone, for instance, where chiefs were targeted by the RUF for the social exclusion they were perceived to enforce against young men). A priority for these leaders, then, might be reasserting their power and with it maintaining prevailing exclusions and inequalities.

In both countries discussed above, local processes that have taken place have been more effective than formal transitional justice processes at dealing with large numbers of perpetrators and victims and the ambiguity of the victim-perpetrator divide. While the Special Court for Sierra Leone and the ICC indictments in northern Uganda have focused on those most culpable for crimes committed during the conflicts, the trials perhaps have limited relevance for those living next door to individuals who committed abuses against them and their families.<sup>93</sup> This is not to suggest that those higher level processes are not important, but rather that they leave gaps that local approaches

can help to fill. The gap around reconciling victims and perpetrators, and helping to recognize the blurring of those distinctions in some cases, is particularly important given the changes that have occurred in the nature of conflicts to which transitional justice is increasingly being applied. Because of their focus on day-to-day lived experience and their ability to process a high volume of perpetrators—including many former soldiers abducted and forcibly conscripted as children—local practices have also been more effective at reintegrating perpetrators with their communities. The role that local transitional justice practices can play is further heightened in contexts where weak government institutions prevent the state from carrying out this role.

In addition, an under-explored benefit of local practices is that because they emerge from long-standing (though nonetheless often re-invented) practices of dealing with disorder in communities, they take conflict out of the “exceptional” category and treat it in similar ways to other breaches of the peace. This is important given the increasing recognition that conflict is not some exceptional order suspended in its own time or space separated from “peacetime,” but rather that it often shares many similarities with pre- and post-conflict stages. As Sverker Finnström notes, “Interaction and social exchange can remain frequent despite the fact that war tends to impose ethnic categorizations and cultural divisions on everyday realities.”<sup>94</sup> In contexts in which conflict is long running (19 years in the case of northern Uganda) and does not necessarily plague the entire country at once, but rather rolls across different regions in waves, it may be more appropriate to recognize these conflicts as continuities of lived experience, rather than treating them as entirely different social orders requiring new or different processes of justice and reconciliation to move beyond them.

At the same time, inversely, a potential deficiency of local transitional justice—or perhaps just an underexplored dimension of it—is that it draws on justice processes developed primarily to respond to more common forms of violence. There are of course instances, like genocide, in which violence and abuse are so exceptional that they require an exceptional response. For such exceptional cases, there is a danger that local transitional justice alone is insufficient.

Further, local transitional justice processes can tend to focus more on restoring social harmony and order than on achieving justice. This is apparent in both the Sierra Leonean and northern Ugandan examples. For that reason, they may not address impunity as effectively as other forms of transitional justice (as they also must balance competing demands). This relates to the fact



that often those presiding over local transitional justice processes tend to be powerful members of the community: chiefs, elders, religious leaders, etc. As such, these practices are not devoid of politics. One paramount chief in Sierra Leone, for example, explained that the central role of chiefs is to maintain peace and order,<sup>95</sup> by imposing fines and punishments on their subjects through local justice. But this was described as less about what is just and more about what would maintain “community order”: The chief reasoned that if he did not punish an offender, victims would be compelled to seek revenge themselves, leading to increased disquiet and incidents of crime. Thus, the chief’s justice system seeks to appease the aggrieved parties and keep the peace and social order within the chiefdom. This can extend, for instance, to encouraging a woman who is beaten by her husband to return to him on the basis that the woman will ultimately be better served financially and socially by her remaining in her marriage.<sup>96</sup> In such a case, it is clear that local justice may privilege social order over justice. This may be a pragmatic choice—especially following conflict—but it is nonetheless a dynamic of power (and maintaining power) that must be acknowledged. Through this, it is the vulnerable and those with less power, such as women, youth, and outsiders, who are more likely to suffer.

Much has been written about the dangers of romanticizing “the local” in relation to justice processes. As Allen and Macdonald highlight, “Just because a process or an institution is nominally traditional does not insulate it from interference from various kinds of public authority, including the state.”<sup>97</sup> In Rwanda, for instance, some argue that the *gacaca* courts have essentially been co-opted by the state and that some cases now being heard have dubious connections to the conflict and are more about personal score settling.<sup>98</sup> Ultimately, local justice (transitional or otherwise) is only as progressive as the norms of wider society. So while local justice is *often* restorative, it is not always so.<sup>99</sup> It can depend on the severity of the crime and involve some disturbing practices that many would not be comfortable with categorizing as transitional justice efforts.<sup>100</sup> Punitive measures are not uncommon and depend “on the crime, who had committed it, and who was arbitrating.”<sup>101</sup> While punitive justice may be appropriate in some circumstances to achieve accountability, this is not evident in many contexts of mass violence, for instance, where children are involved as perpetrators. Punitive justice is also problematic when it is perceived that principles of due process will not be followed, because either the institutional conditions in place do not allow for it or the perception of “victor’s justice” outweighs the possibility of reconciliation. It is important that a critical lens be retained regarding all transitional justice practices, from

retributive trials to truth commissions to local transitional justice, remaining aware of the values prioritized in all such processes.

Moreover, it is also important to remember that the practices that local transitional justice often draws on have never been applied uniformly across countries or regions. They will resonate with some communities, and some people, more than others. James Ojera Latigo notes, for instance, that in northern Uganda such practices appear to have diminishing relevance for younger populations who might not have experienced the rituals before or who are more influenced by Christian or Muslim beliefs or who reject “traditional” cultural practices as out of step with contemporary life.<sup>102</sup> Thus, local approaches will not necessarily offer reconciliation for all members of a community in the same way. It is merely one more tool for offering healing to those who have lived through conflict or repression.

A final word of caution is that it is important to remember that the analytically useful, but empirically false, binaries of *state-non-state*, *modern-traditional*, etc., represent a biased and external view of the world. While these categories may be useful heuristic devices in some contexts, they are not how most Sierra Leoneans or Ugandans see the world and represent the world as much neater than is the case in reality. From the perspective of affected individuals and communities there are not discrete *traditional* or *modern* transitional justice mechanisms.<sup>103</sup> Similarly, but less explored, there are also likely not discrete *transitional-justice* and *non-transitional-justice* measures for dealing with violence. Rather, as Finnström eloquently puts it: “With the help of all kinds of human-made interventions [both modern and traditional], people seek to cope with various problems, including those produced by the . . . failure to bring peace to the country. Ritual action . . . is one example of this.”<sup>104</sup>

## CONCLUSION

The increasing role of local transitional justice as part of wider post-conflict justice and reconciliation processes reflects at least three important features of countries emerging from conflict since the 1990s. First, these countries have experienced forms of conflict that are characterized by predominantly horizontal, rather than vertical, violence. Second, their state institutions are weak and often not seen as legitimate, their normative and/or territorial reach is limited, and those living within their borders do not necessarily have a strong sense of national identity. As a result, it is local-level governance that tends to be most relevant to people’s lives. Finally, the nature of the political settlements

in contemporary post-conflict contexts tends to reflect a continuity with the pre-conflict period in a way that reduces the likelihood of leaders being held accountable for past wrongdoing.

In responding to these features, as well as the greater recognition now afforded to legal pluralism, local transitional justice has begun to play more of a role. As a result:

Two dimensions – national/international, or truth commission/trial – are no longer enough to map the universe of transitional justice efforts. Transitional justice now reaches down into the local village or neighbourhood level, and makes use of a number of techniques drawn from or influenced by local customary law that combine elements of truth-telling, amnesty, justice, reparations, and apology.<sup>105</sup>

Local transitional justice can be especially important in providing reconciliation in contexts characterized by large numbers of perpetrators, a blurring of the victim-perpetrator divide, and where trust is to be built among citizens (and communities), rather than between citizens and the state. Yet local transitional justice is not without its flaws. Critically, it is not an either/or choice between local and other forms of transitional justice. Indeed, individuals emerging from more recent civil wars are entitled to the same standards of justice as the rest of the international community.<sup>106</sup> Local processes may be able to play a role where transgressions are understood to have additional social, cultural, or spiritual implications that other transitional justice practices are not well suited to address. In doing so, however, local transitional justice may be better at restoring social order than addressing impunity.

Finally, it should be noted that given the culture-specific nature of the processes involved in local transitional justice, the temptation for the international community to “extrapolate a ‘formula’ that can be applied, with few changes, to any and all situations” must be avoided.<sup>107</sup> This is crucial if local transitional justice is to retain meaning within local contexts.

## NOTES

- 1 Legal pluralism is a term that, according to Donna Lee Van Cott, “connotes the simultaneous existence of distinct normative systems within a single territory.” Donna Lee Van Cott, “A Political Analysis of Legal Pluralism in Bolivia and Colombia,” *Journal of Latin American Studies* 32, no. 1 (2000): 207–234. This has implications for multiple

understandings of justice and can translate in plural modes of dispute resolution that exist within a society. These may compete or cooperate with each other, but usually derive legitimacy from different sources (formal laws, custom, religion, etc.). For a rich discussion of the politics of legal pluralism, see also chapters in Brian Tamanaha, Caroline Sage, and Michael Woolcock, eds., *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (New York: Cambridge University Press, 2013).

- 2 Akanmu G. Adebayo et al., *Indigenous Conflict Management Strategies in West Africa: Beyond Right and Wrong* (Lanham, MD: Lexington Books, 2014); Tim Allen and Anna MacDonald, "Post-Conflict Traditional Justice: A Critical Overview," Justice and Security Research Programme Paper 3, London: London School of Economics and Political Science, 2013; Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International Institute for Democracy and Electoral Assistance, 2008); Rosalind Shaw and Lars Waldorf, "Introduction: Localizing Transitional Justice," in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Rosalind Shaw, Lars Waldorf, and Pierre Hazan (Stanford, CA: Stanford University Press, 2010). All of these terms are imperfect and carry with them different connotations: "traditional" suggests a continuity with the past that might not be accurate and in juxtaposition with "modernity;" "informal" can deny the formality with which these processes are carried out; "non-state" overlooks the way in which these practices can be sanctioned by or connected with the state, etc. "Local" is used throughout this chapter; while it too can underplay the ways in which the local space is connected to the national and international, it is used due to its contrast with the spaces in which transitional justice practices have conventionally been focused, at the national or international levels. Yet, to avoid its treatment as a "level" subordinate to the national and international, it is used here as "a standpoint based in a particular locality but not bounded by it . . . [a] shifted center from which the rest of the world is viewed." Rosalind Shaw, "Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment," in *Localizing Transitional Justice*, 6.
- 3 These dates are indicative. While some of the processes of integrating customary justice practices into transitional justice processes had a clear start and end date (such as *gacaca*), others were a more ad hoc use of customary practices by communities and non-governmental organisations and thus difficult to date precisely. Moreover, while practices like *gacaca* in Rwanda were only formally undertaken in the 2000s, discussions and planning for their use started earlier in the 1990s.
- 4 Luc Huyse, "Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies," in *Traditional Justice and Reconciliation after Violent Conflict*, 1.
- 5 Rosemary Nagy, "Centralizing Legal Pluralism? Traditional Justice in Transitional Contexts," in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-combatants*, ed.

- Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman, and Olga Martin-Ortega (London and New York: Routledge, 2013), 81.
- 6 Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: United States Institute of Peace, 2011); Rachel Sieder, "Contested Sovereignties: Indigenous Law, Violence and State Effects in Postwar Guatemala," *Critique of Anthropology* 31 (2011): 161–84.
  - 7 Tricia Olsen, Leigh Payne, and Andrew Reiter, eds., *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: US Institute of Peace, 2010); Alexandra Barahona de Brito, "Truth, Justice, Memory and Democratization in the Southern Cone," in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González, and Paloma Aguilar (Oxford: Oxford University Press, 2001); Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).
  - 8 Or indeed settings where conflict remains ongoing, but where transitional justice mechanisms are already part of the socio-political and institutional landscape, as in the case of Colombia.
  - 9 Siri Gloppen, "Roads to Reconciliation: A Conceptual Framework," in *Roads to Reconciliation*, ed. Elin Skaar, Siri Gloppen, and Astri Suhrke (Oxford: Lexington, 2005), 20.
  - 10 Rodrigo Uprimny and Maria Paula Saffon, "Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case," "Coming to Terms" with Reconciliation, Working Paper Library, University of Wisconsin, 2–4 [http://global.wisc.edu/reconciliation/library/papers\\_open/saffon.pdf](http://global.wisc.edu/reconciliation/library/papers_open/saffon.pdf)
  - 11 Ibid.
  - 12 Jonathan Di John and James Putzel, "Political Settlements: Issues Paper," Governance and Social Development Resource Centre, Birmingham: University of Birmingham, 2009.
  - 13 Pilar Domingo, "Dealing with Legacies of Violence: Transitional Justice and Governance Transitions," ODI Background Note, London: Overseas Development Institute, 2012.
  - 14 Bert Ingelaere, "The Gacaca Courts in Rwanda," in *Traditional Justice and Reconciliation after Violent Conflict*, 16.
  - 15 Ibid., 17.
  - 16 BBC News, "Rwanda Gacaca Genocide Courts Finish Work," June 18, 2012, <http://www.bbc.com/news/world-africa-18490348>.
  - 17 UN Secretary-General, *The Rule of Law and Traditional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, S/2004/616, 2004, 12, <http://www.unrol.org/files/2004%20report.pdf>
  - 18 Quoted in Huyse, "Introduction," 1.
  - 19 Rosalind Shaw and Lars Waldorf, "Introduction: Localizing Transitional Justice," in *Localizing Transitional Justice*, 4.

- 20 Eric Stover and Harvey Weinstein, eds., *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004).
- 21 Laurel Fletcher and Harvey Weinstein, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31, no. 1 (2008): 163–220, quoted in Anna Macdonald, "Local Understandings and Experiences of Transitional Justice: A Review of the Evidence," Justice and Security Research Programme Paper 6, London: London School of Economics and Political Science, 2013, 7.
- 22 Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: United States Institute of Peace, 2011); Peter Albrecht and Helene Maria Kyed, "Introduction: Non-state and Customary Actors in Development Programs," in *Perspectives on Involving Non-state and Customary Actors in Justice and Security Reform*, ed. Peter Albrecht, Helene Maria Kyed, Deborah Isser, and Erica Harper (Rome: DIIS and IDLO, 2011); Lisa Denney "Overcoming the State/Non-State Divide: An End-user Approach to Security and Justice Reform," *International Peacekeeping* 21, no. 2 (2014); Rachel Sieder, "Contested Sovereignties: Indigenous Law, Violence and State Effects in Postwar Guatemala," *Critique of Anthropology* 31, no. 3 (2011): 161–84.
- 23 Ibid.
- 24 Lisa Denney, *Justice and Security Reform: Donor Agencies and Informal Institutions in Sierra Leone* (London: Routledge, 2014).
- 25 See, for instance, Sally Falk Moore, *Law as Process: An Anthropological Approach* (London and Boston: Routledge and Kegan Paul, 1978); Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–896; and Franz von Benda-Beckmann, "Scape-Goat and Magic Charm: Law in Development Theory and Practice," *Journal of Legal Pluralism* 28 (1989): 129–148, for some of the earliest work in this regard.
- 26 UK Department for International Development, "Non-state Justice and Security Systems," London: Department for International Development, 2004, 1.
- 27 Ewa Wojkowska, "Doing Justice: How Informal Justice Systems can Contribute," New York: UNDP, 2006.
- 28 OECD, "Enhancing the Delivery of Justice and Security," Paris: OECD, 2007, 6, <http://www.oecd.org/dac/governance-peace/conflictandfragility/docs/38434642.pdf>.
- 29 World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011).
- 30 Charles T. Call, "Introduction: What We Know and Don't Know about Postconflict Justice and Security Reform," in *Constructing Justice and Security After War*, ed. Charles T. Call (Washington, DC: United States Institute of Peace, 2007), 4.
- 31 Macdonald and Allen, "Post-Conflict Traditional Justice."
- 32 Nagy, "Centralizing Legal Pluralism?," 84.
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CHAPTER 7

Non-State Armed Groups in Transitional Justice  
Processes: Adapting to New Realities of Conflict

*By Annyssa Bellal*

Mechanisms of transitional justice have been considered increasingly relevant in helping societies emerging from armed conflicts to confront past abuses and ensure the return of long-lasting peace and stability.<sup>1</sup> Designing and implementing such mechanisms in post-conflict and even ongoing conflict situations, however, comes with a set of specific challenges. These include the large numbers of both victims and armed actors, the difficulties in attributing responsibility, resource and capacity deficits, and the reduced resiliency of institutions.<sup>2</sup> Relevant armed actors and agents of violence necessarily include non-state armed groups, which play a crucial role in contemporary armed conflicts and other situations of armed violence.<sup>3</sup>

Engaging non-state armed groups in transitional justice processes during conflicts and post-conflict situations raises legal, political, and operational issues. First, the exact scope of the obligations of these groups under international law is still unclear. While it is today accepted by case law and state practice that non-state armed groups are bound by the law of armed conflict (or international humanitarian law), whether or not they have human rights law obligations still divides scholars and state practice. There is, in addition, no judicial international mechanism of supervision and implementation of international law for non-state actors. As a consequence, demanding reparations for violations of international humanitarian law and human rights committed by armed groups is difficult for victims.

Counterterrorism legislation presents a further obstacle for the engagement of non-state armed groups on transitional justice matters. Since September 11, 2001, states have adopted a variety of counterterrorism legislation, listing some groups as “terrorist” and imposing sanctions, including on those who provide “material support” to these groups, a notion that has been interpreted quite broadly in some cases. Finally, the complexity of contemporary armed conflicts and the multiplicity and diversity of the types of non-state armed groups involved in violent contexts make it more difficult to elaborate on the

means to practically engage such actors in transitional justice processes.

This chapter explores the opportunities and challenges that arise in involving non-state armed groups in truth-seeking and accountability initiatives and efforts to provide reparation and guarantees of non-recurrence, understood “as a set of measures that are related to, and can reinforce one another, when implemented to redress the legacies of massive human rights violations and abuses.”<sup>4</sup> It is argued that finding ways to better address the collective responsibility of non-state armed groups, ensuring that individuals have a legal right to reparation when their rights are violated by these actors, and establishing a degree of ownership in justice processes of non-state armed groups are essential steps to be taken. The analysis in this chapter focuses on legal argumentation. It also reflects operational and policy considerations, but should be considered as an invitation for further discussion rather than providing for definite answers.

## DEFINING NON-STATE ARMED GROUPS

A range of non-state armed groups operate today in armed conflicts or other situations of violence, but one can find only a few definitions of the term in international law. The UN Security Council, for instance, has defined quite broadly a non-state actor as being an “individual or entity, not acting under the lawful authority of any State.”<sup>5</sup> The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“the Kampala Convention”) considers “armed groups” to mean “dissident armed forces or other organized armed groups that are distinct from the armed forces of the state.”<sup>6</sup> The European Union has defined non-state armed groups as those that “retain the potential to deploy arms for political, economic and ideological objectives, which in practice are often translated into an open challenge to the authority of the State.”<sup>7</sup> Veronique Dudouet, in her research on the transformation of armed groups to actors in peace processes, proposes an interesting definition that will be used in this analysis: groups that operate “primarily within state borders, engaged in violent attempts to challenge or reform the balance and structure of political and economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social groups.”<sup>8</sup>

Among the types of non-state armed groups active in armed conflicts or other situations of violence and relevant for our analysis, one can list the following:

- armed opposition groups that seek the liberation of a social class or a nation
- paramilitary groups, which are irregular combat units that usually act on behalf of, or are at least tolerated by, a given regime
- terrorist groups that aim to spread panic and fear in societies in order to achieve political goals
- vigilante or self-defence groups, composed of armed civilians acting in self-defence, whose degree of organization varies and is often loose; these groups do not necessarily have a political purpose, such as replacing the existing government, but rather aim to defend themselves against the attacks of enemy armed forces
- mafia-type structures, syndicates, or urban gangs, as well as counterfeiters, smugglers, or pirates
- mercenaries recruited from third states who are paid to fight as part of combat units or to conduct independent special tasks<sup>9</sup>

It is clear that non-state armed groups have very different structures and ideologies. Even within the category of armed opposition groups, for example, there are substantive structural differences between an armed group that has state-like characteristics, sometimes defined as “de facto authority,”<sup>10</sup> like the Liberation Tigers of Tamil Eelam during the armed conflict in Sri Lanka,<sup>11</sup> and groups with looser organizational structures, like the anti-Balaka in the conflict in the Central African Republic.<sup>12</sup> Christopher Clapham notes that in Africa we see

a plethora of movements, for the most part locked into regional patterns of conflict, which generally suffer from weak internal organization and poorly articulated goals and can be far less readily incorporated into stable political settlements than earlier liberation insurgencies (whose goals were in any event always clear and limited) and reform insurgencies.<sup>13</sup>

This structural disparity makes it more difficult to achieve a coherent system of responsibility of non-state armed groups for violation of international norms, which, as a consequence, affects transitional justice processes.

## TRUTH SEEKING

Establishing truth in the context of armed conflicts can be done through various mechanisms, both official and non-official.<sup>14</sup> These include commissions of inquiry and fact-finding missions, which can be mandated either by the UN Human Rights Council<sup>15</sup> or by the UN Security Council and the UN Secretary General,<sup>16</sup> or be initiated by the Office of the High Commissioner for Human Rights (OHCHR) as part of its general mandate under General Assembly resolution 48/141.<sup>17</sup> Both types of investigative bodies aim to establish the facts and record the context of events, identify alleged perpetrators, and provide recommendations to the state concerned and the international community as to how to address violations.<sup>18</sup>

In recent years, commissions of inquiry and fact-finding missions have frequently addressed violations of international humanitarian law and human rights law committed by non-state armed groups. For instance, the mandate of the OHCHR investigation in Sri Lanka expressly included the examination of “alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the last phase of the armed conflict.”<sup>19</sup> The Independent International Commission of Inquiry on the Syrian Arab Republic has, since 2012, also systematically reported on the violations of international law committed by non-state armed opposition groups,<sup>20</sup> as have other OHCHR fact-finding missions in Mali<sup>21</sup> and the Central African Republic.<sup>22</sup>

Commissions of inquiry and fact-finding missions can therefore be useful tools for establishing *as a preliminary step* the responsibility of non-state armed groups during a particular conflict. That said, one should also keep in mind that these mechanisms often operate with tight time constraints, leaving less space for the participation of victims.<sup>23</sup> Further, they can focus only on a narrow scope of events and facts, thus limiting their truth-seeking functions.<sup>24</sup> Another limitation of such bodies with regard to truth seeking lies in the multiplicity of existing non-state armed groups in some conflict situations, such as in Libya, the Democratic Republic of the Congo, and Syria. As a consequence, it can prove difficult for these mechanisms to address all the violations committed by all the actors at a given time, leaving many violations unaccounted for.

Truth commissions can be described as “officially sanctioned, temporary, non-judicial investigative bodies,”<sup>25</sup> whose tasks usually include collecting statements from victims, witnesses, and perpetrators; researching and investigating the root causes of an armed conflict; holding public hearings; engaging in

outreach programs; and issuing a final report that summarizes the commission's findings and recommendations.<sup>26</sup> Some truth commissions have been able to denounce violations of human rights and humanitarian law committed by armed groups *per se*. For instance, Liberia's Truth and Reconciliation Commission determined that:

all armed groups whether affiliated with warring factions or with the Government of Liberia are responsible for the commission of human rights violations including violations of international humanitarian law, international human rights law, war crimes and egregious domestic laws violations of Liberia. These groups include: NPFL, LURD, Liberia Peace Council, Militia, ULIMO, MODEL, Armed Forces of Liberia, ULIMO-K, ULIMO-J, Antiterrorist Unit, ECO MOG, Vigilantes, Lofa Defense Force, Liberia National Police, Special Operation Division, Revolutionary United Front (RUF), Special Anti-Terrorist Unit, Special (SATU) Security Unit, Special Security Service, Black Beret, National Security Agency, National Bureau of Investigation, Criminal Investigation Division, and Kamajors.<sup>27</sup>

Whereas ultimately truth commissions aim at accounting for past human rights and international humanitarian law violations, their focus is not only on the responsibility of the perpetrators, as they also seek to understand the patterns and causes of violations. In that regard, "the work of the commission can help a society understand and acknowledge a contested or denied history, and in doing so bring the voices and stories of victims, often hidden from public view, to the public at large."<sup>28</sup>

Truth commissions are designed and resourced differently according to the specific context in which they are created, and their results depend on contextual variables. But because they have a wide margin for including the voices of members of armed groups, not only as individuals who have violated international law but also in certain circumstances as victims, especially when they are former child soldiers,<sup>29</sup> truth commissions can be particularly useful where armed groups are concerned.

In addition, as truth commissions are non-judicial tools that often take a comprehensive approach to establishing facts and understanding the root causes of and circumstances surrounding a given conflict, they may be less threatening to non-state armed groups than strict criminal justice mechanisms. Indeed, many non-state armed groups believe, rightly or not, that national or international criminal law processes are biased against them.



## ACCOUNTABILITY

Because the majority of armed conflicts today are of a non-international character, it is unsurprising that many cases at the International Criminal Court (ICC) deal with individual members of non-state armed groups.<sup>30</sup> The development of international criminal law at both the national and international levels has thus arguably made an important contribution to the fight against impunity for the crimes committed by members of such groups. Prosecutions of international crimes are an important part of transitional justice processes in that they “help strengthen the rule of law, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions . . . [are] a source of comfort for victims . . . [and] play a vital role in restoring their dignity and delivering justice.”<sup>31</sup>

However, in view of the length of criminal trials and the limited breadth of action of international criminal law, targeting a few individuals and relying only on individual criminal responsibility can be seen as insufficient to address violations of international law committed by non-state armed groups.<sup>32</sup> As underlined by one commentator, “while the increasing ability to hold individual perpetrators to account is important, in general there is an agreement that international criminal law and individual prosecutions do not address the full range of the needs of victims.”<sup>33</sup>

One limit of international criminal courts, or any international courts, is their lack of jurisdiction over non-state armed groups as “collective entities.”<sup>34</sup> There are, however, reasons for holding a *group itself* responsible for the violations of international law committed by its members. From a moral point of view, for example, the group may condone, justify, and even incite individuals to commit crimes. Indeed, “organized armed groups regularly succeed to create a climate in which crimes are perceived to be in conformity with, rather than a deviation from, standards of behavior accepted within such a group.”<sup>35</sup> Another compelling reason is that the person who committed violations with the support of the group might be dead, which would prevent any possibility of obtaining reparation in an individualized criminal trial. The group, on the other hand, might have assets that could be seized if responsibility is established.

Holding a group accountable can also enable better implementation of international law—for instance, by calling on the group to change its practice, rather than simply punishing the individual, and encouraging it to develop training and structures to prevent and punish violations.<sup>36</sup> Such reform measures can be seen as guarantees of non-recurrence, which are a key element

of transitional justice processes in both conflict and post-conflict situations, as discussed below. The prospect of establishing at the international level a system of criminal accountability for collective entities, like armed groups, however, is dim. International criminal law is conceived as being applicable to *individuals*, and the assumption is that it is practically unfeasible to try a collective entity as such.<sup>37</sup>

A further powerful and recurrent obstacle to accountability in the context of non-international armed conflicts is the provision of amnesties to members of non-state armed groups. Research has shown that amnesties for such actors are commonly used during and after conflict, suggesting that “the accountability norm has not spread as far in the civil war context.”<sup>38</sup> *Blanket amnesties*, which cover violations of international humanitarian law and human rights, are still a controversial topic both in international law and practice, and there is a rule prohibiting them, allowing amnesties only for those who participated in hostilities but respected international humanitarian law (that is, did not commit genocide, war crimes, or crimes against humanity).<sup>39</sup> It has been argued, however, that certain forms of amnesties may be, in some circumstances, a “necessary evil.”<sup>40</sup> Indeed, many non-state armed groups distrust the government, and it is not uncommon for states at the end of a conflict to be unable or unwilling to establish procedures in which all parties can have confidence.<sup>41</sup> Because the lack of incentives to compromise and the fear of prosecution may push these groups back to armed struggle, granting amnesties may be the only means to bring groups to the negotiation table. In such contexts, some plead for the adoption of a “contextual approach” to amnesties,<sup>42</sup> which could, for example, require amnesties to be supported by a widespread political consensus or to be accompanied by accountability and redress measures that are “not necessarily criminal in nature,” such as truth telling or reparations.<sup>43</sup>

Even limited amnesties come with risks, however, from an accountability standpoint. In Burundi in 2003 and 2015, for example, “temporary immunities” were accorded notably to different armed actors. Aimed at shielding the armed forces of both non-state armed groups and the state from judicial prosecution for political offenses (like an attempted coup), these measures were initially planned to be temporary, and considered at first to be a successful tool for transitional justice in the context of non-international armed conflicts.<sup>44</sup> However, the immunities proved to be anything but temporary. Still in place at the time of writing, they cover not only political offences but also other crimes, including those allegedly committed by the regime now in power. “Burundi’s experience shows that even when *in law* temporary immunity is limited to

certain political offences, *in reality* it guarantees full impunity to perpetrators of serious human rights crimes.”<sup>45</sup>

Be that as it may, one should keep in mind that amnesties or other forms of judicial immunities only bar prosecutions at the national level. Under international law, a member of a non-state armed group can still face prosecution before an international court or a foreign domestic court, which can judge the alleged perpetrator of an international crime on the basis of the principle of universal jurisdiction.<sup>46</sup>

## REPARATION

As the main subjects of international law, states are the drafters and recipients of international norms, which has an impact on the establishment of responsibility for violations of those norms. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), elaborated by the UN International Law Commission, largely codifies customary international law.<sup>47</sup> After taking almost half a century to be finalized,<sup>48</sup> the document has been criticized by some scholars who argue that its set of rules on state responsibility might be somewhat outdated with respect to contemporary problems.<sup>49</sup> In a world where all sorts of different non-state actors evolve at the domestic and international levels, a system of responsibility based entirely on a state-centric paradigm falls short of dealing in a comprehensive manner with the consequences of violations of international norms by these actors.<sup>50</sup>

The norms applicable to the establishment of the responsibility of states foresee the possibility that the behavior of a non-state armed group could directly entail the responsibility of the state as such in three different scenarios: 1) when a non-state armed group is in fact acting under the control of a state<sup>51</sup>; 2) when certain conduct is carried out in the absence or default of official authorities<sup>52</sup>; and 3) when the group becomes the new government.<sup>53</sup> In these instances, the acts committed by the non-state armed group are *directly attributable* to the state, as if they had been committed by the state itself. As a consequence, the non-state actor as the responsible state will be under the “obligation to make full reparation for the injury caused by the internationally wrongful act.”<sup>54</sup>

Furthermore, states have the obligation to exercise *due diligence* and do everything in their capacity to protect everyone in their jurisdiction against threats to the enjoyment of human rights posed by non-state armed groups. As articulated by the Inter-American Court of Human Rights in its landmark

*Velásquez Rodríguez v. Honduras* case of 1988,

an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>55</sup>

The extent to which states have a legal obligation to guarantee the rights of victims to an effective remedy and reparation for violations committed by non-state armed groups, however, is still unsettled. Some practice has gone in this direction. For example, truth commissions in Peru and Sierra Leone defined the term *victims* for the purpose of future reparations programs broadly enough to include victims of such violations. But given the fact that the recommendations of both commissions have been poorly implemented, one can say that an obligation of the state to provide reparations for acts committed by these actors is at best a crystallizing norm of customary international law, and at worst merely a good practice.<sup>56</sup>

A further challenge with regard to ensuring reparation for actions committed by non-state armed groups is related to the uncertainties surrounding the international law applicable to these actors. While it is relatively well settled that international humanitarian law applies to non-state armed groups, controversy remains with regard to human rights law, thus casting doubt on the extent to which an armed group itself would be directly and legally bound by the victims' "right to reparation."

International humanitarian law only applies in times of armed conflict. The applicable law differs depending on whether the conflict is between states (also called "international armed conflict") or between non-state armed groups and a state or between such groups themselves.<sup>57</sup> As spelled out by the International Criminal Tribunal for the former Yugoslavia,

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the

warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>58</sup>

According to case law, two conditions are necessary to the existence of a non-international armed conflict: protracted violence and the level of organization of the non-state armed group. *Protracted* refers to the intensity of the armed violence and not merely its duration, the ordinary meaning of the word notwithstanding.<sup>59</sup> The level of organization required for the applicability of international humanitarian law to non-state armed groups, also spelled out in case law, includes elements such as the existence of a command structure, disciplinary rules, and mechanisms within the group, and the existence of a headquarters or control over certain territory.<sup>60</sup>

While the precise legal means by which non-state armed groups are bound by international humanitarian law have been debated,<sup>61</sup> state practice, international case law, and scholarship have confirmed that Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II of 1977 to the 1949 Geneva Conventions (AP II), and customary international humanitarian law apply to armed non-state actors that are party to non-international armed conflicts.<sup>62</sup> Article 91 of the 1977 First Additional Protocol to the Geneva Conventions requires that “a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” This treaty is only applicable to international armed conflicts, however, and no similar provision is stipulated in the second protocol, which applies to non-international armed conflicts.

A customary international humanitarian law study conducted by the International Committee for the Red Cross has nevertheless shown that a state that has been found responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused both in international and non-international armed conflicts (Rule 150).<sup>63</sup> But whether this applies to reparation sought from non-state armed groups remains unclear. Citing some existing practice, the Commentary of this rule underlines that:

Even if it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups (...), the consequences of such responsibility are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders (...).<sup>64</sup>

Human rights law also applies in situations of armed conflicts, whether international or non-international, as formally confirmed on several occasions by the International Court of Justice.<sup>65</sup> However, the existence of human rights obligations of non-state armed groups in situations of non-international armed conflicts or in other situations of violence is controversial. The main refutation of the applicability of this particular body of international norms to these groups is linked to the structure and alleged philosophy underlying international human rights law. Human rights treaties can be characterized as setting out norms meant to regulate the relationship between a state and the individuals living under its jurisdiction. Thus, such treaties can be argued to be “neither intended, nor adequate, to govern armed conflict between the state and armed opposition groups.”<sup>66</sup> This interpretation has a direct impact on transitional justice processes, because it means that the right to an effective remedy, as enshrined in article 2 of the International Covenant for Civil and Political Rights, could only be claimed against the state.

The fact that human rights law is, in theory at least, not applicable to non-state armed groups has a number of negative consequences for victims of human rights violations. First, in some situations, human rights law is the only relevant framework. This is the case when international humanitarian law is not applicable—for instance, when the level of the intensity of violence is not high enough or when a group is not sufficiently organized. While it is true that a state remains bound by its human rights obligations in the territory under its jurisdiction and control, there are situations, even outside of the context of armed conflicts, where it may lose control over its territory and population and/or where state institutions are failing. Second, even when international humanitarian law is applicable, certain norms, such as freedom of expression or more generally every right concerned with the everyday life of a person, will not be covered, as the ambit of humanitarian law is limited to those acts with the necessary nexus to the armed conflict.<sup>67</sup>

Recent practice by states and international organizations, in particular the United Nations, however, has challenged the assumption that non-state armed groups do not hold human rights obligations. It is not possible within the framework of this chapter to further develop this issue, but for our purpose it suffices to note that it is increasingly accepted that human rights law is applicable to non-state armed groups that exercise *de facto* control over a territory and population and exercise governmental functions.<sup>68</sup> As such, similarly to the state, one could argue that a *de facto authority* or non-state armed group that controls territory would also be under the obligation to ensure effective

remedy to victims of human rights violations it commits.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>69</sup> for their part, take a “victim-oriented” approach to reparations for human rights and international humanitarian law violations. In that sense, they apply to both international humanitarian law and human rights law, irrespective of the perpetrators of the violations. Article II (c) thus requires states to “provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation.”

In addition, the UN Basic Principles foresee two ways to ensure that victims of violations committed by non-state armed groups have access to reparation. Article 15 provides that “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.” Article 16 encourages states “to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”

While these principles are not embedded in a treaty but in a soft law instrument, and as such are not legally binding on states, and articles 15 and 16 are phrased in non-binding language (using the word “should”), they are nevertheless based on some state practice and may inform future practice. Past examples include the African National Congress in South Africa, the Irish Republican Army in Northern Ireland, and the United Self-Defence Forces of Colombia, all non-state armed groups that not only provided symbolic forms of reparation, but also helped to clarify the fate and recovery of the disappeared or were asked to contribute to the rehabilitation of child soldiers.<sup>70</sup>

## **GUARANTEES OF NON-RECURRENCE**

Guarantees of non-recurrence of human rights violations are an essential part of transitional justice processes. Of course, there is no way to ensure the absolute prevention of human rights and international humanitarian law violations. Prevention and non-recurrence will necessarily require the implementation of different tools and mechanisms, touching different sectors of a society, dealing with issues of development, education, health, rule of law, and

democratization. From a transitional justice perspective, guarantees of non-recurrence are aimed at re-establishing the rule of law and restoring the confidence of victims and society at large in state institutions after conflict—for example, through vetting processes.<sup>71</sup> In that regard, the UN Basic Principles require states to “take appropriate legislative and administrative and other appropriate measures to prevent violations.”<sup>72</sup>

Disarmament, demobilization, and reintegration (DDR) programs and measures aimed at the transformation of non-state armed groups into political parties are important steps in diminishing the risks of the resurgence of conflict and abuse.<sup>73</sup> While DDR is certainly a key element of post-conflict reconstruction, however, it is aimed at security rather than accountability or redress, and on its own is insufficient to ensure the return of stability in post-conflict settings. Indeed, from the point of view of the non-state armed group,

the concept of DDR is considered deeply flawed because it implies that non-state actors represent the only threat to security. From the perspective of these actors, however, their renunciation of force is interdependent with, and hence cannot precede, the transition of power towards more accountable and legitimate state institutions that can provide a more secure environment for all.<sup>74</sup>

In order to ensure successful transitions to peace, experts tend to agree that it is important to consider non-state armed groups not only as possible perpetrators of international humanitarian law and human rights violations, but also as actors that can play a positive role in the transition, if only because they are often very close to their constituencies.<sup>75</sup> In addition, one should keep in mind that members of non-state armed groups can also be victims of armed conflict and violations. In that sense, they should be allowed to take ownership of a peacebuilding process, which “will be more likely to be sustained if it is owned and driven by all relevant conflicting actors and their constituencies, and if it addresses their respective needs and interests.”<sup>76</sup> In the context of Northern Ireland or South Sudan, for instance, former combatants were not only subjects of transitional justice measures, they were also involved in implementing them.<sup>77</sup>

Engaging non-state armed groups in peace and transitional processes has proven more problematic since September 11, 2001, with the adoption in many states of antiterrorism legislation. In the United States, engaging with an armed group listed as a terrorist organization can trigger criminal responsibility.<sup>78</sup> The use of the term *terrorist* to designate non-state armed groups is



problematic, as states will tend to label *any* armed group that opposes it as a terrorist group. As noted by the International Committee of the Red Cross,

a recent challenge for IHL has been the tendency of States to label as terrorist all acts of warfare against them committed by armed groups, especially in non-international armed conflicts. This has created confusion in differentiating between lawful acts of war, including such acts committed by domestic insurgents against military targets, and acts of terrorism.<sup>79</sup>

From a peacebuilding perspective, the branding of almost all insurgents as terrorists, regardless of their nature and motivations, has created difficulties and dilemmas. It has been noted that associating non-state armed groups with terrorists has had “a direct impact on the EU and the international community’s capacity for mediation and dialogue in transition processes.”<sup>80</sup> From the perspective of preventing the recurrence of violations of international humanitarian law and human rights law, therefore, there is a need to “look closely at the structural roots and political causes behind the motivation of non-state armed groups . . . as most insurgency movements cannot be defeated by force, and therefore have to be considered as key stakeholders in any negotiation or state-building process.”<sup>81</sup>

## CONCLUSION

Non-state armed groups challenge the notion of transitional justice in different ways. First, the international legal framework, which remains state-centric, has not completely adjusted to the reality of the exercise of power and control that these actors may have over a population. For instance, while in the eyes of a victim it may not matter if a crime has been committed by a soldier or a member of an armed group, norms ensuring that reparations can be directly claimed from a non-state actor have not yet crystallized, nor has a forum where this could be done yet been invented. In that regard, international and national criminal law, focusing only on the individual criminal responsibility of the members of non-state armed groups, fails to address in its entirety the often complex dynamic between individuals and the armed groups to which they belong. To illustrate this point, one might recall the words of Dominic Ongwen, a former leader of the Lord’s Resistance Army (LRA) and former child soldier who is currently being tried at the ICC for multiple war crimes. In an impassioned speech, he told to the court: “I am not the LRA . . . It is the LRA

who abducted people, in northern Uganda. It is the LRA who killed people.”<sup>82</sup> Holding an individual criminally responsible for the international crimes he or she committed is necessary, but criminal trials are also reductive, tending not to account for the groups’ dynamic in inciting crimes. As we have seen, truth commissions, if well designed, with a more comprehensive and inclusive approach, give more space to this dimension.

Second, from an operational point of view, the rise in the number of non-state armed groups in contemporary armed conflicts, the widening territorial scope in which they operate, and the different ideologies they adopt present acute difficulties for the implementation of transitional justice measures. How can we ensure respect for the right to truth when several armed groups operate in the same region? How can we reach for reconciliation and guarantees of non-recurrence with groups, such as the Islamic State or Boko Haram, that profess an ideology that imply the rejection of international humanitarian law and human rights norms? To what extent can the victims of a suicide attack in one country claim reparation for acts committed by a non-state armed groups based in another one, as in the attacks committed in Kenya by the Al-Shabab, a group based in Somalia?

