



Research Report

Transitional Justice Practice: Looking Back, Moving Forward

Scoping Study
May 2016

impunity 
watch

Research Report

Transitional Justice Practice:
Looking Back, Moving
Forward

Scoping Study

impunity 
watch

Research Report

Transitional Justice Practice: Looking Back, Moving Forward

Scoping Study
May 2016

Author

Dr. Vasuki Nesiah

Acknowledgements

Impunity Watch would like to thank Vasuki Nesiah, the author of this study, for her commitment and dedication to this project. We are grateful to the Dutch Ministry of Foreign Affairs for their support to the project. Megan O’Riordan and Ralph Sprenkels provided editorial support for this publication.

On her part, Vasuki Nesiah would like to share the following acknowledgements: there are many people who gave detailed and generous comments at different stages of this paper’s development, including Marlies Stappers, Marieke Wierda, Ralph Sprenkels, Brandon Hamber, Mónica Mazariegos, David Taylor, Ruben Carranza, Megan O’Riordan, Sanne Schotting and participants at the conference “Making Transitional Justice Work” that was co-convened by Impunity Watch, the Dutch Ministry of Foreign Affairs and IDLO at The Hague on the 26-27 November 2015. My thanks to Margaretha Bakker for all the arrangements with that conference and this project more generally. Particular thanks to Ralph Sprenkels for his patience through the iterative editing process and for the many conversations in person, on email and via Skype that helped shape this paper. I worked as a ‘practitioner’ in the field of human rights law and policy for several years; however, for almost a decade now, I have found my primary institutional home in academia and much of my scholarship is directed towards other scholars and students. Thus I particularly appreciated the challenge of code switching to re-enter a conversation with practitioners in the transitional justice field, and to grapple with the different ways in which agendas, priorities and discourses get defined in these different institutional spaces. My thanks to Marlies Stappers and Marieke Wierda for the opportunity presented by this challenge.

Cover Photo: Guatemala, excavation - by Piet den Blanken for Impunity Watch

©Impunity Watch 2016



Table of Contents

Table of Contents	4
Introduction	5
1. Background: Historical Development of Transitional Justice	6
2. Role of International Actors	13
2.1 Initiation of Transitional Justice Mechanisms.....	13
2.2 Mandated Institutional Authority in Hybrid Mechanisms	14
2.3 Funding and Other Measures of Material Support.....	15
2.4 Technical Assistance and Capacity Building.....	16
2.5 Engagement through Related Policy Fields/ Interventions	16
2.6 Cooperation, Collaboration and Solidarity	17
3. Defining Success: Dominant Approaches and Recurrent Challenges	19
3.1 Institutional Goals.....	19
3.2 Impact on Particular Communities	20
3.3 Changes in the Enabling Conditions of Human Rights Abuse	21
4. Heterodox Traditions for Revitalization	24
4.1 Complexity of the Category of Victims	24
4.2 Redefining a ‘Holistic’ Approach	26
4.3 An Ethos of Experimentation	28
4.4 The Politics of Transnational Solidarity.....	30
5. Rethinking Dominant Approaches	32
5.1 Political Dimensions of Challenging Impunity.....	32
5.2 Structural Factors Enabling and Shaping Human Rights Abuse	35
5.3 Transnational Dimensions of Accountability	39
5.4 Civil Society Leadership of Transitional Justice Initiatives	43
5.5 Locally Relevant Approaches to Monitoring and Evaluation.....	45
6. Conclusions	49



Introduction

"We do not want to punish Dyer. We want to change the system that produced Dyer"
-Mahatma Gandhi
Re. Accountability for the Amritsar Massacre and the Goals of the Freedom Struggle

Over the last decades the field of transitional justice has consolidated and gained recognition within the international human rights community, the UN, and agencies focussed on dealing with the past, human rights abuses, and its legacies. Despite the rise in the field's popularity, there are also many questions raised about its legitimacy and effectiveness. Engaging with this paradox, this review seeks to study how transitional justice practice might 'look back and move forward'.¹

This study concludes that this crisis of legitimacy and effectiveness is due to the failure to open up the hierarchies of power to accountability. This exacerbates social justice concerns, which are central to transitional justice. Long term legitimacy and effectiveness has too often been compromised because transitional justice processes left the structures of impunity intact. In part, this has occurred because the field has operated as if it were a sphere of technical engagement rather than a political intervention grappling with contextual imperatives. For instance, challenging impunity has often been equated with individualized criminal prosecutions, rather than efforts to contest the abuse of power enabled by structural injustice.

The field has not always been technocratic and avowedly apolitical. Moreover, the historical record indicates that the transitional justice engagements that have been most powerful in contesting structures of impunity have been heterodox, innovative, and strategic in their engagement with a given context. Social movements and organizations aware of the opportunities and constraints of the political landscape can do more to advance accountability and social change. It is not surprising then that initiatives have been most effective and their impact most sustainable when these struggles emerged from local social movements, and actors embedded in social movements and victims communities took on leading roles.

International support and solidarity has been most effective in conjunction with such initiatives. In the best cases, the space that has opened up to combat structures of impunity has proved dynamic and has required continued strategic political analysis to continuously calibrate and assess the challenges and opportunities of the context. The relationship between (domestic and international) structures of power and patterns of human rights abuse can be complex. National and transnational hierarchies of political, economic and military interests tend to be deeply entrenched. Those struggling against injustice have to analyse the political landscape for where they might find the thin edge of the wedge to pry open the door, so that the effort to advance transitional justice can contribute effectively to undermine the dominant structure and open up space for alternative futures.

¹ "Looking back, Moving Forward" is a familiar phrase in the transitional justice literature and is often employed to describe the vision, challenge and task of communities grappling with legacies of human rights abuse. This study takes that basic precept to the transitional justice field itself and seeks to have the field look back in order to move forward.



1. Background: Historical Development of Transitional Justice

The last two and half decades have seen the transitional justice field grow exponentially on many fronts – from legal and policy developments, to increased financial and institutional investment, to an expanded network of activists/practitioners/scholars working in the field. Most significantly this period has seen the development and maturation of transitional justice mechanisms such as truth commissions and reparation programmes. This growth has been accompanied by its consolidation and institutionalisation within the UN, regional organizations (including the EU and AU), multilateral and donor agencies, government departments, INGOs, NGOs and many other arenas.

The history of the contemporary transitional justice field can be categorised into four phases of development.² The Nuremberg (1945) and Tokyo (1946) tribunals in the aftermath of World War II can be seen as an inaugural moment, with the field slowly evolving over the subsequent decade. The 1961 Eichmann trial for instance, was intended as improvement on the Nuremberg record by foregrounding victims' experience of human rights abuse.



The defendants in the dock listen to the proceedings at the International Military Tribunal trial of war criminals at Nuremberg. —US Holocaust Memorial Museum, courtesy of John W. Mosenthal

The 1975 trials of the Greek military junta contributed to the development of national prosecutions of former heads of state for human rights abuses. Solidarity movements linking human rights and social justice activists in Central America and the United States sought novel avenues for accountability. The innovative use of the Alien Tort Claims Act (ATCA) to pursue redress for human rights abuses in Paraguay in American courts in the 1979 case *Filártiga v. Peña-Irala*³ is an example of this. In the following decades

² Thinking of transitional justice in terms of these phases allows us to highlight broad trends that characterize different moments in the field's development, but it should be noted that these are not iron clad or natural divisions.