While this may paint a grim picture of the possibility to successfully support transitions to peace and justice in complex contexts of non-international armed conflicts, there is an emerging consensus that non-state armed groups can also in some instance play a positive role and that they have in the past contributed to measures of reconciliation. Contrary to the vision embedded by antiterrorism policies adopted by many states, putting all non-state armed groups in one category does not allow for contextualized approaches and successful strategies of engagement.

More research is thus needed to ensure that measures related to transitional justice are better adapted to the reality of non-state armed groups in contemporary international relations. From a legal perspective, finding ways to more systematically address the collective responsibility of a non-state armed group and ensuring that individuals have a *legal* right to reparation when their rights are violated by these actors is one necessary development. From a policy point of view, establishing some degree of ownership among non-state armed groups and their members by collecting their views and connecting them to the elaboration of transitional justice norms and processes is another essential step.<sup>83</sup>

## NOTES

- 1 Transitional justice can be defined as “the mechanisms and processes associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.” UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, UN Doc. S/2004/616, para. 8.
- 2 United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, Pablo de Greiff, 9 August 2012, UN Doc. A/HRC/21/46, para. 53.
- 3 The majority of armed conflicts in recent years have been “non-international armed conflicts”—that is, conflicts with one or several states opposing one or several non-state armed groups, or between such groups themselves. See Annyssa Bellal, ed., *The War Report* (Oxford: Oxford University Press, 2015).
- 4 United Nations, *Report of the Special Rapporteur*, 2012, para 1; See also HRC Resolution 18/7 of 13 October 2011, defining the scope of the mandate of the Special Rapporteur aimed at the promotion of “truth, justice, reparations and guarantees of non-recurrence.”
- 5 UNSC Resolution 1540 (2004), 28 April 2004.
- 6 Article 1.
- 7 European Union, “Mediation and Dialogue in Transitional Processes from Non-State Armed Groups to Political Movements/Political Parties,” Factsheet – EEAS Mediation Support Project, November 2012.
- 8 Véronique Dudouet, “Understanding Armed Groups and their Transformations from War to Politics: A Collection of Insider Perspectives,” paper presented at the Sixth Pan-European Conference on International Relations, Turin (2007), 4.
- 9 Caroline Holmqvist, “Engaging Armed Non-State Actors in Post-Conflict Settings,” in *Security Governance in Post-Conflict Peacebuilding*, ed. Alan Bryden and Heiner Hänggi (Geneva: DCAF, 2005), 46; Ulrich Schneckener, “Fragile Statehood, Armed Non-State Actors and Security Governance,” in *Private Actors and Security Governance*, ed. Alan Bryden and Marina Caparini (Geneva: DCAF, 2006), 25.
- 10 De facto authorities can be defined as “entities, which exercise effective authority over some territory, no matter whether they are engaged in warfare with the sovereign or are subsisting in times of peace.” De facto authorities include partially recognized or not recognized states, but are not limited to these actors. The *Arantzazu Mendi* case, House of Lords, Judgment of 23 February 1939, L.R., [1939] A.C. 256 (House of Lords), reproduced in 1942 ILR 60, at 65 et seq. See also Michael Schoiswohl, “De Facto Regimes and Human

- Rights Obligations – The Twilight Zone of Public International Law?” *Austrian Review of International and European Law*, 6 (2001): 50; Jan Van Essen, “De Facto Regimes in International Law,” *Utrecht Journal of International and European Law* 28, no. 74 (2012): 31–49.
- 11 See UN Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).
  - 12 See Annyssa Bellal, “Central African Republic: From Conflict to Chaos and Back Again?” in *The War Report 2013*, ed. Stuart Casey-Maslen (Oxford: Oxford University Press, 2014), 411–427.
  - 13 Christopher Clapham, “African Guerrillas Revisited,” in *African Guerrillas: Raging Against the Machine*, ed. Morten Bøås and Kevin C. Dunn (Boulder, CO: Lynne Rienner, 2007), 233.
  - 14 Valentina Cadelo, “Transitional Justice Mechanisms: Challenges and Opportunities,” in *The War Report 2014*, ed. Annyssa Bellal (Oxford: Oxford University Press, 2015), 719.
  - 15 Recent COIs mandated by the HRC include the 2006 Commission of Inquiry on Lebanon (Human Rights Council Resolution A/HRC/S-2/1, 11 August 2006); The 2009 United Nations Fact-finding Mission on the Gaza Conflict (Human Rights Council Resolution A/HRC/RES/S-9/1, 12 January 2009); The 2010 International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance (Human Rights Council Resolution A/HRC/RES/14/1, 23 June 2010); The 2010 International Commission of Inquiry on Libya (Human Rights Council Resolution A/HRC/RES/S-15/1, 25 February 2011); The 2011 International Commission of Inquiry on Ivory Coast (Human Rights Council Resolution A/HRC/RES/16/25, 25 March 2011); The 2011 Independent International Commission of Inquiry on the Syrian Arab Republic (Human Rights Council Resolution A/HRC/RES/S-17/1, 18 October 2011); The 2013 Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (A/HRC/22/13, 21 March 2013).
  - 16 Recent examples include the 2004 International Commission of Inquiry on Darfur (UNSC Res. 1564, 2004); The 2009 International Commission of Inquiry on Guinea (established by the UN Secretary-General on 16 October 2009, S/2009/556, The 2010 Secretary-General’s Panel of Experts on Accountability in Sri Lanka (established by the UN Secretary-General, 22 June 2010, SG/SM/12967); The 2013 International Commission of Inquiry on the Central African Republic (UNSC Res. 2127, 2013).
  - 17 See, for example, OHCHR Mission to Kyrgyzstan to Investigate Serious Violations of Human Rights in Andijan, Uzbekistan in May 2005 (2005); OHCHR Mission to Western Sahara and Refugee Camps in Tindouf (2006); OHCHR Fact-finding Mission to Kenya (2008); OHCHR Mission on Situation of Human Rights in Honduras Since the Coup d’état on 28 June 2009 (2009); 2013 OHCHR Mission in Mali.

- 18 See also Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations," *Journal of International Criminal Justice* 3, no. 3 (2005): 600–607.
- 19 Human Rights Council Resolution A/HCR/Res/25/1 of 9 April 2014 on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka.
- 20 The different reports of the Independent Commission on Syria can be found at: [www.ohchr.org/EN/HRBodies/HRC/ICISyria/Pages/Documentation.aspx](http://www.ohchr.org/EN/HRBodies/HRC/ICISyria/Pages/Documentation.aspx)
- 21 See *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Mali*, A/HCR/23/57, 26 June 2013.
- 22 *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Central African Republic*, A/HCR/24/59, 12 September 2013.
- 23 Victims' participation, apart from testimonies, is limited in COIs and FFMs, but it is an essential part of truth-seeking, "which requires the active participation of individuals, who wish to express their grievances and report on the facts and underlying causes of the violations and abuses which occurred." United Nations, *Report of the Special Rapporteur*, 2012, para 54.
- 24 Cadelo, 724–725.
- 25 Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Truth Commissions* (New York and Geneva: United Nations, 2006), 1.
- 26 *Ibid.*, 17–20.
- 27 Truth and Reconciliation Commission of Liberia, *Consolidated Final Report*, Volume 2, 336, [http://trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf)
- 28 OHCHR, *Rule of Law Tools for Post Conflict States: Truth Commissions*, 2.
- 29 See in that regard Sharanjeet Parmar, Mindy Jane Roseman, Saudamini Siegrist, and Theo Sowa, eds., *Children and Transitional Justice: Truth Telling, Accountability and Reconciliation* (Cambridge, MA: Harvard Law School Human Rights Program/UNICEF, 2010).
- 30 See, for example, *The Prosecutor v. Jean-Pierre Bemba*, who was at the time of his arrest president and commander in chief of the Mouvement de Libération du Congo (MLC) in relation to the conflict in the Central African Republic; See also *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, member of the non-state armed group "Ansar Eddin" in the context of the conflict in Mali.
- 31 Cadelo, 717.
- 32 As noted in a newspaper report, it took more than two decades for the ICTR to bring to justice 70 out of the thousands of alleged perpetrators implicated in the genocide in Rwanda. Owen Bowcott, "Rwanda Genocide: The Fight to Bring the Perpetrators to Justice," *Guardian*, April 2, 2014, [www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice](http://www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice).
- 33 Ron Dudai, "Closing the Gap: Symbolic Reparations and Armed Groups," *International Review of the Red Cross* 93, no. 883 (2011): 785.
- 34 See Andrew Clapham, "Extending International Criminal Responsibility beyond the

- Individual to Corporations and Armed Opposition Groups," *Journal of International Criminal Justice* 6 (2008): 899–926.
- 35 Jann Kleffner. "The Collective Accountability of Organized Armed Groups for System Crimes," in *System Criminality in International Law*, ed. André Nollkaemper and Harmen van der Wilt (Cambridge: Cambridge University Press, 2009), 246. See also the ICTY in the Tadi case: "Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less or indeed no different from that of those actually carrying out the acts in question." ICTY, Judgment, *Prosecutor v. Tadi* (IT-94-1-A), Appeals Chamber, 15 July 1999, 191.
- 36 See also, Andrew Clapham, "Non-State Actors," in *International Human Rights Law*, 2nd edition, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford: Oxford University Press, 2013), chapter 26; Mark A. Drumbl. "Collective Responsibility and Post-conflict Justice," in *Accountability for Collective Wrongdoing*, ed. Richard Vernon and Tracy Isaacs (Cambridge: Cambridge University Press, 2011), 23–60.
- 37 See Clapham, "Extending International Criminal Law."
- 38 Andrew G. Reiter, Tricia D. Olsen, and Leigh A. Payne, "Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts," *Transitional Justice Review* 1, no. 1 (2013): 22.
- 39 See Rule 159 of the ICRC Customary International Humanitarian Law study, which underlines that the ICRC holds the position that amnesties cannot be granted for war crimes. [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159)
- 40 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (New York: Cambridge University Press, 2009).
- 41 Anne-Marie La Rosa and Caroline Wuerzner, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law," *International Review of the Red Cross* 90, no. 870 (2008): 335.
- 42 Konstantinos Salonidis, "Amnesty and Prosecution in Non-International Armed Conflicts," in *Les règles et les institutions du droit international humanitaire à l'épreuve des conflits armés récents*, ed. Michael J. Matheson and Djamchid Momtaz (Leiden: Nijhoff, 2010): 863–899.
- 43 Ibid., 883.
- 44 See Stef Vandeginste, "Museveni, Burundi and the Perversity of Immunité Provisoire," *International Journal of Transitional Justice* 10, no. 3 (2016): 516–526.
- 45 Vandeginste, 524 (emphasis in original); see also United Nations, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Pablo de

Greiff. Addendum. Mission to Burundi (8–16 December 2014), UN Doc. A/HRC/30/42/Add.1 (10 August 2015).

46 See Salodinis, 889–892.

47 Draft Articles on the Responsibility of States for Internationally Wrongful Act with Commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two. For a thorough analysis of the law of state responsibility, see James Crawford, Alain Pellet, and Simon Oleson, eds., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010).

48 James Crawford, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect,” *American Journal of International Law* 96 (2002): 874.

49 Edith Brown Weiss noted that “while the Commission’s almost exclusive concern with states may have been appropriate at the beginning of its work, it does not reflect the international system of the twenty-first century.” Edith Brown Weiss, “Invoking State Responsibility in the Twenty-First Century,” *American Journal of International Law* 96 (2002): 799.

50 According to Jutta Brunnée, state responsibility remains the “paradigm form of responsibility on the international plane. Given the focus of classical international law upon the rights and obligations of states, its enduring conceptual centrality is hardly surprising. Nor are its inherent limitations in facilitating international legal accountability. By definition, the regime can facilitate only inter-state accountability on the basis of positive legal rule [...] the regime at once reflects a particular vision of international law and reveals the partial nature of that image.” Jutta Brunnée, “International Legal Accountability Through the Lens of the Law of State Responsibility,” *Netherlands Yearbook of International Law XXXVI* (2005): 23.

51 Under article 8, “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” A typical example of the application of this article would involve the actions of militias—i.e., organized non-state armed groups controlled by a state.

52 Article 9 provides that “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”

53 As for article 10 of the International Law Commission Articles on State Responsibility, it declares that “the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.”

54 Article 31.

- 55 Inter-American Court of Human Rights, Velasquez Rodriguez case, Judgment of 29 July 1988, para. 172.
- 56 See on that point Rose Cecily, "An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations committed by Non-State Actors," *Hastings International and Comparative Law Review* 33, (2010): 307–343.
- 57 See Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations," *International Review of the Red Cross* 91, no. 873 (2009): 69–94.
- 58 ICTY, Tadic, para 70.
- 59 See generally Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (Oxford: Oxford University Press, 2012).
- 60 ICTY Haradinaj, 3 April 2008, para 360.
- 61 For example, in 2004, dodging the issue, the Appeals Chamber of the Sierra Leone Special Court simply held that "it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties." *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, at para. 22, [www.unhcr.org/refworld/docid/49abcoa22.html](http://www.unhcr.org/refworld/docid/49abcoa22.html). For the different theories on the applicability of IHL to armed non-state actors, see Sandesh Sivakumaran, "Binding Armed Opposition Groups," *International and Comparative Law Quarterly* 55 (2006): 381; and Antonio Cassese, "The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts," *International & Comparative Law Quarterly* 30, no. 2 (1981): 429.
- 62 The customary international humanitarian law study conducted by the ICRC has identified 161 rules of which a great majority are also applicable in non-international armed conflicts. See [www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul)
- 63 See the ICRC CIHL database available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule150](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150)
- 64 Ibid.
- 65 See the Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, ICJ Reports 2004. The applicability of international human rights law in situations of armed conflict was also confirmed by the ICJ in the Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment of 9 December 2005, ICJ Reports 2005.
- 66 See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 54. For a different opinion, see Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations," *International Review of the Red Cross* 88, no. 863 (2006): 491–523.



- 67 The scope of IHL extends throughout the territory where hostilities are taking place (*rationae loci*) and must involve a person protected by the instruments (*rationae personae*). ICTY, Prosecutor v. Tadic, paras. 69–70; ICTR, Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment and Sentence, 21 May 1999, para. 189. International tribunals have, however, developed slightly different tests to determine the requisite nexus between alleged crimes and the conflict. According to the judgment in the Tadic case: “It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.” ICTY, Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 573. According to ICTY, Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23, Appeals Chamber Judgment, 12 June 2002, para. 57: “As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.” According to ICTR, Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para. 260: “[T]he alleged crimes ... must be closely related to the hostilities or committed in conjunction with the armed conflict.”
- 68 For instance, the Office of the High Commissioner for Human Rights has consistently taken the position that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.” A/HRC/8/17, para. 9; A/HRC/12/37, para. 7. See also Nigel Rodley, “Can Armed Opposition Groups Violate Human Rights,” in *Human Rights in the Twenty-first Century*, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht: Martinus Nijhoff, 1993). The International Commission on Libya noted that “since the NTC has been exercising *de facto* control over territory akin to that of a Governmental authority, it will examine also allegations of human rights committed by its forces.” *Report of the International Commission on Libya Established by the Human Rights Council Resolution S-15/1 of February 2011*, para. 72.
- 69 UN Doc. A/RES/60/147, adopted by the UN General Assembly on 21 March 2006.
- 70 See Luke Moffett, “Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda,” in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, ed. Noemi Gal-Or, Cedric Ryngaert, and Math Noortmann (Leiden: Brill: Nijhoff, 2015), 323–346; Dudai, “Closing the Gap.”
- 71 United Nations, *Report of the Special Rapporteur*, 2012, para 40ss.
- 72 Article 3,a.

- 73 See EU Factsheet, “Mediation and Dialogue.”
- 74 Veronique Dudouet, Hans J. Giessmann, and Katrina Planta, “From Combatants to Peacebuilders: A Case for Inclusive, Participatory and Holistic Security Transitions,” Policy Report, Berghof Foundation (Berlin, 2012), 7.
- 75 Ron Dudai and Kieran McEvoy, “Thinking Critically about Armed Groups and Human Rights Praxis,” *Journal of Human Rights Practice* 4, no. 1 (2012): 15.
- 76 Dudouet, Giessmann, and Planta, 12.
- 77 *Ibid.*, 34.
- 78 In the controversial US Supreme Court decision of June 21, 2010, *Holder v Humanitarian Law Project* (2010) 130 S. Ct. 2705, the Court held that the training in international law for Kurdistan Workers’ Party (PKK) members planned to be given by a US NGO (the Humanitarian Law Project) could be used by the PKK “as a part of a broader strategy to promote terrorism, and to threaten, manipulate, and disrupt.” According to the Court, the planned training would thus rightly fall under the *Anti-terrorism and Effective Death Penalty Act of 1996* which criminalizes any material support given to terrorist groups. The fact that in the circumstances of the case such a training was prohibited by the law was not found to be a violation of the First Amendment (freedom of expression) enjoyed by the NGO. See also the “The Supreme Court Goes Too Far in the Name of Fighting Terrorism,” *The Washington Post*, June 21, 2010, [www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/06/21/AR2010062104267.html); “What Counts as Abetting Terrorists?” *The New York Times*, June 21, 2010, <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/>.
- 79 International Committee of the Red Cross, “Contemporary Challenges for IHL: Overview,” <https://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/overview-contemporary-challenges-for-ihl.htm>.
- 80 See EU Factsheet, “Mediation and Dialogue.”
- 81 *Ibid.*
- 82 “Landmark Trial Asks if Ex-Child Soldier is Criminal, Victim – or Both,” *The Guardian*, December 7, 2016.
- 83 See Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law,” *International Humanitarian Legal Studies* 1 (2010): 5–51.

CHAPTER 8

## Transitional Justice in Conflict: Reflections on the Colombian Experience

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Toward the end of the last decade, victims' rights defenders in Colombia faced a difficult dilemma. Although a series of transitional measures born of the paramilitary's demobilization process had been underway for several years, victims still faced dire circumstances. One of their main grievances was the absence of reparations. At the time, despite the partial demobilization of some combatant groups, a solution to the armed conflict seemed distant and large-scale violence persisted. The dilemma was, therefore, whether it was appropriate to push for a reparation model within a transitional justice framework when it was very unlikely that the conflict would come to an end soon. For many, the answer to this question was no; for practical and political reasons, it made more sense to aid victims through humanitarian assistance measures and postpone reparation efforts until the cessation of hostilities. Others, on the contrary, thought it was unacceptable to delay reparations until some uncertain date in the future. Many of the victims had been displaced from their homes and dispossessed of their land for more than a decade. Condemning them to an indefinite wait for reparations seemed unfair.

Although the concept of transitional justice was initially intended for post-conflict or post-repression situations, in some instances where certain conditions allow, like Colombia, developing a transitional justice process while conflict rages seems almost unavoidable. Furthermore, Colombia's brief experience indicates that the application of a transitional justice framework in the midst of a conflict may help to set the stage for a future peace process, even if at the same time the conflict makes it difficult to achieve all of the goals of transitional justice. This is the premise of this chapter.

## **THE COLOMBIAN EXPERIENCE<sup>1</sup>**

In the mid-twentieth century, Colombia went through a period called *La Violencia* ("The Violence"), which stemmed from the violent confrontation

between armed groups aligned with the main political parties. This was followed by a national reconciliation process that led to an agreement between liberals and conservatives, known as the *el Frente Nacional* ("National Front"), to divide state power and alternate control of the government between them for 16 years. As these events were transpiring in the 1960s, three guerrilla movements took up arms against the state: the National Liberation Army (ELN), which followed Cuban revolutionary ideology; the Armed Revolutionary Forces of Colombia (FARC), founded on agrarian communist ideals; and the Popular Liberation Army (EPL), of maoist leanings.

The Colombian state tried to confront this violence through state-of-exception laws, issuing decrees that allowed and encouraged the creation of self-defense groups. Under the protection of these laws and regulations, which became permanent in 1968, these self-defense or paramilitary groups, with the support of the Colombian Armed Forces, gained strength in several areas of the country. Over the next two decades, the country saw the consolidation and strengthening of both the guerrilla groups and the anti-insurgency movement. By the end of the 1980s, the violence perpetrated by the paramilitary groups demonstrated the need to undo the legal framework that had fostered their creation. Nevertheless, the violence did not stop, especially that which was connected to paramilitary groups, drug traffickers, and their flourishing cartels.

Despite the promulgation of the 1991 Constitution, political violence persisted in the 1990s, even intensifying in the second half of the decade. Paramilitary groups and guerrillas expanded to the point that they became true armies. The FARC, for example, maintained steady military gains, increased recruitment levels, and improved its equipment, allowing it to achieve important military victories over the Armed Forces. Similarly, paramilitary groups increased their armed actions and created a unified command organization, the United Self-Defense Forces of Colombia (AUC). At the beginning of the new century, paramilitaries had approximately 10,000 combatants distributed in 10 blocks, while the guerrillas had 21,000 combatants distributed over more than 100 fronts.

On December 1, 2002, AUC leaders publicly expressed their intention to negotiate the demobilization of their forces with President Alvaro Uribe Velez's government and declared a unilateral ceasefire. After negotiations, the parties agreed to a demobilization process that was to conclude on December 31, 2005. However, the demobilization of these combatants did not end the armed conflict or the violence associated with it. Although the state's security and counterinsurgency policy dealt strong military blows to the guerrillas,

these groups maintained a large number of combatants, considerable offensive power, and important military and political structures.

On July 22, 2005, Law 975 of 2005—known as the “Justice and Peace Law”—came into force. It was meant to provide the legal framework for the demobilization and reintegration process and the prosecution of the worst violations. Out of the more than 50,000 combatants who were to lay down their arms, the framework would only apply to those who participated in it willingly and applied for benefits. All other former combatants—at least, the ones for whom there was no information incriminating them in egregious crimes—would reintegrate into society based on an amnesty model for political criminals that was recognized in the constitution.<sup>2</sup> Due to various institutional, legal, and political factors, however, by the end of 2015 only 130 of the initial 5,000 applicants had concluded criminal justice and peace proceedings.

In mid-2010, Colombians learned of initial contacts regarding peace between the national government and the FARC, the largest guerrilla group in the country at the time. Since 2012, negotiations supported by guarantor and observer countries centered on five negotiating points: 1) land tenure reform, 2) political participation guarantees, 3) illegal drug policies, 4) end of the conflict, and 5) victims’ rights. Colombia at this point faced the challenge of implementing a set of transitional justice measures that had been in force for almost ten years, while, simultaneously, negotiating and designing another set of transitional justice measures that would allow peace negotiations with the FARC guerrillas to continue. The negotiations ended in late 2016 with the parties signing a final peace agreement, which, at the time of writing, was in its initial regulation and implementation stages.<sup>3</sup>

In many respects, the Colombian situation is very different from the experiences of its Latin American peers. First, most of the countries in the region implemented transitional justice mechanisms and conducted their peace processes (the ones that faced armed conflicts) or democratic transitions (the ones that transitioned from military regimes to more open societies) more than three decades ago. This means Colombia has had to make decisions based on legal standards that were created or consolidated by other Latin American countries when they went through their transitions. Colombia also grapples with a paradoxical “abnormal normality” that sets it apart from other countries’ experiences in the region. The country is the site of one of the longest-running armed conflicts in the world, marked by its sheer scale and the cruelty of the means of warfare.<sup>4</sup> However, it has never experienced radical political breakdowns, like dictatorships (which are quite common in the region), while

some of its institutions—mainly in the major cities and especially the capital—have a long history and high level of sophistication. In that sense, Colombia seems to be a regular democratic country with a strong institutional structure.

Second, the conflict itself and the manner in which the mechanisms to deal with its legacy have been established have peculiar characteristics. The scale and duration of the Colombian conflict is unparalleled in the region. Although there is some controversy regarding the precise beginning of the conflict, there is consensus, at least according to the most conservative estimates, that it has lasted about four decades.<sup>5</sup> The length of the conflict presents a challenge when establishing policies meant to address such a distant past and exponentially increases the number of victims to be included in those policies,<sup>6</sup> as well as the number of crimes and perpetrators that should be included in the accountability process.

Third, Colombia's conflict involves not just two factions—as is the norm—but several: the state, the guerrilla groups, the paramilitary groups, and the groups that formed after these demobilized, which are called emerging bands or criminal bands (*Bacrim*) or post-paramilitaries. The classic formula for peace negotiations between an insurgency and a government therefore becomes more complex, raising many questions regarding political convenience and legal issues surrounding the application of transitional justice measures to pro-state groups. For example, it must be asked whether it is possible to apply a negotiating framework to talks with an armed group that never truly confronted the state; whether it is possible to apply measures to that group that were designed for political criminals; what the relationship is between politically motivated and common crime in the context of creating a transitional framework; and whether the victims of both types of violence should be covered by transitional policies.

Fourth, measures labeled as *transitional justice* have only been implemented in a partial and non-systematic way over the past decade. As a consequence, many questions remain—as described below—about how to harmonize these initiatives and whether in Colombia a minimally coherent transitional justice system actually exists (for example, should the same punitive standards apply to guerrillas and paramilitaries?). Not only have opportunities to advance the justice agenda been scarce and dispersed, but, in some cases, the transitional justice discourse has been used to legitimize agendas that do not truly align with notions of accountability and justice.<sup>7</sup>

Finally, due to diverse factors connected to the institutional context noted above, the transitional process in Colombia has been characterized by hyper-legalistic and hyper-judicial tendencies.<sup>8</sup> Many of the discussions on

institutional arrangements, intervention modalities, and political convenience have been constantly read in the light of legal standards—national and international—and have been challenged before the national courts. Judicial evaluation has been extensive. Simultaneously, the accountability mechanisms now in effect (for holding perpetrators accountable, seeking and accessing the truth, and awarding reparations measures) have privileged judicial proceedings over other mechanisms. This can be seen in the elaborate judicial proceedings established by the 2011 Victims and Land Restitution Law (Law 1448) for the restitution of land dispossessed during the conflict, as well as in the complicated judicial proceedings that the Justice and Peace criminal trials have turned into.<sup>9</sup>

## **THE CHALLENGES AND RISKS OF IMPLEMENTING TRANSITIONAL JUSTICE DURING CONFLICT**

The characteristics of the Colombian context have given rise to a set of transitional justice mechanisms despite the continued existence of a large-scale armed conflict, which has maximized the risks that are implicit in the dilemmas faced by transitioning societies. Below are some of these challenges, specifically with regard to the Colombian experience, but which may be relevant for other countries.

### **ACHIEVING JUSTICE IN A CONTEXT OF WIDESPREAD VIOLENCE**

One of the most obvious, and most important, practical tensions involved in applying a transitional justice framework during an ongoing conflict is the recurring threat of violence faced by victims, those implementing the justice measures, and the population at large. Colombia experienced this firsthand, in part because its transitional framework has been applied only partially—the demobilization process was set in motion with only one of the armed groups and left out the largest group in the conflict—but also because the peace talks between the government and the FARC guerrilla were premised on the understanding that a ceasefire would only take place once the stakeholders had reached a final agreement. Furthermore, peace negotiations with the other guerrilla group, the ELN, are still in an early stage, and the group is still engaged in military hostilities, including attacks on the population and military elements and the commission of human rights violations, like abduction of civilians.



Consequently, two parallel phenomena have occurred: the implementation of a broad transitional justice model for demobilized paramilitaries that includes measures directed at satisfying victims (of this group and also of the entire conflict) and measures for the reintegration of former combatants—all against the backdrop of a military confrontation between the state and guerrillas that are not party to this process. Adding to the complexity, the FARC (the main guerrilla group) and the state engaged in peace negotiations in Havana, while in Colombia they continued waging war.<sup>10</sup>

The consequences of the violence committed by armed factions against the civilian population has been terrifying. Illegal armed groups—the paramilitary or the bands that emerged after their demobilization, and the guerrillas—and members of the Armed Forces continued to be involved in the perpetration of crimes, human rights violations, and infringements of international humanitarian law—actions that translated into violations of the rights to life, personal integrity, and freedom, and perpetuated the internal displacement crisis.<sup>11</sup> In particular, this violence has been acutely suffered by those leading efforts to restore rights (like land restitution leaders), the authorities responsible for transitional processes, and demobilized combatants, all of which has led to very slow implementation of justice policies. Moreover, the persistence of the armed confrontation meant that the state had to continue fighting the war and allocating resources to it.

This context created two problems with regards to reparations in particular. First, the conflict continued producing victims. The number of people who should be provided with reparations increased day by day.<sup>12</sup> This gave rise to important questions regarding the public policy's time limits: Should future victims be included? How can fiscal projections be made when the number of victims has not been determined? Is it possible—and should Colombia try—to repair existing victims partially and, at a later date, implement measures to do the same with future victims?

Second, it was highly unlikely that a successful reparation effort could be conducted against a backdrop that was so violent and intimidating, considering in particular the difficulty in seeking the truth, which in turn is a preliminary guarantee for the satisfaction of the rights to justice and reparation. Additionally, due to the dynamics of the conflict, there was a risk that the actors involved in the violence could coopt the bureaucracy responsible for guaranteeing victims' rights or that these officials would not be able reach victims in a timely way due to the ongoing violence. Further, the intimidating and violent environment that has prevailed in large parts of Colombia has

prevented victims from expressing their reparation expectations in public or even from condemning the violations or the perpetrators.

### SEQUENCING MEASURES

In post-conflict situations, the manner in which different transitional measures are sequenced is fundamentally important. For many reasons, decision makers should weigh the competing interests and options and, on that basis, decide what will happen immediately and what will happen in the future, despite the urgent or impending nature of many of the measures. In the midst of an armed confrontation, these decisions can appear to be more pressing and the dilemmas more difficult.

In Colombia, this can be seen with regard to the implementation of the land restitution policy. Land restitution was used as an entry point to the peace talks and as evidence that if the transition agenda bears fruit from the beginning, justice measures could bring the parties closer to a peace deal.<sup>13</sup> However, at the same time, restitution requires certain ceasefire conditions. This creates a circular argument: to achieve peace we need restitution, but to achieve restitution we need peace. The government's model has been based on an analysis of the conditions in the area where restitution is to be conducted, carried out by an interinstitutional committee composed of restitution authorities and security forces. If the committee approves the safety conditions, the area is selected and restitution efforts move forward. If the committee determines that safety conditions are low, the area is not selected. The problem has been that the most dispossessed areas are also the ones where hostilities have persisted and that are still controlled by guerrillas.<sup>14</sup>

The question of how to sequence various policies under such circumstances also arises with regard to institutional reform and guarantees of non-recurrence. Usually in Colombia it is perceived that to nurture trust—and due to the precarious conditions that characterize the vast majority of victimized families—measures of truth, justice, and reparation should be implemented first. The sequence should then be closed with long-term transformations (which involve lengthier and more complex processes), such as guarantees of non-recurrence and structural state reforms. However, in the face of recurring violence and the difficulty in initiating truth, justice, and reparation measures, it is valid to ask whether guarantees of non-recurrence should be prioritized in order to allow for the implementation of other measures.

Another example of this sequencing and timing dilemma involves the coordination of justice and truth mechanisms. In an ideal scenario, it would

be logical to have a nonjudicial truth mechanism (for example, a truth commission) give demobilized former combatants an opportunity to tell their side of the story. This, in turn, could be the basis of punitive benefits, including the conditional cessation of criminal action. Information gathered from these accounts would allow the truth commission to issue recommendations on how to conduct any future judicial investigation against the perpetrators. However, the logic of peace indicates that if the transition intends to stop the armed conflict, the guerrillas are likely to demand legal certainty and a clarification of accountability, which will also allow them to participate in politics. Therefore, if the process is suspended until a commission conducts its work, the transition could be delayed for at least two years (experience indicates this is the amount of time needed to reasonably perform a complete truth-seeking exercise).<sup>15</sup>

This issue was discussed at length by the government and the FARC when designing the System for Truth, Justice, Reparation and Guarantees of Non-Recurrence that was agreed to, and which provides for the creation of both a truth commission and a special criminal jurisdiction. One question was which of these two measures should come first. For some, the truth commission should begin its work first and then make way for the jurisdiction. Others, conversely, thought it best to start with the implementation of justice measures to demonstrate to society that the accountability process was serious. Ultimately, political pressure and the difficulties faced in starting to implement the agreement meant that no sequencing order or prioritization of the mechanisms was established in the agreement. As a result, the peace agreements provide that the Jurisdiction for Peace and the truth commission must coordinate their work together, because both are part of the same system. However, it is unclear how, in real time, this coordination will operate. For the time being, it is clear only that the truth commission cannot forward the witness statements it receives under its mandate to the special jurisdiction. Nevertheless, the inverse relationship has not been prohibited.

#### **THE SUBORDINATION OF TRANSITIONAL MEASURES TO MILITARY STRATEGY**

In the midst of an armed conflict, strategic military decisions tend to prevail over other considerations; consequently, subordinating the agenda of transitional measures to military strategy can prevent the implementation of those justice measures or see them ultimately being used to advance military goals. The government is a strategic stakeholder in the conflict and, therefore, certain transitional justice measures, particularly the ones that address victims' rights,

are not always separated from the government's military decisions.

A good example of this was already mentioned: the targeting of land-restitution efforts has been done by a committee in which the Ministry of Defense establishes the zones where it can guarantee the safety and conditions necessary for such efforts. Also, two additional examples help illustrate this issue. The first one is the unwillingness of the government of President Álvaro Uribe to accept the existence of an internal armed conflict.<sup>16</sup> This political position—which was a very important part of the government's strategy, in particular its military discourse—had concrete consequences for the design of transitional policies, particularly the failed Victim's Statute.<sup>17</sup> The discussion around the designation of the armed conflict created much uncertainty regarding the universe of victims subject to reparation. The initial version of the project was aimed at providing reparations to the "victims of human rights violations and international humanitarian law infringements occurred by virtue of the armed conflict," but was modified to read "the victims of violence." This small but fundamental change introduced a great deal of ambiguity in the concept of victim and excluded from the benefits of the statute individuals who had suffered infringements of international humanitarian law at the hands of warring groups.

A second example is related to the alleged potentially demoralizing message sent to the official troops by certain policies. The government maintained that in an armed conflict, it was counterproductive to recognize certain measures. For instance, in the government's view, recognizing the administrative liability of the state for violations perpetrated by state agents communicated a negative message to its troops, which would have been tantamount to recriminating the actions of the Armed Forces and would have led to reduced military effectiveness. This was a key reason for the failure of the initiative. Uribe held that approving legislation that recognizes victims of state agents through non-judicial means would make it impossible to continue fighting illegal groups.<sup>18</sup>

A third example is a particular military justice reform promoted by the government of President Juan Manuel Santos. Although the reform was heavily criticized by the international community (including all the United Nations rapporteurs with human rights mandates) and would have been contrary to the basic principles of non-recurrence guarantees, the government considered it a necessary mechanism to fight the war and advanced its approval in Congress. It did so despite the fact that peace talks were underway and other post-conflict reforms were being proposed.

## **DISTINGUISHING HUMANITARIAN AND REPARATIVE MEASURES**

In any large-scale conflict that impacts civilians, the state and society must deploy emergency response and humanitarian assistance systems that reach a large part of the population.<sup>19</sup> In addition to being a significant financial burden, this can entice the state to conflate its duty to provide humanitarian assistance with its duty to provide reparations. Additionally, implementing humanitarian assistance and reparations policies simultaneously can increase the risk that they will be distorted. For example, in violent contexts, it can lead to the creation of systems of regularized humanitarian assistance that may contain perverse incentives that result in “assistentialism,” that feed off corrupt and rent-seeking systems and that, finally, trivialize the significance of economic reparations if beneficiaries simply see this as another assistance payment—that is, if they view reparations as payments or measures meant to alleviate their temporary situation and not necessarily connected to acknowledgement of responsibility for a past harm or aimed at holding accountable the actor that caused it.

## **DIFFERENT COMBATANTS, DIFFERENT PROCESSES: A SINGLE STANDARD?**

Starting negotiations with one party to a conflict raises difficult questions regarding the extent to which standards can be differentiated or if all stakeholders should receive equal treatment. In contrast to the Justice and Peace process with the paramilitary, the process with the FARC brought Colombia closer to a true transition to peace. Decisions on the guerrillas’ legal status should therefore be considered in the context of an overall solution, which includes the various perpetrators, all of the victims, and the demands of a complete transition. Would this justify an approach other than punishment or the arrangements that were negotiated with the paramilitary?

One justification for asymmetric treatment may be in the anti-state nature of the guerrillas, as opposed to the pro-state nature of the paramilitary. Another is that, historically, there have been more prosecutions against the guerrillas than against the paramilitary. Moreover, the guerrillas have been subject—with varying degrees of intensity and territorial differences—to enemy criminal law that denies or limits their procedural guarantees, whereas with paramilitaries there has been a greater tendency towards impunity. These differences could lead to the conclusion that certain differentiated treatment for the actors may be legitimate.<sup>20</sup>

Another issue is what to do with members of the Armed Forces and whether they should be subject to the same standards. The reduction of

punitive standards in transitional contexts is primarily justified as an incentive to lay down arms and permanently disassemble illegal armed structures. This implies recognizing if not the existence of a policy directed towards the perpetration of atrocious crimes, at least the existence of certain structures entrenched within the military forces. Consequently, requirements for accessing benefits should be the dismantling of those structures through a vetting process.

In the end, the state's negotiations with the FARC acknowledged the differences between actors, but maintained a kind of symmetry in the duration of punishment. Thus, the FARC did not accept the same justice model that was imposed on the paramilitaries; instead, it negotiated a special court and punishment system that does not necessarily require imprisonment but does require restrictions on movement and an obligation to personally contribute to restorative justice measures. However, the FARC accepted that the duration of this penalty would equal that which was agreed to in the Justice and Peace Law—that is, the penalties will range from five to eight years. The Armed Forces explicitly refused to accept the same punishments and treatment as the FARC, but agreed to a system that would provide special, differentiated, simultaneous, balanced, and equitable treatment. This also includes penalties ranging from five to eight years of imprisonment for state agents who voluntarily decide to participate in the process and contribute to the truth and reparation of victims.

#### **TENSIONS BETWEEN JUSTICE AND DEMOBILIZATION**

There is very active debate over whether current justice standards are too rigorous in terms of investigation and punishment. This could severely limit a society's options to negotiate approaches to demobilization that include incentives sufficient to encourage political solutions to armed conflicts.<sup>21</sup> Critics maintain that toughening punitive standards during transitions prevents successful negotiations with subversive groups. They maintain that, even when applying principles such as prioritization and selection, tough standards combined with a focus on the most responsible perpetrators make it impossible to offer demobilization options to the military's high command (who generally lead the negotiations but simultaneously end up being the parties most politically accountable for human rights violations perpetrated during the conflict).

The question is how to formulate a criminal justice policy that establishes a balance between socially significant justice and sensitivity to the needs of peace. This dilemma is, of course, not uniquely Colombian; it is intrinsic to

transitional justice contexts. It is, however, accentuated in the Colombian case. Because negotiations occur amidst a large-scale conflict that involves several types of criminality, there is a risk of undermining the principle of equality before the law as well as transforming transitional justice into a permanent and routine matter. In the middle of a conflict that may not appear to be coming to an end, it is difficult to explain to society the application of light penalties for atrocious crimes alongside very severe penalties for ordinary crimes. In exceptional circumstances, society may accept certain punitive benefits as the extraordinary cost of dealing with the past once a transition has occurred. But when the conflict remains intense and compromises are made almost routinely, it is unacceptable from the perspective of a coherent criminal justice policy.

#### **THE RISK OF LOSING SUPPORT AND MOMENTUM**

An additional risk of implementing transitional justice measures in the midst of conflict is the exhaustion of society in the medium and long term. Transitional policies are based on a type of collective vision of breaking with the past. Although the processes associated with transitional justice can be long term, their social message is tied to historical moments in which the public's desire for change reaches a tipping point. When such conditions occur, processes can develop until they reach a climax or achieve a certain level of momentum that allows public efforts to join together with a specific purpose. However, these historical moments are rare and, additionally, brief. Public attention, social expectations, and hope are scarce resources. Societies generally become discouraged easily and lose hope quickly when transitional processes become complex and drawn out over time. This is even more likely when the implementation of measures begins before society has even reached that initial moment of hope brought about by a peace agreement or ceasefire. Thus, the risk is not being able to leverage the support that the implementation of the measures could and should have in a postconflict period.

#### **POSITIVE CONSEQUENCES OF IMPLEMENTING TRANSITIONAL JUSTICE DURING CONFLICT**

Despite the risks and challenges discussed above, the implementation of a transitional justice framework in Colombia is not an experience that has failed or should be regretted. On the contrary, we would argue that transitional

justice measures have made a significant contribution to the consolidation of certain processes aimed at the democratization of society and opened the doors to a political negotiation of the conflict between the state and guerrillas. Additionally, the measures have brought at least some justice in response to victims' grievances.

### **BRINGING STAKEHOLDERS CLOSER BASED ON LEGAL STANDARDS**

One of the positive aspects of the implementation of transitional justice measures, especially those related to the satisfaction of victims' rights, has been the strengthening of legal standards that channel polarized political discussions. As long as conflict persists, and even in the initial stages of the post-conflict period, polarization makes it very difficult to reach agreements. In Colombia, as discussed in a previous paper written by one of the authors and María Paula Saffon,<sup>22</sup> the legal standards associated with transitional justice discussions were useful in bringing the paramilitaries and government closer to discussion and arriving at potential discussion points.

The existence of a minimal, non-negotiable core of legal standards applied to victims' rights can serve as a virtuous restriction that channels peace talks, rather than obstructs them. In effect, the defense of a core of legal standards is important because it strengthens the notion that peace negotiations are taking place within a legal framework, one that is influenced by the international context. This pushes armed actors towards less radical positions and a common ground where all the parties recognize that it is impossible to ignore victims' rights in favor of peace.

The congressional discussion that resulted in the Justice and Peace Law and the peace talks with the FARC are concrete examples of this. The negotiations center mostly on the standards' interpretation and none of them deny the existence of the overall framework. This enables the parties to have a discussion with a common reference point that grounds the negotiators' political expectations.

### **MAKING VICTIMS CENTRAL TO THE PUBLIC DEBATE**

Since transitional justice discussions were introduced in Colombia, victims' rights have been at the center of all political and legal discussions on how to confront past atrocities. This has led to the recognition of victims as relevant political stakeholders that need to be party to all discussions surrounding this question. This is a radical shift in Colombian political dynamics, as the



perspective, needs, and interests of victims had never been taken into account before in a peace negotiation process. It has contributed to the empowerment of victims, the strengthening of their movements, and the establishment of important transnational networks with international nongovernmental groups, all of which are essential elements in transforming the unequal power relationship between victims and perpetrators.

The social acknowledgement of the consequences of the conflict on those who directly suffer the atrocities is a major democratizing advance. As was seen after the first victim statute failed, this point is very important, even if it does not translate into legal developments. Once the vindication of victims' rights as an issue permeated society, the formulation of concrete measures in response did not take long, and only months after the first victim statute was voted down by a parliamentary majority a very similar project was passed into law almost anonymously by the same congress.<sup>23</sup>

#### **VICTIM-CENTERED AGREEMENTS**

In close connection to the previous point, one of the main characteristics of the transitional justice process in Colombia has been the centrality of victims' rights in the parties' negotiation agenda. In both the discussion of the paramilitary demobilization framework and the talks held with the FARC guerrilla, victims' rights have been a fundamental issue. Negotiations about reintegration, punitive pardons, or political participation as legal solutions have centered on their implications for victims' rights. This represents a major shift. During the negotiations held in the late 1980s and early 1990s, for instance, the issue of victims' rights was never as visible as it is today at the negotiating table, even from the perspective of the guerrillas, who have for many years denied the legitimacy of both Colombian law and international law (which they claim only serves capitalist interests). This is demonstrated by the fact that victims' rights were a specific point on the negotiation agenda with the FARC and by historical declarations from the group's spokespersons that recognize victimization. It is not only society, then, but also the parties to the conflict that have incorporated victims' rights as one of the central axes of a transition arrangement.

#### **A TRANSFORMATIONAL AGENDA**

Discussions in Colombia about victims, legal standards, and institutional arrangements have gone beyond the traditional transitional justice issues of

accountability or criminal responsibility. A broader agenda has emerged that addresses more structural deficits in Colombian democracy, such as inequality in access and tenure of land and political participation. The political agenda had been so polarized for so many years that it seemed impossible to revisit the parties' positions on certain issues. For example, equitable distribution of land tenure was seen to be absent from public discussion, without any chance of being discussed at a negotiation table. However, discussion channels began to open as the grievances expressed in the justice and reparation agenda shined a light on the issue of land dispossession and the reforms that were required to bring a massive land restitution policy to life. While this does not mean that restitution has become an integral land-reform process or that, to date, the land status quo in Colombia has undergone true transformation, the inclusion of the issue in the talks and the relative ease in reaching an agreement on it show how the justice agenda provided an effective entry point for dialogue. Other structural topics were also submitted for consideration in the talks through this channel.

## FINAL REFLECTIONS

The Colombian experience illustrates that the implementation of transitional justice mechanisms during an ongoing armed conflict is very complex, because it tends to accentuate many of the risks and challenges associated with these instruments. However, using these or similar measures when victims demand recognition and reparation in the midst of conflict seems unavoidable. Furthermore, in such contexts transitional justice may contribute to setting the stage for a negotiated peace. Due to the progressive empowerment of victims and the crystallization of legal standards regarding victims' rights, using transitional justice instruments during a conflict will not only be more common but might even be necessary to ensure fairness in peace talks. The Colombian experience, which today seems exceptional, may indicate a way forward for many future cases.

*Translated by Paula Corredor*

## NOTES

- 1 It is difficult to explain the characteristics of the Colombian context, armed conflict, and transition framework in a succinct way. In this section, we present a schematic summary of the arguments we have expressed elsewhere. For a more complete and systematic approach, see: Rodrigo Uprimny et al, *¿Justicia transicional sin transición?* (Bogotá: Dejusticia, 2006); María Paula Saffon and Rodrigo Uprimny, "Uses and Abuses of Transitional Justice in Colombia," in *Law in Peace Negotiations*, ed. Morten Bergsmo and Pablo Kalmanovitz, (Oslo: FICJC Publication Series, International Peace Research Institute in Oslo (PRIO), 2007); Diana Guzmán, Nelson Camilo Sánchez, and Rodrigo Uprimny, "La justicia transicional en Colombia," in *Las víctimas y la justicia transicional: ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?* (Washington, DC: Due Process of Law Foundation, 2010); Nelson Camilo Sánchez and Rodrigo Uprimny, "Justicia transicional sin transición?: la experiencia colombiana en la implementación de medidas de transición," in *Contribución de las políticas de verdad, justicia y reparación a las democracias en América Latina*, Carlos Berinstain (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 2011); Rodrigo Uprimny and Nelson Camilo Sánchez, "Ley de víctimas: Avances, limitaciones y retos," in *Entre Uribe y Santos: La hora de la paz o la solución imposible de la Guerra*, ed. Ricardo García Duarte (Bogotá: IPAZUD – Universidad Distrital, 2013). See also Jemima García-Godos and Andreas Knut, "Transitional Justice and Victims' Rights Before the End of a Conflict: The Unusual Case of Colombia," *Journal of Latin American Studies* 42, no. 3 (2010): 487–516.
- 2 The government's initial proposal was to treat rank-and-file members of paramilitaries as political offenders. However, the Constitutional Court ruled that paramilitaries were not political offenders but rather common criminals, because their main offense, and the crime for which they should be prosecuted, was criminal conspiracy. For a more detailed explanation, see: Nelson Camilo Sánchez, Jemima Garcia-Godos, and Catalina Vallejo, "Colombia: Transitional Justice Before Transition," in *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*, ed. Elin Skaar, Jemima Garcia-Godos, and Cath Collins (London: Routledge, 2016).
- 3 On the basis of this agreement, apart from a series of additional extrajudicial mechanisms, such as a truth commission and a special unit for the search for missing persons, the Colombian state will establish a Special Jurisdiction for Peace as a judicial system composed of several chambers and a tribunal with a trial chamber and an appeals chamber. This jurisdiction will have a special chamber to receive information on relevant crimes (including confessions of those who demobilize and state agents who want to participate in the mechanism) and will decide whether acts that were perpetrated can be subject to amnesty (in which case they will be sent to a chamber that will decide on amnesties and pardons) or if the principle of opportunity can be applied (in which

case they will be sent to another chamber specializing on the point). Finally, if the facts refer to responsibility for crimes against humanity, war crimes, genocide, or other grave human rights violations, it will refer the case so that an investigative unit can submit the case to the tribunal.

- 4 Centro Nacional de Memoria Histórica, *¡Basta ya! Colombia: memorias de guerra y dignidad* (Bogotá: CNMH, Imprenta Nacional, 2013).
- 5 In addition, there is a discussion that has toned down politically, but still stirs academic controversy and was very politically charged a few years ago: what type of violence does Colombia face? The difference stems from the way in which the conflict is defined: some refer to it as a civil war, others speak of a terrorist threat, and yet others describe it as a war against society. See, for example, a book with an evocative title: *Nuestra guerra sin nombre* [Our Nameless War]. *Transformaciones del conflicto en Colombia* (Bogotá: IEPRI – Editorial Norma, 2006).
- 6 In accordance with the official count as of mid-2012, the number of conflict victims surpasses 6,200,000 cf. Centro Nacional de Memoria Histórica.
- 7 For this reason, a previous paper referred to the use and abuse of transitional justice mechanisms (Uprimmy and Saffron, “Uses and Abuses of Transitional Justice in Colombia”).
- 8 For a critical view of the Colombian transitional model with its hyperjudicialism and the central role the courts have played in its design and evaluation, see Ivan Orozco Abad, *Justicia Transicional en tiempos del deber de memoria* (Bogotá: Editorial Temis, 2009).
- 9 The legal discussions (brought to the courts) have even led to the discussion of difficult dilemmas on how to advance the negotiation process with the guerrillas. Because of this, it was necessary to pass a constitutional amendment (known as the “Legal Framework for Peace”) to find a “legal solution” to issues such as: the legal uncertainty over the possibility that the state could grant criminal benefits to demobilized individuals who had perpetrated serious crimes; the lack of clarity regarding whether the General Attorney’s Office could conduct its massive investigations with greater efficiency by using tools to prioritize its activities; the uncertainty over the possibility of offering political reintegration to demobilize groups so that they could eventually stand for election for public office; and in connection to these three topics, the risk that any agreement achieved in a negotiation with an armed group would be breached after a judicial decision adopted a different interpretation from the one promoted by the government.
- 10 After more than three years of negotiations, the parties achieved a progressive de-escalation of the conflict. It began with a unilateral cease-fire by the FARC, which was followed by the government’s decision not to conduct aerial bombardments of guerrilla camps. Finally, after the agreements were signed, the two parties decreed a definitive cease-fire.

- 11 UN General Assembly, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, A/HRC/25/19/Add.3, January 24, 2014.
- 12 In the year 2010, when formal negotiations with the FARC began, the victims' registry had 6,800,000 registered victims; by the year 2016, when the negotiations concluded, the number of registered victims was 8,299,334.
- 13 On the use of land policy as the negotiation's entry point, see the speech by Sergio Jaramillo, Peace Commissioner, and one of the heads of the government's negotiation team, at the "La Paz Territorial" conference at Harvard University, March 13, 2013, [www.eltiempo.com/archivo/documento/CMS-13791996](http://www.eltiempo.com/archivo/documento/CMS-13791996)
- 14 This problem has seen improvement with the cease-fire between the FARC and the government but has not been completely overcome due to the additional violence already mentioned.
- 15 This is not an exclusively Colombian dilemma. El Salvador faced a similar situation, with a largely unsuccessful solution that did not necessarily originate in the model's design. In that country the transition assigned significant weight to the truth commission, even allowing it to name specific individuals and suggest that they be restricted from political participation or that their cases be submitted to judicial authorities. However, the agreements were violated and consequently there was a lot of controversy over the mechanism's effectiveness.
- 16 In this regard, the Inter-American Commission of Human Rights' annual report is very illustrative. It describes the government's response to the commission's use of the term "armed conflict." For the government "the term 'armed conflict'" does not apply in Colombia because it is a democracy—with separation of powers and guarantees for political opposition—that is "under threat by the terrorist actions of illegal organized armed groups . . . financed [by] illicit drug trafficking and the kidnapping of civilians, [which are] rejected by the Colombian people completely and repeatedly" (ICHR, 2009, par. 55)
- 17 In 2008 and 2009, the Colombian Congress discussed a bill intended to create reparations measures for victims as a transitional measure. However, it threw out the bill under pressure from the government, which argued that the policy weakened the state's armed confrontation with the guerilla. Cf. Nelson Camilo Sánchez, "Perder es ganar un poco: avances y frustraciones de la discusión del estatuto de víctimas en Colombia," in *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusion*, ed. Catalina Díaz et al (Bogotá: ICTJ/Dejusticia, 2009).
- 18 In the words of Uribe: "The practical effect of the situation [the approval of the victim's law] is that when a soldier and a police officer have to face a terrorist, the soldier and the police officer would say, 'how do I confront them?' Do you know what they will say with this new law? 'I violated their human rights, I assassinated them in a non-combat situation.'" Political Redaction, *Diario El Espectador*, June 20, 2009.

- 19 According to the 2011 estimate of National Economic and Social Policy Council, the cost of humanitarian assistance and attention to Colombia's universe of victims, as of 2011, was approximately 27,976 million pesos (approximately USD \$15 million) and the cost of reparations was estimated at 24,672 million pesos (approximately USD \$13 million). In other words, humanitarian aid and assistance numbers were slightly higher than total reparations numbers. See Consejo Nacional de Política Económica y Social, "Plan de financiación para la sostenibilidad de la ley 1448 de 2011," Documento Conpes 3712, Bogotá, 2011.
- 20 Regarding the differences between the actors it is worth reviewing Leopoldo Múnera, "Proceso de paz con actores armados ilegales y parasistémicos (los paramilitares y las políticas de reconciliación en Colombia)," *Revista Pensamiento Jurídico* no. 17 (2006).
- 21 Internationally, for example, the legal status of amnesties under international law is a recurring subject of debate. In this respect, see Louis Mallinder, "Can Amnesties and International Justice be Reconciled?," *International Journal of Transitional Justice* 1 (2007): 208–230; and Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2010). A critical application to the Colombian experience can be seen in Orozco Abad, *Justicia Transicional en tiempos del deber de memoria*, and a legal vision of the problem with alternatives for the Colombian context is in Rodrigo Uprimny, Luz María Sanchez, and Nelson Camilo Sánchez, *Justicia para la paz: Crímenes atroces, derecho a la justicia y paz negociada* (Bogotá: Dejusticia, 2014).
- 22 Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia."
- 23 Sánchez and Uprimny, "Justicia transicional sin transición?: la experiencia colombiana en la implementación de medidas de transición."

CHAPTER 9

The Contingent Role of Political Parties in  
Transitional Justice Processes

*Ken Opalo*

Post-conflict peace is often fragile. While the average developing country has a 9 percent risk of descending into large-scale civil conflict, for post-conflict states the risk jumps to 40 percent within the first decade after cessation of hostilities. At the same time, around half of civil war onsets take place in countries with previous conflict experience.<sup>1</sup> This is the reality that transitional justice processes—including truth and reconciliation commissions, prosecution of war criminals, reparations and restitution, and institutional reforms—have to contend with. Experience shows post-conflict politics is fraught with a material risk of recidivism to violence, bringing to the fore the need to carefully balance and sequence the pursuit of justice and reconciliation (in whatever form) and the maintenance of peace in post-conflict states.

This is particularly true for countries that engage in competitive politics following the end of conflict. There, transitional justice processes—due to their emphasis on openly addressing past injustices—provide new arenas for both implicit and explicit political competition (and conflict) in a manner that may either reinforce or undermine post-conflict peaceful settlements. Political parties, which typically aggregate and express disparate competing interests, can serve as focal points around which both elites and voters articulate their views and reactions to specific forms of transitional justice.

Over the past two decades, post-conflict elections have become widely accepted as the legitimate means of transition to peaceful state administration.<sup>2</sup> Elections, therefore, usually accompany, and significantly impact, transitional justice processes. The impact of competitive politics on transitional justice processes is often conditioned by the alignment of political actors and interests in the first post-conflict elections. Although competitive elections, in and of themselves, do not appear to increase the risk of return to civil war in post-conflict states,<sup>3</sup> the holding of elections that strengthen rather than weaken wartime cleavages may undermine the full implementation of



transitional justice processes and plant the seeds for future conflict.

This chapter investigates the role of political parties in defining the contours of transitional justice processes in post-conflict states. Parties are the primary organizations through which politics is structured in most states. They serve important functions, including the aggregation of specific sectional interests, linkage of the state to civil society, recruitment of political elites, and implementation of specific government policies. Parties also offer important channels for informal access to state resources for segments of society that have little to no access to the state through formal processes. Last, parties are a channel through which important information can be disseminated to core members and wider supporters alike—and in so doing can provide a focal point around which the public can coordinate collective action to deal with specific challenges. For these reasons, political parties (and especially party leaders) play a critical role in the pursuit of post-conflict transitional justice. Through their power to shape public opinion, they can determine the salience of transitional justice issues in post-conflict contexts. The specific form and tone of post-conflict party politics can either attenuate or exacerbate the risk of a return to conflict and determine the specific trajectories of transitional justice initiatives.

The importance of political parties and institutionalized party systems to the stability of competitive electoral politics cannot be overstated.<sup>4</sup> Nowhere is this truer than in post-conflict contexts. Not only can parties in these settings serve as arenas for reconciliation (by uniting previously warring factions), they can also serve in place of state agencies destroyed during wartime, thereby integrating different sectional interests in the state. Parties also provide platforms on which elites can build consensus around the pursuit of transitional justice, as well as share power in a credible manner that reduces the risk of a return to conflict.

The integrative functions of political parties are particularly important on account of the unique political environment characteristic of post-conflict states. Immediately following conflict, rebel groups tend to be the most organized nonstate actors, and ex-combatants tend to be the most politically active members of society. For example, Christopher Blattman found that Ugandan ex-combatants were 27 percent more likely than noncombatants to vote following conflict. They were also more likely to be community leaders.<sup>5</sup> This means that to reduce the chances of a return to conflict, ex-combatants and their leaders must be integrated into the political environment in a manner that does not reinforce wartime cleavages, while at the same time boosting

the commitment of post-conflict leaders to transitional justice. This is where political parties come in.

As will be shown in the case studies below, however, more often than not parties that emerge in the post-conflict environment tend to reinforce, rather than disrupt, wartime cleavages. Most of these tend to be the “political wings” of armed groups. They also tend to be short-lived and to lack strong linkages to society and their own social bases of support. Furthermore, because of the incentives inherent in political competition, many tend to be particularly susceptible to the lure of extremist positions that win votes.

These observations cast doubt on the potential for a positive role for political parties in transitional justice processes. But they also raise opportunities for strategic action to increase the likelihood that parties will augment, rather than counter, transitional justice. Such strategic action may include advocating institutional engineering to produce party cleavages that are orthogonal to wartime cleavages and mobilization strategies. The creation of parties rooted in society and supportive of transitional justice can be encouraged through a combination of decentralization of governance and electoral competition at subnational levels. Another strategy might be to push for the adoption of electoral rules that restrict party proliferation, with the assumption that having fewer parties creates incentives for elites to form broad-based coalitions that increase the likelihood of a consensus around specific forms of transition justice.

Building a broad-based consensus is crucial to establishing a durable peace premised on inclusive transitional justice. Achieving buy-in to the specific forms of transitional justice—be they truth commissions, criminal prosecutions, or amnesties, among other approaches—requires broad-based agreement and commitment from key political actors. Political disagreement over their specifics can deny transitional justice processes legitimacy, thereby guaranteeing failure. Protecting the legitimacy of these processes increases the political and social costs of nonparticipation (or noncompliance) by political leaders and citizens alike. This is precisely because most actors in post-conflict states typically have incentives not to participate; a common excuse is that in unearthing the pain and trauma of past injustices, the processes are at times in tension with the overall goal of achieving durable peace and political stability.<sup>6</sup> Under these circumstances securing political consensus increases the probability of participation in and success of transitional justice processes. To this end, political parties are crucial for facilitating both elite and mass buy-in.

The first section of this chapter discusses the challenges that characterize the political market in post-conflict states and the roles political parties can

play in alleviating them. The following section presents illustrative case studies from Uganda, Liberia, and Kenya, highlighting the specific roles political parties played in their respective post-conflict transitional processes. The last section discusses the lessons from the case studies and concludes.

## **THE CHALLENGES FACING TRANSITIONAL JUSTICE PROCESSES**

This section outlines the key political challenges to transitional justice processes in fragile post-conflict states. The analysis is in no way exhaustive. The main goal is to highlight the overarching factors that condition the structure and nature of political organizations in the aftermath of conflict, and how these impact transitional justice processes.

### **FIXING THE POLITICAL MARKET**

States descend into conflict due to what might be called political market failures—that is, when elites and their supporters find it impossible to settle political differences peacefully, and war becomes politics by other means. Securing durable peace after conflict therefore hinges on fixing the political marketplace—a process that requires a society to address deep-rooted causes of conflict.<sup>7</sup> Success in this process is often predicated on a fair amount of consensus on the definition of a just settlement.

A comprehensive accounting of historical causes and consequences of conflict amid conflictual party politics comes with the risk of reopening old wounds and reactivating wartime cleavages. Politics does not stop during transitional periods. Indeed, transitional justice processes are typically very political affairs.<sup>8</sup> This means that, if poorly managed, they can produce a politics of discord instead of post-conflict harmony. Well-run parties (and stable party systems) can ensure the political marketplace aggregates and presents divergent opinions in a peaceful manner. They can also provide platforms on which disparate groups can collectively articulate their preferred mode of transitional justice, facilitating broader societal consensus.

### **TRANSITIONAL JUSTICE AND POLITICAL PARTIES IN POST-CONFLICT STATES**

In the past two decades, holding elections has come to mark a key milestone on the road to peace in post-conflict states. The international community has come to value them as mechanisms of electing “legitimate” governments, as clear focal moments that signal a return to “normal” politics and as an exit

strategy in cases that involve international intervention.<sup>9</sup> The focus on elections as a key component of the transition process means transitional justice processes often take place under politically charged conditions and, in turn, that the development of a conducive party system is important for their success. In particular, the conduct of elections in post-conflict states requires the existence of political parties that reinforce, rather than undermine, transitional justice processes and an overall commitment to a durable peace.

In most cases, however, the parties that contest post-conflict elections lack these characteristics. Instead, those that emerge in the immediate post-conflict landscape tend to be the political wings of previously warring groups. Examples include the African National Congress (ANC) and Umkhonto we Sizwe in South Africa and the Sudan People's Liberation Movement (SPLM) and the Sudan People's Liberation Army (SPLA) in Sudan. Some parties, like Angola's Union for the Total Independence of Angola (UNITA) and the People's Movement for the Liberation of Angola (MPLA), contest elections without "civilianizing" first. These often have a ready-made social basis of support, material and coercive capacity to "earn" votes, and national name recognition that sets them apart from newer entities.

That rebel organizations and their leaders tend to dominate the post-conflict political environment is not surprising. Political competition favors the most organized groups that are able to mobilize supporters effectively, and, as far as mobilization capacity is concerned, warring groups tend to have a head start. This reality serves to heighten the risk of having post-conflict political parties that reinforce, rather than disrupt, the very cleavages across which war was fought. Continuation of wartime cleavage patterns limits the likelihood of reaching much-needed consensus on specific forms of transitional justice, which parties tend to view in terms of implications for their political futures. This scenario is in contrast to one in which post-conflict parties collectively agree to pursue transitional justice processes in a manner that is orthogonal to their electoral strategies.

## THE SEARCH FOR CONSENSUS

Because no set formula exists for pursuing transitional justice, the specific forms of processes chosen tend to be highly contextual. The choice of truth and reconciliation commissions, amnesty, or retributive justice, among others, depends on the specific type of conflict and actors involved. But once chosen, the potential for success of any given transitional justice approach depends on significant buy-in. For example, if a country chooses to prosecute

crimes committed during conflict but without first eliciting consensus, the process might be seen as victor's justice. The same can be said about truth and reconciliation commissions that grant amnesty to perpetrators of past injustices. If public buy-in is insufficient, the commissions might be seen as a means of sweeping past injustices under the rug, instead of dealing with the past in a manner acceptable to victims. Achieving societal consensus is, therefore, key to the success of transitional justice processes.

To this end, parties are double-edged swords. On the one hand, they can provide platforms on which to coordinate the building of consensus around the appropriate transitional justice mechanisms; on the other hand, conflictual party politics may create incentives for leaders to politicize transitional justice processes. Furthermore, through the creation of a common party identity, political parties may provide cover for perpetrators of crimes during conflict by creating situations in which groups of people approach the process as a collective instead of as individuals. This is especially true in situations where political parties (and rebel groups) tend to be backed predominantly by ethnic groups that are geographically concentrated, as is often the case in much of Sub-Saharan Africa.<sup>10</sup> Such situations allow perpetrators to hide behind their political supporters or ethnic communities and therefore evade accountability for past actions.

The design of transitional justice processes must, therefore, include an appreciation for the potentially deleterious effects of political parties. The likelihood of their playing a positive role in transitional justice, for example, tends to be higher when post-conflict parties are truly civilian (as opposed to being civilianized rebel groups), formed on the basis of cross-cutting cleavages that do not mirror wartime societal divisions, and part of a party system that is not permissive to the proliferation of parties. The existence of fewer parties forces elites to form electoral coalitions and cut deals that facilitate cross-group cooperation, a situation that in the long run may serve to reduce the likelihood of conflict. Party cleavages that are orthogonal to wartime cleavages increase the likelihood of an objective reflection on the root causes and effects of conflict and the cultivation of a consensus on the specific forms of transitional justice processes to pursue.

At this juncture, it is important to note that different party systems may increase the probability of parties' having positive effects on the transitional justice process. For instance, some scholars have argued that proportional representation systems may be good for generating political stability and general institutional buy-in in ethnically fractious societies because they guarantee

representation for all groups.<sup>11</sup> Yet such systems allow for the proliferation of parties and may, in fact, reinforce wartime cleavages. In the same vein, majoritarian party systems tend to force political leaders and communities to join forces to build winning coalitions.<sup>12</sup> But, by their “winner-take-all” nature, they also provide incentives for zero-sum competition, which may exacerbate conflict.

Beyond party system design, consensus can be achieved through power sharing among formerly warring groups (and newly formed political parties). This approach explicitly eschews conflictual party politics and instead engenders buy-in from relevant political actors. But power sharing may also merely delay the advent of noncooperative competitive politics, with power-sharing arrangements actually stunting political development during the transition by allowing interests to crystallize around transitional justice processes and institutions that create a false sense of cooperative politics. Post-conflict states with power-sharing arrangements, therefore, experience a higher risk of return to conflict, precisely because their stability tends to hinge on the political will among elites sharing power to honor their commitments to one another.<sup>13</sup>

One last important point to note is that institutional designs and specific approaches to transitional justice tend to have long-term effects. For this reason, the short-term goals of conflict cessation and establishment of peaceful competitive politics must always be balanced with the long-term of goals of having institutional systems that are robust enough to withstand noncooperative politics and competition. As a general principle, the design of these institutions must never rely on the goodwill or statesmanship of specific politicians. Instead of creating a specific outcome by fiat, transitional institutional design ought to focus on creating the right incentives for achieving the desired outcome and then letting political elites and their supporters respond to them.

## CASE STUDIES

The first case study, Uganda, presents an interesting case of an “autonomous recovery,” whereby a rebel group won power militarily and did not sign a negotiated settlement. The transitional process was therefore marked by a “no-party” system in which citizens were expected to participate in the electoral process autonomously and not as members of political parties. But this unique “no-party” post-conflict politics was also marked by the exclusion and silencing of political actors who did not buy into the dominant narrative engendered by the ruling coalition.

Liberia presents a case of recidivism following its initial post-conflict election. It also sharply highlights the dangers of political organization in the post-conflict period without sufficient disarmament, demobilization, and reintegration (DDR) and institutional engineering to break up wartime coalitions and alliances.

Finally, the Kenyan case highlights the dangers of expedient power sharing in a post-conflict scenario without a properly thought-out transitional justice process.

#### **NO-PARTY POLITICAL SETTLEMENT AND PERSONALIST RULE IN UGANDA**

After seizing power in Uganda in 1986, President Yoweri Museveni consolidated his rule through a so-called populist “Movement” system of government.<sup>14</sup> The Movement system was essentially a no-party system, in which political leaders were judged by voters on their own merit rather than on the merit of their parties.<sup>15</sup> Museveni’s rebel organization, the National Resistance Movement (NRM)—the successor to the National Resistance Army—formed the backbone of the state and was the key channel through which Ugandans could participate in politics. All Ugandan adults were members of the NRM by default. At the outset, Museveni engendered a policy of inclusiveness of all Ugandans, provided they remained loyal to the regime. Because the conflict ended with an outright military victory, Museveni had no external constraints on how to share power with fellow elites. The banning of all political parties served to weaken the interest groups that had developed around the civil war that started in 1979. These parties existed underground, but they were denied open representation in Ugandan society.

To entrench its reach in society, the NRM created resistance councils and held elections at the grassroots level, which served both to legitimate the regime among the public and elect an electoral college that determined the membership of higher tiers of administration. No direct elections were held for national offices until the mid-1990s. In Kampala, the Central Committee of the National Resistance Council (the *de facto* national legislature) and Museveni wielded power. The popularity of the regime was, therefore, predicated on local elections and the goodwill Museveni had engendered for ending the country’s prolonged era of political instability since the accession of Idi Amin to the presidency in 1971.

The first national elections under Museveni and the NRM were held in 1989, after which the National Resistance Council was expanded to include majority elected members. The strategy of including all groups, but without sufficient

political organization in the form of parties, ensured the NRM was the only party with a national reach among the electorate. It also gave Museveni a substantial head start against any future challengers. In the 1996 elections, for instance, Museveni won 74 percent of the vote. In the same year, NRM-affiliated politicians won decisively against those who had openly campaigned against the Movement system.

Museveni's popularity, however, did not extend to the north of the country. There, the old pre-conflict divisions between former regime insiders (under former Presidents Milton Obote and Amin) and southern Ugandans persisted. Indeed, beginning in 1987, a brutal insurgency devastated the region in the name of Joseph Kony's Lord's Resistance Army (LRA).

The failure of the Movement system to integrate northern Uganda into Museveni's regime reflects the challenges of a "no-party" settlement in a transition period. Indeed, the choice to ban all other parties and monopolize political space was obviously a strategic one by Museveni, designed to ensure that no alternative centers of power emerged. But the success of such a system required a consensus among all of Uganda's people, something that was not obtained in the north. As a result, continued exclusion and marginalization of northern Uganda and Museveni's determination to end the conflict militarily ensured that the region did not reap the peace dividend that visited much of southern Uganda beginning in the late 1980s.

In 1997, the Ugandan Parliament passed the Movement Act, which converted the governing NRM into a political party. It also gave the party access to resources and a seven-year head start on opposition groups. When opposition groups were finally legalized in 2005, the NRM had a far superior grassroots reach that all but guaranteed it electoral victory in the 2006 general election.<sup>16</sup> And so, by the time a real political opening developed in the mid-2000s, Museveni had sufficiently entrenched himself as president and the NRM as the ruling party, making the seizure of power by any other party virtually impossible. Museveni openly exploited state resources to entrench the NRM's hold on the electorate through the creation of new local administrative units,<sup>17</sup> coupling these units and their service delivery with local NRM structures.<sup>18</sup>

Uganda's experience was that of a victor's post-conflict settlement. The rebel group, NRA, became the post-conflict governing party, the NRM. The "no-party" Movement was instrumentally exploited by Museveni to limit the political space and exclude views at variance with NRM's agenda. The result was that only individuals and communities that were integrated into the regime benefited from the cessation of hostilities. In northern Uganda, the



conflict continued to fester because the “post-conflict” settlement reinforced rather than disrupted the wartime divisions between northerners and southerners. Museveni’s victory foreclosed any collective acknowledgement that, besides the NRA, multiple other armed groups had fought in the Ugandan civil war. No consensus existed on how to pursue post-conflict transitional justice—either for the pre-1986 conflicts or the conflict with the LRA.

Furthermore, the pursuit of a military solution to the conflict in northern Uganda all but barred any chance of a reconciliation process as long as the NRM was in power. Indeed, it is telling that Museveni pursued a retributive and internationalized solution to the conflict by inviting the International Criminal Court (ICC) to investigate atrocities committed by the LRA, while at the same time seeking US military assistance to defeat Kony and his army on the battlefield. Museveni’s invitation to the ICC is particularly interesting, considering the court has jurisdiction to prosecute atrocities committed by both the LRA and the Uganda People’s Defence Force (UPDF). Given the UPDF’s widely reported human rights abuses during the war in the north,<sup>19</sup> Museveni’s motivations for inviting the court are suspect.

Uganda’s experience thus far is a cautionary tale of the risks of victor capture of transitional justice processes. Instead of committing to any specific transitional process, Museveni and the Ugandan government have instead instrumentally deployed different post-conflict settlement strategies with a view to ensuring that the UPDF and its leadership are not held accountable for atrocities committed in northern Uganda. The invitation to the ICC can, therefore, be interpreted as part of a military strategy designed to leverage Kampala’s bargaining power vis-à-vis the leaders of the LRA.<sup>20</sup>

Indeed, in 2007, the government of Uganda and the LRA signed an Agreement on Accountability and Reconciliation that called for, among other things, a whole gamut of transitional justice processes, including formal and informal (community-driven) justice, reparations for victims of violence, and the establishment of a government body to document the root causes and consequences of the conflict in northern Uganda. None of these initiatives gained traction—because both the LRA leader Kony failed to sign the agreement and Museveni was yet again instrumentally using peace negotiations to bolster his image at home, while at the same time pursuing a military solution to the conflict. Also instructive is that Museveni only began to pursue the peace process in mid-2006, after he lost the northern vote by a two-to-one margin to his challenger, Kizza Besigye, in February of that year.

By arguing that it was already inclusive enough, Uganda’s “no-party”

political settlement foreclosed on the possibility of a credible transitional justice process. Museveni was willing to incorporate elites from the periphery into his regime, but on his terms. This gave the false impression of a largely inclusive regime and cast the north as simply unwilling to participate fully in the administration in Kampala. For this reason, the conflict in Northern Uganda was viewed, both domestically and internationally, as an LRA problem. The focus was, therefore, primarily on the abuses conducted by the LRA and their human toll. This approach diverted attention from the Ugandan military and the need for a credible transitional justice process that respects the rights of all the victims of warring groups in Uganda.

#### **COERCED SETTLEMENT, RECIDIVISM, AND AN UNCERTAIN FUTURE IN LIBERIA**

The fourteen-year Liberian civil war broke out in late 1989, when Charles Taylor invaded the country from neighboring Côte d'Ivoire under the banner of the National Patriotic Front of Liberia (NPLF). The NPLF invasion exploited existing grievances against the government of President Samuel Doe, which enabled it to quickly gain control over large swathes of territory in Liberia. Ten years earlier, Doe had seized power in a military coup against a government dominated by Americo-Liberians (descendants of free slaves who founded the country in 1847). Five years after that, he attempted to legitimize his rule by holding elections in 1985. But the elections only proved how deeply unpopular Doe was among the public, forcing the president to rig the vote count to stay in power. The coup attempt that followed was met by targeted, brutal repression of the co-ethnics of those suspected of plotting it, with the result that members of the Gio and Mano ethnic groups bore the brunt of the increasingly oppressive Doe regime in the late 1980s.<sup>21</sup> At the same time, Doe's co-ethnics (the Krahn) and ethnic Mandingos (whose elites dominated the transport sector and collaborated with the Doe regime) were perceived to disproportionately benefit from the unpopular regime.

Taylor's invasion, therefore, enjoyed popular support in areas dominated by the Mano and Gio, despite his being Americo-Liberian. Through rapid military conquest and connections to international businesses, Taylor managed to position himself as the *de facto* president of Liberia, albeit from a capital in the rural outpost of Gbarnga. The collapse of the government in Monrovia occasioned the mushrooming of armed groups, both for self-defense and the exploitation of natural resources and extortion through security rackets. Among them was the United Liberation Movement of Liberia (ULIMO), an armed group that brought together the Mandingo and Krahn, whose association with

the Doe regime made them targets for reprisals by the NPLF and its supporters. In the early 1990s, an international peacekeeping force under the aegis of the Economic Community of West African States was deployed in the country with a view to establishing a transitional government in preparation for elections. In 1995, the first Abuja peace accord was signed, followed by the second Abuja accord and the scheduling of elections for 1997.

But even as they prepared for elections, Liberia's different armed groups continued to stockpile weapons. The parties that contested the 1997 elections were mere political wings of the rebel organizations.<sup>22</sup> The National Patriotic Party (NPP) was the political wing of Taylor's NPLF; the All Liberia Coalition Party (ALCOP) was associated with the ULIMO-K, a Mandingo-dominated splinter group from ULIMO; the National Democratic Party of Liberia (NDPL) was the political wing of ULIMO-J, the rump ULIMO dominated by Krahn co-ethnics. Yet another coalition, led by Clinton Waterson, represented remnants of supporters of the Americo-Liberian-dominated True Whig Party, which had ruled Liberia for over 130 years before 1980. The election was, therefore, a continuation of the conflict via peaceful means, and it guaranteed the strongest armed group (the NPLF) victory at the polls.

To secure victory, Taylor and the NPP ran as incumbents, openly threatening a return to conflict if they lost the elections. They also used the vast resources under their control to provide limited services to segments of the Liberian population. In addition, Taylor and the NPLF cultivated an image of being the most disciplined of the rebel groups that roamed the Liberian landscape. Even though the options, overall, were not particularly attractive, NPLF successfully styled itself as the least bad.

And so Taylor won the election with more than three-quarters of the vote. However, because the lead up to the electoral process had barely addressed the deep-seated security concerns that characterized the Liberian state, the losers took up arms. The main rebel organizations now were the Mandingo-dominated Liberians United for Reconciliation and Democracy (LURD) and the Krahn-dominated Movement for Democracy in Liberia (MODEL)—mere reincarnations of ULIMO-K and ULIMO-J, respectively.<sup>23</sup>

The new phase of the Liberian civil war lasted until 2003. This time, the pre-election transitional period was marked by better preparation. A 15,000-troop strong United Nations peacekeeping force (UNMIL) was deployed to secure the August 2003 peace agreement ahead of the 2005 elections. The agreement banned ex-warlords from running for president. In addition, there was a concerted effort at disarmament, demobilization, and reintegration of the more than 100,000 ex-combatants.<sup>24</sup>

As far as permissiveness to party proliferation is concerned, the electoral process that resulted from the constitution-making process in the transitional period had a mixed record. In the first round, more than 20 parties contested the presidential and legislative elections. But the second round of the presidential election forced elites to craft coalitions, which produced a 41 percent to 59 percent split in vote share of the two candidates who contested the runoff.

The key difference between 1997 and 2005 in Liberia was that the political process in the latter period was expressly designed to overcome the cleavages that had emerged during wartime. There was no incumbent rebel victor. And the diminished influence of former rebel groups allowed for the emergence of multiple parties and looser ethnic attachment to specific parties.<sup>25</sup> In addition, warring groups were severely weakened by the presence of a large international peacekeeping force—a fact that attenuated a winner-take-all approach to the process. Furthermore, Taylor's exit from the political stage (and the country) increased the prospects for a nonviolent political settlement. It signaled the end of conflict and created the chance for a transitional justice process that would openly address the consequences and root causes of the civil war.

Of these factors, the most important was the break from wartime divisions to an era of political contestation that allowed new elite and mass alliances to coalesce at the national level. This process created cross-cutting cleavages that have continued to weaken the strong divisions that characterized the Liberian civil war. Taylor's absence reduced the potency of rebel groups as focal points around which to organize political interests, facilitating a shift to political parties and elites not directly involved in armed conflict. Liberia's second attempt at a post-conflict settlement and the transitional justice process were, therefore, boosted by the existence of political parties that were willing to compromise and engage with each other on purely civilian terms, without the implicit threat of violence.

Liberians at the time opted for a raft of transitional justice processes, the most important of which was the Truth and Reconciliation Commission of Liberia (TRC). Despite several missteps throughout its evidence-gathering phase, in the end the TRC released a report that was bold in its willingness to pinpoint specific government officials (past and present) as having been responsible for the tragedy of the civil war and to recommend barring them from holding public office or prosecution. However, the TRC's recommendations had little impact as the political class came out in united opposition to their full implementation. Many of those named in the report, including incumbent President Ellen Johnson-Sirleaf, were the very ones charged with its implementation.

The Liberian case is a lesson on the crucial role of political parties in building consensus around transitional justice processes. When the TRC was constituted, there was dispute over how far back its examination of Liberia's history should go. While the Americo-Liberian elites who had dominated the political landscape from 1847 to 1980 insisted the commission should begin its work from the Rice Riots of 1979, the vast majority of Liberians wanted it to uncover abuses throughout the country's history. Furthermore, the legal requirement that only Liberian citizens could be commissioners denied the TRC much-needed technical expertise, experience, and neutrality.<sup>26</sup> The TRC's activities were, therefore, intensely politicized and contested and lacked the stature of rising above everyday politics.

A key weakness of the Liberian transitional justice process following the 2005 elections was the false belief that the absence of Charles Taylor meant the end of warlord politics. For this reason, the TRC failed to directly address and provide an antidote to ethnicity-based warlord politics during peacetime. At the same time, the general focus on national-level alliance building distracted from the much-needed complementary task of weakening the latent local bases of wartime cleavages. The persistence of wartime cleavages as a basis for national integration meant that there was always a risk of recidivism to peacetime warlord politics whenever it became politically expedient to do so. These shortcomings, and the failure to build consensus among different political parties, ensured that the TRC findings and recommendations would be subordinated to political exigencies. The collective reaction by the political elite to the TRC report revealed that the 2005 political pact was primarily an electoral settlement that lacked a true transitional justice component. Once in power, political leaders were willing to tolerate, but not seriously commit to, transitional justice processes.<sup>27</sup>

The lack of consensus on the way forward became starkly apparent when the main opposition group—the Congress for Democratic Change—boycotted the second round of the 2011 elections. Johnson-Sirleaf proceeded to win the election with more than 90 percent of the votes cast. By then, the political environment had evolved to the extent that political parties prioritized competitive politics over implementation of the TRC's recommendations. And, despite repeated calls from civil society, political leaders were unwilling to fathom a broad-based attempt to implement them, instead opting to form national coalitions whose bases were the old conflict-era sectional interests. Despite the hope of cross-cutting national parties, Liberia ended up with parties that, in many ways, mirrored the rebel-led cleavages of the war period.

This ensured that leaders could earn political protection from the TRC's recommendations by hiding behind their demonstrated popular support.