³ Centre for Constitutional Rights, *Filártiga v. Peña-Irala* (1979), available at: <https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala> [accessed 7 February 2016].

this would open the doors to a range of cases allowing foreign victims of human rights abuses to seek remedies in US courts. It did not matter whether these were against government officials such as the Bosnian-Serb Karadžić, or corporate actors such as the oil company Unocal for its activities in Burma.⁴ In Brazil and elsewhere, activists collected testimonials regarding peoples' experiences under the military dictatorship; these practices would soon birth official truth commissions across the Southern Cone. At this point, the field had yet to consolidate and, perhaps for that reason, it remained relatively heterogeneous and experimental.⁵

The 1983 National Commission on the Disappearance of Persons (CONADEP) in Argentina is often seen as the first official truth commission - a historical landmark inaugurating the second phase of the field of transitional justice. CONADEP produced the bestselling report *Nunca Mas*, and showed how a truth commission process can complement and contribute to justice processes.⁶ Subsequently, in South Africa the truth-for-amnesty model envisioned prosecutions and truth commission processes as co-travellers, carrots and sticks that work in tandem to advance justice. Arguably the truth commission may have functioned in fact as a substitute for prosecutions but the original vision set the stage for further institutional experimentation. The end of the Cold War may have been the most pivotal historical development on the global terrain that shaped this second phase. The fall of the Berlin wall was followed by the rapid expansion of the subfield of transitional justice across the globe. Two international tribunals and over half a dozen truth commissions (including Chile, El Salvador, Guatemala, South Africa, Haiti and Sri Lanka) were established in the '90s. Most of these also led to reparations programmes for victims of human rights abuses. While these processes had varied impact, collectively they signalled the potential of transitional justice institutions in addressing the priorities of victimized populations and human rights activists in challenging political contexts. In some of these cases, transitional justice institutions were able to clarify individual cases while also revealing important dimensions of the overall architecture of abuse. In the case of the tribunals, this helped build the case for the prosecution of those with superior responsibility. In Chile and Guatemala for instance, where immediate prosecutions were not politically feasible, transitional justice helped establish the record in a timely manner and gather evidence that would be pivotal for prosecution efforts that followed many years later. Many of the truth commissions (including Sri Lanka, Chile and South Africa) also led to reparations - often reparations that were vastly inadequate but nevertheless served some ameliorative purpose for victim families.

In South Africa, the public hearings of the truth commission process conveyed the enormous political reach of open discussion and official acknowledgement of victim narratives in navigating a complex

⁴ Centre for Constitutional Rights, *Corporate Human Rights Abuse*, available at: <https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses> [accessed 7 February 2016].

⁵ Indeed, as Ruben Carranza notes [Email to Author 2/4/2016], even the term 'transitional justice' was not in common parlance then and many initiatives that may be termed transitional justice mechanisms today were not described as such when they were established. Moreover, many of the initiatives that could be placed in a history of transitional justice are not recognized as such for a number of reasons, including that they may have not hid the radar of the human rights movement in the global North (this may for instance partly explain the different between the prominence of the Argentinian commission and the relative obscurity of the disappearances commission in Uganda from the same period in the early eighties).

⁶ In the periodization we offer here, we situate Argentina in phase two because it is part of a larger trend in that phase, which involved a turn to truth commissions and reparations and not just prosecutions. That said, arguably Argentina is different from initiatives that emerged after the Cold War when different global winds shaped the role and impact of the international community in national processes. Ruti Teitel and Paige Arthur offer histories of the field that resonate with the account offered here and with each other; there are also important differences. These histories of transitional justice are also in conversation with histories of human rights more generally. See Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 69-94 (2003), Paige Arthur "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 321-367 (2009) and Samuel Moyn, *Last Utopia*, Harvard University Press: Cambridge MA (2009).



transition from an abusive regime. The commission sought to demonstrate norms of democratic transparency and due process for the post-apartheid nation, while offering some platform for collective nation building. In this way transitional justice institutions emerged as important avenues for human rights goals. They also provided significant support for allied fields such as: peace building, conflict resolution, democratic transition, and nation building.

Challenges to the field persisted however, and often those most victimized continued to be left out in the cold and prosecutions seemed to contribute more to international law and professionalized human rights activists than to the communities involved.

The individualizing focus on deaths, disappearances and torture distracted from other serious and systemic human rights abuses.⁷ Indeed justice and truth seeking processes sometimes reflected and often failed to adequately redress the structures, hierarchies and biases that shaped human rights abuses in those contexts. Subaltern communities remained vulnerable and effective social change was elusive. In some cases the establishment of a transitional justice institution contributed to the demobilization of social movements and managed conflict to deter more radical challenges to the status quo.⁸

Yet, alongside these significant challenges, there were also significant achievements in advancing struggles for justice, truth and reparations. In some contexts this was because transitional justice initiatives were embedded in strategies for long-term social change- arguably this describes the approach taken by groups such as Centro de Estudios Legales y Sociales (CELS) in Argentina. Similar initiatives continued the innovation noted earlier in responding to the constraints and opportunities of their particular contexts. National institutions like the South African TRC were innovative with their use of public hearings to open up a more dialogical approach to grappling with the past in the public sphere. In other cases, formal judicial international institutions such as the Inter-American Court for Human Rights', which challenged Peruvian amnesty in *Barrios Altos*, offered important ways forward for transitional justice initiatives.⁹

⁷ The doctrine of command responsibility (and what is sometimes referred to as systems crimes) could have developed in ways that opened the doors to a more systemic analysis; instead it narrowed the focus to legal chains of command and control that were relevant to prosecutorial evidence standards.

⁸ Alan Keenan and Vasuki Nesiah, "Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles," in Neve Gordon ed., *From the Margins of Globalization: Critical Perspectives on Human Rights*, Lexington Books: Lanham (2004). See also Deborah Posel and Graeme Simpson (eds.) *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, Wits University Press: Johannesburg (2002).

⁹ Carolina de Campos Melo, *Transitional Justice in South America: The Role of the Inter-American Court of Human Rights*, available at: <http://www.corteidh.or.cr/tablas/r24268.pdf> [accessed 7 February 2016].





Gacaca courts – (cc) Elisa Finocchiaro, 21 July, 2006

In yet other contexts, local communities adopted alternative mechanisms that did not fit neatly within the framework of approaches that were most privileged by dominant strands of the field. These alternatives ranged from official initiatives such as the Gacaca process in Rwanda, to unofficial processes such as the people's tribunals regarding comfort women,¹⁰ memorials constructed by indigenous communities in Guatemala,¹¹ and the cleansing ceremonies that took place in Mozambique.¹² As I will discuss further below, the relationship between these alternative mechanisms and dominant approaches to transitional justice was often contested, but such experimentation was not uncommon.

In addition to the contributions of particular transitional justice processes in their countries, these diverse initiatives also had a collective global impact. By the end of the decade, even as the field became increasingly institutionalized, the boundaries of the field remained contested. In fact as truth commissions became increasingly popular, they emerged as a critical lightning rod for many of these debates. For instance, there were robust debates about the relative priority of truth v. justice, and even whether truth commissions were a threat to justice.¹³ There was debate about whether truth commissions should focus on victims and perpetrators or victims and beneficiaries.¹⁴ There was debate about whether social movements that fought human rights abuses should become part of official processes that investigated those abuses.¹⁵ In addition, and significantly there was increasing momentum in some regions (notably Europe and the Americas) for an international forum to complement national processes. As the drafting of the statute for the International Criminal Court evolved, there was much debate about the focus of the

¹⁰ Christine M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," *The American Journal of International Law* 95 (2) 335-341 (Apr 2001).

¹¹ As IW has noted, memorials have particular significance because "great potential exists for these initiatives to be used to address some of the intangible aspects of conflict." In: Walter Paniagua, *Guatemala resists forgetting: post conflict memory initiatives* (2012), available at: http://www.impunitywatch.org/docs/Guatemala_Mem_Research_Report_English.pdf [accessed 7 February 2016].

¹² Victor Igreja, "Justice and Reconciliation in the Aftermath of the Civil War in Gorongosa, Mozambique Central," in: Kai Ambos, Judith Large, and Marieke Wierda (eds.) *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development*, Springer: Berlin (2009).

¹³ Robert I. Rotberg and Dennis Thompson (eds.) *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press: NY (2000).

¹⁴ This was an important early criticism of the South African truth commission by Mahmood Mamdani in "Reconciliation without Justice," *Southern African Review of Books* 46 (Dec 1996).

¹⁵ The latter debate was poignantly captured in *Death and the Maiden*, the play by the Chilean playwright Ariel Dorfman.



court and its ambit.¹⁶ By the end of the 20th century, the transitional justice field was thus increasingly institutionalized, but also still a domain of robust and dynamic debate.