#### **WEAK PARTIES, POWER SHARING, AND COLLECTIVE AMNESIA IN KENYA**

The 2007 elections were the most hotly contested in Kenya's history. Incumbent President Mwai Kibaki squared off against challenger Raila Odinga. The two men had been part of the same coalition that won the 2002 election but fell out soon after over disagreements regarding the power-sharing formula that underpinned their pre-election pact. Tensions were high in the lead up to the election, but most observers did not expect the near descent into civil war that greeted the announcement of results. On the night of December 30, Kibaki, of the Party of National Unity (PNU), was declared the winner over Odinga, of the Orange Democratic Movement (ODM), and hurriedly sworn into office. Immediately afterward, ethnically charged violence erupted in pro-opposition urban areas and rapidly spread across the country. In total, over 1,150 people were killed and some 350,000 displaced from their homes.

It took international intervention, under the aegis of the African Union's Panel of Eminent Persons, led by Kofi Annan, to bring the rival political blocs to the negotiating table. After almost 40 days of negotiations and brinkmanship, Kibaki and Odinga signed an agreement to end the violence. The National Dialogue and Reconciliation Accord (hereafter the National Accord) also established a government of national unity (GNU), in which Kibaki would remain as president and Odinga would become prime minister. The two were also to share cabinet portfolios equally in government.

Although the proximate cause of the 2007–8 post-election violence (PEV) was the alleged rigging of the election results in favor of Kibaki, the underlying causes ran deeper into history. Odinga's electoral coalition was composed of poorer ethnic groups in Kenya that had been largely marginalized by successive governments in Nairobi. Furthermore, a section of the coalition—the Kalenjin ethnic groups—had historical land-related grievances against Kibaki's co-ethnics (the Kikuyu), who had been resettled in historically Kalenjin lands after independence.<sup>28</sup> The Rift Valley Province, the site of these land disputes, was therefore the epicenter of the PEV.

The National Accord sought to address both the proximate and structural causes of the violence. The accord recognized that a general distrust of state institutions and historical structural injustices could not be ignored if such an occurrence were to be avoided in the future. For example, in the run up to the election, Kibaki had appointed 19 of the 22 members of the electoral

management body (EMB), in direct contravention of the 1997 Inter-Party Parliamentary Group's "gentleman's agreement" for multiparty representation in the EMB. His former lawyer became deputy chairman of the Electoral Commission of Kenya (ECK). In addition, two days before the election, Kibaki appointed five new High Court judges. The same court had the mandate to hear electoral disputes. Distrust in these key state institutions foreclosed on the possibility of a procedural response by the ODM over electoral malpractices suspected by the PNU. The accord mandated a constitutional review process that would curtail presidential powers over key state institutions like the ECK in order to even the playing field in future elections.

To address regional-cum-ethnic socioeconomic disparities and grievances, the accord recognized the need to tame the vice of ethnic favoritism that had plagued Kenyan politics since independence.<sup>29</sup> Also to be addressed was the problem of increasing militarization of elections through the use of ethnic militias<sup>30</sup>—a practice that was not new. In the run up to the 1992 and 1997 elections, then president Daniel arap Moi's supporters had effectively deployed armed gangs to instigate "ethnic clashes" as a way of gerrymandering the distribution of voters, with a view to engineering an outcome favorable to the president.<sup>31</sup>

The specific mechanisms meant to address these challenges included a truth-telling process, comprising the creation of the Truth, Justice, and Reconciliation Commission (TJRC) and a formal inquiry into the PEV, with a view to exposing the organizers of the violence via the Commission of Inquiry into the Post Election Violence (CIPEV); a comprehensive constitutional review; and a commitment to national reconciliation and reparations to victims of both the PEV and other deeper historical injustices.

The key success of the coalition government between Odinga's ODM and Kibaki's PNU was the enactment of a new constitution in 2010. And perhaps the most important aspect of the constitution was the provision for the devolved system of government with a stipulated revenue sharing formula among the country's 47 counties. No longer would politics begin and end in Nairobi. Competitive elections in the counties, backed by real devolution of resources, were designed to eliminate the zero-sum approach that characterized general elections in Kenya.

The other provisions of the post-2008 political settlement, however, were scarcely met. CIPEV concluded its investigations but never publicly named the perpetrators of the PEV. The Odinga-Kibaki GNU proved uninterested in seriously prosecuting the perpetrators of the PEV, a lack of interest that led



the chairman of CIPEV to hand over the list of suspects to the ICC. The TJRC report was watered down before release and afterward largely ignored by the political class. The commission itself suffered a major blow when it emerged that its head, Amb. Bethuel Kiplagat, was linked to human rights violations under the Moi dictatorship.

In addition, elite political configurations ahead of the 2013 general elections created strong disincentives to address the root causes of the PEV and associated historical injustices. The rush to form interethnic political alliances meant that the key individuals implicated could hide behind their respective ethnic blocs, and that specific community interests were subordinated to those of their self-appointed ethnic spokespeople. For example, the alliance between William Ruto (a Kalenjin) and Uhuru Kenyatta (a Kikuyu) forestalled any attempts to effectively resolve the problem of land-related Kalenjin-Kikuyu conflicts in the Rift Valley region.

The Kenyan case offers an important lesson on the role of political parties in maintaining the salience of transitional justice amid a fast-evolving political environment. There is no doubt that the PEV shocked the Kenyan political establishment—the quick move to amend the constitution and constitute various transitional organs is testament to this fact. Yet as soon as the 2013 election cycle began, political parties were quick to abandon the transitional justice initiatives and instead focus on building alliances ahead of the election. It was this willingness of party formations to prioritize political expediency over transitional justice that saw William Ruto and Uhuru Kenyatta, both accused of instigating and financing perpetrators of the PEV, join forces to form an alliance, and Odinga to use the PEV and the cases facing Ruto and Kenyatta to gain political mileage.

In short, Kenyan party politics foreclosed on any substantive implementation of the different components of the transitional justice architecture that emerged from the February 2008 National Accord and the 2010 constitution.

The root causes of past violence in Kenya have remained unaddressed, and elite alliances have continued to trump the public's demands for justice and accountability for past human rights violations. For example, since 2010 eight successive polls have shown a majority of Kenyans (mean: 58.25) supporting the intervention of the ICC in prosecuting suspected PEV instigators and perpetrators.<sup>32</sup> Yet the leaders of Kenya's main political parties continue to view the matter through a purely political prism. Because of this, the durability of peace, especially in the hotspots of the PEV in the Rift Valley region, will crucially hinge on the survival of interparty political alliances. Given the



ever-shifting landscape of political parties in Kenya, though, there is no guarantee that the current politically motivated refusal to discuss the historical injustices that triggered the PEV will last.

The ephemeral nature of political parties in Kenya limits the chances of creating platforms for the negotiation and enactment of a credible transitional justice process. Instead, parties have served as mere electoral special-purpose vehicles only loosely linked to the electorate. The loose link between party leaders and the electorate means that voters cannot hold leaders accountable on their promises to pursue transitional justice. The lack of a stable party system, and the constant search for possible alliances, means that no party or alliance in Kenya has the incentive to advocate for a comprehensive implementation of any of the reports that came out of the various transitional justice processes between 2008 and 2013. A political opponent today may be a potential alliance partner tomorrow. Furthermore, specific party leaders have been implicated in various past human rights abuses. Therefore, from the perspective of different political parties, commitment to the transitional justice processes and their outcomes brings the risk of potentially alienating future political partners. It is for this reason that the political class in Kenya, and the parties it represents, prefers to leave the past untouched.

## CONCLUSION

The main lesson from the foregoing discussions is that tension is inherent between elite objectives and the publics' desires in countries transitioning out of conflict. Elites form parties as electoral vehicles, and the general public supports specific parties in the hope of achieving beneficial outcomes, among them a long-term return to peace. However, these objectives are often in conflict with each other. And because political elites have an advantage in defining a given party's agenda, the public often lacks any mechanism for securing their objectives when they do not coincide with those of the political elite. The role of political parties in transitional justice processes after conflict therefore comes with mixed blessings, most of them bad. This reality should inform the design and implementation of transitional justice processes in post-conflict states.

For parties to play a beneficial role in transitional justice, an explicit effort must be made to reconstruct afresh the cleavage structures around which political contestations take place in the post-conflict era. Transitional justice processes should therefore be engineered to provide incentive for a reduction

in the salience of wartime cleavages, both in the short term and long term. This ought to be a priority immediately after cessation of hostilities, either by banning warring groups from morphing into parties or through institutional design that provides incentive for intergroup cooperation. Reducing the salience of wartime cleavages can facilitate the building of a general consensus around the specific form of transitional justice, as well as the emergence of political parties whose bases of support are orthogonal to wartime cleavages.

Failure to do so results in a situation in which post-conflict politics merely becomes a civilianization of previous conflict, with a high risk of recidivism. The cases of Kenya, Liberia, and Uganda provide important insights into how idiosyncratic local conditions may structure the roles that parties play in transitional justice processes. In particular, they highlight the important role that political parties play in building consensus around the specific form of transitional justice that is adopted following conflict, as well as in maintaining continued commitment to transitional justice processes. Briefly stated, these processes are more likely than not to fail when infused with fractious party politics. For this reason, post-conflict settlements should be engineered in favor of post-conflict party systems that both are stable and do not reproduce wartime cleavages.

The Kenyan case shows how weakly institutionalized parties can be both a blessing and a curse. On the one hand, they may facilitate easier alliance building among elites; but on the other, they serve to disconnect the public from political elites and diminish the chances for vertical accountability and elite commitment to transitional justice to prevail. The ease with which Kenyan politicians are able to enter and exit alliances means that the political settlement following the 2007-08 post-election violence was a primarily elite affair. It is unclear if the prevailing calm in the Rift Valley province, the epicenter of much of the violence, would obtain if the political alliance between William Ruto and Uhuru Kenyatta were to break apart.

The case of Liberia shows the dangers of mere civilianization of conflicts in the transitional period without a complete restructuring of the political landscape. The country's return to civil war after the 1997 election is a cautionary tale against a naïve accommodation of the political wings of warring groups in the post-conflict settlement. Indeed, the failure to consolidate the initial success of the 2005 settlement by eliminating warlord politics is a reminder of the dangers of post-conflict national alliance building on the basis of wartime sectoral interests.

Lastly, Uganda's experience teaches us the lesson that, while a "no-party" environment may serve as an inclusive framework for facilitating peaceful

intra-elite cooperation in the post-conflict period, such a settlement relies heavily on the need for a consensus for meaningful inclusion to prevail. A “no-party” post-conflict arrangement also runs the risk of implementing a “victor’s transitional justice” by silencing dissenting voices and instrumentally deploying transitional justice processes for political purposes.

This chapter has highlighted the contingent role political parties play in transitional justice processes. In particular, it emphasizes the need to carefully structure post-conflict party systems in a manner that makes the long-term goals of lasting peace and reconciliation compatible with those for achieving the short-term goals of political elites. Due to their unique dual roles of aggregating interests and influencing public opinion, political parties can either serve as vehicles for building consensus and commitment to specific transitional justice processes or as sources of discord that discredit the same processes. Whether political parties and party systems support or undermine transitional justice processes depends on whether they attenuate or exacerbate wartime cleavages. For this reason, post-conflict settlements and the transitional justice processes on which they are built should be pursued with the range of possible future party systems in mind.

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CHAPTER 10

Reflections on the Presence and Absence of  
Religious Actors in Transitional Justice Processes:  
On Legitimacy and Accountability

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The image of a teary-eyed Desmond Tutu at a public hearing of the South African Truth and Reconciliation Commission is emblematic of the transitional justice process in that country. Examining the work of the commission without recalling the archbishop's role in promoting (restorative) justice in South Africa is a scholarly faux pas. Yet it has also become something of a cliché—which begs the question, are there other religious actors out there championing transitional justice mechanisms?

One possible answer is provided by Daniel Philpott, who documented the involvement of religious nonstate entities in state-led transitional justice initiatives. He found, using a sample of fifteen cases, that such actors were influential in eight out of ten “moderately strong” and “strong” truth processes and in two out of four punitive processes.<sup>2</sup> Other works similarly indicate an important presence of religious nonstate entities in various transitional justice initiatives.<sup>3</sup> Taken together, this evidence is curious if one assumes that transitional justice is built on the same pillars as its sister discipline, international law—namely, secularism and state-centrism.

To probe this curiosity, this chapter relies on a parallelism between international law and transitional justice and their respective relationships to religion and nonstate actors, and is guided by three research questions. First, it asks why religious nonstate actors are called on to participate in state-sanctioned transitional justice processes. For the purpose of this study, religious nonstate actors are defined as those individuals, churches, religious organizations, and political parties which present several of the following characteristics: a religious organizational structure, religious doctrine, religious motivation, religious overarching goal, or predominately religious discourse. Their claim to have the legitimate authority to interpret religion differentiates religious actors from secular<sup>4</sup> actors. In making this claim, they tap primarily into traditional or charismatic sources of legitimacy, which confers on them what can be called a “special” legitimacy.<sup>5</sup> The chapter shall argue that the potential to lend their special legitimacy to transitional justice processes is what makes religious



actors particularly valuable allies for governments, international organizations, and nongovernmental organizations (NGOs) in post-authoritarian and post-conflict settings.

Second, the chapter explores why religious entities are at times absent from transitional justice initiatives in situations where they would otherwise be societally relevant and visible, while at other times they act as spoilers or, on the contrary, as enablers of transitional justice. A number of variables may explain a religious actor's silence or spoiling, or indeed enabling attitudes: past conduct (whether a religious actor was responsible for or complicit in rights violations during the period of authoritarianism or conflict), past treatment (whether a religious actor was a target of abuse perpetrated by other actors), and accountability (whether the religious actor and other actors have been held accountable for their past conduct). In this study, the term accountability denotes "the relationship whereby someone is held to explain and justify their behaviour to someone else;"<sup>6</sup> it, therefore, can include criminal responsibility but it is not limited to it.

The link between legitimacy and accountability is examined in five case studies of religious actors in Romania, Rwanda, Solomon Islands, and Tunisia and Libya (explored jointly). While the findings may have relevance beyond the four examples, in a similar vein to other works that rely on case studies, this chapter does not assume that extrapolation to other cases follows automatically.

Whilst the first two questions addressed in this study are explorative in nature, the third is normative; it asks whether religious actors should be involved in state-led transitional justice initiatives. The answer is outlined by means of a critical assessment of the legality, neutrality, and denial/distortion of justice arguments.

## RELIGIOUS ACTORS AND LEGITIMACY

Given the significant role that international law plays in transitional justice,<sup>7</sup> examining the relationship between the former and religion helps to shed some light on the relationship between the latter and religion. This parallel may provide some important insights into why religious entities are courted by governments, intergovernmental organizations, and NGOs, and specifically why they are called on to take part in state-led justice initiatives in the aftermath of repression and conflict.

An earlier study examined in detail efforts by legal scholars to unearth

the religious roots of international law and, in particular, those of human rights and humanitarian law.<sup>8</sup> Such narratives posit that major constitutional documents, such as the French and the US constitutions and the Universal Declaration of Human Rights, are reflective of the philosophy of natural law; insofar as natural law can be seen as an extension of religion, the claim made by religions to have played an important role in the development of human rights law would not be amiss.<sup>9</sup> Also noteworthy are attempts to rebut the exclusivity or predominance of Western, Christian thought in the evolution of human rights and humanitarian law, showing how other religions have contributed to it,<sup>10</sup> and how they are “asserting their values as relevant factors to be considered in its continued evolution.”<sup>11</sup>

Attempts by legal scholars to analyze and actualize the role of religion in the evolution of international law may be seen as an exercise in historical accuracy or one in political correctness. They may also be seen, as is evident from many writings, as efforts to strengthen the legitimacy of human rights and humanitarian law within different religious and cultural traditions by appealing to the special legitimacy that religious actors often enjoy. For instance, Daniel Thürer recognizes that “law as such is powerless if it is not backed by forces beyond the legal system, such as customs, public opinion or—religion.”<sup>12</sup> In a conscious and strategic effort, Thürer validates appeals to religion, in particular in times of armed conflict, with the aim of unearthing and putting forward its positive elements that can support the law and rebut those that endanger it.<sup>13</sup>

The question that emerges is what the special legitimacy or the special legitimate authority of religious actors should be taken to mean. Drawing on Max Weber’s *Idealtypen* of legitimate authority it has been shown elsewhere that the legitimacy of religious actors is primarily ascribed on traditional or charismatic grounds, as opposed to legal-rational ones.<sup>14</sup> On this account, the followers of a religious actor respect “commands” due to “an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them”<sup>15</sup>—the actor thus assumes a traditional authority. A religious actor can also act as a charismatic authority, drawing on emotions and faith that sanction a type of conduct, whereas followers show a devotion to the “exceptional sanctity” of this actor and “the normative patterns or order revealed or ordained by him.”<sup>16</sup> By comparison, the legal-rational authority that corresponds to most secular actors, and indeed international law itself,<sup>17</sup> draws primarily on the “belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands.”<sup>18</sup> With this

framework in mind, the narrative that explains the authoritative pull of human rights and humanitarian law not only through their grounding in legal-rational arguments but also through their emergence from the “distillation of religious and cultural traditions” is interesting for transitional justice initiatives,<sup>19</sup> which aim to redress violations of precisely such rights.<sup>20</sup>

Reliance on local religious elements as a strategy to lend special legitimacy to transitional justice measures may carry particular weight in transitional contexts, where claims are often made regarding the importance and need for foreign resources and international structures, on the one hand, and local ownership, on the other. Post-authoritarian and post-conflict states are often characterized by “severely underdeveloped economic and social institutions, widespread scarcity of resources, and myriad competing needs;”<sup>21</sup> hence, foreign funding and a certain reliance on international institutions are often necessary to implement transitional justice mechanisms. At the same time, scholars and practitioners of transitional justice have repeatedly emphasized that local participation in and ownership of these processes are key to a society’s prospects of coming to terms with its past.<sup>22</sup> Thus, religious actors’ support for and/or involvement in truth commissions, domestic and international criminal prosecutions, vetting programs, and institutional reforms that could be perceived as foreign—at a conceptual level or due to external institutional and financial backing—can prove instrumental. Indeed, Aaron P. Boesenecker and Leslie Vinjamuri suggest that, in addition to civil society organizations, faith-based actors can act as “norm adaptors” and are thus of crucial importance to embedding an international (criminal) accountability norm in various contexts.<sup>23</sup>

At the same time, one must be careful not to fetishize context—not least because few contexts are untouched by outside influences, as “the forms of lives we find around the world are already products of long histories of interactions.”<sup>24</sup> It would also be objectionable to accept cultural relativist demands that misuse the discourse of contextuality to essentially deny certain rights to victims or reject certain modes of accountability because they are “alien,” thus bereaving victims of adequate redress. But does religious actors’ involvement in transitional justice result in such scenarios, and, if so, should they be involved? These are questions to which we shall return.

## RELIGIOUS ACTORS AND ACCOUNTABILITY

Having previously focused on the *religious* in the expression *religious nonstate actors* the analysis will now utilize the parallel between international law and transitional justice to contrast their respective accounts of the *nonstate* element.

The role of the state in international law, and in transitional justice, is central. Yet, in recent years, the role of nonstate actors has occupied the minds of many international lawyers—and appears as a trend in transitional justice literature as well. Why so? In international law, pragmatic considerations have led to a reassessment of entities that are not states. Whereas it is generally accepted that states remain the “fundamental or primary” legal subjects, because they control territory in a stable and permanent manner and exercise legislative and executive functions,<sup>25</sup> legal scholars also acknowledge that today “there is not a single area of international law where law-making and law-enforcement . . . has not been affected by . . . [nonstate] actors.”<sup>26</sup> In other words, as nonstate actors appear to be everywhere, it is necessary to grasp their doings and account for their growing importance in norm creation and implementation.

A number of strategies have been pursued to include nonstate actors within the framework of the international legal system. “Relativizing the subjects or subjectivizing the actors”<sup>27</sup>—one of the tried strategies—has proved difficult. A subject of international law or an international legal person<sup>28</sup> is that which possesses international rights and obligations and has the capacity to bring international claims to maintain such rights and to be subjected to claims for breaches of its obligations.<sup>29</sup> The state, which conforms closely to this definition, has historically been portrayed as the sole subject of international law; today it is regarded as the sole *full* subject.<sup>30</sup> Indeed, some commentators have critically noted that subjectivity is nothing more than the description of the attributes of statehood.<sup>31</sup> While intergovernmental organizations, such as the UN, have been accepted as subjects,<sup>32</sup> this has occurred due to their strong links with states, which set them up in the first place.<sup>33</sup> Hence, when other actors are forced into the schemata of subjects (read: the schemata of states), unsurprisingly they never quite fit.

Alternatively, Andrew Clapham has developed the “capacity approach,” a method that extracts the capacity of nonstate actors to enjoy human rights and carry obligations from treaty and customary international law and jurisprudence.<sup>34</sup> This approach bypasses any discussion about an entity’s subjectivity and the symbolism this status attaches<sup>35</sup>; the aim is to ensure an entity’s accountability by parsing out its rights and obligations under international law. Complementary to this pragmatic method is the reconceptualization of international legal personality by Janne Nijman, who traces the initial use of the concept to Gottfried Wilhelm Leibniz (1646–1716) and his intention to accommodate the participation in international affairs of German princes (as relative, not full sovereigns) in order to hold them accountable to positive and

natural law.<sup>36</sup> In effect, Nijman unearthed the original meaning of international legal personality as one which does not correspond to subjectivity as preeminently embodied by the state; this latter meaning is a construction of later legal positivist thought. As such, the reconceptualization or recuperation of the original meaning of international legal personality may provide a theoretical underpinning for the capacity approach.<sup>37</sup>

Regardless of which of the above-discussed paths is chosen, one has a strong sense that the driving force behind such efforts to include nonstate entities in international law stems foremost from the need to clarify the accountability framework of these actors, specifically in contexts where they exercise power and affect guarantees of human rights. This is usually predicated on an understanding of accountability in a wide sense, certainly not limited to criminal punishment and not necessarily involving judicial proceedings.<sup>38</sup>

Is the accountability motive mirrored in transitional justice literature and practice? Criminal law scholarship on nonstate entities—in particular, works dealing with armed groups—is abundant and relevant to transitional justice, given that criminal justice is one of its important components, alongside truth seeking, reparation, and initiatives aimed at ensuring non-recurrence. For example, Fionnuala D. Ní Aoláin and Catherine O'Rourke capitalize on precisely such scholarship in proposing alternatives to a state-oriented transitional justice framework that fails to satisfactorily address the accountability of nonstate actors for gender violence in Colombia.<sup>39</sup> A number of studies have explored the topic of armed groups and reparations,<sup>40</sup> and a recent volume edited by Sabine Michalowski examines the accountability of corporations.<sup>41</sup> The concept of accountability that this last publication promotes is—rightly—a broad one, not restricted to holding corporations to account solely through criminal prosecution but also through reparation programs, truth processes, and UN human rights mechanisms.

Beyond this, with regard to the field of transitional justice and its treatment of nonstate actors, two observations can be made. First, the focus on nonstate actors in transitional justice is at an incipient stage. In and of itself, this is not surprising: the traditional approach to transitional justice developed largely as a response to transitions in the Southern Cone of Latin America and was mostly aimed at redressing gross human rights violations committed by an authoritarian state—hence, it was generally acknowledged that the state with its existing institutions could and should repair these violations through transitional justice measures. Much of the literature and practice, therefore, concentrated on improving state action. Yet even in such transitions, nonstate actors, including religious leaders and organizations, were instrumental.<sup>42</sup>

In post-conflict and conflict settings, where today transitional justice measures are frequently called on to operate, one would expect the presence and role of nonstate actors to be heightened. Such contexts are often confronted with state institutions that are weak or corrupt, with populations experiencing mass poverty and marginalization, which in turn create the space for or, rather, require the action of entities beyond the state; moreover, perpetrators tend to be numerous and to involve an array of nonstate actors that will need to be held accountable.<sup>43</sup> In such settings, the state-centric approach to transitional justice appears somewhat frustrated; hence, while increasing the capacity of the state remains vital, it may be insufficient in today's reality.

Second, transitional justice literature on nonstate actors, while not vast, does attempt to provide a more holistic picture of these entities by exploring the roles they play in supporting or shaping the processes of redress of violations and the motivations for their actions. To illustrate, Elin Skar and Eric Wiebelhaus-Brahm propose a multilevel framework for analyzing how domestic and international actors operate within local, national, and transnational environments; they argue that the type of actors that promote or obstruct transitional justice significantly influences the type of initiatives adopted and shapes their impact.<sup>44</sup> The suggested framework avoids an obsessive preoccupation with retribution and provides valuable insights into an "agentic constructivism"<sup>45</sup> of transitional justice. With regard to religious actors, scholars identify a variety of roles they have played in transitional justice, including those of capacity builders, peace builders, legalists, pragmatists, and traditionalists,<sup>46</sup> as well as norm adaptors, norm makers, norm facilitators, and norm reflectors.<sup>47</sup>

Returning to the issue of accountability, post-authoritarian contexts in which transitional justice is implemented raise questions as to whether and how to hold nonstate actors accountable through truth commissions, reparations, and vetting, in addition to criminal prosecutions for past violations. Post-conflict or mixed (post-conflict and post-authoritarian) contexts certainly increase the pressure to find answers to these questions. While some important work exists, research remains scarce when the panoply of nonstate actors is considered—spanning, in addition to armed groups and corporations, international organizations, private military companies, NGOs, media outlets, and, indeed, religious actors—and when accountability measures beyond criminal prosecutions are considered.

A holistic understanding of the roles of nonstate actors in transitional justice would presumably benefit if these entities' actions during the transition were to be linked to their actions during the period to be redressed—ultimately

this means that research will examine their roles in transitional justice through the prism of their conduct and victimhood experience in the past and their accountability (broadly understood). Likely, a more complete understanding of the role of nonstate actors in transitional justice would be gained, including their preferences for one mechanism over another or, contrarily, their silence in the midst of such processes or obstruction thereof.

## **LINKING LEGITIMACY AND ACCOUNTABILITY: PAST AND PRESENT ROLES OF RELIGIOUS ACTORS**

To inquire whether and how the past roles of religious actors in periods of repression or conflict have a bearing on their roles in transitional justice processes and their motivations to pursue such roles, four case studies are examined. The selection of cases attempts to ensure a balance between older and newer transitions, between post-authoritarian, post-conflict, and mixed contexts, and among geographical regions. The first case depicts churches in Romania in a post-authoritarian context: while the regime change occurred in 1989, various transitional justice initiatives of relevance for religious actors are ongoing. The second looks at religious actors in post-conflict Rwanda, one of the more mature transitions. The case of Solomon Islands offers an illustration of a less explored transitional justice process in which religious actors played an important role. Finally, having emerged from the Arab Spring, the cases of Tunisia and Libya—examined here together—can be considered “newer” contexts, where transitional justice measures are currently being implemented. While the entities examined here are diverse—churches, religious (women’s) organizations, and political parties with a religious message—they have in common a number of religious features and are united in their claim of special legitimacy anchored in tradition or charisma; these common features justify their treatment under the umbrella-term religious actors.

### **ROMANIA**

The communist regime in Romania, installed in the aftermath of World War II, initially subjected the Romanian Orthodox Church to harsh repression. In various episodes, clergy were arbitrarily arrested, imprisoned, sentenced to forced labor, and at times killed; monasteries and monastic seminaries were closed; and churches were demolished.<sup>48</sup> However, the self-proclaimed atheist regime eventually recognized that the legitimacy of the Orthodox Church (the

denomination of the vast majority of the population) could be instrumentalized to its benefit, and it proceeded to appoint directly in 1948 the head of the church from among its own “faithful.”<sup>49</sup> The result was, as Lavinia Stan and Lucian Turcescu recall, “a *modus vivendi* which allowed the Church to be enlisted as an unconditional supporter of communist policies in return for the government’s toleration of a certain level of ecclesiastical activity.”<sup>50</sup> The report of the Presidential Commission for the Study of the Communist Dictatorship in Romania (the Tismaneanu Report) confirms that the connections of the Orthodox Church with the communist apparatus involved the patriarch’s “collaboration” with the Securitate, the regime’s repressive secret police.<sup>51</sup> Some studies portray this collaboration as having been pervasive, with one estimating that 80 to 90 percent of the Orthodox clergy were recruited by the secret police.<sup>52</sup>

Among the other religious actors that suffered persecution by the communist regime in Romania was the Greek Catholic Church.<sup>53</sup> The church was formally dismantled in 1948, with hundreds of its priests and its entire leadership arbitrarily imprisoned and its properties, including churches, nationalized and then transferred by means of a legislative act to the Orthodox Church.<sup>54</sup>

After the 1989 regime change, transitional justice demands in Romania centered on three elements: disclosure of the names of informers and collaborators with the former Securitate; condemnation of the communist past; and restitution of property. The Greek Catholic Church became an agent of transitional justice insofar as it placed itself at the forefront of efforts of property restitution. Faced with unwilling and incapable domestic legislative and justice systems, and with failed negotiations with the Orthodox Church over the restitution of churches and other properties, the Greek Catholic Church sought redress by appealing to the European Court of Human Rights. Norman Doe estimates in a 2011 publication that more than 300 Romanian church property claims were outstanding in Strasbourg,<sup>55</sup> several of which were introduced by the Greek Catholic Church as applicant.

At the other end of the spectrum, the Orthodox Church opposed the transitional justice strategies pursued in Romania and, to the extent that it was expected to deal with its own past, acted as a spoiler.<sup>56</sup> Some illustrations are in order. The 1997 legislative project that provided partial restitution of property to the Greek Catholic Church and alternating services in some parishes with the Orthodox Church was rejected by the leaders of the latter church; reportedly, some Orthodox clergy “threatened civil war” if the bill were passed.<sup>57</sup> In 1999, the Orthodox Church vehemently opposed a law ensuring access to the



files of the former Securitate.<sup>58</sup> In addition to permitting individuals to ask to see their own files, the law provided that a government agency was to investigate the files of public officials and other categories, including religious leaders. A legislative amendment passed in later years that removed the agency's competence to review the files of religious leaders—hence effectively ensuring, if not an amnesty for its members, then an amnesia regarding the role of the Orthodox Church—was welcomed by the religious actor.<sup>59</sup> In 2006, upon the publication of the Tismaneanu Report—which prompted an official “condemnation” of the Romanian communist regime by the Romanian president—the Orthodox Church charged that the study's chapter depicting church–state relations during the communist period was biased, unscientific, and not in accordance with historic truth.<sup>60</sup>

One avenue for exploring the reasons and logic behind the actions of the Greek Catholic Church and the Romanian Orthodox Church during the transitional period is to analyze their respective roles in the transition in relation to those during the authoritarian period. In other cases, it has been suggested that the extent of a church's autonomy from a repressive regime explains, to a large measure, its role in the transitional period.<sup>61</sup> Additionally, religious actors' actions in transitional justice are said to be animated by a “political theology,” most often that of reconciliation, which may be expressed as pleas for forgiveness.<sup>62</sup>

It is submitted here that autonomy (or lack thereof) is insufficiently precise as an explanatory variable, and the logic of reconciliation or forgiveness may obscure a number of other interests. This chapter will examine instead past conduct and accountability for such conduct as explanatory variables and acknowledge that a host of other factors—which may conform to a logic of forgiveness or may take the shape of more mundane interests—can be responsible for an actor's actions and positions toward transitional justice measures. Furthermore, the chapter will explore whether a link may exist between the accountability of religious actors and the legitimacy they can bring to transitional justice processes.

The Greek Catholic Church in Romania, it should be recalled, was dismantled, and its leadership was arbitrarily detained and ultimately physically obliterated<sup>63</sup>; hence, strictly speaking, one cannot refer to its autonomy as a variable<sup>64</sup>—instead, its involvement in transitional justice efforts was driven by its past victimization. At the same time, the church must (also) have been cognizant of its economic interests, which were to be restored through property restitution. Reconciliation may have been on the agenda of the Greek Catholic

Church, and the church's participation may well have been inspired by a logic of forgiveness. Nevertheless, the championing role this actor assumed in property restitution leads to the conclusion that, in its understanding, reconciliation was viewed as a complement to—not a substitute for—redress of the violations it had suffered and accountability of the Romanian authorities that had perpetrated such abuse.

As for the Orthodox Church, its lack of autonomy fails to capture adequately the complexity of the actor's positions during the period of Romanian authoritarianism—that of a victim of repression at the hands of the communist regime, beneficiary of the spoils of human rights violations (through the transfer of property confiscated from other denominations), and possible accomplice in violations given the extensive collaboration of its clergy with the regime. Just as important, it fails to account for the triadic role the church played during the lengthy transitional period in Romania, as memorializer-opponent-spoiler. After 1989, the church was ready to memorialize its own victimhood episodes in an attempt to explain or legitimize its accommodation with the regime; yet it was reluctant to engage in property restitution, likely due to the real harm this posed to its economic interests. It also objected vehemently to the Tismaneanu Report's disclosure of the extent of its collaboration with the former regime—its fear may have been a loss of legitimacy.

Since 2006, when the Tismaneanu Report was released, the Orthodox Church has not addressed its past wrongs at an institutional level (by, for instance, vetting clerics who had been collaborators of the Securitate), nor has it asked for forgiveness or expressed repentance as an institution. On the whole, few individual clerics have confessed their collaboration with the former regime or subsequently asked their followers and the wider society for forgiveness—despite the Orthodox dogma encouraging the confession of one's sins.<sup>65</sup> That it colluded with repressive tactics of the communist regime and was not held accountable for such past conduct, in addition to its economic interests, may explain the opposition of the Orthodox Church to transitional justice initiatives.

It is interesting to note that opinion polls in Romania that show high levels of trust in the church also portray a strong opposition to its "involvement" in politics.<sup>66</sup> Anecdotal evidence supports a positive correlation between this societal opposition and the past unconditional support the Orthodox Church gave to the communist regime. It could be that in the Romanian collective memory, the church lacks the legitimacy to influence political life due to its failure to deal with its own past.

## RWANDA

In considering the role of religious actors during the Rwandan genocide of 1994, the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) can serve as a starting point. In 2004, a pastor of the Seventh Day Adventist Church who transported militias to a complex where they killed hundreds of Tutsi refugees was sentenced to ten years' imprisonment for aiding and abetting genocide and for extermination as a crime against humanity.<sup>67</sup> In 2006, a Catholic priest was found to have actively participated in the destruction of his own church by means of a bulldozer; at least 1,500 Tutsi who had sought refuge in the church were killed. He was sentenced to life in prison after being found guilty of committing genocide and extermination as a crime against humanity.<sup>68</sup>

Beyond these illustrations depicting the involvement of some religious leaders in the conflict, studies suggest that churches have played a deeper, structural role in the Rwandan genocide. Timothy Longman emphasizes the churches' colonial roots and that their missionaries imposed patterns of racial and ethnic discrimination. Over the years, they have promoted a model of obedience to authorities, be they the churches' own agents or government authorities<sup>69</sup> which, in the words of David P. Gushee, amounted to an "unquestioning submission."<sup>70</sup> Missionaries, it is asserted, "showed through example that Christianity allowed Machiavellian manipulations in the struggle for influence and accepted ethnic discrimination."<sup>71</sup> Longman submits that it was not only the strong cooperation between church and state in Rwanda that explains why religious actors became involved in the genocide, but also a never resolved conflict within the churches between conservatives expounding a discriminatory vision seeking to preserve personal benefits and progressive voices aiming to democratize the institution.<sup>72</sup> Reverend Roger W. Bowen has confirmed this with reference to the Anglican Church:

Within the Church itself the mutual fears between Hutu and Tutsis were not faced up and dealt with . . . It was hard for Tutsis to advance in leadership while the hierarchy remained solidly Hutu. The issue, which in the past in times of revival had been addressed so powerfully, was allowed to remain unresolved . . . By and large, however, the Church had allowed these ethnic tensions to continue unresolved, often below the surface, until conditions occurred where the issue exploded beyond their control in horrific violence. What happened in Rwanda is a salutary reminder that the fear and pain preventing the Church from addressing a painful tension within itself needs to be overcome if one is to avoid the far more horrific consequences of not facing it.<sup>73</sup>

Since the genocide, Rwanda has pursued a number of transitional justice measures, including prosecutions through the ICTR (established in 1994 by the UN Security Council) and the *gacaca* courts (a traditional, community-based court system reestablished by the government in 2005).<sup>74</sup> In addition to the judicial response, constitutional reform and a series of other legislative measures were adopted, and in 1999 the National Unity and Reconciliation Commission was established to elaborate various programs aimed at reconciliation.<sup>75</sup> What roles did religious actors play in these initiatives? One author notes that the Catholic, Anglican, and Presbyterian churches—all established churches in Rwanda and otherwise powerful societal actors—have exercised “starkly . . . little influence on state-level efforts to deal with the past,” with their involvement occurring mainly at the grassroots level.<sup>76</sup>

One means of understanding this apparent inconsistency is by approaching it through the prism of the involvement of Rwandan churches in the genocide, linking their roles in the conflict with those in the transition. Along these lines, then, religious actors were present in state-sanctioned transitional justice efforts in the country but, often, on the bench of the accused. This was the case, as we have seen above, with the ICTR proceedings as well as with the *gacaca* system. Legislation regulating the *gacaca* courts designated leaders within religious denominations as “Category I” defendants, alongside leaders from political parties, the army, and militia who had committed genocide or crimes against humanity, with the highest penalties reserved for them.<sup>77</sup> Such emphasis on religious actors suggests that their deeds during the genocide were perceived as both grave and pervasive; hence, the importance attached by the state to establishing their accountability. Some of the actors themselves felt it necessary to take responsibility for acts committed during the genocide; the archbishop of Canterbury offered an apology on behalf of the Anglican Church, and the Pope called for Catholic clergy “to have the courage to face the consequences of their crimes.”<sup>78</sup> A certain introspection in the Catholic Church is said to have occurred, but the lack of a public assessment of the institutional accountability or an official apology may indicate, arguably, a “seamless continuity”<sup>79</sup> from its actions during the genocide to its behavior afterward.

Outside state-sanctioned transitional justice measures, religious actors made numerous efforts to promote reconciliation at the grassroots level. An illustration is the Interfaith Commission of Rwanda set up in 2003 by Anglican Archbishop Emanuel Kolini and Sheikh Saleh Habimana, the mufti of Rwanda. Among other things, the Commission entrusts development projects to genocide survivors, victims’ families, and released prisoners in order to

enable cooperation among them and contribute to poverty eradication.<sup>80</sup> The Catholic Relief Services and other NGOs have trained “justice and peace volunteers” to assist communities in trauma healing and conflict transformation.<sup>81</sup> Also noteworthy is the work of religious actors with individuals who had been convicted of or charged with genocide crimes, the focus of such projects being on “repentance, confession, and facing criminal responsibility with a clear conscience.”<sup>82</sup> These grassroots efforts may well support state-led transitional justice efforts and function as catalysts for reconciliation in Rwanda.