A third phase of transitional justice could be seen to emerge after 2001, in the aftermath of the 9.11 attacks in 2001 and the inauguration of the International Criminal Court in 2002. In different ways, both these developments served to anchor the field in the global North. In phase II, institutions such as the Security Council had a founding role in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the United Nations was a significant actor in the Central American, East Timorese and Sierra Leonean truth commissions but at the same time some of the flagship transitional justice processes (including those in Argentina, Chile and South Africa) were national processes. With the new millennium however, all transitional justice processes were launched in reference to an international and comparative context – be it through the initiation of the Security Council, participation of other United Nations agencies (such as the Office of the High Commission of Human Rights) or the powerful role of international NGOs who brought in comparative knowledge and mobile expertise. The centre of gravity of transitional justice processes shifted from their national context to the international public sphere thereby scaling up of the lessons and achievements of the 1990s onto a global stage with a push away from an ad hoc approach to international justice.

Many policy makers, scholars and activists began to talk of prosecutions, truth commissions, reparation programmes, and institutional reform initiatives as allied initiatives that had a collective valence in post-conflict spaces.¹⁷ If there was debate about the ‘pillars’ of transitional justice¹⁸, it was debate about the sequencing and prioritization of these different institutional interventions. In sum, this phase saw a powerful consolidation of the transitional justice field. This was reflected in many different contexts – the United Nations and other actors incorporated some reference to transitional justice processes in peace accords, donor governments developed dedicated lines of funding for transitional justice, and all new transitional justice processes drew on comparative expertise in shaping mandates and modes of operation. For instance, this was the case in Sierra Leone, Timor-Leste, Liberia, Peru, Ghana and Cambodia.

In some ways the consolidation of the field and the development of an internationally mobile practitioner community facilitated the establishment of transitional justice institutions. In other ways it also narrowed the field of experimentation and mobilized a normative model of transitional justice. It tended to treat the ‘pillars’ of transitional justice as ends in themselves, and marginalized broader goals for accountability

¹⁶ For instance, in the course of debates about the drafting of the Rome Statute some argued for provision for prosecuting corporations and enabling victims of corporate crimes to claim reparations but this argument was defeated by those who wanted to focus only on individual responsibility. See p. 21 of Julia Graff, *Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo* at <https://www.wcl.american.edu/hrbrief/11/2graff.pdf> [accessed 13 March 2016]. Similarly, there was an effort to include transnational organized crimes but many of these crimes were also not included in the final draft of the Rome Statute. See Andreas Schloenhardt, "Transnational Organised Crime and the International Criminal Court Developments and Debates," *University of Queensland Law Journal* 24(1) 93 (2005). Arguably many of these crimes, particularly as related to drug trafficking, were the primary motivation of Trinidad and Tobago when they wrote to initiate the discussions that resulted in the International Criminal Court in their *Letter dated 21 August 1998 from the Permanent Representative of Trinidad and Tobago to the United Nations Addressed to the Secretary-General*, UN Doc A/44/195 (1989). See Mahnoush H. Arsanjani, *The American Journal of International Law* 93(1) 22-43 (Jan. 1999).

¹⁷ See the revised final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 1 (2 October 1997); The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General (23 August 2004) UN Doc S/2004/616.

¹⁸ Prosecutions, truth commissions, reparation programmes and institutional reform initiatives were often referred to as the ‘pillars’ of transitional justice at the turn of the millennium.



and social change. Another significant dimension of this period was the impact of 9.11 and the response of the US and its allies in Iraq and Afghanistan. The invocation of human rights discourse in relation to both of these military interventions also impacted the global landscape within which transitional justice processes unfolded. Critique around contradictions and double standards in the fields of human rights and transitional justice increased.

In many contexts these developments troubled the human rights framework and linked it to super-power agendas and military interventions. Thus while there was an ongoing proliferation of transitional justice processes, the context in which they unfolded were politically fraught international contexts. This foregrounded questions of political legitimacy and colonial legacies. The North-South tensions were exacerbated by charges that the newly inaugurated International Criminal Court was itself emerging as a tool of the Security Council with an exclusive focus on the global South, particularly Africa, but no legal space or political will to focus on the violations of powerful countries. With powerful states supporting externally choreographed regime changes in the name of human rights, rights based approaches to transition became an increasingly fraught enterprise.

Arguably, we are now in a fourth phase of transitional justice. The dust has settled on some of the earlier battles about the relative priority of different transitional justice institutions (debates such as truth commissions vs. courts have long since faded) but there continue to be deep divisions about the more fundamental boundaries of the field. In fact, today some of the most contentious issues related to whether the field should be defined in terms of institutions (the 'pillars') or whether those institutions should be situated as avenues to deeper socio-political transformation. The field is at a crossroads. On the one hand, this is a moment in which the field has an established globalized presence; on the other hand, this is also a period where the past record has been disappointing in regard to the contribution to fundamental change. Institutions established in the name of victims, have prioritized managing victim expectations; they have stepped away from efforts to change structures that sustain the on-going disempowerment of victims and other marginalized communities. While transitional contexts could be moments of progressive political change, too often transitional justice institutions have been conservative instruments deployed to manage transitions and contain change. This once innovative and dynamic field now travels as a stable repertoire of normative assumptions, institutional forms and policy prescriptions – ambitious in seeking to be mainstreamed into post-conflict policy, while minimalist in its push for social change. This paradoxical record has provoked challenging questions about effectiveness and legitimacy. Foregrounding these challenges, the current phase also offers an opportunity to rethink many dimensions of the dominant model. Amongst other things, these challenges underscore the critical importance of looking at the political context and making a political assessment of accountability processes.

To better understand the challenges that have come to the fore in the current phase we need to understand the intersection of transitional justice and its allied fields: humanitarianism and international intervention, peace building, conflict resolution, and development. The end of the Cold War thus appeared to promote a normative consensus on liberal internationalist interpretations of human rights norms. The interventions in Iraq and Afghanistan however opened critical fault lines in that consensus and challenged how we understand the politics of human rights and the divergent political ends to which human rights discourse can be employed.

In addition, as transitional justice became increasingly intertwined with peace and conflict processes, there were challenges that arose in Uganda and more recently in Colombia, regarding the complex tensions between accountability for past war crimes by actors who were critical to the advancing of peace



processes. There were parallel tensions between the individual prosecutorial focus of transitional justice and the international criminal law approach, and the larger, more collectively and less judicially defined goals of humanitarian workers in contexts that ranged from Bosnia to Darfur.¹⁹

Finally, as questions of global economic inequality became more urgent (with particular prominence in the context of the 2008 economic crisis) there were more challenging concerns about the narrow discourse of impunity in transitional justice and the need to develop a more robust approach to accountability for economic crimes. There was also increased focus on the interrelationship and mutually reinforcing work of human rights abuse and structural injustice. There were precursors to these challenges, in relation to specific transitional justice processes, in several countries where activists wanted more attention to economic injustices as root causes for specific patterns of human rights abuse (such as the mineral trade in countries such as Sierra Leone and the DRC, and the imbrication of corporate actors in conflict minerals) or the intertwining of economic injustices and political repression in countries such as Peru, Chile and South Africa or corruption in Arab Spring countries such as Tunisia and Egypt. In response to these challenges there are some tentative steps towards change (such as the incorporation of economic crimes in the Kenyan, Liberian and Tunisian truth commission mandates),²⁰ and more critical reflection on the future trajectory of the transitional justice field.

¹⁹ For instance, in Bosnia these tensions presented when humanitarian agencies working in confidential and trust based relationships with families of the disappeared were in receipt of information that the ICTY wanted to aid with cases that were moving through the tribunal - *Recognition of the ICRC's long-standing rule of confidentiality - An important decision by the International Criminal Tribunal for the former Yugoslavia* at <https://www.icrc.org/eng/resources/documents/misc/57jqhg.htm> [accessed 13 March 2016]; in Darfur these tensions presented when the ICC's genocide indictment against Omar al-Bashir catalysed a range of hostile repercussions for the ongoing work of humanitarian agencies. Alex de Waal, *African Arguments Moreno Ocampo's Coup de Theatre* (2008), available at: <http://africanarguments.org/2008/07/29/moreno-ocampo-coup-de-theatre/> [accessed 9 February 2016].

²⁰ There has also been more focus on "economic crimes and corporate accountability" in a number of countries, including "Brazil, Argentina, and perhaps even Colombia and Guatemala" [Ruben Carranza in Email to Author 2/4/2106].

2. Role of International Actors

This study has been commissioned with particular interest in assessing the role of international actors. Over the last few decades the growth of the transitional justice field has been a paradoxical transnational process. International actors play a particularly significant role that paradox as they are central to the field's consolidation and prominence, but also central to the crisis of effectiveness and legitimacy. There have been a range of different kinds of international actors in the transitional justice field. In addition to the United Nations and in particular the OHCHR, transitional justice has also become an important dimension of donor interventions. Moreover, international NGOs have also played a particularly significant role in advocating for and helping establish transitional justice institutions. This section identifies the key modalities through which international engagement has taken place before we turn to the discussion of successes and failures.

2.1 Initiation of Transitional Justice Mechanisms

The most influential role that international actors have had in this field is in initiating transitional justice processes. In some cases occupation and military victory becomes the prelude to introducing a transitional justice mechanism. For instance, in the aftermath of World War II, it was military victory by the allies that occasioned the establishment of the International Military Tribunal at Nuremberg through the "Inter Allied Resolution on German War Crimes". In an analogous situation, the creation of the Iraqi High Tribunal that convicted Saddam Hussein for Crimes against Humanity in the aftermath of the US invasion of Iraq was first suggested by the US, and only later adopted by the Iraqi parliament.²¹ Trials emerging from military victories have suffered the greatest legitimacy challenges because they emerge from conquest. In this they are often the most blatant instantiations of victor's justice.

Less controversially (although not un-controversially), international actors have also been positioned to introduce transitional justice processes when they have served as facilitators to a negotiated peace. For instance, the international community brokered the 2000 Arusha Peace and Reconciliation Agreement that brought an end to a 12-year civil war in Burundi. The parties to the peace agreement agreed to include provisions for transitional justice "under international pressure."²² Arguably, there was a parallel story regarding the South Sudan peace agreement that was negotiated under the auspices of the Intergovernmental Authority on Development (IGAD). In some cases, the international community's initiation of a transitional justice process is linked to the international legal authority of the Security Council or the United Nations. In Sierra Leone, the Special Court was formally the product of an agreement between the government and the United Nations at the request of President Kabbah but observers note that the request "was not seen to be Kabbah acting entirely on his own volition". Rather, it was described euphemistically as a request "with strong international backing".²³

In cases where powerful countries of the global North have played a role in advocating for a transitional justice mechanism in the global South, this role and these mechanisms have also suffered legitimacy

²¹ Arguably, this sequence of events not only raised questions about the local legitimacy of the tribunal, it also compromised the actions of the Iraqi parliament.

²² Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford University Press: CA (2010); This includes a call for the government to get the assistance of the Security Council to establish an "International Judicial Commission of Inquiry into Genocide, War Crimes and other Crimes against Humanity" (article 6) and a National Truth and Reconciliation Commission (Article 8).

²³ Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge*, ICTJ report (2007), p. 26.



issues with charges of double standards and imperial hubris.²⁴ In some cases, the local process is not directly initiated by international actors but the international actors do serve a catalytic role in the local process. Arguably the Inter-American Court and the ICC had such a role in Colombia. The Secretary General's Panel of Experts followed by the OHCHR investigation had such a role in Sri Lanka. In both cases, the international body's initiation of investigations pushed local actors to launch a domestic process, partly as a buffer against international processes, or as part of a complex negotiation with the international justice system. Significantly in some cases, local processes have had a more catalytic role than international ones. In Guatemala the unofficial project to Recover Historic Memory (REMHI) published the Never Again report, which stimulated the UN appointed Historical Clarification Commission (CEH) to be bold in its investigations, analysis and findings.²⁵ In a different way, the Sierra Leonean *Fambul Tok* serves as a grassroots alternative to the Special Court. It is an initiative that sought to be more rooted in the community in response to what many perceived to be the alienating and internationally owned Special Court process.²⁶

2.2 Mandated Institutional Authority in Hybrid Mechanisms

International actors have also played a role in transitional justice processes when the mandate called for a hybrid structure with international actors and national actors sharing institutional authority. In Guatemala, the chair of the Commission for Historical Clarification was to be appointed by the UN Secretary General, with Guatemalans playing other roles in the Commission. It was a complex hybrid approach with an international structure partially embedded in a domestic structure. In El Salvador the peace agreement provided for all the commissioners to be international actors appointed by the Secretary General.

In Sierra Leone, 3 of the 7 truth commissioners were international. Hybrid structures have governed the Cambodian Extraordinary Chambers, the Timor-Leste process and the Sierra Leone Truth Commission and Special Court – all with different formulas for hybridity. For instance, the Sierra Leone Special Court had a management structure that included actors such as Nigeria that had a leadership role in peace keeping, as well as donor countries such as the USA, UK, Canada and the Netherlands. Indeed when making the request for the court, the late Sierra Leonean president Ahmed Tejan Kabbah had wanted a national court with “a strong international component because “the Sierra Leonean lawyers and judges that were consulted suggested that the local justice system was capable of holding fair trials.”²⁷ The UN however, preferred “an international Court with strong national elements”.²⁸ The Special Court that was eventually agreed to was seen as much more the latter than the former.²⁹ Today the most significant actors exercising institutional authority are the Security Council and the ICC – both have legitimacy issues. The ICC indictments in Uganda have faced even more fierce criticism for neglecting local priorities and even

²⁴ See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press: NY (2014).

²⁵ Conflict Research Consortium, Eric Brahm, *Proyecto Interdiocesano Recuperacion de la Memoria Histórica (Guatemala)*, available at: <http://www.colorado.edu/conflict/peace/example/remhi.htm> [accessed 8 February 2016]

²⁶ Fambul Tok International, available at: <http://www.fambultok.org> [accessed 7 February 2016].

²⁷ Charles C. Jalloh, “Special Court for Sierra Leone: Achieving Justice?” *Michigan Journal of International Law* 32 (3) p.401 (2011), available at: <http://repository.law.umich.edu/mjil/vol32/iss3/1> [accessed 8 February 2016].

²⁸ Ibid.

²⁹ Sara Kendall, “Hybrid Justice at the Special Court for Sierra Leone,” *Studies in Law, Politics and Society* 5 p.11-27(2010).



taking action that have problematic partisan impacts that have exacerbated conflict and empowered the Museveni government.³⁰

2.3 Funding and Other Measures of Material Support

International actors play a powerful role in shaping the field through their role as donors. Donors have included foundations such as Macarthur and Soros,³¹ foreign governments³² and UN agencies.³³ Donor governments and agencies have not shied away from using funding to leverage their own agendas and priorities. The Sierra Leone Special Court offers an instructive example. In this case the biggest donor by far was the USA and accordingly the US had an outsize role in determining prosecution policy. For many it was the American prosecutor David Crane who was the face of the court and there were signs of US attempts to influence the Court in terms of steering it towards investigating Colonel Gadhafi and al-Qaeda activity in the region.³⁴ Thus in this case, the combination of funding and hybrid design ensured that American interests were reflected in the work of the court. Very early on therefore, the International Crisis Group raised red flags about the legitimacy issues that accompanied the “the perceived Americanisation of the Court”.³⁵ The management committee of the Sierra Leone Court was dominated by the biggest funders; namely, the United States, the UK, Canada, and the Netherlands. Eventually other regional powers such as Nigeria were included. The most striking dimension of this process however, was that it took extensive lobbying for the Government of Sierra Leone itself to be included.³⁶ Against the backdrop of the Bush administration’s campaign against the ICC (in which the SCSL model was presented as an alternative), US investment in the Sierra Leone Special Court and the goals it was advancing by funding the Court went beyond (and were often in tension) with objectives related to the Sierra Leone context. Indeed, arguably those local objectives became co-opted, as the work of the court became a tool in the larger US effort to undermine the ICC.³⁷ Thus not only was the Sierra Leone government displaced, local justice priorities were also overshadowed by the battle the US was waging globally on the shape of

³⁰ Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics and International Affairs*, 21 (2) p.179-198 (2007).