Be that as it may, the involvement of established churches in the genocide appears to have eroded their legitimacy, in particular, that of the Catholic Church. Some reports claim that the number of followers of Islam grew after the genocide, because “Muslims seemed to have given a good account of themselves during the massacres.”<sup>83</sup> Further, one factor said to have contributed to the decline of the Catholic demographic (overwhelmingly predominant before the genocide) and the important growth of new churches (Protestant, in particular Pentecostal) has been the return of Tutsi refugees,<sup>84</sup> who have reportedly refused to “associate with the traditional church, which they said aided the genocide.”<sup>85</sup>

Along these lines, the deficit in accountability for past conduct and erosion of legitimacy may explain the disinclination of the state to call on religious actors to assume any visible position in the establishment or functioning of transitional justice mechanisms in Rwanda. Illustrating the link between accountability (or lack thereof) and legitimacy (or lack thereof) is the legislation establishing the *gacaca* courts, which explicitly excludes members of “leading organs of . . . a religious confession” from membership in their organs.<sup>86</sup>

## SOLOMON ISLANDS

In 1998, a violent conflict known as the “Tensions” erupted in Solomon Islands. A British protectorate since 1893, Solomon Islands gained independence in 1978. Colonial policies had contributed to massive migration from Malaita and other islands to Guadalcanal, where development investment was concentrated, a trend that continued after independence.<sup>87</sup> A set of political, social, and economic grievances by Guadalcanal natives related to land distribution and registration remained unaddressed.<sup>88</sup> In 1998, armed groups, initially known as the Guadalcanal Revolutionary Army and later as the Isatabu Freedom Movement, started a campaign of “threats and intimidation” that included forced evictions of Malatian settlers in Guadalcanal.<sup>89</sup> In 2000, the Malaita Eagle Force was formed and retaliated, allegedly with the support of

police forces.<sup>90</sup> Reports note that “civilians suffered abuses by all sides,” including killings, abduction and illegal detention, torture and ill treatment, rape, the recruitment of child soldiers, looting, and the destruction of property.<sup>91</sup> An estimated 35,000 individuals (out of a total population of 408,000) were internally displaced by the conflict.<sup>92</sup> In July 2003, the Regional Assistance Mission to Solomon Islands (RAMSI), an Australian-led peacekeeping force, entered the country at the request of the Solomon Islands government; the date represents the official end of the conflict.<sup>93</sup>

During the conflict, churches and women’s groups that typically conducted their activity through church groups had shown, in the words of Amnesty International, “an enormous capacity for providing practical help and emergency relief to victims and their families.”<sup>94</sup> These activities sometimes exposed their members to harassment by militants and led to their victimization, including killings.<sup>95</sup> Drawing on their strong organizational networks, these groups filled a void left by a frail and corrupt state, providing social services, including in the areas of education, health care, and food provision.<sup>96</sup> Service provision was used as an instrument of mediation while drawing on customary practices. Examples include the efforts of the Catholic Daughters of Mary Immaculate Sisters, which brought food to fighters of opposing factions and attempted to persuade them to stop fighting.<sup>97</sup>

Their efforts in the aftermath of the conflict can certainly be seen as a continuation of their support and mediation roles during the Tensions. Provision of services by church and women’s groups continued, alongside grassroots efforts for reconciliation and transitional justice. Elizabeth Snyder notes that “the inadequacies of the state judicial system have intensified grassroots efforts to deter violence, resolve conflict and enhance human rights” with women’s organizations centered around church groups (such as the National Council of Women, Women for Peace, and the Guadalcanal Women for Peace) being at the forefront of these efforts.<sup>98</sup> Their activities aimed to bridge community, state, and international efforts. For instance, women assumed leadership roles in disarmament initiatives and served on weapons collection committees under RAMSI.<sup>99</sup> The Solomon Islands Christian Association (SICA), an umbrella nongovernmental organization of Christian churches, championed the establishment of a truth commission and held public consultations in 2002–3 to that effect.<sup>100</sup> However, with the arrival of RAMSI in 2003, the “law and order” agenda, which it sought to pursue foremost through criminal prosecutions, took center stage.<sup>101</sup>

Church groups in Solomon Islands blended strong and reliable

organizational structures with Christianity—"one of the few shared values in an otherwise diverse, and frequently divided society"—creating an agenda that focused on human rights and rule of law and a societal perception of women, in particular, as truthful custodians of custom.<sup>102</sup> Importantly, their conduct during the Tensions left them with an unblemished accountability record. These cumulated characteristics maintained their strong perceived public legitimacy during and after the Tensions and should have positioned them, according to Louise Vella, as natural allies for the truth commission. Although the truth commission was born from domestic church efforts, it failed to enlist these groups as ongoing supporters—this created a perception that the commission was "an arm of the government" (which was regarded as corrupt) and divorced from civil society efforts.<sup>103</sup> In turn, this situation led to a lack of local ownership by victims and the wider society. In the end, Vella suggests, the commission failed to capitalize on the legitimacy and capacity of churches, relying solely on the state for legitimation and implementation purposes.<sup>104</sup>

It is interesting to note that, faced with the failure of the government to make the truth commission's final report public and, indeed, to implement its recommendations, it was Terry Brown, a bishop, who released it to the press, commenting, "It is not good enough to forgive the perpetrators and forget the victims, which seems to be the approach of the government."<sup>105</sup>

#### TUNISIA AND LIBYA

During the Bourguiba and Ben Ali regimes in Tunisia and the Gaddafi regime in Libya, individuals said to espouse Islamist ideologies were victimized and their organizations largely excluded from political processes.<sup>106</sup> In Tunisia, attempts by the Mouvement de Tendances Islamiques (MTI) to enter politics in the 1980s were thwarted through arrests and imprisonment of its members.<sup>107</sup> During the Ben Ali era, although MTI changed its name to Ennahda to comply with the law prohibiting political parties from having religious names, it was not granted recognition as a party to stand in the 1989 elections.<sup>108</sup> Monica Marks notes that during this time "the threat of '*terrorisme*' became a frequent excuse for targeting political opponents, most commonly Islamist sympathizers," many of whom were arbitrarily imprisoned and tortured in detention and faced persecution on their release.<sup>109</sup> Ennahda members reported the brutal tactics employed by the police against them, including sodomization with glass bottles and the rape of their wives, which they were subsequently forced to watch on tape.<sup>110</sup>

While Tunisia's women's rights legislation was considered progressive in the region and beyond,<sup>111</sup> veiled women (who were perceived to embrace Islamist ideologies merely because they wore the veil and irrespective of their actual political views) were subjected to de jure and de facto discrimination. Circular 108 of 1981 introduced by Bourguiba and enthusiastically enforced by Ben Ali's regime "prohibited access of those wearing a 'sectarian dress' (a reference to the veil, known as *hijab*) to government services."<sup>112</sup> As a consequence, veiled women were deprived of educational and professional opportunities and suffered violations of their socio-economic rights, in addition to violations of their freedom of expression and their right to manifest religion.<sup>113</sup>

In Libya, reports of arbitrary arrests and imprisonment abound for the period of Gaddafi's rule (1969–2010). A 2009 press release by Human Rights Watch, for instance, recalls that the trials of members of the Libyan Islamic Fighting Group, a rebel group, were unfair for, among other reasons, a lack of adequate access to lawyers.<sup>114</sup> Torture and ill treatment in intelligence centers and detention facilities as well as extrajudicial executions are said have been widespread.<sup>115</sup> One of the "most notorious attacks on Libya's Islamists" occurred in June 1996 at the Abu Salim prison in Tripoli, a facility run by Gaddafi's Internal Security Agency.<sup>116</sup> Amnesty International collected a number of accounts from former prisoners and reported that riots had broken out due to horrific detention conditions; despite ongoing negotiations, security forces shot at some inmates who had been freed from their cells but were trapped within the prison gates.<sup>117</sup> Sources estimate different numbers of those killed in the riots ranging from tens to hundreds to over 1,200.<sup>118</sup> According to the journalist Lindsey Hilsum, it was a protest staged by relatives of Abu Salim victims in Benghazi that sparked the Libyan revolution in February 2011.<sup>119</sup>

In the aftermath of their revolutions, both Tunisia and Libya considered and embarked on a number of transitional justice initiatives. In both countries, high on the agenda of political parties described as Islamist were laws on political exclusion (in Tunisia) and isolation (in Libya). This analysis acknowledges that the political parties discussed here are somewhat different to previously examined religious actors—churches in Romania and Rwanda and religious (women's) groups in Solomon Islands. As political parties, these entities naturally seek political power. Nonetheless, the religious discourse that they espouse and their attempt to legitimize themselves by appeal to religion—or, in Weberian terms, by drawing on traditional and charismatic grounds as opposed to legal-rational ones—justifies their inclusion in the category of religious actors. As such, it is important to examine what specific transitional



justice measures they have advocated and how these measures relate to their political goals.

In Tunisia, political exclusion of individuals associated with the Ben Ali regime gained momentum after the 2011 elections for the National Constituent Assembly, which had been won by candidates representing Ennahda and its coalition partners, the Congress for the Republic (CRP) and Ettakatol.<sup>120</sup> Four separate legislative drafts were proposed.<sup>121</sup> The November 2012 version proposed by Ennahda envisaged barring members of the Rassemblement Constitutionnel Démocratique (RDC), Ben Ali's political party, and those who called for his reelection in 2014 from standing in local and national elections and from civil service positions for ten years.<sup>122</sup> The proposal's criteria for exclusion were party membership and (loose) affiliation with Ben Ali, as opposed to individual responsibility for involvement or complicity in human rights violations. It thus went beyond a vetting initiative that would seek to pursue the legitimate aim of removing personnel responsible for gross human rights violations and screening new candidates in an effort to ensure nonrecurrence<sup>123</sup>—instead, it resembled a purge attempt. Thousands of individuals would have been prevented from exercising their political rights, which would likely have been in breach of Tunisia's obligations under the International Covenant on Civil and Political Rights and other human rights instruments.<sup>124</sup> The law, which ultimately was not adopted, could have also resulted in draining much-needed resources and expertise from the administration, as many of those who would have been affected had clerical functions in the state bureaucracy.<sup>125</sup>

A more recent attempt at barring from elected office individuals who were part of the Ben Ali government and those who held positions of responsibility in the RDC was included in article 167 of the draft electoral law.<sup>126</sup> This provision was time-bound insofar as it stipulated that its validity was to cease when the transitional justice system (provided for in the 2013 transitional justice law) was (fully) established, yet it also raised a number of concerns regarding due process guarantees, respect for political rights, and proportionality.<sup>127</sup> The National Constituent Assembly failed to adopt the article in May 2014. The Ennahda party, after strongly supporting similar exclusionary initiatives, was split on this vote, with a considerable number of its delegates abstaining.<sup>128</sup>

Yet again, linking the present role of a religious actor to its role during the authoritarian regime offers a useful angle from which to understand Ennahda's pursuance of transitional justice measures in general and vetting legislation specifically. Commentators identify victimhood as the key element

driving Ennahda's transitional justice efforts.<sup>129</sup> Post-Ben Ali, one of the most sought-after roles became that of "getting to decide who the victims are."<sup>130</sup> In this respect, Ennahda, which, unlike religious actors in Romania, Rwanda, or Solomon Islands, held governmental and legislative power during the transition, was in a position to shape and contribute directly to the adoption of specific transitional justice legislation. This facilitated the creation of a dominant narrative that emphasized the victimhood of members and sympathizers of Ennahda and obscured the suffering of other categories of victims, such as those belonging to the leftist opposition or, indeed, those who had fought in the revolution. In turn, Ennahda's search for accountability for the treatment of its members represented an attempt to strengthen its legitimacy and political credentials.<sup>131</sup>

At the same time, the "fragmentation among different categories of victims" through a dominant-victim narrative and policies aimed at disenfranchising scores of individuals affiliated with the former regime heightened both political and societal polarization.<sup>132</sup> Ennahda's split vote on article 167 may have been an indication that some of its members understood the likely effects of this provision and changed course so as to mitigate the perception that the transitional justice measures it helped draft represented victor's justice.

In Libya, the Political Isolation Law is a broadly worded act adopted by the General National Congress (GNC) in May 2013. The act disqualifies for a period of ten years individuals associated with the Gaddafi regime from holding public office, including governmental, legislative, administrative, and security positions, as well as from positions in political parties, the judiciary, the media, and universities; "isolated" categories include individuals who served in leading political, administrative, diplomatic, and security positions, heads of universities and student unions, and researchers at propaganda institutions.<sup>133</sup> Described as a draconian law,<sup>134</sup> the act certainly resembles a purge. It falls short of rule of law standards,<sup>135</sup> and, in the words of the UN secretary-general's special representative on Libya, "Many of the criteria for exclusion are arbitrary, far-reaching, at times vague, and are likely to violate the civil and political rights of large numbers of individuals."<sup>136</sup>

The law's adoption is said to have occurred as a result of sustained pressure—including in the form of sieges of ministries—exercised by armed militias, most of which reportedly supported political forces with an Islamist orientation;<sup>137</sup> the Libyan wing of the Muslim Brotherhood was among the law's strongest supporters.<sup>138</sup> Agreement appears to be widespread among a variety of observers that "Islamist parties" that had been excluded from the Gaddafi

regime stood to benefit most from its exclusionary measures.<sup>139</sup> In this sense, victimhood was used as a means to achieve political gains. According to Wiebelhaus-Brahm,

The law seems intended to curb the influence of successful politicians, many of whom were part of Qaddafi's regime at some point. The mechanism to replace banned parliamentarians benefits Islamist groups, whose representatives were runners-up in many districts. Thus far, retributive justice in Libya has been about settling old scores and has undermined the development of credible political institutions.<sup>140</sup>

It is difficult to establish a correlation and, even less, causality between the instrumentalization of victimhood in the form of exclusionary policies and the Islamist forces' devastating loss at the ballot box in the 2014 elections; certainly many other factors contributed to the election results.<sup>141</sup> One may nonetheless legitimately inquire whether the exclusionary agenda has backfired. At the most basic level, the large number of individuals who found themselves among the isolated categories would not have voted for the Islamist parties. Others may have been disinclined to do so because they would have perceived these policies to be nothing more than victor's justice leading thus to a loss of legitimacy for these parties.

The Tunisian and Libyan contexts are not equivalent, and the religious actors involved in transitional justice in the two countries are certainly not identical in actions or rationale of actions. The review of their respective exclusionary "vetting" initiatives, however, reveals that the goal of these policies was predominately retributive, as opposed to preventive or restorative. While in Tunisia reconciliation continues to be an important topic,<sup>142</sup> the political exclusion proposals showed few signs of having been drafted with a reconciliatory model in mind. This was clearly the case for Libya's Political Isolation Law.

Against this background, however, it would be erroneous to charge religious actors embracing Islam with a preference for retributive measures and a disinclination toward reconciliation or forgiveness. On the contrary, scholars have argued that a logic of forgiveness similar to Christianity's is present in Islam.<sup>143</sup>

Beyond this, one can look to the military and *secular* regime that came to power in Egypt in July 2013 as a possible comparison. The new regime imposed in 2014 a mass death penalty on 1,212 supporters of former Egyptian President Mohamed Morsi, who was affiliated with the Muslim Brotherhood. The retributive character of the "vetting" laws in Tunisia and Libya pales in comparison

to these death sentences, which were likened to “a political trial carried out in haste with the aim of eradicating political opposition rather than establishing the guilt of perpetrators on a well-founded basis of law.”<sup>144</sup>

What is suggested here is that while religion was present in the makeup of Tunisian and Libyan societies and likely also responsible for certain cleavages, the religious nature of the examined political parties fails to account for their decision to pursue transitional justice and certainly fails to explain the particular form that these measures took. Much rather, it is the treatment to which these groups had been subjected by the former regimes and, incontestably, the political ends they sought to obtain by instrumentalizing their victimhood that are the explanatory factors for their support of particular transitional justice measures.

Even if only in relation to the five sample case studies examined here, two points hold true. First, the involvement of a religious actor in rights abuses or, conversely, its experience as a target of violations in the period of repression or conflict, and whether the religious entity and other perpetrators were held accountable can be considered explanatory variables for the role it assumes in transitional justice or, indeed, the lack of such a role. Second, without denying that reconciliation or forgiveness may drive a religious actor's involvement in transitional justice, more directly political goals and economic interests may equally motivate them.

### **SHOULD RELIGIOUS ACTORS “ACT” IN TRANSITIONAL JUSTICE?**

In answering the question of whether religious actors should be called on to “act” in transitional justice, the chapter must engage critically with some of the perceived drawbacks of their involvement. It is useful to revert to the leitmotiv parallel between the relationship of religion and international law and that of religious actors and transitional justice.

A first objection raised by some international lawyers to “immixtures” of religion and law can be termed the legality argument. According to this view, the establishment of international law as “law proper” resulted from its conscious separation from religion;<sup>145</sup> accordingly, international law is law because states consent to it by means of treaty or custom and because it can be rationally discerned from general principles and case law, irrespective of its roots in natural law and its seminal relationship to religion.<sup>146</sup> When applied to transitional justice, the legality argument carries some force. Over the past 20–30 years, a comprehensive conception of transitional justice has been

articulated, one that is increasingly grounded in legal instruments.<sup>147</sup> This “new law” of transitional justice relies cumulatively on international human rights law, humanitarian law, and criminal law.<sup>148</sup> Hence, seeking the truth, pursuing criminal prosecutions, making efforts to repair victims, and, to a certain extent, enacting institutional reforms are today binding legal obligations.<sup>149</sup> Moral, religious, and other grounds would thus represent additional impetuses for pursuing transitional justice. Yet, even at a commonsensical level, one can surely understand that by calling on religious actors to strengthen the legitimacy of transitional justice or, indeed, international law in various cultural contexts, a de-legalization (or a de-secularization, if it is admitted that both disciplines are secular ones)<sup>150</sup> is not intended: the source of the legitimacy of transitional justice and international law will not come to be based primarily on tradition or charisma through the mere presence of such actors.

A second reason for the insistence on the separation of law and religion draws on historical awareness of religious wars; a neutrality argument emerges whereby if the law is to ensure equality and nondiscrimination in today’s multi-religious and multicultural world it must rest on secular foundations.<sup>151</sup> This argument may be particularly relevant for transitional justice contexts in which societies have experienced conflict across religious lines or where a secular–religious cleavage exists, given that the operational involvement of religious actors in formal transitional justice mechanisms may raise tensions by, for instance, reinforcing such cleavages.<sup>152</sup> Their involvement may, however—as argued by some in reference to grassroots initiatives in Bosnia—assuage certain religious tensions and legitimize (personal) reconciliation when religious leaders of opposing parties seek to work together.<sup>153</sup>

From a legal point of view, a certain religious neutrality of the work of transitional justice mechanisms is warranted. It may be relevant to recall the case of *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*. In that case, the African Commission on Human and Peoples’ Rights found that non-Muslims and Muslims alike have the right to trial in nonreligious courts if they so choose,<sup>154</sup> a finding that appeared to flow both from the guarantee of a fair trial and the right to religious freedom.<sup>155</sup> The Commission’s view would certainly be salient in relation to criminal prosecutions of alleged perpetrators of past human rights and international humanitarian law violations, who similarly should have the right to be tried by non-religious courts. Beyond this, when the proposition is embraced that all formal transitional justice mechanisms should follow the rule of law,<sup>156</sup> which in its substantive form includes

freedom of and from religion,<sup>157</sup> one finds support for the argument that a (predominantly) religious character of a truth commission's sessions and its religiously inspired findings may frustrate the rights of certain victims and alleged perpetrators. A victim-centered approach to truth seeking would also sanction a certain neutrality, as some victims may feel uncomfortable with the religious contours of a truth commission.<sup>158</sup> Even so, the mere presence of religious actors in truth commissions would not, *per se*, vitiate the rule of law requirement.

A third separationist claim could be called the denial/distortion of justice argument, which points to the possibility that the involvement of religious actors in transitional justice may result in a denial of justice or its distortion toward certain "softer" forms. This argument has several strands. One suggests that a logic of reconciliation grounded in forgiveness, which allegedly animates the actions of religious actors in transitional justice, could determine an advocacy for amnesties. To the extent that these are amnesties that bar from prosecution individuals that have allegedly committed war crimes, genocide, crimes against humanity or gross violations of human rights, they would be inconsistent with international law; if they frustrate the right of victims to obtain a remedy and reparation, and the victims' and society's right to know the truth, they may also fall short of legal requirements.<sup>159</sup> While the rules of non-international armed conflict<sup>160</sup> permit amnesties, they do so in order to "encourage a release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. [They do] not aim [provide] an amnesty for those having violated international humanitarian law."<sup>161</sup> Along these lines and drawing on the etiological roots of the term, amnesties do not aim to ensure forgiveness—religious, social, political, or otherwise—but represent a legal instrument through which a limited category of crimes are "forgotten" in the interest of societal integration.<sup>162</sup>

It should be clearly stated at this stage that religious actors are not the foremost promoters of amnesties; governments, and certainly secular ones, have outdone religious actors in that regard by a considerable margin. Certainly, religious entities have specifically advocated for amnesties in some cases, such as in Mozambique and Sierra Leone,<sup>163</sup> and in Uganda, where the Acholi Religious Leaders Peace Initiative reportedly regarded the Amnesty Act of 1999 (which entails a blanket amnesty) as its "moment of triumph."<sup>164</sup> In the latter case, the provision of amnesty was seen as the necessary fundament upon which the religious actor could build a "systematic advocacy for peace through sensitization campaigns conducted at all levels of society."<sup>165</sup>

In other contexts, religious entities have approached amnesties very differently. In El Salvador, for example, various Catholic entities have disagreed on the issue of granting amnesty. The Tutela Legal del Arzobispado, the legal aid office set up in 1977 by archbishop Oscar Romero to systematically document rights violations in El Salvador, including during the civil war, lodged the *El Mozote Massacre* case with the Inter-American system. As a result, in 2012 the Inter-American Court of Human Rights held that the amnesty law which was in force in El Salvador since 1993 was “evident[ly] incompatible” with international law, and asked the authorities to investigate, prosecute, and punish those responsible for grave human rights violations.<sup>166</sup> In 2013, however, the current archbishop of San Salvador abruptly closed down Tutela Legal; he had previously spoken in favor of the amnesty law as “the most appropriate mechanism” for preserving the peace.<sup>167</sup> In still other contexts, religious nonstate entities have openly worked to discourage amnesties. In Solomon Islands, for instance, SICA has condemned blanket amnesties while explicitly promoting truth and reconciliation.<sup>168</sup>

A related strand of opinion suggests that the logic of reconciliation and forgiveness espoused by numerous religions skews or distorts the type of accountability sought by religious actors toward restorative forms of justice, as opposed to retributive ones. This, in turn, is said to translate into the preference of religious entities for truth commissions,<sup>169</sup> although sometimes the causality appears to be inversed and the preference for truth-seeking mechanisms is taken as evidence of their logic of forgiveness or reconciliation.<sup>170</sup> It is statistically correct to observe that religious actors have been involved more often in truth commissions than in other transitional justice mechanisms, but part of the reason behind this may be more mundane: priests, ministers, imams, and rabbis can be more easily accommodated by truth commissions as commissioners or capacity builders than on the bench or at the bar in criminal proceedings.<sup>171</sup>

The preference for truth commissions could become problematic from a legal point of view only if religious actors pursue them as an exclusionary strategy—that is, at the expense of other transitional justice measures.<sup>172</sup> Perhaps the more pressing problem, as identified by some, refers to tensions between religious actors and human rights advocates, who are often said to embrace a logic of liberal legalism and prefer to pursue criminal prosecutions.<sup>173</sup> However, the panoply of rights underpinning transitional justice today requires a comprehensive or integrated framework that includes, in addition to prosecution, truth seeking, reparations, and institutional reforms.<sup>174</sup> While the retributivist approach may still be overly influential, this integrated framework

is setting the stage for a rebalancing between retribution and restoration and should function as a check on the actions of religious actors, human rights organizations, and, indeed, states.

Several of the case studies in this chapter offer examples of transitions where religious actors advocate or pursue more retributive forms of justice or, indeed, act against the interest of any form of justice, and such actions are grounded not necessarily in religious forgiveness but in less “sacred” interests, such as economic or political ones. In some cases, the skewing of justice may hold true, but this is because of an element more resembling revenge than forgiveness—as has seemingly become apparent in respect to the exclusion and isolation laws in Tunisia and Libya.

Although the legality, neutrality, and denial/distortion of justice arguments regarding the interaction of religion and international law, discussed above, hold some—albeit limited—merit, this chapter has shown how these concerns and objections can be addressed or even invalidated in the context of transitional justice.

Finally, it is important to take a step back and examine the very question asked in this part of the study—whether religious actors should act in transitional justice. Zinaida Miller portrays transitional justice as a “definitional project explaining who has been silenced by delineating who may now speak.”<sup>175</sup> She contends that “[d]espite its claims to exposure, revelation and memorialization, the project of transitional justice may simultaneously perpetuate invisibility and silence.”<sup>176</sup> In embracing this understanding, one should acknowledge that (international) lawyers are not *the* gatekeepers of the system, although they “tend to be represented [in transitional justice processes] with a relatively strong voice (often backed up by institutional power and money).”<sup>177</sup> Much rather, a plurality of actors are, and will have to be, involved in transitional justice processes if these measures are to assist in the pursuit of redressing violations and in facilitating the (re)establishment of the rule of law and of a measure of reconciliation.

Instead of offering a normative answer to the question of whether religious actors should be *allowed* to participate, much rather the analysis in this chapter provides evidence that they will often be present in transitional justice in various roles; yet, if they lack accountability for their own deeds during repression or conflict, their capacity to lend legitimacy to transitional justice processes is doubtful, and so is their active presence. As such, it is the accountability of religious actors which sets the limit of their involvement in transitional justice as a measure of effectiveness.



## CONCLUSION

Scholars of transitional justice, unlike much of international law scholarship, have grasped the importance of religious actors as *actors* and have avoided the pitfall of proposing incompatibility scenarios between their own field and religion. They have understood that religious nonstate actors are agents that provide religious and social interpretations that can underpin but also frustrate transitional justice processes in various contexts. Their underpinning can refer to the provision of capacity (in particular, in scenarios where states are weak) and to the transfer of legitimacy (including when official institutions are not trusted by the public either because they are perceived as corrupt or foreign). This chapter ultimately ties into this tradition of the agency of religious actors.

The chapter has explored the full panoply of interpretations that religious actors may offer—beyond those related to reconciliation or forgiveness—by linking the reasons for such interpretations to the roles they themselves played in the period from which transitional justice aims to make a transition. It found that the roles of religious actors in repression or conflict, as victims of, complicit in, or perpetrators of abuse, will likely affect the roles they assume in transitional justice processes as advocates, agents, or spoilers thereof or, indeed, their absence from such initiatives. The linking of the period to be redressed to the period of redress also suggests that the roles of religious entities in the former may influence the form of justice they pursue and the precise measures they advocate, which may include truth-seeking initiatives, but also criminal prosecutions, vetting, and property restitution. This linking of periods also reveals that, in addition to a religious logic of forgiveness, more mundane aspects, such as economic and political interests, may drive religious actors' actions in transitional justice contexts.

Last, in a rejoinder on legitimacy it can be concluded that at stake is not a one-sided process of legitimation—that of transitional justice with the assistance of religious entities—but a dual process whereby religious actors are perceived as legitimate, or not, by reference not only to their religious integrity but also in terms of their own adherence to human rights and humanitarian law standards. This also holds in the aftermath of authoritarianism and conflict. The accountability of religious actors for their own actions during the period of repression or conflict is perhaps the most important variable to be considered when evaluating whether the involvement of such actors can result in a transfer of legitimacy to transitional justice mechanisms.

## NOTES

- 1 Research for this chapter was undertaken during the author's scholarly residence at the Center for Human Rights and Global Justice, NYU School of Law, funded through a grant by the Swiss National Science Foundation. Thanks are due for research assistance to Jessica Boulet, and for comments to Pablo de Greiff and Roger Duthie, as well as to the participants in the authors' workshop organized by ICTJ in April 2014. A much-reduced draft of this chapter was published on <http://voelkerrechtsblog.org> in May 2015; Evelyne Schmidt's insightful commentary to that contribution has been useful in improving this chapter. Shortcomings as they may remain are the author's sole responsibility.
- 2 The sample included Argentina, Brazil, Chile, the Czech Republic, East Germany, East Timor, El Salvador, Guatemala, Northern Ireland, Peru, Poland, Rwanda, Sierra Leone, South Africa, and the former Yugoslavia. Daniel Philpott, "When Faith Meets History: the Influence of Religion on Transitional Justice," in *The Religious in Response to Mass Atrocity: Interdisciplinary Perspectives*, ed. Thomas Brudholm and Thomas Cushman (Cambridge: Cambridge University Press, 2013), 174–212, 178. For the elements used to qualify the processes as strong or moderately strong, see 176–77.
- 3 An overview of cases and typology of religious actors' roles is offered in Leslie Vinjamuri and Aaron P. Boesenecker, "Religious Actors and Transitional Justice," in *Religious Pluralism, Globalization, and World Politics*, ed. Thomas Banchoff (Oxford: Oxford University Press, 2008), 155–88; Aaron P. Boesenecker and Leslie Vinjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," *International Journal of Transitional Justice* 5 (2011): 345–365.
- 4 The term "secular" refers to a neutral stance towards religion.
- 5 Religious actors were previously theorized in Ioana Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014), 51–8. See also the section in this chapter on "Religious Actors and Legitimacy."
- 6 Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), 124.
- 7 See generally, Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-field,'" *International Journal of Transitional Justice* 3, no. 1 (2009): 5–27; and Christine Bell, "The 'New Law' of Transitional Justice," in *Building a Future on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Berlin, Heidelberg: Springer, 2009), 105–126.
- 8 See Cismas, *Religious Actors and International Law*, 17–26.
- 9 Ibid., 19; Ilias Bantekas, "Religion as a Source of International Law," in *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices*, ed. Javaid Rehman and Susan Breau (Leiden: Martinus Nijhoff Publishers, 2007), 115–136, 130.
- 10 See James Cockayne, "Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations," *International Review of the Red Cross* 84 (2002):

597–626.

- 11 Mashood A. Baderin, "Religion and International Law: Friends or Foes?," *European Human Rights Law Review* 5 (2009): 637–658, 643.
- 12 Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (London: Martinus Nijhoff, 2011), 167; Cismas, *Religious Actors and International Law*, 20.
- 13 Thürer, *International Humanitarian Law: Theory, Practice, Context*, 167.
- 14 See Cismas, *Religious Actors and International Law*, 55–58.
- 15 Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich, eds.) (Berkeley: University of California Press, 1978), 215. See also H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1975), 296.
- 16 Weber, *Economy and Society*, 33 and 215. See also Martin E. Spencer, "Weber on Legitimate Norms and Authority," *The British Journal of Sociology* 21 (1970): 123–134, 123.
- 17 For instance, Thomas Franck describes the legitimacy of international law in the following terms: "The real power of law to secure systematic compliance does not rest, primarily, on police enforcement—not even in police states, surely not in ordinary societies, and especially not in the society of nations—but, rather, on the general belief of those to whom the law is addressed that they have a stake in the rule of law itself: that law is binding because it is the law." Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," *American Journal of International Law* 100 (2006): 88–106, 91.
- 18 Weber, *Economy and Society*, 215.
- 19 Cismas, *Religious Actors and International Law*, 19.
- 20 A project that taps into religious roots to advocate for transitional justice is Daniel Philpott's *Just and Unjust Peace: An Ethic of Political Reconciliation*. The author argues that a view of political reconciliation, which "equals justice that entails a comprehensive restoration of [right] relationship," can be constructed from the religious traditions of Judaism, Christianity, and Islam. Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation: An Ethic of Political Reconciliation* (Oxford: Oxford University Press, 2012), 8, 53.
- 21 Roger Duthie, "Introduction," in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009), 19.
- 22 See, for example, Yasmin Sooka, "Dealing with the Past and Transitional Justice: Building Peace Through Accountability," *International Review of the Red Cross* 88 (2006): 311–325, 312–315; Patrick Vinck and Phuong Pham, "Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC," *International Journal of Transitional Justice* 2 (2008): 398–411.
- 23 In their article, Boesenecker and Vinjamuri explain that they define accountability narrowly in terms of criminal prosecutions. Vinjamuri and Boesnecker, "Religious Actors and Transitional Justice," 364.

- 24 Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others," *American Anthropologist* 104 (2002): 783–790, 783.
- 25 See Antonio Cassese, *International Law* (2nd edition, Oxford: Oxford University Press, 2005), 71.
- 26 Jean D'Aspremont, "Inclusive Law-Making and Law-Enforcement for an Exclusive International Legal System," in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, ed. Jean D'Aspremont (London: Routledge, 2011), 425–439, 425.
- 27 This refers to attempts to portray nonstate actors as subjects of international law. See Andrea Bianchi, "Introduction: Relativizing the Subjects or Subjectivizing the Actors: Is That the Question?," in *Non-state Actors and International Law*, ed., Andrea Bianchi (Dartmouth: Ashgate Publishing, 2009), xi–xxx.
- 28 The two terms, subject and international legal person, are often employed by scholars as synonyms.
- 29 James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford: Oxford University Press, 2012), 115.
- 30 Interestingly, many commentators embracing this view overlook the fact that states do not hold the most prominent international rights, human rights.
- 31 See Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?," in *Non-state Actors and Human Rights*, ed. Philip Alston (New York: Oxford University Press, 2005), 3–36, 19–20. See also Jan Klabbers, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors," in *Nordic Cosmopolitanism: Essays in International Law for Martti Koskeniemi*, ed. Jarna Petman and Jan Klabbers (Leiden: Martinus Nijhoff Publishers, 2003), 351–369.
- 32 The acceptance of international organizations as subjects of international law was prompted in 1949 by the International Court of Justice (ICJ) in *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174.
- 33 Indeed, given this strong relation, some international lawyers considered it erroneous to even include international organizations among the category of nonstate actors. See Nigel Rodley, "Non-State Actors and Human Rights," in *The Routledge Handbook of International Human Rights Law*, ed. Scott Sheeran and Nigel Rodley (Abingdon: Routledge, 2013), 523–544, 523–524.
- 34 See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).
- 35 *Ibid.*, 25–58.
- 36 Janne E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: TMC Asser Press, 2004), 65–80.
- 37 This suggestion is developed in Cismas, *Religious Actors and International Law*, 76–82.

- 38 The work of the International Law Association on the accountability of international organizations, for example, included a “first level of accountability” designated “Internal and External Scrutiny in General,” comprising such principles as those of good governance, good faith, constitutionality and institutional balance, supervision, and control and due diligence. See International Law Association, “Accountability of International Organizations: Final Report,” Berlin Conference, 2004, 5.
- 39 Fionnuala D. Ní Aoláin and Catherine O’Rourke, “Gendered Transitional Justice and the Non-state Actor,” in *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience*, ed. Michael Reed and Amanda Lyons (Bogota: International Center for Transitional Justice, 2010), 115–143.
- 40 Ron Dudai, “Closing the Gap: Symbolic Reparations and Armed Groups,” *International Review of the Red Cross* 93 (2011): 783–808; Luke Moffett, “Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda,” Queen’s University Belfast Law Research Paper No. 20 (2013).
- 41 Sabine Michalowski, ed., *Corporate Accountability in the Context of Transitional Justice* (New York: Routledge, 2013).
- 42 Pablo de Greiff mentions the activity of civil society organizations, sponsored or not by churches, in collecting information about human rights violations in Latin America that was later drawn upon by state-sanctioned truth commissions. See Pablo de Greiff, “Transitional Justice and Development,” in *International Development: Ideas, Experience, and Prospects*, ed. Bruce Currie-Alder et al. (Oxford: Oxford University Press, 2014), 414.
- 43 For a comparative analysis of the features of “traditional” transitional justice settings versus fragile and post-conflict contexts, see *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, UN doc. A/HRC/21/46, August 9, 2012, paras. 15–17.
- 44 Elin Skar and Eric Wiebelhaus-Brahm, “The Drivers of Transitional Justice: An Analytical Framework for Assessing the Role of Actors,” *Nordic Journal of Human Rights* 31 (2013): 127–148.
- 45 Agentic constructivism is a theory that regards actors as norm-entrepreneurs and examines their role in norm-diffusion. See Kathryn Sikkink, “Beyond the Justice Cascade: How Agentic Constructivism Could Help Explain Change in International Politics,” Revised Paper from a Keynote Address, Millennium Annual Conference, October 22, 2011, “Out of the Ivory Tower: Weaving the Theories and Practice of International Relations,” London School of Economics, presented at the Princeton University IR Colloquium, November 21, 2011. See also Hun Joon Kim and J. C. Sharman, “Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms,” *International Organization* 68 (2014): 417–448.
- 46 Vinjamuri and Boesnecker, “Religious Actors and Transitional Justice,” 155–188.
- 47 Boesenecker and Vinjamuri, “Lost in Translation? Civil Society, Faith-Based Organizations

- and the Negotiation of International Norms,” 345–365.
- 48 Lavinia Stan and Lucian Turcescu, “The Romanian Orthodox Church and Post-Communist Democratisation,” *Europe-Asia Studies* 52 (2000): 1467–1488, 1468; Comisia Prezidentia pentru Analiza Dictaturii Comuniste din Romania, Raport Final (Bucuresti, 2006), 16, 166, and 459–63.
  - 49 Although, as noted by Stan and Turcescu, Patriarch Iustinian was not, per se, a member of the Communist Party. Stan and Turcescu, “The Romanian Orthodox Church and Post-Communist Democratisation,” 1468.
  - 50 Ibid.
  - 51 Comisia Prezidentia pentru Analiza Dictaturii Comuniste din Romania, Raport Final, 467. For the manifold relations between the Orthodox Church and the communist authorities, see also Cristian Vasile, “Scholarship and Public Memory: The Presidential Commission for the Analysis of the Communist Dictatorship in Romania (PCACDR),” in *Remembrance, History, and Justice: Coming to Terms with Traumatic Pasts*, ed. Vladimir Tismaneanu and Bogdan Iacob (Budapest: Central University Press, 2015), 329–346, 340–42.
  - 52 See Lucian Turcescu and Lavinia Stan, “The Romanian Orthodox Church and Post-Communist Democratisation: Twenty Years Later,” *International Journal for the Study of the Christian Church* 10 (2010): 144–159, 151. Some clerics were vulnerable to the blackmail of the Securitate because of their support of and membership in the Romanian Iron Guard, an anti-Semitic and pro-Nazi party, during the interwar period. Comisia Prezidentia pentru Analiza Dictaturii Comuniste din Romania, Raport Final, 467.
  - 53 It should be mentioned here that clergy and lay members of the Roman Catholic Church and of protestant denominations in Romania have also been persecuted, arbitrarily imprisoned, or tortured or have suffered inhumane treatment and flagrant violations of their freedom of religion. See Comisia Prezidentia pentru Analiza Dictaturii Comuniste din Romania, Raport Final, 166, and 376–382, 463–472.
  - 54 Stan and Turcescu, “The Romanian Orthodox Church and Post-Communist Democratisation,” 1482. See also Decree No. 177/1948 for the general regime of religions, published in Official Gazette (“Monitorul Oficial”) no 178, August 4, 1948.
  - 55 Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford: Oxford University Press, 2011), 170.
  - 56 Notably, some efforts for institutional reform appear to have been made from within the Church in early 1990, but were fruitless. See Oana Iuliana Murgoci, *Romania—In Church We Trust! An Analysis of the Nationalistic Discourse of the Romanian Orthodox Church in Four Case Studies* (MA Thesis, Budapest: CEU, 2009), 23.
  - 57 Stan and Turcescu, “The Romanian Orthodox Church and Post-Communist Democratisation,” 1483.
  - 58 Turcescu and Stan, “The Romanian Orthodox Church and Post-Communist Democratisation: Twenty Years Later,” 149.

- 59 The 2008 amendment permitted the governmental agency to verify the files of clergy “exclusively at the demand of the representatives of their own religious denomination, meaning the leadership of their Church.” Until 2015, no such request was made by the Orthodox Church. Cristian Vasile, “Scholarship and Public Memory: The Presidential Commission for the Analysis of the Communist Dictatorship in Romania (PCACDR),” 340–342. See also Iuliana Conovici, “Re-Weaving Memory: Representations of the Inter-war and Communist Periods in the Romanian Orthodox Church After 1989,” *Journal for the Study of Religions and Ideologies* 35 (2013): 109–131, 120.
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- 61 Philpott, “When Faith Meets History: the Influence of Religion on Transitional Justice,” 188. The idea has been articulated in earlier works as well: Daniel Philpott, “Religion, Reconciliation, and Transitional Justice: The State of the Field,” Social Science Research Council Working Paper, 2007; Daniel Philpott, “What Religion Brings to the Politics of Transitional Justice,” *Journal of International Affairs* 61 (2007): 93–110.
- 62 Philpott, “When Faith Meets History: the Influence of Religion on Transitional Justice,” 189 at footnote 49.
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- 64 One may speak of “moral extraterritoriality,” to use the term of Philpott, who borrowed it from George Weigel. Ibid., 188. Even so, the autonomy variable does not faithfully account for the economic aspect at stake in the restitution of property.
- 65 Turcescu and Stan, “The Romanian Orthodox Church and Post-Communist Democratization: Twenty Years Later,” 148–149.
- 66 “Involvement” here refers to clerics’ standing for elections or their advising followers as to a preferred (external) candidate of the church. See Ovidiu Voicu, “Implicarea Bisericii in politica: Desi au incredere in Biserica, Romanii nu o vor amestecata in politica,” Fundatia Soros România, September 2011, available at [http://www.fundatia.ro/sites/default/files/Implicarea%20Bisericii%20in%20Politica\\_analiza%20studiului.pdf](http://www.fundatia.ro/sites/default/files/Implicarea%20Bisericii%20in%20Politica_analiza%20studiului.pdf). It should also be noted that trust in the church as measured by polls has decreased radically from percentages in the mid-80s during the 1990s to the low 70s in 2011, to the low 60s in 2014. Ibid., and “Sondaj INSCOP: Increderea romanilor in DNA a inregistrat o crestere spectaculoasa, UE ocupa locul I in topul increderii in institutiile internationale, urmata de NATO. Biserica isi continua scaderea,” *Hotnews*, December 11, 2014.
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- ICTR-96-17-T, International Criminal Tribunal for Rwanda, Trial Chamber I, Judgment and Sentence of 21 February 2003; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-A & ICTR-96-17-A, Appeals Chamber, Judgment of 13 December 2004.
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- 143 See Daniel Philpott, "The Justice of Forgiveness," *Journal of Religious Ethics* 41, no. 3 (2013): 400–416.
- 144 "ICTJ Expresses Deep Concern Over Egypt Death Sentences," March 27, 2014, available at [www.ictj.org/news/ictj-expresses-deep-concern-over-egypt-death-sentences](http://www.ictj.org/news/ictj-expresses-deep-concern-over-egypt-death-sentences). The verdicts were considered by independent experts of the UN and African Union to represent "a mockery of justice." See OHCHR, "Egypt: Mass Death Sentences—A Mockery of Justice," Geneva, March 31, 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14457>; OHCHR, "Egypt: Justice and Reconciliation Increasingly Failing after Second Wave of Mass Death Sentences," Banjul/Geneva, May 15, 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14596&LangID=E>.
- 145 Mark W. Janis, "Introduction," in *Religion and International Law*, ed. Mark W. Janis and Carolyn Evans (The Hague: Martinus Nijhoff Publishers, 1999), xi–xiii, xi.
- 146 See Cismas, *Religious Actors and International Law*, 21–22.
- 147 Pablo de Greiff, "Justice in Context: Transitional Justice and Paradigms of State and Conflict," International Center for Transitional Justice, undated, 2.
- 148 Christine Bell, "The 'New Law' of Transitional Justice," 105–126.
- 149 See *ibid.*
- 150 For a critical account of such assertions, see David Kennedy, "Losing Faith in the Secular and the Culture of International Governance," in *Transgression, Punishment, Responsibility and Forgiveness*, ed. Andrew D. Weiner and Leonard V. Kaplan (Madison: Wisconsin University Press, 1998), 115–127.
- 151 See discussion in Cismas, *Religious Actors and International Law*, 22.
- 152 In a conversation with the author, for instance, a keen observer of the Tunisian transitional justice process argued that the perception that some members of the Truth and Dignity Commission are close to either Ennahda or the secular party Nidaa Tounes may delegitimize the work of the mechanism in the eyes of the rival faction. See also Jonathan Steele, "On the Eve of Its Launch, Tunisia's Commission on Truth, Dignity in Turmoil," *Middle East Eye*, November 21, 2014, available at [www.middleeasteye.net/news/eve-its-launch-tunisias-commission-truth-dignity-turmoil-213755480#sthash.vMuFVpDY.dpuf](http://www.middleeasteye.net/news/eve-its-launch-tunisias-commission-truth-dignity-turmoil-213755480#sthash.vMuFVpDY.dpuf).
- 153 See Branka Peuraca, "Can Faith-Based NGOs Advance Interfaith Reconciliation? The Case of Bosnia and Herzegovina," USIP Special Report (Washington, DC: US Institute

- of Peace, 2003). See more generally the work of R. Scott Appleby on religious actors as peacebuilders who “strive to create coalitions across ethnic and religious boundaries; they channel the militancy of religion in the direction of the disciplined pursuit of justice and nonviolent resistance to extremism. The religious argument they build in support of this agenda is decisive to its success.” See R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Lanham, MD: Rowman & Littlefield Publishers, 2000), 282.
- 154 Amnesty International, *Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Sudan v. Sudan*, Communication nos. 48/90-50/91-52/91-89/93 (1999), para. 72.
- 155 See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 24.
- 156 See *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, September 13, 2012, A/67/368, paras. 68-73 and 83.
- 157 On the difference between substantial or “thick” and procedural or “thin” forms of the rule of law, see Martin Krygier, “Rule of Law (and Rechtsstaat),” in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* ed. James R. Silkenat et al. (Berlin: Springer, 2014), 51ff.
- 158 Perhaps the closest such reported situation was that in South Africa. Scholars have documented that some public hearings of the South African Truth and Reconciliation Commission had a “decidedly religious character” which “resembled a church service more than a judicial proceeding, with a definite ‘liturgical character.’” While this was welcomed by many South Africans who could relate to a critique of apartheid founded in Christian ideals, it was alien to some commissioners and some victims, who complained about “the imposition of Christian morality.” Audrey R. Chapman and Patrick Ball, “The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala,” *Human Rights Quarterly* 23 (2001): 1-43, 18.
- 159 See OHCHR, “Rule of Law Tools for Post-Conflict States: Amnesties,” Geneva, 2009; *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, Addendum, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, principle 24.
- 160 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977), art. 6(5); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol. I (Cambridge: Cambridge University Press, 2009), rule 159.
- 161 See Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, 1997, as cited in Naomi Roht-Arriaza, “Combating Impunity: Some Thoughts on the Way Forward,” *Law and Contemporary Problems* 59 (1996): 93-102, 97.

- 162 See Bell, "The 'New Law' of Transitional Justice," 105–126.
- 163 See Boesenecker and Vinjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," 358 and 363.
- 164 See Gilbert M. Khadiagala, *Greater Horn of Africa Peacebuilding Project: Case Study Two: The Role of the Acholi Religious Leaders Peace Initiative (ARLPI) in Peacebuilding in Northern Uganda* (Washington, DC: US Agency for International Development and Management Systems International, 2001), 8.
- 165 Ibid.
- 166 Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment of 25 October 2012 (Merits, Reparations And Costs), paras. 296 and 301.
- 167 Erika Johnson, "Human Rights Archives Under Attack in El Salvador," Council on Hemispheric Affairs, November 15, 2013, available at <http://www.coha.org/human-rights-archives-under-attack-in-el-salvador/>. See also Elaine Freedman, "Monsignor Romero's Murder: Thirty Years of Impunity," *envio*, no. 345, 2010, available at <http://www.envio.org.ni/articulo/4166>. It should be noted that El Salvador's Supreme Court overturned the amnesty law in 2016. See "With Amnesty Law Overturned in El Salvador, Prosecutors Must Work with Victims to Investigate Civil War Atrocities," International Center for Transitional Justice, July 21, 2016, available at <https://www.ictj.org/news/amnesty-el-salvador-civil-war>.
- 168 Documento - Solomon Islands: Fear For Safety, ASA 43/08/00, 13 September 2000, available at <http://www.amnesty.org/es/library/asset/ASA43/008/2000/es/c5f5b7ec-ddca-11dd-9bb6-9d0e42687e7f/asa430082000en.html>.
- 169 See for instance Philpott, "Religion, Reconciliation, and Transitional Justice: The State of the Field," 26 and 41.
- 170 See for example Daniel Philpott, "Introduction," in *The Politics of Past Evil: Religion Reconciliation, and the Dilemmas of Transitional Justice*, ed. Daniel Philpott (South Bend, IN: University of Notre Dame Press, 2006), 1–9, 3–5.
- 171 Unless, of course, they have the relevant qualifications for the latter positions.
- 172 This observation is based on the claim that only a comprehensive or integrated approach to transitional justice would be able to realize all the rights which underpin the transitional justice paradigm—i.e., the right to truth, access to justice and the obligations to investigate and prosecute, the right to reparation, and the legitimate expectation of nonrecurrence.
- 173 See Daniel Philpott, "Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?," in *The Politics of Past Evil*, 11–44, 12–13; Philpott, "The Justice of Forgiveness," 401; Boesenecker and Vinjamuri, "Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms," 346–7.
- 174 See *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of*

*non-recurrence*, Pablo de Greiff, UN doc. A/HRC/21/46, August 9, 2012.

- 175 Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 266–291, 267.
- 176 Ibid.
- 177 Evelyne Schmid, "Who May Now Speak? International Lawyers and Religious Actors in Transitional Justice," Voelkerrechtsblog, May 20, 2015, available at <http://voelkerrechtsblog.org/who-may-now-speak-international-lawyers-and-religious-actors-in-transitional-justice/>.



CHAPTER 11

Labor Unions and Transitional Justice: An  
Exploratory Study on a Neglected Actor

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Until now, research on transitional justice has largely neglected the role of labor unions, even though comparative historical analyses have shown the working class in general and labor unions in particular to be crucial forces when it comes to processes of democratization.<sup>2</sup> Labor movements are frequently among the strongest and best-organized collective actors in society,<sup>3</sup> affording them great potential both to push for and also hinder initiatives to deal with the past. In addition, labor unions, by their very nature, are engaged in issues related to economic and social rights as well as socioeconomic development.<sup>4</sup> In line with current debates about whether the concept and practice of transitional justice should be expanded to include a socioeconomic dimension, one could therefore expect organized labor to push for such a broadening of the transitional justice agenda. Hence, it is surprising that labor's role in transitional justice has received so little scholarly attention.

This chapter develops an analytical framework that identifies the potential contributions of labor unions at different stages of a transitional justice process. This conceptual proposal is based on a discussion of current debates about transitional justice, including the above-mentioned nexus between transitional justice and development and existing research on the role of labor unions in democratization and the role of civil society in transitional justice. Next, it applies this framework to three case studies that represent different world regions and time periods. In assessing the role of organized labor in processes of transitional justice in Argentina in the 1980s, South Africa in the 1990s, and contemporary Tunisia, the analysis empirically explores the range as well as the limits of labor unions' contributions and, in doing so, provides insights into the reasons that make labor unions somewhat hesitant or even reluctant actors in transitional justice.

This chapter offers four major insights. First, labor unions play a role in transitional justice, and their contributions are manifold. Second, the overall importance of organized labor in transitional justice is, however, rather limited. Third, the case studies suggest that labor unions' limited engagement in

transitional justice reflects not external constraints but, rather, their own strategic considerations, which are shaped, in particular, by two factors: the low priority they assign to transitional justice and the dominant logic of political alliances. Fourth, there is scant evidence indicating that labor unions engage in transitional justice processes with a view to broadening the agenda to include socioeconomic rights and development issues.

## **CONCEPTUALIZING LABOR UNIONS' ROLE IN TRANSITIONAL JUSTICE: A PROPOSAL**

### **CHANGING CONCEPTS OF DEALING WITH THE PAST**

Transitional justice is usually defined as comprising a set of judicial and non-judicial instruments that deal with massive human rights violations, committed by an authoritarian regime or during violent conflict, that are applied after the ruling regime has fallen or the conflict has ended. These instruments may include trials, truth commissions, lustration/vetting or other institutional reforms, and reparations. Transitional justice is not only backward-looking but also has forward-looking aspects. For example, truth commissions often formulate recommendations for future state activities aimed at reforming political institutions, empower victims, and implement official politics of public memory. The rationale of the whole endeavor is, therefore, to not only redress past injustices, but also to prevent the recurrence of massive human rights violations in the future.

Traditionally, transitional justice focused on violations of a narrow core of "bodily integrity" rights. Large-scale economic crimes, such as the looting of natural resources and corruption, were largely absent from both the debate about transitional justice and its practice.<sup>5</sup> However, with its application in the context of peacebuilding, addressing the socioeconomic relations of deprivation and exploitation has entered the agenda of dealing with the violent past.<sup>6</sup> In this context, scholars have criticized the narrow concept of transitional justice as being part of a supposedly depoliticized liberalization agenda that neglects social injustices as root causes of conflict and, therefore, fails to significantly contribute to the well-being and empowerment of victims.<sup>7</sup>

The debate has developed toward expanding the focus of transitional justice to include violations of economic, social, and cultural (ESC) rights and to conceptualize its forward-looking aspects as a contribution to development.<sup>8</sup>

This has raised the questions of whether transitional justice should directly take account of economic crimes and whether the respective instruments are adequate to do so.<sup>9</sup> Critical voices argue that such an expansion of transitional justice would dilute the whole concept and raise unrealistic expectations.<sup>10</sup> In contrast, advocates of this broader approach suggest that truth commissions are particularly suitable instruments in this regard; commissions in their final reports, for instance, can analyze socioeconomic root causes of a conflict and formulate recommendations for eliminating them in the near future.<sup>11</sup> Whether such recommendations, aimed at structural change in order to reduce social inequality and better protect ESC rights, stand a chance of being implemented by the incumbent government is, however, another question.<sup>12</sup> In the case of trials, scholars also discuss the inclusion of economic crimes that directly contributed to the commitment of serious violations during past conflicts or authoritarian regimes.<sup>13</sup> A broad focus on economic crimes as root causes of conflict—which could imply holding accountable all those who benefited from these crimes, including international corporations as well as significant parts of the population—seems less feasible.<sup>14</sup>

This study provides some empirical evidence on the feasibility of dealing with economic and social rights in processes of transitional justice. Labor unions are, by their very nature, engaged in advocacy for economic and social rights, primarily for the workers they represent, but often also with a view toward impacting society at large.<sup>15</sup> Given their level of organization, they therefore represent arguably the type of social actors with the greatest potential to push such a socioeconomic broadening of the transitional justice agenda.

#### CIVIL SOCIETY AND LABOR UNIONS IN TRANSITIONS

Research on civil society in transitional justice has demonstrated that societal organizations do play an important role in initiating transitional justice processes, as well as in accompanying and monitoring the implementation of the respective instruments.<sup>16</sup> Labor unions, defined as collectives of wage earners or salaried employees organized for their mutual aid and protection and to bargain and deal collectively with employers and the state,<sup>17</sup> are certainly part of civil society,<sup>18</sup> but their role has so far been largely—and surprisingly—neglected in research on transitional justice. Within civil society, labor unions are usually among the strongest and best organized societal actors; correspondingly, comparative research has demonstrated that the working class in general and organized labor in particular have played an important role in

processes of democratization.<sup>19</sup> In many cases, labor unions have been crucial in mobilizing their members and affiliates against authoritarian regimes, exerting pressure on transitional governments and elite negotiations, and, at times, directly participating in the negotiation of political transitions.<sup>20</sup>

Given the lack of specific research on organized labor's role in transitional justice, this analysis develops its framework by drawing on these two strands of research: studies on labor's role in democratization and studies on the role of civil society in transitional justice. The former tell us that labor unions can potentially play an important role in transitional justice, enabling us to hypothesize two overall contributions: direct participation in specific processes of transitional justice and/or mobilization "on the streets" to influence those processes from the outside.<sup>21</sup>

Regarding the role of civil society in transitional justice, David A. Crocker has argued that civil society organizations could help to define the goals of transitional justice as well as the decisions about the means to reach them.<sup>22</sup> This implies that civil society has different entry points to a transitional justice process. In order to take a closer look at its potential contributions, it is therefore necessary to identify different stages of the process. Additionally, Crocker's observation points to the influence of civil society organizations on fundamental issues like the kind of justice that should be provided for in the post-conflict or post-authoritarian society at hand. Labor unions might, for instance, advance an agenda of social justice that broadens transitional justice to address economic and social rights.

In specifying different ways in which civil society can contribute to transitional justice processes, David Backer has provided a list of potential activities. These comprise the collection of data on human rights violations and monitoring; representation of victims and advocacy for the establishment of instruments of transitional justice; facilitation of proceedings and consultation; service delivery and intervention; and acknowledgment as well as compensation.<sup>23</sup> Backer also points out that civil society groups, due to their level of organization and mobilization of the broad population, might be able to install projects in parallel with official approaches to dealing with the past. In general, all these activities may be performed by labor unions. Their level of organization enables them to collect data about human rights violations as well as to advocate for (and acts as spoilers of) transitional justice and monitor the process. Labor unions could also represent members who have been victimized and support them during hearings and tribunals, and they may establish parallel unofficial transitional justice processes.

Transitional justice may also influence civil society. According to Roger Duthie, Luke Wilcox, and other authors, transitional justice can support civil society actors by building their capacity, multiplying their functions, and strengthening their social standing as actors with integrity.<sup>24</sup> Here again, labor unions present a special case in point. While other actors such as human rights organizations are sometimes founded for the purpose of lobbying for transitional justice, among other issue areas, this is not the case with labor unions. In any event, this chapter will not investigate this reverse effect but rather focus on labor unions' contributions to transitional justice.

### AN ANALYTICAL FRAMEWORK

The chapter's analytical framework relies on two kinds of distinctions. The first differentiates among three types of labor union contributions that are defined by levels of integration into an official transitional justice process. It also splits the transitional justice process into three stages in order to distinguish between the different points of entry for labor unions' potential engagement.

The three types of contribution labor can make to transitional justice are:

1. **Direct participation:** Labor unions are included in the official instruments' proceedings, including the provision of data on human rights violations, the provision of victims' support, such as counseling and legal aid, and the work of official advisory bodies and monitoring commissions.
2. **Indirect contribution:** Labor unions engage in or join independent societal activities, such as monitoring, advocacy, and mobilization, which refer to but are not part of an official transitional justice process.
3. **Autonomous contribution:** Labor unions establish independent instruments and projects of transitional justice that may parallel, complement, or contradict official transitional justice instruments.

Within direct participation, another differentiation concerning the level of agency is important: labor unions can be active participants in the instruments, but in as much as they and their members have suffered human rights violations, they can also be "merely" passive subject-matter that is dealt with by transitional justice processes. This distinction is important because the fact that labor unions may, for example, be dealt with in hearings on human rights violations does not necessarily mean that they take on an active role in the process.

Given the different entry points for civil society actors, the process of transitional justice is split into three stages. Here the focus is on truth commissions

and trials, because a study of this scope cannot possibly provide an analysis of all instruments comprising transitional justice, and these are instruments for which a significant contribution by civil society can be expected. While vetting and amnesties are often decided on in deals signed between warring factions or between the predecessor and successor regimes, trials and truth commissions depend on information from the population and therefore tend to be more open to input.<sup>25</sup> Furthermore, while civil society can certainly play a decisive role in designing, implementing, or pushing for other instruments, such as reparations and public apologies, these often result from the recommendations of truth commissions or trial verdicts. Truth commissions and trials, then, are often a starting point for other initiatives and are dependent on input from and cooperation with civil society. It is therefore most promising to examine labor's engagement in these typically initial initiatives.

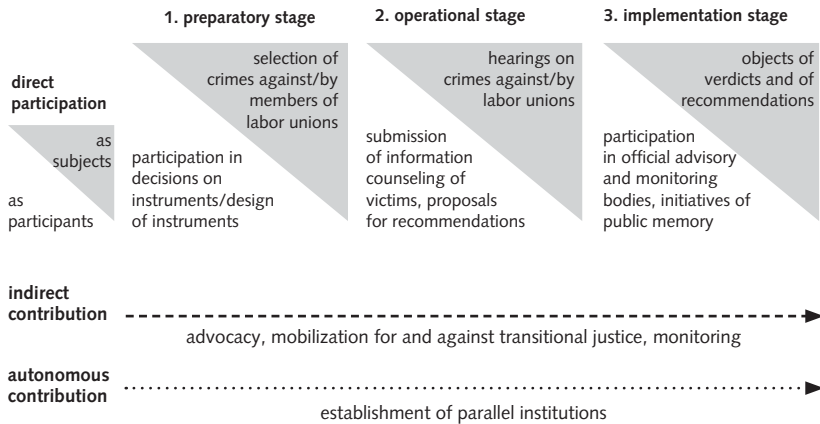
The first, *preparatory stage* of the process comprises a discussion of the general appropriateness of transitional justice and the selection of instruments and their specific design. In this stage, debates concern the kind of justice that should be provided to victims and the types of crimes the instruments should deal with. In this context, labor unions can actively participate by calling for or mobilizing around certain positions from the outside, but they can also be subjects of such debates if others demand or decide that transitional justice instruments will address crimes against labor unions and their members themselves—or if labor unions and their members are suspected of having contributed in some way to the commission of human rights violations, directly or indirectly.

During the *operational stage*, the selected instruments are applied. In this second stage, labor unions can—acting either as official participants or from the outside—submit information, provide legal and psychological support for victims, and make proposals for the recommendations of the final report of the truth commission. Again, truth commissions and tribunals can also deal with crimes against labor unions and their members or by them.

The *implementation stage* is concerned with the outputs and outcomes of the transitional justice process.<sup>26</sup> It covers, in particular, the implementation of the recommendations of truth commissions and courtroom verdicts. In this third stage, labor unions can contribute by taking part in official advisory and monitoring bodies or by participating in official initiatives of public memory, including public education. Of course, they can also accompany or put pressure on these processes from the outside. Labor unions can be the objects of recommendations and verdicts, as well.

Figure 1 summarizes this analytical framework.

Figure 1: Labor Unions' Potential Contributions to Transitional Justice:  
An Analytical Framework



### STUDYING ORGANIZED LABOR IN TRANSITIONAL JUSTICE: THREE CASE STUDIES

This section applies the analytical framework to three case studies: Argentina, South Africa, and Tunisia. These cases not only represent three different world regions, but also belong to different time periods. In Argentina, transitional justice began in the context of the Latin American wave of democratic transitions in the 1980s,<sup>27</sup> while in South Africa, the processes of democratization and transitional justice took place in the 1990s, after the end of the Cold War. Tunisia represents one of the most recent cases of transitional justice, associated with the political upheavals that have shaken the Arab world since 2011.

Accordingly, the three cases also represent different phases in the development of the concept of transitional justice. Comparing them, therefore, should illustrate whether and how issues such as the inclusion of ESC rights have gained ground in the practice of transitional justice over time.

Finally, the three countries are all characterized by relatively strong labor movements. Given the lack of research on the topic, it is analytically most promising to focus on countries in which the probability of significant labor contributions is relatively high.



## ARGENTINA'S CGT: MANIFOLD, BUT MINOR AND AMBIVALENT, CONTRIBUTIONS TO TRANSITIONAL JUSTICE

The case of Argentina nicely shows the complex motives involved in labor's participation in transitional justice.<sup>28</sup> On the one hand, the Argentine labor movement was severely affected by the military regimes that ruled the country between 1976 and 1983. Following the 1976 coup, the military junta put the trade union confederation CGT (Confederación General del Trabajo) under government trusteeship, took control of the most important unions, and killed, forcibly disappeared, or imprisoned thousands of labor leaders. This repression notwithstanding, labor unions were able to play a significant role in the transition to democracy: protests led by the CGT contributed to the destabilization of the military regime and put continuous pressure on the transitional regime, while labor leaders also participated in the negotiation of the transition process itself. On the other hand, a series of labor leaders had collaborated with the military regime. In the run-up to the 1983 general elections, key union representatives reportedly even negotiated a deal with the outgoing military leadership that included the promise of an amnesty to military officers.<sup>29</sup>

*Direct participation:* Given that labor leaders and union members made up a substantial portion of the victims of the military regime,<sup>30</sup> they constituted a core group addressed by the transitional justice processes. Prominent cases dealt with in the 1984 final report (*Nunca Más*) of the National Commission on the Disappearance of Persons (CONADEP) included that of labor leader Oscar Smith and the enforced disappearance of union delegations from multinational employers, like Ford Motors.<sup>31</sup> In terms of reparations, a series of laws established the reincorporation and/or indemnification of workers who had been dismissed from their jobs on political grounds.<sup>32</sup>

Despite their important role as subjects in transitional justice, however, labor unions hardly participated actively in the official transitional justice processes, which were—on the part of civil society—clearly dominated by Argentina's strong and diverse human rights movement. No labor representative, for instance, participated in CONADEP.<sup>33</sup> During the 1985 trials of the military juntas, union leaders were among the witnesses, but their testimonies did not necessarily contribute to ascertaining the truth; in a notorious incident, a group of labor leaders testified they “could not remember” the enforced disappearances of union members, thereby highlighting the amount of labor complicity with the military regime.<sup>34</sup> This group included CGT co-leader Jorge Triaca, whose testimony was fiercely criticized by then-CGT Secretary General Saúl Ubaldini.<sup>35</sup> This exemplified the confederation's ambivalent stance toward

transitional justice, which directly reflected the general conflict between conservative and reformist forces that played out in the 1980s within the Peronist movement, to which the CGT belongs.<sup>36</sup>

*Indirect contribution:* In mobilizing for transitional justice, the Argentine human rights movement again played the most prominent role. But at times, labor unions did join forces with it. In 1986, for instance, the CGT participated in protests against the so-called *Punto Final* law that put an effective end to the trials against military officers. During these years, the CGT also mobilized in defense of democracy when military uprisings provoked by transitional justice threatened the government of Raúl Alfonsín.<sup>37</sup> In general, CGT leader Ubaldini, who had led the combative labor faction during the military regime, has been described as “a vocal advocate for the families of the disappeared.”<sup>38</sup>

At the same time, the fact that the Peronist party was in opposition throughout the 1980s meant that criticism of Alfonsín’s human rights policy was generally in line with the CGT’s overall political strategy, while resistance to military coups served to enable a future victory of the Peronist party. This situation, however, changed with the 1989 victory of Peronist presidential candidate Carlos Menem, who, once in power, pardoned all military officers, including the former rulers who had already been convicted of human rights violations.<sup>39</sup> During the 1990s, it was therefore not the CGT but, rather, the new, rival labor confederation CTA (Central de Trabajadores de la Argentina) that pushed for transitional justice issues.<sup>40</sup> This effort notably included a focus on businessmen who had been implicated in the enforced disappearance of workers.<sup>41</sup>

*Autonomous contribution:* Alongside the official transitional justice processes, Argentina’s labor organizations organized their own activities. In a remarkable bottom-up process, which began in 1982, a series of individual unions founded human rights commissions, started coordinating their work, and eventually prompted the CGT to establish a Human Rights Secretariat in 1987. While this secretariat “clearly represented a minority voice within the CGT,” it “pursued complaints of human rights violations against union members, attended human rights movement events, sponsored educational activities, issued policy statements, and contacted government officials on human rights issues.”<sup>42</sup> While most of these activities focused on current human rights concerns, the secretariat also cooperated with the human rights movement on transitional justice issues (for instance, by supporting events).

*Analysis:* The Argentine labor movement’s limited and ambivalent role in transitional justice clearly reflects labor’s ambivalent role during the military

dictatorship as well as its own organizational interests, which were, to an important extent, shaped by political alliances. On the one hand, some segments of organized labor were closely related to (parts of) the human rights movement, with a series of labor leaders having participated in it.<sup>43</sup> On the other hand, organized labor's main political relation has been the Peronist party. As seen, this political alliance was reflected in the internal tensions between reformers and conservatives as well as in the failure to protest against fellow Peronist President Menem, who revoked the remaining judicial results of the transitional justice process.

The debate about transitional justice in Argentina has also been very much characterized by a focus on "bodily integrity" human rights violations.<sup>44</sup> As far as is known, the Argentine labor movement did not try to broaden the transitional justice agenda to include ESC rights. In this latter regard, it must be noted that the 1980s economic crisis and neoliberal reforms put organized labor very much on the defensive. The struggle, in this sense, was more about defending what remained of the socioeconomic status quo than about pushing for some kind of progressive transformation.

#### **SOUTH AFRICA'S COSATU: SHIFTING ENGAGEMENT FOR EXPANDING THE SCOPE OF TRANSITIONAL JUSTICE**

The case of South Africa brings to the fore another dynamic in labor unions' engagement with transitional justice. Due to its anti-apartheid stance, the country's biggest federation of trade unions, the Congress of South African Trade Unions (COSATU), suffered from strong repression under the apartheid regime; but its proximity to the African National Congress (ANC), the post-apartheid ruling party, has put it in an ambivalent position towards transitional justice over the years.

COSATU was founded in 1985 with the aim of uniting all labor unions opposed to apartheid. It initiated several general strikes, mobilizing millions of workers to put down their work.<sup>45</sup> As a result, its members faced severe repression by the apartheid regime that included bombing attacks on its offices as well as the detainment and murder of many trade union leaders.<sup>46</sup> While labor unions played a decisive role in destabilizing the apartheid regime,<sup>47</sup> however, COSATU did not participate in the negotiations at the Conference for a Democratic South Africa (CODESA), which were dominated by the ANC. Instead, it was engaged in the formation of the National Economic Forum (NEF) paralleling CODESA, which dealt with economic policies of the South African state.<sup>48</sup> Still, COSATU pushed through an inclusive procedure for the

drafting of the new constitution and certain demands concerning workers' rights. The organization was also able to exert pressure on the negotiation parties by initiating strikes to overcome stalemates.<sup>49</sup>

*Direct participation:* Labor unions were not directly involved in the negotiations about the establishment of the South African Truth and Reconciliation Commission (SATRC) and were therefore able to influence neither the overall decision to establish such an instrument nor the commission's specific design.<sup>50</sup> Instead, human rights organizations, as well as victims' and faith-based organizations, handed in suggestions on its design.<sup>51</sup> However, COSATU was directly present in hearings of the commission, both as subject and participant. Concerning the former, the bombing attacks on COSATU offices gained widespread attention in official hearings broadcasted on television. These were of special interest because they revealed that the highest level of the apartheid government, including then President F. W. de Klerk, was more directly involved in instigating the attacks than had been thought.<sup>52</sup>

COSATU also actively participated in the commission's hearing on the role of business in apartheid.<sup>53</sup> In this case, COSATU, together with other labor unions and the ANC, provided data about private national and international businesses that had benefited from the apartheid regime by exploiting the black work force and argued that these corporations should take responsibility for human rights violations and for profiting from the apartheid system. COSATU took the lead in proposing a more encompassing form of justice for post-apartheid South Africa by demanding reparations from these corporations.<sup>54</sup> In its statement, the federation explicitly referred to reparations as an instrument for social transformation and the realization of ESC rights: "If the only meaningful reparation is a future without abuse, it hinges on how you define abuses. If abuses is [sic] to pay starvation wages, then the reparation is a living wage. If it's to force minors unemployment, then reparation becomes employment creation."<sup>55</sup>

In its final report, the SATRC adopted COSATU's position and concluded that "business was central to the economy that sustained the South African state during the apartheid years."<sup>56</sup> However, it did not follow COSATU's recommendation concerning reparations from international and national corporations and instead took the government's stance that, in the interests of the country's economic development, they should not be held accountable.<sup>57</sup> It therefore provided reparations through a "President's Fund," provided by the government of South Africa.<sup>58</sup>

*Indirect contribution:* No evidence suggests that COSATU actively lobbied for the establishment of the SATRC or any other instrument of transitional justice.

As far as is known, the organization did not engage in any kind of mobilization or advocacy related to transitional justice.

*Autonomous contribution:* An important example of autonomous transitional justice initiatives being pushed forward by civil society organizations in South Africa concerns the reparations litigation brought forward against international corporations. In this case, the role of COSATU has been decidedly ambivalent. In 2002, a group of civil society and victims' organizations, among them Khulumani support group and Jubilee South Africa, took up the idea of the accountability of international corporations and initiated reparations litigation at the U.S. District Court for New York under the U.S. Alien Tort Claims Act. The plaintiffs were not direct victims of the corporations' exploitative practices but rather victims of torture, rape, and maltreatment by the apartheid regime, which were encouraged and furthered by the participation of 23 foreign companies, thus constituting the charge of aiding and abetting massive human rights violations.<sup>59</sup>

Despite its demand for reparations at the TRC hearing, however, the ANC government issued an affidavit claiming that the plaint would violate the sovereignty of the South African government.<sup>60</sup> COSATU also withdrew its initial support for the initiative. According to one of the initiators of the plaint, Dennis Brutus, leader of Jubilee South Africa, the U.S. government and international corporations had put pressure on the ANC government to withdraw the lawsuit, and COSATU, because of its alliance with the ANC, saw itself forced to follow the ruling party's political line.<sup>61</sup> This interpretation is supported by the fact that, when the new ANC leadership under Jacob Zuma changed its stance on the reparations issue, COSATU followed suit and returned to officially supporting the lawsuit.<sup>62</sup>

*Analysis:* COSATU was not active in initiating the South African TRC. Instead, human rights, victims', and faith-based organizations took the lead in discussing the commission's design and the selection of commissioners. However, concerning the kind of justice to be sought, COSATU pursued an encompassing concept that included ESC rights. It thereby actively influenced the commission's selection of issues to address by submitting information and making statements at the TRC's hearing on the role of business under apartheid. During the hearings, it argued in favor of a broader understanding of justice that included creating employment, paying fair wages, and fighting economic abuse and social inequality. However, COSATU's ambivalent position on the reparations litigation shows that the organization's activities in this area were constrained by its close relationship with the ruling party.<sup>63</sup> When the ANC government rejected the trial, COSATU immediately withdrew its

support for an autonomous initiative that had initially been developed in line with the very demands of the organization in the SATRC.

#### **THE TUNISIAN UGTT: DIRECT, YET UNAMBITIOUS, PARTICIPATION IN TRANSITIONAL JUSTICE**

Discontent with social injustice, unemployment, corruption, and economic crimes was at the heart of the uprising leading to the ouster of former Tunisian President Zine El Abidine Ben Ali in 2011, and socioeconomic questions are comparatively well addressed in the Tunisian transitional justice law. Under the country's first President after independence, Habib Bourguiba, and then under Ben Ali, entire regions, mainly in the country's center-west, were politically and economically marginalized and systematically excluded from public investment in infrastructure, education, and health. These regions can now qualify as victims under the law (article 10), which also clearly states that social peace is one of its reconciliatory aims (article 15). But, as this analysis will show, the politically powerful major trade union, which has played an important mediating role in the overall process of democratization, did not formulate or promote a transitional justice agenda specifically oriented toward the realization of ESC rights. To the extent that the Tunisian General Labor Union (known by its French acronym, UGTT) has participated in the design and implementation of institutions and instruments of transitional justice, it has done so as one actor among many, focusing on violence against its members.

Since its involvement in the struggle for independence in the 1950s, the UGTT has played an important role in Tunisian politics. With more than 150 offices in all governorates and districts and over half a million members, it has constituted the only political force in the country that comes close to the former ruling party's size and presence. The labor union's relationship with the regime has always been ambivalent, with varying degrees of alignment over time. Yet the UGTT was never fully coopted; local cadres have remained relatively autonomous and contributed to the mass mobilization against former President Ben Ali in December 2010. After the dictator's ouster, the UGTT elected a new national leadership (including a new general secretary, Hussein Abassi), whose members all enjoy widespread recognition as strong and independent labor representatives.<sup>64</sup>

During the ongoing process of democratization, the national leadership of the UGTT has played an important role, at times through mobilization (for instance, in pushing for the withdrawal of the Islamist-dominated government in 2013), and at times through mediation. Most prominently, together with the

employers' association, UTICA, the Lawyers' Guild, and the Tunisian League for Human Rights, the UGTT helped broker the National Dialogue as "insider mediators."<sup>65</sup> The National Dialogue brought high-level leaders of competing political factions together to compromise on political issues. Thereby, it helped to overcome a government deadlock and bring the constitutional process to a successful ending—efforts for which the quartet received the 2015 Nobel Peace Prize.

In contrast to this political role, the UGTT has yet to define a socioeconomic agenda that would be able to unite its quite heterogeneous membership.<sup>66</sup> At the moment, therefore, the union's national leadership is facing growing discontent from local cadres who criticize a disregard of socioeconomic concerns.

*Direct participation:* Among the cases studied here, Tunisia is the only one in which organized labor directly participated in the preparatory stage of the official transitional justice process. Many labor union members took part in the National Dialogue on Transitional Justice (hereafter transitional justice dialogue, not to be confused with the abovementioned National Dialogue), a wide consultation process with civil society participation across all regions.<sup>67</sup> As a member of an association of various civil society organizations, the Independent National Coordination for Transitional Justice, the UGTT was also indirectly represented on the technical committee charged with overseeing the transitional justice dialogue and preparing the draft transitional justice law. Although it did not have a representative of its own on the committee, the UGTT has participated in the National Coordination's leadership and is regarded as one of the most powerful, and thus important, member organizations in the association.

In December 2013, the National Constituent Assembly passed an amended version of the transitional justice law, which provided for the establishment of a Truth and Dignity Commission and Specialized Chambers. Yet, dissatisfied with Parliament's decision to appoint a solely parliamentary committee to select the truth commission's members, the National Coordination, including the UGTT, decided to no longer participate in official instruments of transitional justice.<sup>68</sup> Within the selection committee, political parties were represented proportionately to their strength in Parliament, hence excluding civil society. Given the UGTT's relative strength in Tunisian politics, as pointed out above, one could infer that it purposefully decided not to press for more direct involvement in the official transitional justice process. As a UGTT official stated, the UGTT as an organization has its own channels to influence politics



and policymaking according to its agenda and does not rely on transitional justice to make its demands heard.<sup>69</sup>

This political decision notwithstanding, “Transitional justice [can be] important for workers.”<sup>70</sup> Hence, union members are among the plaintiffs who have submitted files to the Truth and Dignity Commission demanding investigations into violations of unionists’ “bodily integrity rights.” This is related to the status of UGTT members as subjects of transitional justice. Incidents to be investigated include “Black Thursday” (*Jeudi Noir*), which took place on January 26, 1978, as well as the so-called bread riots of 1984.<sup>71</sup> *Jeudi Noir* was a brutal crackdown on the first general strike in Tunisian history, which was called by the UGTT, during which up to 200 people died. Moreover, the UGTT participated in consultations on reparations in the marginalized central and southern regions, organized by the International Center for Transitional Justice.<sup>72</sup>

*Indirect contribution:* Outside of official institutions, the National Coordination has continued to monitor and publicly comment on the transitional justice process. The UGTT in particular has approached powerful stakeholders independently. For example, in 2012 the media reported on meetings of UGTT officials with Samir Dilou, the minister for human rights and transitional justice at that time, to discuss questions of transitional justice and injustices committed against its members.<sup>73</sup>

In 2015 and again in 2016, a draft “reconciliation law” was introduced on presidential initiative that would grant amnesty to corrupt businessmen and officials of the old regime, offering them the opportunity to “buy themselves out” of charges by contributing to a development fund. This initiative aims to curtail the competencies of the truth commission, as it basically renders the arbitration part of the latter redundant and, hence, interferes with its competencies on corruption, embezzlement, and, eventually, vetting, because the law would also concern civil servants suspected of corruption. UGTT officials publicly took a stance against the draft law, emphasizing its contradiction with the constitution and the transitional justice law,<sup>74</sup> and local UGTT cadres participated in demonstrations against it. However, one can also observe the ambivalent position of the UGTT, since the central umbrella organization did not participate in demonstrations against the proposed “reconciliation law” put forward by the president and only repudiated the *current version* of the draft, not the idea of amnesties per se.<sup>75</sup>

*Autonomous contribution:* While the Truth and Dignity Commission is proceeding with its work, the UGTT has launched an independent initiative of its own. The labor union has requested access to the archives on *Jeudi Noir*, which



were seized by the authorities in 1978. The declared aim is to study the events, present the historical truth to the people, and thereby reestablish justice and equity, “without which no reconciliation will be realized.”<sup>76</sup> To date, however, this claim has not met with official approval. According to the transitional justice law, only the official truth commission has access to public and private archives.

*Analysis:* Compared to the other cases, labor’s participation in Tunisia’s transitional justice process is both unusually manifold and direct. Yet, when measured against the UGTT’s overall role in the democratization process, its role in transitional justice has remained fairly limited and unambitious. Whether direct, indirect, or autonomous, the UGTT’s contribution to transitional justice has been mainly concentrated on justice for trade union members (with regard to violence against them or discrimination as result of UGTT membership), which dominates the UGTT’s discourse on transitional justice. In the wake of the presidential initiative for the “reconciliation law,” the UGTT did link questions of economic injustice to the transitional justice discourse, albeit hesitantly.

On the one hand, this rather narrow agenda for transitional justice reflects the above-mentioned strategy of the UGTT’s national leadership to prioritize political over socioeconomic issues. On the other hand, however, one has to keep in mind that the UGTT has other channels for raising socioeconomic demands, most notably the tripartite Social Dialogue with the Tunisian Businessmen Association (UTICA) and the government. It therefore does not rely on transitional justice measures to achieve its socioeconomic agenda. Of course, because Tunisia’s transitional justice process is still ongoing, this analysis remains preliminary. Still, up to now the available evidence suggests that the UGTT has not viewed transitional justice as a major issue. It has, rather, used its powerful political position as a mediator and reconciling force in the overall democratization process, while using different channels for raising socioeconomic demands.

## **CONCLUSION: LABOR UNIONS’ CONTRIBUTION TO TRANSITIONAL JUSTICE**

Four major insights emerge from these case studies: 1) the range of labor unions’ contribution to transitional justice, 2) organized labor’s overall significance for transitional justice processes, 3) why labor unions’ engagement in transitional justice is limited, and 4) whether labor organizations are

particularly prone to lobbying for an integration of economic and social rights into the transitional justice agenda.

First, against the general impression that emerges from the lack of scholarly attention, the three case studies show that labor unions *do* play a role in transitional justice and their contributions are manifold. They have contributed to transitional justice dialogues, as in Tunisia; participated in official instruments, thereby challenging the established conception of justice, as in South Africa; and initiated autonomous contributions to the official process by setting up independent human rights commissions, as in Argentina. Very clearly, labor unions constitute collective social actors that can use their political power, social legitimacy, and organizational strength to influence the selection, design, and operation of transitional justice instruments. However, we also identified several points at which labor unions dropped out of the official process, refused to collaborate, or did not support autonomous contributions that were in line with their original positions.

Second, and no less important, labor unions, without doubt, have not been decisive in any of the three transitional justice processes investigated. Instead, other civil society actors, such as human rights groups, victims' organizations, and/or faith-based organizations, have influenced the transitional justice process at one or more stages. Although labor unions in these three cases did participate in transitional justice and only rarely rejected any participation, their role was not essential in any of them. This result is particularly significant given the selection of cases: if the importance of organized labor to transitional justice is limited even in countries with comparably powerful labor unions, as in Argentina, South Africa, and Tunisia, this can be expected to be all the more true in countries without significant and unified labor movements—a situation that arguably fits, in particular, many post-conflict societies.

Third, the comparative analysis suggests two factors that help to make sense of the relatively limited, and in part openly ambivalent, role that organized labor seems to play in transitional justice. First and foremost, the case studies suggest that organized labor's engagement in transitional justice is circumscribed by the fact that labor unions simply do not view transitional justice as their core business. To the extent that they assume a political role, as most notably in the case of Tunisia, transitional justice has been considered neither a primary aim of labor unions nor an important means of making their demands heard. In this sense, while the particular strength of labor unions (as compared to other civil society organizations) theoretically enables them to play an important role in transitional justice, this same strength limits their interest in making use of this potential. Organized labor will usually not see

transitional justice as a means to strengthen its position and, instead, will normally use other channels and institutions to exert influence on the regime or government. In addition, one may also speculate that labor unions perhaps simply prefer corporatist and/or class-based logics of negotiating with the state (and business) to the kind of rights-based logic that prevails in the context of transitional justice. Whereas in the latter case labor unions are merely one among many voices that make human rights–related claims, in the former they—at least officially—constitute *the* representative of the working class, claiming to speak on behalf of the working population.

The second factor is that labor unions' contribution to transitional justice is limited by their overall position vis-à-vis the political regime and, in particular, by their specific political alliances. Certainly, to the extent that labor organizations were implicated in a predecessor regime that is charged with major human rights violations, this will inhibit an unambiguous stance toward transitional justice, as in Argentina. Yet, shown by shifting engagements over time in Argentina and South Africa, close political relations with the successor regime can also constrain labor unions' activities in the sense that they will tend to selectively support only those transitional justice initiatives that are in line with the government's stance. The Tunisian case, however, demonstrates that an independent position vis-à-vis all major political forces during the democratization process may enable, but not automatically lead to, a correspondingly high level of activity in transitional justice, as the first factor might still prevail.