³¹ Both foundations played an important role in providing financial support to the ICTY in its early years; p. 211 of Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press (2000).

³² The Europeans and North Americans are big donors. This does not exclude other countries like the Japanese government, which funded the dissemination of the Timor-Leste commission final report *Chega!* Available at: Comissao de Acolhimento, Verdade e Reconciliacao de Timor-Leste <http://www.cavr-timorleste.org/en/cheгаReport.htm> [accessed 8 February 2016]

³³ The role of UNDP in channelling funds to the Liberian commission is an example of this.

³⁴ For instance, the ICG notes that “While the subtle links alleged on several occasions by Prosecutor Crane between diamonds and al-Qaeda terrorist networks can be interpreted as an attempt to increase US interest, they are also seen by many in Sierra Leone as examples of the Court being used to promote US foreign policy interests. Against this background, it is important that the Court not lose focus. It needs to be careful not to appear to be subject to outside influence if it wants to fulfil its mandate with impartiality and provide a “new model” for international justice.” International Crisis Group, “The Special Court for Sierra Leone: Promises and Pitfalls of a ‘New Model’,” *Africa Briefing* 16, 4 (Aug 2003), <http://www.crisisgroup.org/en/regions/africa/west-africa/sierra-leone/B016-the-special-court-for-sierra-leone-promises-and-pitfalls-of-a-new-model.aspx> [accessed 12 March, 2016].

³⁵ ICG Ibid. This does not mean that all the court’s activities were led by US interests. For instance, some saw Crane’s indictment of Taylor as not entirely aligned with American priorities at the time.

³⁶ “The Management Committee was originally meant to be composed of “important contributors,” including the United States, the UK, Canada, and the Netherlands, but this was interpreted broadly to include Lesotho and Nigeria. Finally, after lobbying, the Government of Sierra Leone was allowed onto the Committee, and the UN Secretariat was also included.” p.19 of Tom Periello and Marieke Wierda, *The Special Court of Sierra Leone Under Scrutiny*, ICTJ, March 2006 at <https://www1.umn.edu/humanrts/instrree/SCSL/Case-studies-ICTJ.pdf> [accessed 12 March, 2016].

³⁷ At the time there were proposals that war crimes by Foday Sankoh and others in Sierra Leone should be taken up by the ICC. “In the longer run, there’s obviously only one solution for Sankoh’s ilk: a permanent international criminal court...The bad news is that the United States is still fighting a rearguard action to make the court weaker, out of a feat it might try to prosecute American citizens.” Carroll Bogert, *World Class Crimes*, Washington Post, June 7, 2000. See also p. 12 of Periello and Wierda, Ibid.



international justice institutions. Even against this backdrop, local civil society actors in Sierra Leone sought to find space to advance local justice priorities (which included holding Taylor accountable), but they had to do so within the boundaries established by US agendas. Holding the heads of multinational companies responsible was therefore not on the agenda of the Special Court.

The instrumentalisation of transitional justice processes to advance donor agendas is not the only way in which funding can be an especially complex and controversial arena for international actors. The influx of funds can itself have a distorted effect in economically fraught local contexts. For instance, in some cases it can inadvertently exacerbate inequalities within local civil society because it allows westernized, donor savvy NGOs to punch beyond their weight in influencing local transitional justice processes. In many contexts the post-conflict industry contributes to channelling policy-making and institutional development into funding driven bubbles that are increasingly removed from grassroots influence. CBOs, social movements and other non NGO-ised civil society actors may play a more diminished role once transitional justice processes are established because funding becomes critical in post-conflict policy making.

2.4 Technical Assistance and Capacity Building

The field of transitional justice has developed through a process of comparative learning, and international actors have played a significant role in offering substantive support on transitional Justice. In some cases, judges, commissioners and other officials involved with transitional justice processes in one context have been called to share expertise in other contexts. Thus the Chilean Commissioner Pepe Zalaquett was involved in early planning workshops for the South African Truth Commission. Yasmin Sooka of the South African Truth Commission was then recruited to serve as an international commissioner in the Sierra Leone Truth Commission. In other cases, UN offices such as OHCHR, foreign government agencies such as the US Institute for Peace or international NGOs such as the International Center for Transitional Justice (ICTJ) have offered technical assistance and capacity building programmes. In many ways the work of institutions such as ICTJ, have pushed for transitional justice to become not only an arena of human rights activism but also an area of 'expertise'. As elaborated elsewhere in this study, this move to expertise is not without controversy and negative consequences, including the de-politicization of transitional justice engagements, the marginalization of alternative 'knowledges', the displacement of activists and local capacity, and the assimilation of these technical assistant models into neoliberal peace.

2.5 Engagement through Related Policy Fields/ Interventions

International actors also play a role directly and indirectly through their engagements in related fields such as development and humanitarian assistance. As the field of transitional justice has developed, a range of other fields have been co-travellers in engaging with contexts of conflict and peace. These fields have included humanitarian intervention, conflict resolution/peace-building, democratization/rule of law/nation building (human rights, basic freedoms, and civil society promotion), development, women's rights etc. This development has taken place alongside the rise of humanitarian intervention and new initiatives focused on development in post-conflict situations. These allied fields of intervention have sometimes been in tension and sometimes been complementary. In both cases, they have impacted each other. In particular, these fields have had a mutually reinforcing dynamic in emphasizing the 'conflict'/'post-conflict' context as an arena of intervention.



The emergence of the ‘conflict’/‘post-conflict’ context as an anchor for various allied policy interventions has sometimes tended to catalyse valuable comparative learning. However, it has also given rise to a problematic tendency to treat these diverse contexts as functionally similar with little attention to socio-political specificity. This may in turn generate diverse and complex transitional justice priorities that may resist imposition of a universal blue print. The emergence of contexts of conflict and post-conflict as arenas for external intervention has particular sensitivity when the root causes of conflict are themselves historical and transnational.³⁸ As referenced earlier transitional justice processes however continue to be dominated by the geographic and historical boundaries of nation states. In fact, the focus on violence and emergence from violence may have also encouraged problematic treatment of ‘conflict’/‘post-conflict’ environments as pre-political or ones where politics is crowded out by violence and humanitarian crisis. This is an approach that neglects and thereby compounds the significant political legitimacy considerations that accompany interventions, including international human rights interventions.

In this sense it not only encourages a depoliticized understanding of the transitional justice environment, it also depoliticizes international intervention.³⁹ For instance, the “EU’s Policy Framework on support to transitional justice” (adopted in 2015) begins by asserting that the EU has credibility in the transitional justice field with little acknowledgement of the democratic legitimacy crisis that accompanies Western interventions. These legitimacy challenges arise partly from the historical shadow of colonial relationships but also from more contemporary neo-colonial dynamics.⁴⁰ In many ways, not grappling with the legitimacy challenges only compounds them and sharpens the dissonance between justice perceptions in the global North and the global South.

2.6 Cooperation, Collaboration and Solidarity

A final mode of engagement by international actors is through collaboration with local human rights activists. Often such solidarity emerges from South-South partnerships amongst civil society actors in different countries. For instance, the Centre for the Study of Violence and Reconciliation (CSV) in South Africa and the Centre for Democratic Development (CDD) in Ghana co-founded the African Transitional Justice Research Network (ATJRN) to collaborate, share expertise and network across the continent.⁴¹ In some cases, international agencies have been active as advocates supporting the work of local groups interested in generating greater international awareness of on-going transitional justice priorities. For

³⁸ For instance, investigating human right violations emerging in contexts of conflict, may require more historical understanding of the conflict – and frequently conflicts are the long term legacies of colonialism (such as the legacies of Belgian colonialism in shaping the Rwandan genocide), the Cold War’s proxy wars (such as the dynamics that shaped the conflicts in Central America), or the consequences of more contemporary resource wars with mining companies and other transnational actors playing a significant role in the political economy of conflict (such as the conflict in the DRC).