The lack of major interest in transitional justice that seems to characterize labor unions' engagement in this area leads to the fourth insight: labor unions do not play a significant role in pushing for the integration of economic and social rights into transitional justice initiatives. Since labor unions are, by their very nature, engaged with economic and social rights, one may expect them to aim to broaden the agenda of transitional justice in this direction. However, the case studies do not generally confirm this expectation. The only exception is the one instance in which COSATU in South Africa lobbied for expanding the justice conception prevailing in the Truth and Reconciliation Commission. In general, the fairly narrow human rights agenda pursued by labor unions in Argentina in the 1980s and in South Africa in the 1990s could be explained by the fact that, at that time, economic and social rights had not yet entered the debate about transitional justice. COSATU's demand for reparations as a form of transformative justice is therefore even more notable.<sup>77</sup>

This does not apply to the contemporary case of Tunisia: As far as may be seen, UGTT did not lobby for incorporating socioeconomic and

development-related issues, such as collective reparations or investment projects for marginalized regions and social peace, into the law on transitional justice.

In order to explain this lack of interest in the socioeconomic dimension of transitional justice, one can only point to the argument made above: labor unions prefer to use other channels to push for their socioeconomic agendas. In South Africa, this was the case after the labor union's demands were not met within the Truth and Reconciliation Commission. In this sense, the limited relevance of transitional justice measures when it comes to achieving socioeconomic change and the low interest on behalf of labor in participating in transitional justice seem to mutually reinforce each other. This could still change if other actors are able to demonstrate the inherent value of transitional justice measures to push for a socioeconomic agenda. However, this has not been the case so far.

With regard to the potential influence of transitional justice on labor unions, the case studies did not offer any empirical evidence. While not an explicit aim of this study, labor unions were relatively strong actors in all three countries and, therefore, not in particular need of capacity building. Whether transitional justice processes can support and strengthen organizationally weak labor unions and, perhaps, be even deliberately used by them to this effect, has to be assessed in future research.

Given the nature of this exploratory study, its findings are, of course, only preliminary, and they will have to be further elaborated and cross-checked with much more detailed case studies, as well as with more comprehensive comparative analyses. With a view to such future research, the three case studies presented here suggest that recognition of transitional justice as embedded in the overall process of political bargaining in times of change is essential to understanding labor unions' role in transitional justice.

## NOTES

- 1 The authors thank Fynn Kaese for research assistance. Irene and Jonas acknowledge the financial support of the Volkswagen Stiftung (research grant for the project "Socio-economic Protests and Political Transformation: Dynamics of Contentious Politics in Egypt and Tunisia against the Background of South American Experiences"; see Irene Weipert-Fenner and Jonas Wolff, "Socioeconomic Contention and Post-revolutionary Political Change in Egypt and Tunisia: A Research Agenda," *PRIF Working paper* 24, 2015, [http://www.hsfk.de/fileadmin/user\\_upload/PRIF\\_WP\\_24.pdf](http://www.hsfk.de/fileadmin/user_upload/PRIF_WP_24.pdf)).

- 2 Ruth B. Collier, *Paths to Democracy: The Working Class and Elites in Western Europe and South America* (New York: Cambridge University Press, 1999); Dietrich Rueschemeyer et al., *Capitalist Development and Democracy* (Chicago: University of Chicago Press, 1992).
- 3 J. Samuel Valenzuela, "Labor Movements in Transitions to Democracy: A Framework for Analysis," *Comparative Politics* 4, no. 21 (1989): 445–472.
- 4 Kevin Kolben, "Labour Rights as Human Rights?" *Virginia Journal of International Law* 50 (2010): 449–484.
- 5 Dustin N. Sharp, "Introduction: Addressing Economic Violence in Times of Transitions," in *Justice and Economic Violence in Transition*, ed. Dustin N. Sharp (New York: Springer, 2014), 22; Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 322–364.
- 6 Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Blackwell, 2002); Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3 (2009): 28–48.
- 7 Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2 (2008): 267; Paul Gready, *The Era of Transitional Justice* (London: Routledge, 2010), 233.
- 8 Louise Arbour, "Economic and Social Justice for Societies in Transition," *International Law and Politics* 40 (2005): 1–27; Lisa Laplante, "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework," *International Journal of Transitional Justice* 2 (2008): 331–355. Going even further, scholars have also proposed rethinking transitional justice as transformative justice. Such a move would replace the focus on rights and their violation with a broad agenda of transforming social, economic, and political structures in order to level out power asymmetries and social inequality not only on the local or national levels but also on the global level. See Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice* 8 (2014): 339–361.
- 9 Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development," *International Journal of Transitional Justice* 2 (2008): 1–13.
- 10 Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21 (2012): 186; Roger Duthie, "Transitional Justice, Development, and Economic Violence," in *Justice and Economic Violence in Transition*, 181.
- 11 Dustin N. Sharp, "Economic Violence in the Practice of African Truth Commissions and Beyond," in *Justice and Economic Violence in Transition*, 79–107.
- 12 So far, the integration of ESC rights into the recommendations of truth commissions has not led to systemic changes in any single case. Laplante, 341; Sharp, "Economic Violence," 106.

- 13 Sharp, "Introduction," 17.
- 14 Ibid. On the issue of bystanders and profiteers, see Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16 (2002): 91–108.
- 15 Kolben, 449–484.
- 16 Eric Brahm, "Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies," *International Journal of Not-for-Profit Law* 9 (2007): 62–72; David Backer, "Civil society and Transitional Justice: Possibilities, Patterns and Prospects," *Journal of Human Rights* 2 (2003): 297–313.
- 17 See *Dictionary of American History*, [http://www.encyclopedia.com/topic/Trade\\_Unions.aspx](http://www.encyclopedia.com/topic/Trade_Unions.aspx); accessed May 19, 2015.
- 18 Civil society is certainly a contested term but it usually refers to the sphere of society that is situated between the family, the market, and the state, and that comprises a diverse range of voluntary associations and networks of citizens. See, for instance, Christopher Bryant, "Civic Nation, Civil Society, Civic Religion," in *Civil Society, Theory, History and Comparison*, ed. John R. Hall (Cambridge: Polity Press, 1995).
- 19 Glenn Adler and Eddie Webster, "The Labour Movement, Radical Reform and the Transition to Democracy in South Africa," *Politics and Society* 23 (1995): 88–90; Collier; Rueschemeyer et al.; Valenzuela.
- 20 We have to focus here on organized labor in democratization processes because the role of labor unions in bringing civil war to an end has not yet been adequately addressed by research.
- 21 The corresponding two kinds of labor contributions to democratic transitions have been emphasized, in particular, by Ruth B. Collier for the cases of South America. See Collier, chapter 4.
- 22 David A. Crocker, "Truth Commissions, Transitional Justice and Civil Society," in *Truth vs. Justice. The Moral Efficacy of Truth Commissions: South Africa and Beyond*, ed. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 99–121.
- 23 Backer, 302–305.
- 24 Roger Duthie, "Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective," International Center for Transitional Justice, New York, 2009, 15–17, <https://www.ictj.org/sites/default/files/ICTJ-Development-CivilSociety-FullPaper-2009-English.pdf>, accessed October 5, 2015; Luke Wilcox, "Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform," *International Journal of Transitional Justice* 3 (2009): 49–68; Brahm, 66; Backer, 302.
- 25 Backer, 298.
- 26 On the distinction between outputs and outcomes in transitional justice processes, see Eva Ottendörfer, *Die internationale Politik der Vergangenheitsaufarbeitung. Global-lokale Interaktion in Timor-Leste* (Baden-Baden: Nomos, 2016).

- 27 We will focus on transitional justice in the 1980s—that is, in the immediate aftermath of military rule. Since 2003, Argentina has seen a second wave of transitional justice processes, which, most notably, included a series of judicial trials enabled by the cancellation of amnesty laws.
- 28 On the following, see Victoria Basualdo, *La clase trabajadora durante la última dictadura militar argentina 1976-1983* (La Plata: Comisión Provincial por la Memoria, 2010); Alison Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994); Ruth B. Collier, *Paths Toward Democracy: The Working Class and Elites in Western Europe and South America* (Cambridge: Cambridge University Press, 1999), 119–126; James W. McGuire, *Peronism Without Perón: Unions, Parties, and Democracy in Argentina* (Stanford, CA: Stanford University Press, 1997), chapters 6–7.
- 29 The context of this deal was the general expectation that the Peronist party (*Partido Justicialista*), which has traditionally been closely allied to the Argentine labor movement, would win the 1983 elections. In the end, however, the Peronists lost the vote.
- 30 According to David Pion-Berlin (quoted in Brysk, 203, note 126), almost half of those who were forcefully disappeared by the Argentine military junta were union members.
- 31 Brysk, 203, note 126.
- 32 María José Guembe, *La Experiencia Argentina de Reparación Económica de Graves Violaciones a los Derechos Humanos* (Buenos Aires: Centro de Estudios Legales y Sociales, 2004), 3.
- 33 Brysk, 68–72.
- 34 Ibid, 77.
- 35 McGuire, 195.
- 36 Brysk, 141–144; McGuire, chapter 7.
- 37 Brysk, 81, 148, 117; *El País Archivo*, April 17, 1987, [http://elpais.com/diario/1987/04/17/internacional/545608810\\_850215.html](http://elpais.com/diario/1987/04/17/internacional/545608810_850215.html); accessed April 20, 2015.
- 38 McGuire, 195.
- 39 Brysk, 84.
- 40 When the CTA was founded in the 1990s, it deliberately incorporated “leaders from diverse social movements, some of which had emerged from the fight against the military dictatorship.” Héctor Palomino, “Los sindicatos en la Argentina contemporánea,” *Nueva Sociedad* 169 (2000): 131.
- 41 Victoria Basualdo, *Complicidad civil: el rol empresario en los delitos de lesa humanidad*, March 21, 2015, <http://www.infojusnoticias.gov.ar/opinion/complicidad-civil-el-rol-empresario-en-los-delitos-de-lesa-humanidad-162.html>, accessed April 21, 2015.
- 42 Brysk, 147.
- 43 Ibid, 146.
- 44 “The Argentine human rights movement mobilized to defend the traditional ‘rights of the person’: life, liberty, and personal security.” Brysk, 6–7.
- 45 COSATU, *Homepage of COSATU trade union federation*, <http://www.sahistory.org.za/topic/>

- congress-south-african-trade-unions-cosatu, accessed on April 20, 2015.
- 46 Gail M. Gerhart and Clive L. Glaser, *From Protest to Challenge: A Documentary History of African Politics in South Africa 1882-1990*. Vol. 6 (Bloomington: Indiana University Press, 2010), 107.
  - 47 Adler and Webster, 88–90.
  - 48 Gregory Houston, Ian Liebenberg, and William Dichiba, “Interest Group Participation in the National Economic Development and Labour Council,” in *Public Participation in Democratic Governance in South Africa*, ed. Gregory Houston (Pretoria: Human Sciences Research Council), 17–82.
  - 49 Adler and Webster, 95–96.
  - 50 The original list of candidates eligible for appointment as commissioners to the South African truth commission contained 229 names. Among them was one trade unionist who was not considered any further in the following election rounds. University of Witwatersrand, *Traces of Truth: Documents Relating to the South African Truth and Reconciliation Commission*, [http://truth.wvl.wits.ac.za/list\\_docs.php?it=3110-e5-4&li=cat](http://truth.wvl.wits.ac.za/list_docs.php?it=3110-e5-4&li=cat); accessed October 3, 2015.
  - 51 These organizations included, among others, Lawyers for Human Rights, the Research Institute on Christianity in South Africa, the South African Council of Churches, and the Trauma Center for Victims of Violence and Torture. See University of Witwatersrand, *Traces of Truth*, [http://truth.wvl.wits.ac.za/list\\_items.php?cat=1.1](http://truth.wvl.wits.ac.za/list_items.php?cat=1.1); accessed October 3, 2015.
  - 52 The issue came up in the amnesty hearing of former law and order minister Adrian Vlok, who confessed together with more than 30 policemen. Government of South Africa Press Release, “TRC to Notify Those Implicated in Illegal Police Acts.” See Government of South Africa Press Release, “Bomb Disposal Hero Set COSATU and Khotso Bomb Blasts: TRC Hears,” July 23, 1998, <http://www.justice.gov.za/trc/media%5C1998%5C9807/s980723e.htm>; accessed April 30, 2015.
  - 53 COSATU Press Release, “TRC Hearing on Business and Apartheid,” November 10, 1997, <http://www.cosatu.org.za/show.php?ID=605>; accessed April 10, 2015.
  - 54 South African Truth and Reconciliation Commission (SATRC), “Transcript of the Hearing on the Role of Business in Apartheid, 3rd day,” November 27, 1997, <http://www.justice.gov.za/trc/special%5Cbusiness/busin3.htm>; accessed April 10, 2015.
  - 55 Ibid.
  - 56 Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1998), vol. 4, chapter 2, 58.
  - 57 Charles P. Abrahams, “Lessons from the South African Example,” in *Corporate Accountability in the Context of Transitional Justice*, ed. Sabine Michalowski (Abingdon, New York: Routledge, 2013), 153–173.
  - 58 Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa*



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CHAPTER 12

Transitional Justice and Development Aid to  
Fragile and Conflict-Affected States: Risks  
and Reforms

*Elena Baylis*

Transitional justice is expensive. Hundreds of millions of dollars are spent each year supporting ad hoc tribunals, trials in national courts, commissions, reparations, and rule of law initiatives in transitioning countries. Accordingly, funding for transitional justice, and the willingness of donors to provide that funding, is critically important to the field.

Among the funders of transitional justice are development organizations, including the United Nations Development Program (UNDP), the US Agency for International Development (USAID), and other national, regional, and international entities. These donors are of course primarily concerned with promoting economic and social development. Among the contributing factors for such development are political stability and the effectiveness of government institutions, while violent conflict and political oppression and dysfunction tend to interfere with development. So while transitional justice is not the primary focus of development organizations, these donors contend with transitional justice issues by virtue of the association with their primary goals.

Donors' approaches to transitional justice are shaped by the relationship between transitional justice and their development agendas and by the dynamics and trends of development work in transitioning states. Donors look for connections to their core mission to determine whether to engage in transitional justice initiatives, and if so, how to characterize their investment in transitional justice activities. Because transitional justice is a hybrid field, incorporating elements of several subject areas, donors often can find elements of transitional justice that overlap with their agendas without committing to the entire transitional justice paradigm. In addition, work in transitioning countries is inherently risky, and transitional justice presents particularly high political risks. However, the international community has increasingly recognized the importance of engaging in the fragile and conflict-affected states that are often the settings for transitional justice initiatives, as well as the centrality of justice and other statebuilding components to such work. These and the other factors identified below are not discrete considerations but, rather,

interact synergistically to influence donors' decision-making.

Several recent reforms should affect how development donors support justice-related projects in the future, and consequently, may influence their engagement in transitional justice initiatives. In particular, the New Deal framework has brought about a series of high-level changes to the formal relationships between donors and recipients in fragile and conflict-affected state contexts. In addition, the Global Focal Point (GFP) arrangement has reformed the relationship between UN development entities and peacekeeping forces. These reforms should open more space and legitimacy for supporting justice in general, and transitional justice in particular, but because these are new frameworks, their effects are as yet mostly potential rather than actual.

This chapter assesses the role of development donors in transitional justice. It begins with an evaluation of transitional justice as part of development aid, outlines several reform trends relevant to transitional justice, and then explores how some of those reforms are being implemented. The chapter focuses primarily on aid to fragile<sup>1</sup> and conflict-affected states for two reasons. First, conflict-affected and fragile states are key contexts for transitional justice work. Conditions of conflict and fragility often trigger transitions in government; they can also create an environment conducive to human rights abuses and atrocities that demand accountability; and they may give rise to the need for rule of law reforms if justice systems become nonfunctional, are coopted into government abuse of power, or both. Second, the above-mentioned recent reforms to aid processes and institutions have focused on fragile and conflict-affected states and are relevant to transitional justice because of their nexus to such states and to justice issues.

## **SCOPE OF TRANSITIONAL JUSTICE**

### **TRANSITIONAL JUSTICE AS ONE ASPECT OF DEVELOPMENT**

While there are many ways of categorizing development work, transitional justice can be understood as one component of justice and rule of law, which also encompasses constitutional and legal reforms, as well as training, institutional development, and capacity-building of the judiciary, attorneys, police, and prison system. Justice is in turn one aspect of the area of governance, democracy, and human rights.

Transitional justice does not fit neatly into this categorization, however, because it also connects to security and peacekeeping. Here, the transitional justice endeavors of seeking accountability for atrocities and building capacity for rule of law play several roles that can be in tension with each other. Such initiatives can be integral to carrying out peacekeeping functions, like detention of individuals suspected of acts of violence against civilians. But transitional justice has a complex relationship with security in a transitioning state; depending on the circumstances, transitional justice may either promote or threaten stability and progress toward peace. For example, the risk that leaders in a transition will be prosecuted may either disrupt or benefit processes of disarmament, demobilization, and reintegration.<sup>2</sup>

### TRANSITIONAL JUSTICE IN FRAGILE AND CONFLICT-AFFECTED STATES

An examination of the relationship among transitional justice, reconciliation, and peace in transitioning states is beyond the scope of this chapter<sup>3</sup>; however, it is useful to briefly address two particularly salient issues concerning the scope of transitional justice as it is implemented in fragile and conflict-affected states. What is considered “transitional justice” can vary somewhat across several dimensions, one of which is the extent of the subjects and activities that are included. This chapter takes a relatively broad and inclusive view, in accord with the International Center for Transitional Justice’s definition as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.”<sup>4</sup> As such, transitional justice includes measures aimed at accountability and redress for past atrocities, such as criminal prosecutions, truth commissions, reparations, and restitution, as well as rule of law initiatives intended to prevent future abuses and produce functional, human-rights-respecting judicial systems by reforming legal codes and constitutions, courts, and police, and by undertaking memorialization and education efforts.<sup>5</sup>

However, this definition can be problematic in practice in the context of the prolific initiatives and multiple sweeping aims of reform in fragile and conflict-affected states. Programs that serve the purposes of transitional justice also promote the goals of other reform frameworks, such as capacity-building and human rights. As such, activities that are part of the transitional justice framework can also be identified as part of these other overlapping frameworks. Donors and other involved actors may justify their interventions as part of one framework or another, depending on their internal agendas or other factors.<sup>6</sup> This is particularly true of forward-looking initiatives, such as constitutional

or legislative reforms or training for police or judges. Development donors may support such projects out of a concern with capacity-building, political reform, or justice generally, rather than because of the connection to the transitional justice framework as such.

The stage of a given transition represents another variable component. During conflict or at the beginning of a transition, a key concern is determining when it will be productive to initiate transitional justice processes. This is not merely a formal question of categorizing a process as transitional or nontransitional but rather a pragmatic question of whether the necessary conditions exist for a transitional justice mechanism to serve its intended purposes. Some components of transitional justice might be unavailing until a conflict has entirely ended. In contrast, others, such as investigations, mapping, and other fact-finding, might be crucial to securing evidence for later accountability efforts, while support for development of essential judicial functions in the early stages of a transition sets the stage for prevention as well as accountability.

Complicating this analysis, it can be difficult to tell whether a conflict is truly ending and a genuine transition beginning. Conflict-affected states often move in and out of conflict repeatedly, making false starts at establishing new governments that then fail. Accordingly, transitional justice is not a discrete process that takes place all at one time as part of a singular transition. Rather, the necessary conditions may exist for some types of transitional justice initiatives to serve their purposes at a relatively early stage in a transition, while other mechanisms may need to wait until later or may require additional preliminary steps before they can be effective.<sup>7</sup>

## **TRANSITIONAL JUSTICE: A CHALLENGING ARENA FOR DEVELOPMENT AID**

Development aid can support a wide variety of activities in many spheres—including such disparate initiatives as supplying vaccinations and mosquito nets in the field of health; support for schools, books, and teachers in the education arena; weapons or training for military forces in the realm of security; and debt relief, budget aid, or microloans to entrepreneurs in the economic sphere. In relation to other aspects of the development agenda, transitional justice poses certain challenges for donor organizations. This section reviews several of these challenges, looking first at the difficult environment of conflict-affected and fragile states, then at the political nature of transitional justice work, the difficulty of measuring impact, and the interconnection with peacekeeping and security.

## CONFLICT-AFFECTED OR FRAGILE STATES AS DIFFICULT ENVIRONMENTS FOR DEVELOPMENT WORK

Conflict-affected and fragile states are difficult and risky environments for carrying out development work for all the reasons that one would expect. An influential report by the Organisation for Economic Co-operation and Development (OECD) divides these risks into three categories: “contextual risk” that the circumstances will become chaotic due to “state failure, return to conflict,” or other external developments; “programmatic risk” that the aid will be ineffective or even do harm; and “institutional risk” that the support will negatively impact on the donor’s reputation, finances, or operations.<sup>8</sup> Of course, these categories are not discrete in practice but rather tend to interact synergistically. Overall, providing aid in chaotic conditions is inherently risky in many ways, such as physical danger to personnel, a high potential for aid funding or supplies being stolen or misdirected, and the possibility that the aid will not achieve its desired effect even if it is implemented because of the surrounding environment. In addition, it is particularly difficult in fragile states to mitigate these inherent contextual and programmatic risks, as multiple factors are not under the control of either the donor or the recipient, such as the behavior of powerful third parties.<sup>9</sup>

Certain risks are more important in the justice context than others. Fragile states are characterized by the incapacity of their governments to carry out their role effectively, even absent any change for the worse in the initial level of contextual risk.<sup>10</sup> By their nature, transitional justice programs often require partnerships with the concerned government, such as capacity building for court personnel, legislative reform efforts, or support for trials in national courts; they are thus constrained by the ability of the recipient government to absorb such aid and implement such programs. While transitional justice aid is sometimes—although less frequently—funneled through partnerships with civil society,<sup>11</sup> it is likewise difficult for civil society organizations to coalesce around or implement effective strategies in situations of conflict or uncertainty. The problems of partnering with the state have in some instances been bypassed in the accountability context with the creation of international and hybrid tribunals that are outside the framework of the transitioning government. However, these courts have also struggled to act effectively in conflict-affected settings. In particular, they have suffered from lack of popular legitimacy or even popular awareness of their work; ironically, this is due in part to their very distance from the concerned national setting.<sup>12</sup>

In addition, an institutional risk that has little meaning for the recipient



country, but that will typically be of fundamental concern to the donor, is the prospect that the donor will be prevented by the circumstances on the ground or the incapacity of the recipient from carrying out its ordinary institutional processes with regard to the aid, such as monitoring and evaluation. Were that to happen, the project could be regarded as a failure from an institutional standpoint for not producing the requisite data and reports, irrespective of its actual on-the-ground effectiveness. The inherent problems of measuring the effects of justice initiatives, discussed below, make this concern particularly acute for transitional justice programs.<sup>13</sup>

Several other types of risk associated with conflict-affected and fragile states are particularly salient in the transitional justice context, including political risk and the complexities that come from the engagement of military forces or peacekeepers. These are discussed in the following sections.

#### A POLITICIZED AND CONTROVERSIAL INTERVENTION

The political risk that aid will shift internal political dynamics in ways that are damaging to the external donor is particularly high in transitional justice initiatives, especially those that deal with accountability for prominent political actors.<sup>14</sup> National actors may use transitional justice mechanisms as tools for undermining rivals or advancing a political agenda. Conversely, national authorities may resist calls for transitional justice if such measures may undermine their authority. In addition, while international actors may view their engagement as neutral, national actors will often view accountability measures as favoring the rivals of those selected for prosecution or exposed in truth commission proceedings. Finally, the political effects of trials or other accountability measures may not be foreseeable to international actors, lending uncertainty to the implications of their support.<sup>15</sup>

Donor organizations are therefore sometimes reluctant to engage in transitional justice for fear of undermining their other initiatives in a country by instigating political tension. Alternatively, donors may prefer to engage in the least politicized version of transitional justice that does not directly favor one political group, party, or leader over another. For example, they may support rule-of-law initiatives, like training judges and attorneys, rather than supporting trials, truth commissions, or other accountability mechanisms. They may also choose to couch what might be described as transitional justice initiatives in less controversial terms, for example, by describing such programs as relating to human rights.<sup>16</sup>

Engaging in transitional justice can also be controversial internally within a

development organization. Although development donors share overlapping concerns with transitional justice, they are not necessarily committed to the transitional justice paradigm, whether as a formal organizational position or as a matter of organizational culture. This can emerge in various ways. Donors may not be persuaded of transitional justice's central principle that addressing the legacy of human rights violations is fundamental to establishing a stable political order, or they may view that claim as contingent on circumstances. For example, they may be reluctant to support transitional justice in the unstable political settings of fragile and conflict-affected states, in contrast to more stable political environments. They may associate transitional justice solely with its criminal justice component, or even more specifically with political trials, and so may be unwilling to support initiatives framed as "transitional justice" for the political reasons discussed above. Finally, donors may not be well informed about transitional justice or may view themselves as inexperienced in it. Any of these organizational conditions can make a transitional justice aid proposal controversial within a development organization or vis-à-vis its external constituencies.

#### EFFECTIVENESS AND MEASURING SUCCESS

Even if donors support transitional justice aims in principle, they may be concerned that transitional justice initiatives are not effective in practice. Certainly, there have been numerous critiques of the effectiveness of transitional justice from inside and outside the field: accountability processes have been critiqued as selective, slow, expensive, politically risky, dangerous for victims and witnesses, inaccessible to ordinary people, troubled by bias and procedural unfairness, and driven by elite and international concerns and preferences. Rule-of-law programs (both within and without transitional justice contexts) are also seen as expensive, slow, and elite/international driven, as well as overly focused on formal results, shaped by externally imposed, cookie-cutter models rather than local realities; repetitive and overlapping due to a lack of coordination and consistency; and simply ineffective in achieving both short- and long-term goals. At the most fundamental level, some argue that the field of rule of law lacks a clear concept of what it is trying to achieve.<sup>17</sup>

One important aspect of the question of effectiveness is the issue of measuring success. Donors have increasingly moved toward using indicators to support evidence-based aid programming. Donors' use of such proposal formats requires transitional justice proponents to be able to describe their

programs in these legitimized metrics; otherwise, these proposals will appear less desirable than alternative, more readily measured aid investments.<sup>18</sup> In addition to the use of indicators for project assessment, indicators are also useful tools for identifying problems that require intervention and thus prompting donor action; without indicators, transitional justice advocates may find it more difficult to focus partners' attention on their concerns. For example, UN Women undertook a project to develop indicators for the extent to which truth and reconciliation commissions and reparations programs benefited women and girls, as a way of incentivizing attention to these groups' needs in the future.<sup>19</sup>

Several aspects of transitional justice are particularly difficult to measure, especially in ways that will provide useful data for development donors within their funding cycles.<sup>20</sup> To start with, transitional justice's aims are multi-generational. As such, measuring change, for example, in the degree of reconciliation between previously warring social groups or the level of public trust in the judicial system would require a commitment to long-term studies that extend far beyond donors' funding cycles. Furthermore, while some transitional justice aims can be measured by numerical indicators like the percentage of those polled who report a sense of trust in the judiciary, the underlying characteristics to be measured are predominantly subjective and qualitative in nature. And while quantitative measures are found in transitional justice—such as the number of trials held, number of judges trained, and so on—those measures are focused on short-term outcomes. Such outcomes may demonstrate that the provided aid is not being stolen or misdirected, but they do not correlate directly to the long-term goals of transitional justice initiatives: increased respect for human rights, redress for victims, restoring trust in public institutions, and nonrecurrence of violations.<sup>21</sup> It is difficult to design indicators that reflect the multifaceted nature of many transitional justice goals, that appropriately signal progressive movement towards those goals, and that accurately connect components of particular programs to those goals.<sup>22</sup> In this, transitional justice suffers from similar kinds of measurement difficulties as other aspects of governance and justice work, in contrast to fields whose primary outcomes are inherently quantitative in nature, such as economic or health initiatives.

#### COMPLICATIONS FROM CONNECTIONS TO PEACEKEEPING

Transitional justice's interconnection with peacekeeping and stabilization activities adds another layer of complexity to planning in states where peacekeepers or military forces play an active role. Even if peacekeepers and other

military forces do not have a specific justice mandate, they often engage in activities that relate to transitional justice as part of their security role. For example, when peacekeepers make arrests in the areas under their jurisdiction, these arrests create a need for trials and for whatever capacity-building is necessary to establish a venue for such trials. Such needs, which are driven by peacekeepers' core security role, have incentivized increasing engagement in rule-of-law activities.<sup>23</sup> For example, the U.S. military has been increasingly engaged in rule-of-law roles, particularly in Iraq and Afghanistan,<sup>24</sup> and the Regional Assistance Mission to Solomon Islands also served substantial rule-of-law functions.<sup>25</sup>

Increasingly, however, peacekeeping forces do have a mandate to carry out some aspects of the rule of law work that constitutes a part of transitional justice. As of 2013, ten active UN peacekeeping missions were engaged in "peace-building" work in some way, as well as thirteen UN special political missions.<sup>26</sup> In addition, the African Union Mission in Somalia (AMISOM) also includes rule of law as part of its mandate.<sup>27</sup> Beginning in 2006, the UN Department of Peacekeeping Operations (DPKO) acquired primary authority over "police, prisons, and legal and justice institutions wherever there were DPKO missions."<sup>28</sup> Then, in 2012, the UN established the Global Focal Point for Justice, Peace, and Corrections in crisis or conflict-affected countries as a joint office of UNDP and DPKO, with the mandate to jointly manage rule-of-law programs in countries where both offices are active.<sup>29</sup> The Global Focal Point is discussed further in the section on reforms below.

Weaknesses of cooperation and collaboration between international actors are a common critique of transitional justice and other development initiatives. Peacekeeping organizations have very different professional cultures, goals, funding, and implementation mechanisms than development organizations, making such collaboration and cooperation particularly difficult to navigate. Further, organizations are not necessarily interested in or incentivized to work together but rather may wish to expand their areas of influence and authority. At its most extreme, this situation has played out in the form of competing programs of DPKO and other UN entities, such as when both DPKO and UNDP sponsored police training programs in South Sudan.<sup>30</sup>

## **DRIVERS OF DONORS' ENGAGEMENT IN TRANSITIONAL JUSTICE**

In spite of the many obstacles to donors' engagement in transitional justice, they do nonetheless contribute to transitional justice programs. Several

nonexclusive drivers explain this involvement. Here, there are two questions to consider: 1) What affects donors' decisions about whether to engage in transitional justice at all? 2) What affects their decisions about what kinds of transitional justice initiatives to undertake? This section reviews factors including an organization's mission, the stage of transition, recipient states' interests, and individual actors' interests. Some of these factors serve to mitigate the risks described in the previous section, while others provide incentives to support transitional justice in spite of those risks.

## MISSION

The more closely and narrowly related an organization's mission is to transitional justice, the more it can be expected to engage in such programs and the more willing it is to embrace their more controversial aspects. One reason is that the upside potential of transitional justice is higher for such an organization: The accomplishment of transitional justice goals clearly and directly promotes its mission and allows it to claim success. In such contexts, when evaluating success, transitional justice also benefits from being compared within the organization to comparable kinds of initiatives with similar long-term timelines and difficulties of carrying out measurements, rather than to very different kinds of programs that may produce short-term, easily quantifiable results. The downside risk is also minimized for such organizations. They do not have to worry that pushback against their controversial transitional justice activities will undermine their less controversial programs in the same state. Transitional justice also benefits from being compared by the donor to similar kinds of activities that pose similar kinds of risks, rather than to disparate, potentially less risky endeavors.

However, even donors that are not focused on issues relating closely to transitional justice will engage in these activities when they deem it necessary to their overall mission. Increasingly, development agencies have acknowledged the need for good governance to effectuate economic and human welfare development goals in fragile and conflict-affected states. An influential 2011 World Bank report on the subject repeatedly referenced the role of transitional justice in building confidence in government institutions and ending cycles of violence.<sup>31</sup> For such organizations, work in the justice realm is a means to other ends rather than an end in itself.

As a consequence, donors with broad development missions tend to become involved in transitional justice primarily when they see it as a necessary step toward good governance, which will in turn support other elements

of their agenda. If such institutions engage in transitional justice at all, they are likely to prefer rule-of-law programs that are more directly aimed at creating the good governance that is needed to achieve their general development purposes. For such organizations, the accountability aspects of transitional justice may be too controversial and risky. UNDP, for example, has a Global Programme to Strengthen the Rule of Law in Fragile and Conflict-Affected Situations, which includes a transitional justice component.<sup>32</sup> UNDP's characterization of its transitional justice work carefully and repeatedly ties its support for accountability-focused measures to its rule of law aim of developing effective judicial institutions for the purpose of overall development:

Given its development mandate, UNDP's support to transitional justice processes will not be done in separation from broader capacity building programmes in the Rule of Law sector. The overarching objective of UNDP's engagement on transitional justice is to strengthen the linkage between transitional justice and development.<sup>33</sup>

At the explicit request of national counterparts, UNDP's transitional justice engagements will continue to undertake activities tied to capacity building of national institutions and civil society organizations.<sup>34</sup>

In contrast, other kinds of organizations have missions that enable them to openly support accountability initiatives. These include human rights groups for whom this type of work poses a direct means to achieve their key mission of accounting for human rights abuses, as well as legal organizations focused on trial work, for whom such initiatives provide a means to use the tools they have available. For example, the Center for Justice and Accountability has as its core mandate seeking accountability for human rights abuses, including through criminal trials. It is one of the few organizations to pursue programs in Somalia that are directly aimed at accountability and to use the words “transitional justice” to describe its work; for example, it has sponsored excavations of mass graves in Somaliland as part of a transitional justice initiative aimed at forensic investigation of war crimes, which can satisfy truth seeking, reparative justice, and eventually accountability goals.<sup>35</sup>

Another related way in which a donor's mission emerges as a factor in its support of transitional justice-related projects is in how it understands and describes those programs. Because of the overlap between transitional justice and other frameworks, it is possible to characterize transitional justice programs in several ways. An organization that wishes to support such activities will typically characterize them in terms that most closely match its mission. As such,

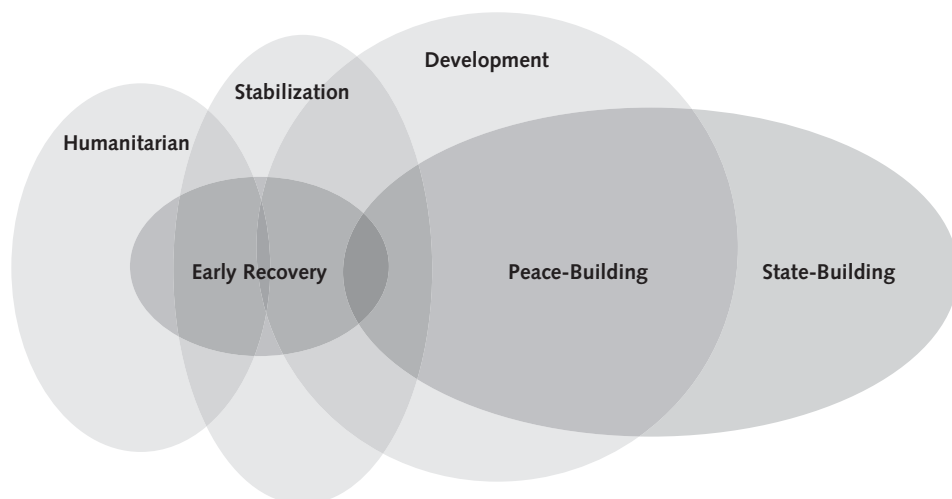
we see donors with human rights missions describing their initiatives in human rights terms, even when they are also serving transitional justice purposes; similarly, development agencies may focus on the capacity-building and access-to-justice elements of their initiatives, rather than transitional justice functions *per se*.<sup>36</sup> Accordingly, forward-looking programs are more readily adaptable to these alternative frameworks than backward-looking measures aimed at accountability for past atrocities, like trials or truth commissions, which are more closely connected to the transitional justice paradigm, especially if the proceedings implicate political leaders.

### STAGE OF TRANSITION

Development donors and other governments and organizations engaged in transitioning states may view different sorts of assistance as being appropriate for different stages of fragility and conflict. Initially, pure humanitarian assistance and measures to reestablish security may be paramount, while assistance aimed at education and economic development may come later. For example, a policy document by the European Union on engagement in fragile and conflict-affected states uses a multiplex graphic (figure 1) to show the stages at which development aid should be deployed in such states.<sup>37</sup> In its model (pictured below), statebuilding, of which transitional justice might be considered a part, is staged as a late-stabilization/post-stabilization process. If this is correct, we would expect to see a gradual shift in the funding provided to conflict-affected states, with transitional justice and other justice-related measures achieving support only after some degree of security has been established.

Several other factors, however, complicate treating transitional justice as a second-stage reform. At times, accountability measures are initiated before the end of a conflict. It is important, for example, to gather evidence concerning any atrocities committed during a conflict as promptly as possible, suggesting that assistance aimed at investigation and evidence-gathering would be useful earlier on. Further, one of the purposes of accountability is to deter further atrocities; if accountability measures are not initiated until after the conflict has ended, they cannot play a role in helping to prevent violations during the ongoing conflict, although they may still deter the later recurrence of atrocities.<sup>38</sup> In addition, in situations where peacekeeping troops have been deployed to quell a conflict, the dynamics of peacekeeping require some immediate mechanisms for dealing with offenders. As such, peacekeepers have an interest in transitional justice as part of their mission, as referenced above, and it naturally arises from the peacekeeping role in early humanitarian and stabilization

Figure 1: International Approaches to Conflict and Transitional Settings



phases. Finally, many modern conflicts do not have a clear beginning or end, but rather play out as iterative cycles of violence that change in intensity and location or resolve briefly and then recur but do not entirely conclude. The World Bank has pinpointed a lack of effective, legitimate government institutions as a central component of such iterative conflicts,<sup>39</sup> suggesting that early action to develop such institutions (including the transitional justice mainstay of institutional reform) is key to successful transition.

As noted at the outset, these drivers are not mutually exclusive but rather tend to coexist and intersect. An organization may call on its mission to justify the transitional justice goals it is promoting or to undermine transitional justice initiatives it does not personally favor, or it may rely on the concept of staging to push forward or delay transitional justice programs according to its institutional preference. Organizations driven by their missions to engage in transitional justice may also concern themselves with the role of staging, as in a recent guidance document issued by the UNDP-DPKO GFP suggesting that transitional justice is a long process, much of which may need to occur at a later stage than initial efforts aimed at securitization.<sup>40</sup>

#### RECIPIENT STATES' INTERESTS

Donors hold considerable power in their relationship with fragile states. Critics often allege that donors design their initiatives without sufficient attention to



the concerned state's interests. However, those interests do of course play a substantial role in aid investments, including in transitional justice. For example, among fragile and conflict-affected states, those with prominent accountability mechanisms, such as the Democratic Republic of Congo and Sierra Leone, have national governments that have specifically requested international support. In addition to requests, civil society interests are another factor. As discussed below, a primary purpose of the New Deal reforms is to shift power from donors to fragile and conflict-affected states. As such, recipient states' interests should feature prominently in decisions about whether and how to invest in transitional justice in the future.

### **INTERNAL ACTORS' INTERESTS**

In some organizations, such as the US Agency for International Development, the choice of aid projects is decentralized to the country level, and individual officers in those countries have considerable discretion in selecting initiatives, albeit generally with the requirement that the chosen initiatives be tied to agency-wide goals. In these circumstances, the interests of the individual may determine whether the organization engages in transitional justice and what projects it supports. If individual decision makers charged with selecting and designing aid projects have an interest in transitional justice, they have the discretion to do so.<sup>41</sup> In addition, especially where institutional structures are limited or new, individuals often set agendas and priorities. Reports on the UN's new Global Focal Point for Police, Justice, and Corrections repeatedly reference the central role that individuals have played in pushing the development of that collaboration forward.<sup>42</sup> Because transitional justice often occurs in national settings without established bureaucratic mechanisms, the process of implementing these programs allows substantial room for individual initiative. In the Democratic Republic of Congo, a network of internationals working at the UN Mission and other organizations supplied domestic military courts hearing war crimes cases with the relevant provisions of the Rome Statute of the International Criminal Court, enabling them to use international law in their decisions.<sup>43</sup>

### **TRENDS AND REFORMS**

Several new trends in development aid could provide additional incentives for development organizations to support transitional justice initiatives and

decrease the perceived risks associated with doing so. One is a shift toward treating fragile and conflict-affected states as a discrete group with particular needs, including the need for effective justice and governance as a prerequisite for economic development. Another is a move toward greater coordination and joint programming between peacekeepers and development organizations in the justice sector in conflict-affected countries. This section will address those trends.

Many of the particular measures that make up these trends arise as reforms responding to criticisms of aid delivery. As such, it is useful to understand this general critical context. In brief, a set of commonly perceived problems inhibits the effectiveness of development aid. Many of these concerns are deeply embedded in the institutional characteristics of the involved international organizations and states, or in the qualities of the concerned relationships between internationals and nationals on individual, institutional, and transnational levels. Others relate to the multifaceted, fraught nature of the situations in fragile and conflict-affected states, posing problems that are not amenable to easy solutions. Prominent among these concerns are lack of cooperation among donors, resulting in repetitive or even conflicting programming, short-term planning, and donor control of planning and agenda setting. Additional problems include the burden of the administrative and substantive requirements placed on aid recipients and a focus on measuring inputs and accounting for use of funds and resources rather than on measuring results and assessing effectiveness. As discussed below, the failure of existing aid practices to produce successful results in the poorest countries is a key driver of the current reforms.

In the development context, since 2002, a series of high-level meetings on development aid have issued statements and implemented frameworks meant to produce a paradigm shift in how aid is delivered,<sup>44</sup> especially to the most fragile and conflict-ridden states in which transitional justice initiatives are often needed. The principles, goals, and modes of implementation endorsed by these statements encapsulate many of the central critiques of development aid and indicate the direction of attempts at reform.<sup>45</sup> Vis-à-vis transitional justice, these critiques and proposed reforms aimed at development are relevant in two senses: first, while the critiques are not targeted at transitional justice in particular, many of them are applicable to it; second, to the extent that the proposed reforms influence donors' development aid strategies, they should affect transitional justice aid.

## THE NEW DEAL FRAMEWORK FOR FRAGILE STATES

### EVOLUTION OF THE FOCUS ON FRAGILE STATES

The failure of fragile and conflict-affected states to make progress toward achieving the Millennium Development Goals (MDGs)<sup>46</sup> triggered a discussion about how to most effectively assist those states and created an impetus for high-level change.<sup>47</sup> A focus on fragile and conflict-affected states gradually developed during a series of high-level meetings on aid sponsored by the UN and the OECD.<sup>48</sup> This period saw a shift toward a focus on fragile and conflict-affected states as a discrete group; concomitantly, those states took steps to establish themselves 1) as actors and decision makers rather than mere recipients of aid, and 2) as a collective with shared concerns, self-designated as fragile and distinct from other developing states. This culminated in the New Deal Framework for Fragile States, which redesigns the relationship between donors and recipient states.

One key early development was the Paris Declaration on Aid Effectiveness of 2005, a product of the Second High-Level Meeting on Aid Effectiveness. The declaration proposed fundamental shifts in aid relationships, including a paradigm of recipient-country leadership and donor-country support, as well as measuring and accounting for results, rather than inputs, and improved collaboration and transparency among donor countries and between donor and recipient countries.<sup>49</sup> Then, in 2008 the Third High-Level Forum on Aid Effectiveness established the International Dialogue on Peacebuilding and Statebuilding (IDPS) to focus on development assistance to fragile and conflict-affected states.<sup>50</sup>

Fragile states then took a step toward asserting control at an IDPS meeting in Dili, Timor-Leste, in 2010, when a set of 10 fragile and conflict-affected states formed the g7+ group during a side meeting. The g7+ issued a statement declaring its intent to be “a collective voice as member countries in a formal forum”<sup>51</sup> and to define its own development agenda. Crucial to this agenda were the guidelines that “the national context must guide each distinctive path to sustainable development” and that fragile states “must give [themselves] a transitional period to reinforce [their] capabilities and systems.”<sup>52</sup> The g7+ and IDPS jointly developed the New Deal for Engagement in Fragile States, which was then ratified by the broader aid community at the Fourth High-Level Forum on Aid Effectiveness in 2011.<sup>53</sup> Since 2011, the New Deal framework has been used to conduct Fragility Assessments and establish Compacts in several states, including Afghanistan, Sierra Leone, Somalia, and the Democratic Republic of Congo.<sup>54</sup>

## CONTENT OF THE NEW DEAL

The New Deal created five broad peacebuilding and statebuilding goals for fragile states (PSGs), set out a series of principles for recipient-led planning (“FOCUS”), and outlined commitments for donor-recipient relationships (“TRUST”).<sup>55</sup> The five peacebuilding and statebuilding goals are: legitimate politics, security, justice, economic foundations, and revenue and services. The balance of these goals notably tilts toward assuring basic security and governance, more than the traditional aid/development goal of economic development; and justice is a core component. A set of common objective and subjective indicators tracks progress on the PSGs.<sup>56</sup> The FOCUS principles create mechanisms for fragile states to undertake planning, including a fragility assessment and a compact agreement with donors. They also propose guiding principles for the planning process, including developing a single plan for each country, consulting civil society in the planning process, and using the PSGs and associated indicators to measure progress. While the FOCUS principles primarily target recipient states, the TRUST principles apply primarily to international partners, requiring greater transparency, acceptance, and management of the inherent risks, increased focus on capacity development, and streamlined procedures for delivering and managing aid. For their part, fragile states agree to strengthen their systems and engage with international partners on the other components.<sup>57</sup>

Thus, substantively, the PSGs focus aid primarily on the issues of governance, security, and justice as issues that are fundamental for fragile and conflict-affected states to avoid further cycles of violence and to have the opportunity to pursue the development agenda. In doing so, the New Deal places the burden on development donors to engage with the obstacles discussed above to pursuing such governance goals in fragile states: the difficulties of measurement, the long-term nature of the aims, the risks associated with working in fragile states, enmeshment in politics, and so on.

The New Deal's process reforms embodied in the FOCUS and TRUST principles confront several of the core critiques of aid processes. The New Deal responds to the critique that aid should be more locally controlled by calling for recipient governments to set the strategy and the benchmarks for success. It both implements the call for greater empirical data by requiring use of indicators and ensures local input into defining the data by placing the development of indicators as a joint goal of recipient states and donor partners. In addition, it addresses the critique of lack of coordination by requiring the creation of a single governing compact between the recipient state and donors (states and organizations).<sup>58</sup>

Through these measures, the New Deal seeks to address the power dynamic between donor and recipient countries by claiming greater control for fragile states. It does so in two ways, by: 1) creating new ties and emphasizing common interests among fragile states and 2) asserting fragile states' control over each stage of the aid process. However, what remains to be seen is whether these shifts in the power dynamic between donor and recipient states can be accomplished in reality as well as on paper.<sup>59</sup>

#### SIGNIFICANCE OF THE NEW DEAL FOR TRANSITIONAL JUSTICE

Overall, these targeted changes in development priorities and processes have several implications for transitional justice. Fragile states have prioritized justice as one of their five key PSGs that will lead to their eventually achieving their development goals; two other PSGs are the closely related subjects of governance and security. Thus, rather than being on the periphery of aid, transitional justice is integrally related to three of five core goals.<sup>60</sup>

Donors also have recognized the importance of transitional justice to development. For example, in its influential 2011 *World Development Report*, the World Bank pointed to conflict as a key driver of disparities in achieving the MDGs: "The average cost of civil war is more than 30 years of GDP growth for a medium-size developing country . . . In other words, a major episode of violence can wipe out an entire generation of economic progress."<sup>61</sup> It also identified the trifecta of justice, security, and governance as key components for stabilizing conflict-prone states and enabling their economic development and specifically named transitional justice as one aspect of this work.<sup>62</sup>

While the centering of justice, governance, and security is a clear move toward transitional justice, the relevance of other elements of proposed fragile-state aid reforms is more context dependent. The call for local ownership of development projects and for bespoke initiatives tailored to local interests is familiar to transitional justice already. In particular, the principles for effective international intervention in fragile states and situations (which are preliminary to the New Deal) have as their number-one priority "taking context as the starting point," which comes down firmly on one side of the ongoing debate over the use of models as the starting point for rule-of-law work.<sup>63</sup> Local control implicates several central questions in the implementation of transitional justice. There is generally an acknowledged need for transitional justice to take procedural forms and provide types of redress that resonate with the concerned population. However, local control also raises concerns about the protection of defendants' and victims' rights, the risk that processes will be

hijacked by powerful actors, and choice of law between potentially conflicting international and national standards.

Another key critique has been that development aid has been too focused on accounting for inputs, rather than results. The New Deal's requirement that states create indicators to measure progress toward the PSGs reflects the trend of increasing use of indicators and other empiric measurements to assess results in development work. A set of interim common indicators developed in 2013 are meant to be voluntarily piloted and amended as needed, in conjunction with country-specific indicators developed by each fragile state as part of its individual New Deal process. The justice-related indicators focus on questions relating to public confidence in, access to, and performance of the judiciary as a whole. These aims are most directly promoted by rule of law initiatives, although they are meant to be indirectly promoted by accountability processes as well. In addition, each component, including justice, has only a few indicators; the justice indicators are not nearly as specific or wide ranging as the UN's rule of law indicators, for example.<sup>64</sup>

In addition, the New Deal calls for more recipient government control of the strategy for aid and its delivery; most transitional justice aid already goes either to recipient governments or to separately established tribunals and truth commissions. This practice runs against the grain of a recent US State Department-sponsored study calling for more transitional justice aid to go to civil society, rather than to governments.<sup>65</sup> On the one hand, the structure of the New Deal appears to allocate substantial control to recipient governments and therefore appears likely to result in aid going directly to those governments. On the other hand, the International Dialogue on Peacebuilding and Statebuilding also sponsors a Civil Society Platform for Peacebuilding and Statebuilding that is intended to provide crosscutting support for civil society in participating member states. The aim is to "ensure that the New Deal implementation includes civil society members and representatives as actors and agents, rather than recipients or evaluators, and that societies are broadly represented in nationally owned processes."<sup>66</sup> It is uncertain, however, to what extent this platform is operational and actual, rather than merely conceptual and aspirational.

Finally, at the broadest level, identifying fragile and conflict-affected states as a group with distinct dynamics and needs may encourage more donor participation in transitional justice within those states. Doing so frames the risks associated with such states as an inherent and accepted part of that aid environment. It also characterizes the need for governance, justice, and security

as a fundamental aspect of working in fragile states. As such, some of the obstacles discussed earlier that might discourage donors from participating in transitional justice are normalized as an inherent part of the commitment to these states.

However, while these proposed reforms have implications for transitional justice, at this point it appears that they are taking place primarily at the highest level of planning, with little infiltration into aid allocations so far. As of the end of 2015, of the fragile and conflict-affected states involved in the New Deal, an independent review found no evidence of shifts in aid priorities in Liberia, the Democratic Republic of Congo, Sierra Leone, or Afghanistan.<sup>67</sup> Even in Somalia, where aid planning has been aligned to the PSGs, actual development spending on the justice, security, and government PSGs remained relatively small in 2014–16 (16% of development aid spending, as compared to 68% for economic development and for revenue and services), although there were increases in spending on those PSGs.<sup>68</sup> Many countries are still engaging in preliminary steps, such as fragility assessments.<sup>69</sup> However, there is evidence that some national institutions are internalizing the PSGs; for example, the Ministries of Finance and Planning in Sierra Leone and Liberia are reportedly incorporating the PSG framework and principles of national ownership and mutual accountability into their planning.<sup>70</sup>

The New Deal faces several fundamental challenges to effective implementation. While donors and self-identified fragile countries alike have agreed that the recipient states should be taking the lead, this conceptual determination does not change the underlying power dynamic that is exactly the reverse. Another aspect of the paradigm that cannot be changed through intention alone is capabilities: As noted above, by definition, fragile states' governments are unable to effectively plan and execute ordinary functions. As such, these states will likely also find it difficult to effectively plan and execute a new aid strategy. Finally, some states' work toward adopting the New Deal framework has been interrupted by crises that are common to fragile and conflict-affected states, such as Ebola outbreaks and civil war.<sup>71</sup>

## GLOBAL FOCAL POINT

### CREATION AND ACTIVITIES OF THE GFP

In 2012 the UN established the Global Focal Point for Police, Justice, and Corrections in the Rule of Law in Post-Conflict and Other Crisis Situations (GFP) as a joint initiative of UNDP and DPKO.<sup>72</sup> It is meant to address the

problem of multiple UN entities working on rule-of-law issues in conflict-affected countries without sufficient coordination, in particular the overlap discussed above between rule-of-law work and peacekeeping activities where DPKO is active.<sup>73</sup>

The GFP creates an institutional structure for joint activities among DPKO, UNDP, and other UN entities conducting rule of law work. Its structure requires: 1) shared offices in headquarters and whenever possible in the field; 2) a joint work plan and financing for each initiative; and 3) a single response for each concerned state, with UNDP and DPKO jointly accountable for the response and coordinating with all relevant UN entities.<sup>74</sup> As with the other reforms, an open question remains the extent to which the GFP will result in change in the field or merely in reconfiguration or reconceptualization at the headquarters level. While the policy document creating GFP refers repeatedly to requests for assistance from the field as driving GFP's activities, the establishment of the GFP was a top-down enterprise of which many in the field were not even initially aware. In its first couple of years, the GFP engaged in a flurry of field mission visits, but only some of these have evolved into active projects.<sup>75</sup>

As of 2015, the GFP indicated it was engaged in 18 countries and identified its areas of activity as joint assessments and planning, fundraising, and training, as well as providing experts and facilitating international partnerships.<sup>76</sup> In its first few years, the GFP primarily engaged in initial meetings in target countries while addressing internal issues such as differences in employment policies and technical systems.<sup>77</sup> At least one of the GFP's early projects has focused on transitional justice: a program in Yemen that has sponsored national consultative processes on the draft Law on Transitional Justice and National Reconciliation and on transitional justice generally, as well as providing technical assistance to build the capacity of the Land and Dismissals Commissions and the Ministry of Legal Affairs to work on transitional justice matters.<sup>78</sup> In 2015, the GFP began several programs, including a joint special court and other joint projects in the Central African Republic and joint criminal justice reform projects in Mali. The GFP has also initiated a joint rule-of-law planning program in Somalia, where its efforts have been synergistic with the New Deal in encouraging collaboration and joint activities among international partners.<sup>79</sup>

#### RELEVANCE OF GFP FOR TRANSITIONAL JUSTICE

As with the New Deal, these reform efforts have direct conceptual implications for transitional justice, but what is uncertain is the extent to which they will



have tangible effects in the concerned states. The most fundamental purpose of the GFP is to streamline and harmonize UN engagement in justice programming in conflict-affected states. Like the New Deal, this arrangement centers on justice, and thus also on transitional justice, as a key component of the UN enterprise in these states. As such, it should create more space for transitional justice initiatives. The GFP also responds to conflict between UNDP and DPKO and seeks to foster cooperation between them on justice initiatives. In principle, this collaboration should improve not only the harmonized delivery of assistance at any one point in time but also the consistency of delivery over time, as the peacekeeping forces that may be the first to address transitional justice concerns are now more tightly connected to the development organization that may typically arrive on the scene later. It should also enable more effective use of expertise.

In addition, the GFP ought to enable development of shared norms and processes across peacekeeping and civilian enterprises for both transitional justice and related justice areas. For example, one area that is critical to transitional justice work and difficult to coordinate is UN knowledge of and tools for assessing rule of law. On the one hand, the GFP has developed a community of practice at headquarters with expertise in criminal justice reform that includes participants from DPKO, OHCHR, UNDP, UNODC, and UN Women. On the other hand, different UN entities use a wide range of disparate tools to assess rule-of-law status and guide rule-of-law programming, including a set of indicators, various toolkits, handbooks, and guidance documents.<sup>80</sup> Harmonizing these information sources and norms would be a massive, but worthwhile, undertaking.

## CONCLUSION

There are many obstacles to supporting transitional justice initiatives in fragile and conflict-affected states, including the controversial nature of transitional justice, the fact that justice has traditionally been tangential to development donors' core missions and goals, and the inherent difficulties of working in these states. Conflict-affected and fragile states pose contextual, programmatic, and institutional risks for donors; of these, the political risks associated with transitional justice mechanisms are particularly high. In addition, it is difficult to measure the effectiveness of transitional justice initiatives, because transitional justice's goals can be achieved only over the long term and because the characteristics that mark progress toward those goals tend to be subjective and

qualitative rather than objective and quantitative. Finally, development organizations often must cooperate with peacekeeping forces that are increasingly undertaking rule-of-law work in the regions under their oversight. Particularly for institutions like development donors that have broad mandates to improve living conditions generally, these complications can discourage engagement in transitional justice programming in favor of other areas.

Nonetheless, in spite of these difficulties, security and human-welfare concerns impel donors to provide assistance to fragile and conflict-affected states. Furthermore, the international community is increasingly recognizing the importance of justice, including transitional justice, to the recovery of such states.<sup>81</sup> Several factors affect donors' decisions about whether to engage in transitional justice work, including their missions, the stage of the transition, and whether the concerned state is calling for transitional justice processes, as well as the preferences of individual decision-makers within the organization. These factors also influence how donors characterize their justice-related programs. Because the justice arena comprises several complementary goals with substantially overlapping agendas, development donors may end up supporting what amount to transitional justice activities under the auspices of human rights, capacity-building, or other, less divisive aims. This dynamic can also enable donors to tie transitional justice activities more directly to their missions and thus more readily justify their support.

In addition, recent reforms in the development sphere are nudging donors toward greater investment in justice. The New Deal Framework for Fragile States emphasizes the importance of statebuilding processes like developing functioning legal systems as a prerequisite for economic development. It also highlights the interrelated nature of governance, security, and justice in conflict-affected states and calls for a focus on justice as a means to security. In addition to its substantive content, the New Deal legitimizes engaging in fragile and conflict-affected states in spite of the risks. In addition, the Global Focal Point initiative acknowledges the overlap on the ground between peacekeeping and rule-of-law activities and attempts to create an institutional framework for joint development-peacekeeping work. Lessons learned from the Global Focal Point experience should be useful for future coordination efforts between civilian rule-of-law actors and peacekeeping or other military forces.

The New Deal reforms offer actors who are interested in transitional justice a framework in which to promote transitional justice aims and a series of processes in which to do so. The security, governance, and justice PSGs provide three interrelated categories for government and civil society actors

in fragile and conflict-affected states to incorporate transitional justice concerns into aid plans. They can do so at multiple stages of the New Deal process: while conducting an initial fragility assessment, negotiating a Compact, developing indicators or milestones, and so on. Since each step in the process builds on the previous one, the earlier transitional justice goals are integrated, the more readily activities promoting those goals can be pursued at later stages. For example, the fragility assessment, which is often the first step is intended to “assess a country’s causes, features and drivers of fragility as well as the sources of resilience with the country” by “bringing out and reflecting the views of national stakeholders.”<sup>82</sup> In states with a history of severe human rights abuses, the causes of fragility probably include those human rights violations and the attendant consequences. Including these in the fragility assessment makes these violations and their legacy part of the baseline that is to be improved by future aid projects. As such, including consideration of this issue in the fragility assessment means it should be taken into account in future planning and programming under the New Deal. In addition, because the fragility assessment is expressly intended to engage many stakeholders who are representative of the entire society, it provides an opportunity for civil society actors and ordinary citizens, as well as government actors, to share any transitional justice-related concerns at this foundational stage of the process.

Similarly, international actors interested in promoting transitional justice can support national efforts to raise transitional justice concerns in New Deal processes by partnering with national actors who share these concerns. For example, in the fragility assessment process, international actors could ensure that the civil society groups concerned with transitional justice are aware of the opportunity to participate and are enabled to do so. They can assist with technical aspects of the process, such as collecting data or developing the indicators for assessing improvements in fragility that are one of the intended outcomes of the fragility assessment.<sup>83</sup> Of course, the fragility assessment is just one stage. There are also opportunities for incorporating transitional justice principles and for partnerships between international and national actors at later stages of the process.

More broadly, transitional justice supporters can leverage the New Deal’s core principles to facilitate development donors’ support for transitional justice. One of the identified obstacles to engaging in transitional justice is the inherent difficulty and risk of working in fragile and conflict-affected states. For development organizations that have committed to the New Deal framework, these risks and difficulties should now be accepted as part of that

commitment. Similarly, both the New Deal and the preceding World Bank report on fragile states emphasize the importance of justice and conflict reduction to development in fragile states, providing a link to transitional justice programming.

Transitional justice actors can also facilitate development donors' investment in transitional justice by enabling them to do so on their own terms. Development organizations have a strong interest in evidence-based programming and indicators. By sponsoring studies of the factors determining effectiveness of transitional justice programs and working on careful development of indicators, transitional justice supporters could provide evidence to serve as a basis for justifying transitional justice programming and measures for assessing the need for results of such programming. On a more conceptual level, transitional justice advocates can find areas of overlap with other frameworks like capacity-building and good governance that are more closely tied to development organization's missions and expertise and advocate transitional justice programs through those alternative frameworks. In light of the importance of development organizations' funding for transitional justice aims, it is worth understanding and facilitating the factors that promote their participation in the transitional justice project.

## NOTES

- 1 The development community's various definitions of what constitutes a "fragile" state or situation center predominantly on the inability of the state to govern, provide services, ensure security, or represent citizens' interests, due to lack of legitimacy, capacity, or authority. Francis Stewart and Graham Brown, "Fragile States," CRISE Working Paper No. 51, Center for Research on Inequality, Human Security and Ethnicity (January 2009), 1–5 (reviewing definitions from the UK Department for International Development (DFID), the Organization for Economic Co-operation and Development (OECD), USAID, the Canadian International Development Agency (CIDA), and the World Bank), <http://r4d.dfid.gov.uk/PDF/Outputs/Inequality/wp51.pdf>; World Bank and African Development Bank, "Providing Budget Aid in Situations of Fragility: A World Bank-African Development Bank Common Approach Paper," World Bank, Washington D.C., 2011, 6.
- 2 Johanna Herman, Olga Martin-Ortega, and Chandra Lekha Sriram, "Beyond Justice versus Peace: Transitional Justice and Peace building Strategies," in *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans*, ed. Karin Aggestam and Annika Bjorkdahl (New York: Routledge, 2013).

- 3 E.g., Martina Fischer, "Transitional Justice: Theory and Practice," in *Advancing Conflict Transformation, The Berghof Handbook II*, ed. Beatrix Austin, Martina Fischer, and Hans J. Giessmann (Opladen/Framington Hills: Barbara Budrich Publisher, 2011), [www.berghof-handbook.net](http://www.berghof-handbook.net).
- 4 "What is Transitional Justice?," International Center for Transitional Justice, <https://www.ictj.org/about/transitional-justice>.
- 5 Ibid.
- 6 Paige Arthur and Christalla Yakinthou, "Funding Transitional Justice: A Guide for Supporting Civil Society Engagement," Public Action Research (2015), 1 (noting that there are multiple ways to refer to transitional justice processes, and the term "transitional justice" is not always used).
- 7 At the other end of the spectrum, at some point a country has transitioned to the extent that work on rule-of-law initiatives is no longer in service of a transition, but rather is merely the ordinary process of strengthening a functional judicial system. Because this chapter takes as its set of relevant cases fragile and conflict-affected states, it does not grapple with this question. But for other states that are further along in the transition process, this question might arise.
- 8 Marc Jacquard and Shelley Ranii, "UN Development Risk Management Systems in Fragile States," New York University Center on International Cooperation (May 2014), 7, 9, [http://cic.nyu.edu/sites/default/files/un\\_dev\\_risk\\_mgmt\\_ranii\\_jacquard\\_1.pdf](http://cic.nyu.edu/sites/default/files/un_dev_risk_mgmt_ranii_jacquard_1.pdf), citing OECD-INCAF, "Managing Risks in Fragile and Transitional Contexts: The Price of Success?" (2011).
- 9 Ibid.
- 10 Stewart and Brown, "Fragile States," 1–5 (reviewing definitions from DFID, OECD, USAID, CIDA and the World Bank).
- 11 Arthur and Yakinthou, 6–7.
- 12 Ibid, 7.
- 13 World Bank and African Development Bank, 18; *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools*, 1st ed. (United Nations, 2011), 13 ("conducting empirical research in this kind of environment is inherently difficult.").
- 14 World Bank and African Development Bank, 15–18.
- 15 E.g., Kora Andrieu, "Confronting the Dictatorial Past in Tunisia: The Politicization of Transitional Justice," Justice Info (August 31, 2015), <http://www.justiceinfo.net/en/research/1818-confronting-the-dictatorial-past-in-tunisia-the-politicization-of-transitional-justice.html>; Alana Tiemessen, "Defying Gravity: Seeking Political Balance in ICC Prosecutions," Justice in Conflict (April 22, 2013), <http://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/>.
- 16 E.g., *United Nations Development Program Annual Report for Somalia: A New Deal for Somalia*

- (UNDP, 2013) (supporting programs to train judges and attorneys, support mobile courts, and monitor sexual/gender-based crimes).
- 17 Thomas Carothers, *Promoting the Rule of Law Abroad* (Washington, DC: Carnegie Endowment for International Peace, 2006); Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington, DC: Carnegie Endowment for International Peace 2012).
  - 18 Arthur and Yakinthou, 12.
  - 19 Paige Arthur, "Notes from the Field: Global Indicators for Transitional Justice and Challenges in Measurement for Policy Actors," *Transitional Justice Review* 1, no. 4 (2016): 288–289, <http://ir.lib.uwo.ca/tjreview/vol1/iss4/9/>
  - 20 However, new studies attempt to empirically determine the effectiveness of various transitional justice mechanisms and may provide evidence to support particular interventions or to determine appropriate indicators. Timothy Williams and Mariam Salehi, "Beyond Peace vs. Justice: Assessing Transitional Justice's Impact on Enduring Peace Using Qualitative Comparative Analysis," *Transitional Justice Review* (forthcoming), <https://ssrn.com/abstract=2748581>
  - 21 The United Nations has produced a set of indicators for rule-of-law work and a detailed set of guidelines for gathering the data for them. In so doing, it has acknowledged the difficulty of obtaining such data in post-conflict settings. *United Nations Rule of Law Indicators: Implementation Guide and Project Tools*.
  - 22 Arthur.
  - 23 William J. Durch et al., "Independent Progress Review on the UN Global Focal Point for Police Justice and Corrections," Folke Bernadotte Academy, Clingendael Institute, and Stimson Center (June 2014), 14 (tracing increasing peacekeeper involvement in rule of law, first in police training and then more broadly).
  - 24 *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates* (Charlottesville, VA: The Judge Advocate General's Legal Center and School, U.S. Army Center for Law and Military Operations, 2015), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/rule-of-law\\_2011.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf)
  - 25 Jenny Whalen, *How Peace Operations Work: Power Legitimacy and Effectiveness* (Oxford University Press 2013), 153.
  - 26 Cedric de Coning et al, "Turning to the South: Civilian Capacity in the Aftermath of Conflict," *Global Governance* 19 (2013): 135–152, at 135, [http://www.academia.edu/5107666/Turning\\_to\\_the\\_South\\_Civilian\\_Capacity\\_in\\_the\\_Aftermath\\_of\\_Conflict](http://www.academia.edu/5107666/Turning_to_the_South_Civilian_Capacity_in_the_Aftermath_of_Conflict).
  - 27 African Union Mission in Somalia, AMISOM mandate, <http://amisom-au.org/amisom-mandate>. AMISOM's role is complicated by reports that it has committed human rights violations itself. Human Rights Watch, "The Power These Men Have Over Us: Sexual Exploitation and Abuse by African Union Forces" (September 8, 2014), <https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces>
  - 28 Ibid (citing a Decision of the November 7, 2006 meeting of the Secretary-General's Policy

- Committee, issued November 24.)
- 29 DPKO's Office of the Rule of Law and Security Institutions has managed this work, which includes the Criminal Law Justice and Advisory Service, among other divisions. Office of Rule of Law and Security Institutions, <http://www.un.org/en/peacekeeping/sites/police/orolsi.shtml>.
  - 30 Durch et al., 16–18, 24.
  - 31 World Bank, 2011 *World Development Report: Conflict Security and Development* (Washington, DC: World Bank, 2011), [http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011\\_Full\\_Text.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf).
  - 32 UNDP, "Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: A UNDP Global Programme for Justice and Security, Phase II: 2012-15," 6, <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/rule-of-law-global-programme-phase-ii.html>.
  - 33 UNDP, "Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: A UNDP Global Programme for Justice and Security, 2008-11," 9.
  - 34 UNDP, "Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: A UNDP Global Programme for Justice and Security, Phase II: 2012-15," 21.
  - 35 Center for Justice and Accountability, *Transitional Justice in Somaliland: Exhuming Mass Graves*, [cja.org/what-we-do/transitional-justice/Somaliland](http://cja.org/what-we-do/transitional-justice/Somaliland).
  - 36 See, for example, UNDP, "New Deal Implementation Support Facility, 2015 Annual Report" (2016), 1 (supporting rule-of-law programming in justice and policing in Somalia and describing its work as a "human rights approach"); Human Rights Watch, "Report: The Courts of 'Absolute Power': Fair Trial Violations by Somalia's Military Court" (May 21, 2014), <https://www.hrw.org/report/2014/05/21/courts-absolute-power/fair-trial-violations-somalias-military-court>
  - 37 Directorate General for External Policies, Policy Department, EU Parliament, "EU Development Cooperation in Fragile States: Challenges and Opportunities," EXPO/B/DEVE/FWC/2009-01/Lot5/35 (April 2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433724/EXPO-DEVE\\_ET\(2013\)433724\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433724/EXPO-DEVE_ET(2013)433724_EN.pdf). Original source: Sarah Bailey and Sara Pavanello, "Untangling Early Recovery," Humanitarian Policy Group Policy Brief 28, Overseas Development Institute, London, 2009.
  - 38 Of course, whether accountability measures are effective in achieving a measure of deterrence is debated.
  - 39 World Bank, 5–7.
  - 40 Resource Note: Sector Planning for Police, Justice and Corrections in Post-Crisis and Transition Situations, United Nations Global Focal Point for the Police, Justice and Corrections Areas in the Rule of Law in Post-conflict and other Crisis Situations, Civilian Capacities Initiative (July 1, 2014), 5.
  - 41 Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*

- (New York: Routledge 2013), 2.
- 42 Lisa Elejöv and Richard Zajac Sannerholm, "The UN Global Focal Point for Police, Justice and Corrections is at the Crossroads," FBA Brief, Folke Bernadotte Academy (May, 2015); Durch et al., 20.
  - 43 Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks," *Boston College Law Review* 50, no. 1 (2009).
  - 44 A first monitoring report from the Global Network on Aid Effectiveness characterizes the desired end of the Busan Agreement as a paradigm shift, and this characterization seems apropos for this enterprise as a whole.
  - 45 It should be understood, however, that many of these critiques have also been issued by other people and institutions with varying perspectives, including practitioners, analysts, and scholars; as such, they do not function solely or even primarily as a self-critique or reform process that is internal to the development community, even though the sources I focus on here could be characterized that way.
  - 46 The Millennium Development Goals (MDGs) are a set of targets adopted by the UN in 2000 for the international community, like eradicating extreme poverty and hunger by 2015 and achieving universal primary education. United Nations, Millennium Goals, <http://www.un.org/millenniumgoals/>. The MDGs have now been superseded by the Sustainable Development Goals (SDGs), which comprise 17 goals that are much broader than the MDGs, encompassing all the MDGs and going far beyond them. United Nations, Sustainable Development Goals, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/#>
  - 47 UNDP, "Workshop Report: UNDP Engagement with the New Deal: Taking Stock and Accelerating Implementation" (July 1-2, 2015), 3, [http://www.g7plus.org/sites/default/files/basic-page-downloads/New-Deal-Workshop-Addis-1\\_2July2015-Summary-Report.pdf](http://www.g7plus.org/sites/default/files/basic-page-downloads/New-Deal-Workshop-Addis-1_2July2015-Summary-Report.pdf); Third High Level Forum on Aid Effectiveness, OECD, <http://www.oecd.org/dac/effectiveness/theaccrahighlevelforumhlf3andtheaccraagendaforaction.htm>; Fourth High Level Forum on Aid Effectiveness, OECD, <http://www.oecd.org/dac/effectiveness/fourthhigh-levelforumonaideffectiveness.htm>.
  - 48 These included the International Conference on Financing in Development in Monterrey in 2002 (which produced the Monterrey Consensus), the Rome High Level Forum on Harmonization in 2003, the Second High Level Forum on Aid Effectiveness in Paris in 2005 (which produced the Paris Declaration), and the Third High Level Forum on Aid Effectiveness in 2008 (which produced the Accra Agenda). The High Level Forums on Aid Effectiveness are sponsored by OECD DAC, and the OECD Working Party on Aid Effectiveness played a monitoring role until the Global Partnership for Effective Aid Cooperation took over this function in 2012. The Principles for Good International Engagement in Fragile States and Situations ("Fragile States Principles" or FSPs) were drafted at a 2005 meeting; they encapsulated some of the core concepts that pervade later documents, such



as “tak[ing] context as the starting point” and “focus[ing] on statebuilding as the central objective.”

- 49 The Paris Declaration specifies that partner countries should take the lead in creating strategies and indicators for development (ownership), donor countries should base their aid and conditions on those strategies (alignment), donor countries should collaborate on complementary programs (harmonization), and partner and donor countries should focus on results and adopt mechanisms for measuring results (results) and improve information flow as well as jointly assess aid success (mutual accountability). Paris Declaration on Aid Effectiveness (2005).
- 50 The IDPS comprises the governments of relevant fragile countries and their international partners, including donor states, development banks, the EU, UN, and the African Union. Participating Countries and Organizations, International Dialogue on Peacebuilding and Statebuilding, <http://www.pbsbdialogue.org/en/new-deal/endorsing-countries/>; International Dialogue on Peacebuilding and Statebuilding, The International Dialogue at a Glance, [http://www.pbsbdialogue.org/media/filer\\_public/d1/80/d1804e80-908e-43e1-8c77-3fc7557397dd/id\\_at\\_a\\_glance.pdf](http://www.pbsbdialogue.org/media/filer_public/d1/80/d1804e80-908e-43e1-8c77-3fc7557397dd/id_at_a_glance.pdf).
- 51 g7+ statement (2010), <http://www.g7plus.org/en/resources/g7-statement-dili-10-april-2010>. The broader IDPS group then recognized and formally established the g7+ in the Dili Declaration, which builds on the g7+ statement. Dili Declaration (2010), <http://www.oecd.org/dac/gender-development/45250308.pdf>.
- 52 g7+ statement. The broader IDPS group then recognized and formally established the g7+ in the Dili Declaration, which builds on the g7+ statement. Dili Declaration.
- 53 Busan Partnership for Effective Development Cooperation, 4th High Level Forum on Aid Effectiveness (2011), 8 (“We welcome the New Deal developed by the International Dialogue on Peacebuilding and Statebuilding, including the g7+ group of fragile and conflict-affected states.”). The New Deal rests on the consensus built through this evolutionary series of meetings, particularly on the Paris Declaration on Aid Effectiveness’s five pillars of ownership, alignment, harmonization, results, and mutual accountability, and on the Principles for Good International Engagement in Fragile States and Situations, which include a focus on statebuilding and on an integrated strategy for security and political and economic development. Paris Declaration on Aid Effectiveness (2005), <http://www.oecd.org/dac/effectiveness/34428351.pdf>; Principles for Good International Engagement in Fragile States and Situations (April 2007), <http://www.oecd.org/dac/fragilestates/43463433.pdf>.
- 54 New Deal Implementation—Country Level Progress, International Dialogue on Peacebuilding and Statebuilding, <http://www.pbsbdialogue.org/en/new-deal/implementation-progress/>. In addition, the g7+ group has expanded to a set of 20 countries self-identified as fragile Member Countries, g7+, <http://www.g7plus.org/en/who-were-are/member-countries>.

- 55 Monrovia Roadmap (2011), <http://www.icnl.org/research/library/files/Transnational/monrovia.pdf>. It is referred to as a “new aid deal.” The Fourth High Level Forum on Aid Effectiveness in 2011 also produced the Busan Partnership for Effective Development and established the Global Partnership for Effective Aid Cooperation, which monitors progress through indicators and issues monitoring reports.
- 56 International Dialogue on Peacebuilding and Statebuilding, *A New Deal for Engaging in Fragile States*, [http://www.pbsbdialogue.org/media/filer\\_public/07/69/07692de0-3557-494e-918e-18dfooe9ef73/the\\_new\\_deal.pdf](http://www.pbsbdialogue.org/media/filer_public/07/69/07692de0-3557-494e-918e-18dfooe9ef73/the_new_deal.pdf); Julia Shu, “Time for a ‘New Deal’: The G7+ as an Emerging Voice for Fragile States,” *Stimson Center* (May 2, 2013), <http://www.stimson.org/spotlight/time-for-a-new-deal-the-g7-as-an-emerging-voice-for-fragile-states/>.
- 57 International Dialogue on Peacebuilding and Statebuilding, *A New Deal for Engaging in Fragile States*.
- 58 Ibid; UNDP, “Workshop Report: UNDP Engagement with the New Deal: Taking Stock and Accelerating Implementation,” 4–5 (July 1–2, 2015), [http://www.g7plus.org/sites/default/files/basic-page-downloads/New-Deal-Workshop-Addis-1\\_2July2015-Summary-Report.pdf](http://www.g7plus.org/sites/default/files/basic-page-downloads/New-Deal-Workshop-Addis-1_2July2015-Summary-Report.pdf).
- 59 One commentator has pointed to the South-South relationships that constitute the G7+ membership as being at the core of the New Deal. In her view, these relationships are a source of legitimacy for the New Deal and also a source of mutual support and compliance assurance based in the states’ desire to maintain those relationships and in a mutual understanding stemming from their common experiences and situations. This is in contrast to donor-recipient relationships, which are characterized by an inherent power imbalance and by disparate experiences and situations. Shu.
- 60 World Bank.
- 61 Ibid, 5–6.
- 62 Ibid.
- 63 Kleinfeld.
- 64 International Dialogue on Peacebuilding and Statebuilding, “Peacebuilding and Statebuilding Indicators—Progress, Interim List and Next Steps, Document 03 - For Discussion,” Third International Dialogue Global Meeting (April 19, 2013), 4–5 and 12–14; *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools*.
- 65 Arthur and Yakinthou.
- 66 Amplifying the Voice of Civil Society in New Deal Processes: Civil Society Platform for Peacebuilding and Statebuilding, International Dialogue on Peacebuilding and Statebuilding, [http://www.pbsbdialogue.org/media/filer\\_public/9a/74/9a74927f-ab48-47d1-bea5-7469e1625d99/cspps\\_brochure.pdf](http://www.pbsbdialogue.org/media/filer_public/9a/74/9a74927f-ab48-47d1-bea5-7469e1625d99/cspps_brochure.pdf).
- 67 Sarah Hearn, “Independent Review of the New Deal for Engagement in Fragile States,” *NYU Centre on International Cooperation* (2016), 30–31.
- 68 The remaining amount went to crosscutting projects and capacity development. Also,

there were increases in spending on security, justice, and governance between 2014 and 2016, from 12% of the budget in 2014 to 18% in 2016. [www.usaid.gov/documents/1860/strengthening-somali-governance-1](http://www.usaid.gov/documents/1860/strengthening-somali-governance-1)

69 For example, Afghanistan was conducting its fragility assessment in 2015, and the Democratic Republic of Congo had stalled in its process at the point of integrating its New Deal planning with its national planning. UNDP, “New Deal Implementation Support Facility: 2015 Annual Report” (2016), 6 and 8.

70 Hearn.

71 UNDP, “New Deal Implementation Support Facility: 2015 Annual Report,” 1. However, the Ebola crisis also may have promoted more rapid national implementation of the PSGs in the health context. Hearn, 36.

72 United Nations, Policy Committee Decision 2012/13 (September 11, 2012), <http://www.ref-world.org/pdfid/52ca7a2f4.pdf>

73 Elejöv and Sannerholm; Durch et al., 20.

74 The GFP applies to “PKOs [peacekeeping operations], SPMs [special political missions] and priority nonmission conflict-affected countries.” United Nations, Policy Committee Decision 2012/13. Insufficient collaboration between international partners was also raised in the fragile states context above and is a ubiquitous concern across rule of law, aid, and transitional justice contexts.

75 Ibid; Elejöv and Sannerholm; Durch et al., 21–23, 33–36.

76 Global Focal Point Police Justice and Corrections Fact Sheet, United Nations Peacekeeping and UNDP (July 2015).

77 Elejöv and Sannerholm; Durch et al.

78 Elejöv and Sannerholm; “Support to the Implementation of Transitional Justice in Yemen: What is the Project About,” UNDP, [www.ye.undp.org/content/yemen/en/home/operations/projects/democratic\\_governance/support-to-the-implementation-of-transitional-justice-in-yemen.html](http://www.ye.undp.org/content/yemen/en/home/operations/projects/democratic_governance/support-to-the-implementation-of-transitional-justice-in-yemen.html)

79 United Nations, Policy Committee Decision 2012/13, 3; Elejöv and Sannerholm.

80 United Nations, Policy Committee Decision 2012/13, 3; Elejöv and Sannerholm.

81 UNDP, “Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: A UNDP Global Programme for Justice and Security, Phase II: 2012–15,” 6; World Bank; Directorate General for External Policies, Policy Department, EU Parliament; World Bank and African Development Bank.

82 International Dialogue on Peace building and State building, “Guidance Note on Fragility Assessment,” document 04, 1 (May 2014), [http://www.pbsbdialogue.org/media/filer\\_public/96/fb/96fb5ae4-7bod-4007-bf9e-1ed869db21da/rd\\_4\\_fragility\\_assessment\\_guidance\\_note\\_final.pdf](http://www.pbsbdialogue.org/media/filer_public/96/fb/96fb5ae4-7bod-4007-bf9e-1ed869db21da/rd_4_fragility_assessment_guidance_note_final.pdf).

83 Ibid, 5.





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The contexts in which societies attempt to address legacies of serious and massive human rights violations are integral to the concept of transitional justice. Such contexts vary widely: they can include ongoing conflicts, post-authoritarian transitions, post-conflict transitions, and post-transitional periods. They can also differ in terms of institutional and political fragility as well as levels of economic and social development. Transitional justice efforts, however, have sometimes been criticized as a toolkit to be applied uniformly wherever widespread human rights violations have occurred. Policymakers and practitioners are therefore called on to take context into greater consideration when advocating and designing transitional justice processes. To assist them, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* examines some of the main contextual factors that have implications for responding to massive human rights violations: the institutional context, the nature of conflict and violence, the political context, and economic and social structural problems. It presents the findings of an ICTJ research project on the challenges and opportunities of seeking accountability, acknowledgment, and reform in different—and difficult—settings.

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