³⁹ For instance, in an approach that is fairly emblematic of the dominant strands of the field, David Tolbert, the President of ICTJ, argues that justice is advanced by depoliticizing the discussion of human rights: “[advancing] the demands of justice depends on the possibility to extricate the discussion from the political merry-go-round and frame it in terms of the legal rights and obligations arising from universal principles of human rights”. See <https://www.ictj.org/sites/default/files/ICTJ-DT-Keynote-Address-Salzburg-Aug-2015.pdf> [accessed 13 march, 2016].

⁴⁰ Moreover, in some contexts these are intertwined as in France’s role in transitions in Francophone West Africa [Ruben Carranza, Email to author 2/4/2016].

⁴¹ African Transitional Justice Research Network (ATJRN) has a four-member steering committee that (in addition to CSV and CDD) also includes the Ugandan Refugee Law Project (RLP) and the Sierra Leone based Campaign for Good Governance (CGG). It defines its mandate as follows: “The ATJRN seeks to promote and encourage transitional justice research in Africa through the development of research capacity, the building of transitional justice content knowledge, and the creation of spaces for practitioners and researchers in Africa to share experiences, expertise, and lessons learned. The goal is to ensure that the transitional justice agenda in Africa is locally informed and owned.” *African Transitional Justice Network* available at: <http://www.transitionaljustice.org.za> [accessed 8 February 2016].



instance the UN Working Group on Enforced or Involuntary Disappearances (WGEID) has worked with families of the disappeared in many parts of the world to advocate for strengthening the international legal and policy framework for truth seeking, reparations and justice. In Afghanistan, a small group of international experts were embedded inside the Afghan Independent Human Rights Commission to assist it in compiling its Conflict Mapping report, in 2009-2010.

Finally, civil society actors based in the global North leverage their position to work in solidarity with local agendas in a range of different ways. For instance, the American organization, the National Security Archives has used the Freedom of Information Act (FOIA) in the US to assist with investigations of human rights violations by activists, victim groups and transitional justice institutions in El Salvador, Guatemala and elsewhere.



Recovery of the National Police Archives in Guatemala- photo by Frank de Ruiter for Impunity Watch

In similar vein, Impunity Watch's role in Guatemala has manifested this solidarity with long-term commitments that enable responsible political analysis and the ability to respond to changing contexts. Finally, as referenced earlier, the Centre for Constitutional Rights has worked in collaboration with social justice and human rights activists in Nigeria, Paraguay, Burma and elsewhere in launching ATCA cases in US courts on for human rights abuses that have taken place elsewhere. This has involved shaping initiatives and calibrating priorities through close collaboration with local activists – in short, there is an investment in the justice struggles of partners, not just investment in the success of a project or programme.

3. Defining Success: Dominant Approaches and Recurrent Challenges

As the field of transitional justice has grown, it has been accompanied by a focus on monitoring and evaluation (M&E) to assess impact and define success. This is a field that has been driven by international actors, particularly in their capacity as donors to determine funding priorities and strategies. In any particular context there are multiple and diverging interests shaped by class, race, gender and other fault lines; there are also interests that diverge when examined through a national lens as opposed to an international lens, short term time frames and long term long term time frames. How M&E processes shape priorities through funding log frames and other modalities thus has enormous political significance that warrants scrutiny. The evaluative literature defines goals in terms of three broad categories and the discussion below will describe and analyse these broad categories since they play such a central role in establishing barometers for the field.

3.1 Institutional Goals

Firstly, a significant subset of the literature assesses transitional justice processes in terms of the institutional goals of particular initiatives.⁴² Thus a transitional justice initiative may often be driven by indicators such as the numbers of victim statements undertaken or in particular procedures for hearing testimony.⁴³ Assessing success in relation to clearly and narrowly defined institutional goals may be attractive to some in the field because it presents as a straightforward measure for M&E. For instance, a reparation programme can be assessed according to whether it was implemented in compliance with the mandate established for the programme. This may include whether victims were treated with dignity and whether eligibility of beneficiaries was reviewed according to fair guidelines without bias and in a timely manner.

Increasingly, as the field of transitional justice has grown, there has been greater dissemination of different institutional models and more comparative learning regarding positive and negative lessons pertaining to the details of institutional practices. Institutional goals offer a window into a range of policies and practices that shape the details of how transitional justice gets operationalized through best practice models.

With the heightened role of international ‘technical assistance’ and ‘capacity building workshops’ over the last two decades, today it is more likely that transitional justice institutions will be better able to meet

⁴² For instance, see Priscilla Hayner’s comparison of truth commission in *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge: London (2001).

⁴³ For instance, both of these were dimensions of the Ghanaian national reconciliation commission where there were considerable institutional resources directed at ensuring that a large number of victim statements that were channelled into public hearings, and then on approaching victim testimony as part of an investigative process with cross-examination and provisions for legal counsel. For a discussion of this and similar approaches in truth commissions more generally, see “Icons and Measures: (Re)presenting Victims in Truth Commission Processes,” Edited by Ashleigh Barnes et. al. *Feminism of Discontent: Global Contestations*, OUP Delhi (2013). This judicialisation of transitional justice processes is part of a broader tribunalisation of justice (See Kamari Clarke). For more on how this bureaucratization unfolded in the South African truth commission process, see Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post-Apartheid State*, Cambridge University Press: Cambridge (2001); For more on the rise of measurement and audit culture in the human rights field generally, see Sally E. Merry, “Measuring the World: Indicators, Human Rights, and Global Governance,” *Current Anthropology* 52 (3) (2001).



these pre-defined institutional goals. The field is also better positioned to evaluate that process because there are widely disseminated models of ‘best’ practices. However, this also means that there are increasingly ‘standardized’ models of what it means to treat victims with dignity or to define priorities for reparation eligibility – models that may not accord with the specifics of local context or the demands of local social movements. Thus there are dilemmas that attend transitional justice processes, even when such institutions are ostensible beneficiaries of the ‘best practice’ recommendations. In some contexts, these obstacles recur because the recommended best practices are treated perfunctorily as items on a to-do check list rather than considerations that need to be taken into account for meaningful implementation. For instance, if we pay lip service to consulting civil society but we do not establish and support genuinely democratizing and inclusive transitional justice institutions, then those public consultations end up alienating the broader public and narrowing the reach of these institutions. In many cases however, we may face recurrent obstacles because there are challenges that are not addressed by the ‘best practice’ recommendations or because these recommendations deter and distract from engagement with context specific imperatives. The technocratic approach to institutional goals has often mitigated against political analysis of the situation and its particular opportunities and constraints. The technocratic focus on models and institutionalized strategies does not capture how institutional goals diverge from other human rights and social justice priorities, both national and transnational.

3.2 Impact on Particular Communities

In many cases, even if a transitional justice institution effectively discharges the terms of its mandate, this may not tell us much about the content and consequence of its work. This speaks to the relevance of the second category of literature that assesses transitional justice processes. This is their impact on particular communities such as victims, women etc.⁴⁴ Transitional justice practitioners frequently recommend that particular attention is paid to historically marginalized groups affected most by the atrocities. Mass human rights abuse is seldom random; some groups are more vulnerable because of social structures such as class, race and ethnicity and/or political allegiances and histories of dissent. For instance, in both Peru and Guatemala, indigenous groups were targeted. It may therefore be prudent to assess transitional justice processes in relation to how they engaged with particular communities. This includes how different social groups experience the reparative impact of a programme and whether victims who had suffered different kinds of abuse feel they were recognized in how a truth commission implemented procedures for public hearings?⁴⁵ Did a prosecution office implement victim consultation and outreach initiatives in ways that were accessible and meaningful for all categories of victims – such as male and female or urban and rural? The focused attention on gendered dimensions of human rights abuse can be pivotal in defining the impact of transitional justice institutions.⁴⁶ For instance, the recommended

⁴⁴ For instance, see Simon Robin, “Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste,” *International Journal of Transitional Justice* 6 (1) (2012).

⁴⁵ For instance, David Taylor looks at whether initiatives for victim participation are empty rituals or genuine mechanisms for victim empowerment. See “Discussion Paper: *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?*” Available at: http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf [accessed 8 February 2016].

⁴⁶ In recent years, human rights practitioners have been particularly sensitive to questions of gender and have often advocated that transitional justice institutions pay particular attention to gendered dimensions of human rights abuse. This extends from feminist legal analysis of human rights jurisprudence (such as the interpretation of rape as a form torture in the ad hoc tribunals), to the incorporation of gender focussed units in institutions such as truth commissions (as was the case in the Peruvian truth commission for instance), to the representation of women in framing and implementing policies for reparations and institutional reform (as was the case in the formulation of reparation policy in Morocco for instance), to the mainstreaming of gender ‘sensitivity’ in the analysis of the record and the development of recommendations (such as in the drafting of the Rome statute). For instance, see Dianne Lupig, “Investigation and Prosecution of Sexual and Gender



attention to vulnerable groups is often translated into very specific operations such as consultations with women's groups, the incorporation of feminist legal analysis in defining human rights violations, the hiring of gender experts, gender parity in the staffing of transitional justice institutions, gender sensitivity on issues that range from investigations to the content of reparation awards and so on. In this way actual guidance on transitional justice (such as lists of best practices) often engage with a significant level of institutional detail. Moreover, as we discuss further below and in the final category, women may have a range of different kinds of justice claims emerging from conflict but it is sexual violence claims that transitional justice processes are most responsive to. Thus like in many areas, assessing transitional justice processes in terms of their impact on particular communities is a complex process that requires context specific political analysis.

In Timor-Leste the gender researchers ensured that there was particular outreach to women victims; they also liaised with women's groups and ensured that their records and expertise were shared with the commission and fundamentally shaped the commission's own findings. In some cases, special measures have been undertaken to address children as victims. Accordingly, in Sierra Leone and contexts where child soldiers have played a critical role in the conflict, UNICEF has recommended that transitional justice institutions recognize child perpetrators as victims and that prosecution does not proceed against those who are underage. This turn to assessing the work of transitional justice processes through their impact on particular communities can help marginalized communities to mobilize collectively to make a claim on transitional justice processes. It has also meant however that often transitional justice processes may rest on broad generalizations regarding what particular communities want or need. Indigenous communities for instance may have an interest in making redistributive land claims, while its cultural claims might be more successful in gaining the ear of international bodies.⁴⁷

3.3 Changes in the Enabling Conditions of Human Rights Abuse

Finally, the third category of literature addresses the most challenging dimension of defining success. It deals with 'extra-institutional' goals, such as whether the process contributed to changes in the enabling conditions of human rights abuse. Did transitional justice have transformative impact?⁴⁸ Did the transitional justice programme empower victims in ways that addressed the enabling conditions of abuse? For instance, the truth commissions in Chile have been much celebrated; undoubtedly they had considerable positive impact in recognizing victims and opening the door to reparations in the short term, and prosecutions in the long term. Over the last decades however, analysts of the Chilean political landscape have also raised questions about the effectiveness of the complex array of transitional justice efforts in Chile in addressing the structures that maintain impunity. Have the political, economic and military establishment that empowered the Pinochet regime been successfully challenged? The continued strength of the pro-Pinochet party Independent Democratic Union (*Unión Demócrata Independiente*, UDI), and the recent rise of Augusto Pinochet Molina (the dictator's grandson) and the political movement "Republican Order My Country" [*Orden Republicano Mi Patria*], suggests that the structures that

Based Crimes before the International Criminal Court." *Journal of Gender, Social Policy & the Law* 17(2) (2001), available at: <https://www.wcl.american.edu/journal/genderlaw/17/2luping.pdf> [accessed 8 February 2016] The ICTR's *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions* offers another illustrative example. Available at: http://www.unicttr.org/sites/unicttr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf [accessed 8 February 2016].

⁴⁷ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*, Duke University Press: US (2010)

⁴⁸ This paper does not engage with assessments of the academic field of transitional justice such as Laurel Fletcher and Harvey Weinstein's "Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals," *Journal of Human Rights Practice* 7 (2) 177-189 (2015).



maintained impunity have not been defeated. Even if transitional justice institutions are established in ways that comply with due process norms and the advice of technical experts, if they are not situated in a strategy to wrestle with and weaken the structures enabling human rights violations, these institutions can be missed opportunities in the long term struggle against impunity. To this end it may be helpful, as suggested in the “Making Transitional Justice Work” expert meeting, to think in terms of progress rather than hard impacts or outcomes.⁴⁹

In many cases, the goals for transitional justice processes have involved all three literary dimensions discussed above to varying degrees; accordingly, efforts to evaluate such processes sometimes involved these three strands of inquiry.⁵⁰ These different modalities of defining the success of transitional justice processes, is a reminder that there is no single bottom line in assessing transitional justice processes. This is impossible due to the complex array of goals and success on some fronts which simultaneously may accompany defeat on others. On the one hand, these are part of a multifaceted and complex definition of success. On the other hand, they are also divergent conceptions of success that stand in tension with one and other.

For instance, the South African reparations programme arguably largely complied with the policy framework established by the government. In this sense it successfully disbursed reparations to all those the TRC designated as victims. However, victims were frustrated with the reparations offered.⁵¹ The reparations grants were minimalist one-off payments that did little to empower victim groups. The reparations debate foregrounds the divergent ideologies about the work that reparations programmes were intended to do. For some in the human rights community, reparations constituted ameliorative assistance for beneficiaries that invited victims to ‘trust’ the state.⁵² For others, reparations were a symbolic and material manifestation of victims’ justice claims and reflected a more oppositional relationship to the establishment. In fact, the government’s reparations programme ignored the demands of Khulumani, the victim organization that emerged from the TRC process, and their priorities and proposals for reparations policy. Instead, the official reparations programme stood in counterpoint to the victim groups’ civil suit in US courts, *Khulumani v. Barclay National Bank*; a suit against corporations complicit in apartheid era human rights abuse. The South African government opposed this lawsuit and presented its own reparations programme as a means of closing the reparations questions. In this way the government’s reparations policy was used to undermine the more transformative potential of transitional justice, while claiming it had successfully fulfilled its reparations obligations.

This example shows that the different definitions of success addressed by the literature can be in tension with each other. A programme that may be passably successful on one count could be seen as an obstacle to success if defined differently. It also underscores the extent to which there are significant differences even within the human rights and transitional justice community, and that these differences speak to significant political stakes. Moreover, it speaks to the more fundamental dilemma that offers both a positive and negative lesson when we engage with the dilemmas of measuring success. On the one hand,

⁴⁹ Impunity Watch, Ministry of Foreign Affairs, IDLO, conference. Proceedings of “Making Transitional Justice Work”, The Hague (26-27 November 2016).

⁵⁰ Elizabeth Stanley, “Evaluating the Truth and Reconciliation Commission,” *The Journal of Modern African Studies* 39(3), 525-546 (2001), available at: <http://www.jstor.org/stable> [accessed 10 February 2016].

⁵¹ As one commentator notes, “For many victims and survivors the post-apartheid experience has become one of bitterness, broken promises and a sense of betrayal.” Narnia Bohler-Muller, *Reparations for Apartheid-Era Human Rights Abuses: The Ongoing Struggle of Khulumani Support Group*, available at: http://www.speculumjuris.co.za/files/pdf/Bohler_Muller_SJ20131_1.pdf [accessed 8 February 2016].

⁵² Pablo de Greiff, *The handbook of reparations*. Oxford: Oxford University Press (2006) Greiff also sees trust as crucial to the transitional justice project more generally, see de Greiff, “A Normative Conception of Transitional Justice” *Politorbis* 50 17–29 (2010).



winning the suit against Barclays et al. would have taken on the global corporate establishment that helped prop up apartheid and that legal victory would have been a remarkable success in terms of the third approach to success cited earlier. On the other hand, mobilizing for the suit, even if it was ultimately defeated, contributed to victim empowerment and extended the on-going reach of the truth commission processes beyond its institutional mandate or the expectations or plans of the TRC architects. This in itself is a success and the challenge and promise is for activists, organizations and funders to define goals in ways that are capacious enough to allow for and engender these possibilities.

Developing more relevant approaches to success and impact requires that we prioritize how transitional justice agendas are advanced in relation to the broader constraints and opportunities of context. This may require that we do not rely on measurable indicators alone but engage in a more nuanced socio-political analysis contexts. It also requires that we look at how transitional justice initiatives could deepen opportunities for social change, so that it becomes more difficult for abuses to recur. To this end, the long term impact of such initiatives would be to weaken the structures that have sustained impunity while effecting redress and vindication for victim and dissenting communities.

Goals and indicators need to be flexible so that transitional justice initiatives can be responsive and flexible when recalibrating to changing political dynamics and unexpected consequences of different interventions. In many contexts, advancing transitional justice entails strengthening elements of the environment within which transitional justice initiatives can thrive. For instance, supporting an independent and strong civil society may be much more critical in the long term, and definitions of success and measures of impact need to develop an accordingly complex appreciation. Indeed, a focus on transformative social change that looks at root causes/structures of impunity would require donors to use a longer time frame in assessing the work of different strategies.



4. Heterodox Traditions for Revitalization

In this section we turn to dimensions of the transitional justice tradition that are not the most dominant or visible elements of the field but nevertheless are ones that carry important legacies and hold promising potential as we move forward.⁵³ As I discussed already, even while the field of transitional justice has become more powerful, well-resourced and mainstreamed within international law and policy, it has also become less effective than we would have hoped. Some of the challenges that have thwarted that effectiveness have been highlighted already. Against that backdrop, the dimensions flagged here offer inspiration and guidance for revitalizing the field from within and addressing the challenges that have limited the reach and effectiveness of transitional justice interventions.

4.1 Complexity of the Category of Victims

The dominant approach to transitional justice foregrounds the significance of victim-centred processes. There is considerable variation on the extent to which “a victim focus” informs institutional practice or even what that focus connotes, but all contemporary transitional justice institutions will have to make at least a rhetorical gesture to these themes. Transitional justice differs from ordinary criminal justice on many fronts, and one critical dimension of this difference is the attention that has been paid to the role of victims, even if that category remains contested and complex. From prosecutions to truth commissions, to reparations and memorials,⁵⁴ there have been many efforts to ensure that there are institutionalized avenues for ‘victim participation’ and efforts to draw from community traditions and localized initiatives when they comport with international human rights norms. International human rights norms themselves have evolved with the transitional justice field with more progressive expectations about what is entailed in treating victims with dignity. For instance, while early prosecution processes (including at the ICTY and ICTR) were charged with taking a narrowly instrumental view of victim’s role in proceedings (i.e. merely as ‘evidence’), today the ICC has much more extensive victim outreach procedures with much greater appreciation of how participation in such proceedings may impact victims.

There are normative, legal and practical rationales for the focus on victims in transitional justice, including a very active and agential conception of rights.⁵⁵ Too often human rights interventions can carry the tone

⁵³ At the expert meeting “Making Transitional Justice Work”, these were referred to as ‘lost traditions’ that need to be retrieved. The meeting took place in The Hague on 26-27 November 2015.

⁵⁴ Impunity Watch, *The Involvement and Representation of Victims and Perpetrators in Memorialization processes*, available at: http://www.impunitywatch.org/docs/Report_mini_conference_victims_and_mem_nov_2010.pdf [accessed 8 February 2016].

⁵⁵ Given the significance of this focus, it is worth flagging the different dimensions of these rationales. Firstly, victims have a right established in international law to justice, truth and reparation, and foregrounding victims is an effort to recognize this right as not a passive entitlement but an active, agential claim. This can be read into the references to ‘dignity’ and ‘participation’ in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [accessed 9 February 2016].

Secondly, in many cases transitional justice processes can yield concrete, material value for victims and a victim centred process can prioritize initiatives that have a material ameliorative effect. Reparations can serve this function but in addition families of the disappeared may find truth seeking initiatives may be particularly important in recovering bodies, establishing death to issue death certificates and the like.

Third, since transitional justice efforts are often initiated in the aftermath of brutal conflicts there is much focus on as a dimension of a just and reparative approach to trauma and violation, and ensuring that transitional justice institutions giving victims voice and priority helps institutionalize that healing process, or, at the very least, ensure that such processes do not re-victimize and alienate those who have already suffered so much. For instance, Note Penelope Andrews’ discussion of TRCs as having a cathartic task in: “Reparations for Apartheid’s Reconciliation?” *DePaul Law Review* 53 (3)

and culture of some kinds of humanitarian and development work, as if victims were beneficiaries of external munificence rather than rights holders with claims that are independent of that intervention. In some contexts victim communities have expressed some disgruntlement that transitional justice institutions have made gestures to victim consultations, which amounted to little more than lip service. As signalled by terms such as ‘stakeholders’ and ‘target populations’, local communities are implicitly assigned a passive role in projects that do little to change the power dynamics that victimized them in the first place. In other contexts transitional justice institutions have been seen to develop their own bureaucratic mechanisms and are subject to control by state officials, funders, international agencies (including international NGOs) and other powerful actors.⁵⁶ In yet other cases, victims have felt exploited by transitional justice institutions to legitimate these processes, while advancing agendas that may be indifferent to or even sacrifice victim priorities.⁵⁷ Indeed there is almost no transitional justice institution that is established or policy that is advanced without being accompanied by the claim that it is in the interests of victims. Moreover, victims themselves may be internally divided in terms of ideologies and political priorities and a romanticized or homogenized model of victimhood may ignore important politically complex issues. For instance, in the context of disappearances we often see a conflict between some families of the disappeared. The one may prioritize justice and others prioritize information or truth about the disappeared. Those who prioritize truth may be concerned that justice processes may jeopardize their goal. In addition, accounts of victim agendas and leadership of victim communities may reflect problematic hierarchies of gender, ethnicity, political affiliation and such. There is a need to develop a nuanced account of victim agendas and voices without relying on simplistic clichés about victim centred processes.

1155-1180 (2004) available at: <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1465&context=law-review> [accessed on 10 February 2016].

Fourth, and relatedly, when victims have a voice in shaping policy those policies are much improved – they reflect the fact that policies were tailored to fit the interests and priorities of those who suffered the most grievous harm in that context. This is also an opportunity to draw on community values in shaping transitional justice initiatives and empowering local traditions of dealing with injustice and violation.

Fifth, when victims have a public voice – such as in giving human rights testimony in publicly broadcast hearings or constructing memorials in the town centre – this functions as a symbolic reclaiming of public space. This in itself is a way to advance justice, honour a neglected truth and provide a form of reparations. While often neglected, the role of symbolic reparations, memorials, must be underscored as part of a holistic TJ agenda as illustrated in *Understanding the Role of Memory Initiatives in Communities Struggling with Impunity* pp.28, available at: http://www.impunitywatch.org/docs/IW_Memorialisation_Debates_Project_Final_Report.pdf.

Finally, since transitional justice processes are established to tackle large-scale violations not all individual claims will be addressed. In most cases prosecution efforts can deal with only a handful of cases and therefore only a small subset of victims will have justice claims directly vindicated in court processes; not all victims of disappearances and other crimes will get obtain the truth about what happened in their particular cases; not everyone who submits a statement to a truth commission will have a public hearing on their case; not all victims will be beneficiaries of reparations. Thus, because all individual cases will not move forward in even the most ambitious transitional justice initiatives, it becomes especially important that the larger community of victims are able to exert some collective ownership over transitional justice policy as a whole. There may be parallel considerations in truth commissions because not all victim statements submitted to a commission get public hearings, as well as with reparations where beneficiaries are often only a subset of victims

⁵⁶ For a discussion of how international actors displace local actors and local priorities see Rosalind Shaw on Sierra Leone in “Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone,” *The International Journal of Transitional Justice* 1 183–207 (2007) For a discussion of how state-building can shape the direction of a truth commission process see Wilson on South Africa in Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post-Apartheid State*. Cambridge University Press: Cambridge (2001).

⁵⁷ See Fiona Ross’s discussion of the South African TRC’s treatment of women victims in Fiona Ross, *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa*, Pluto Press: London (2003) and Madeleine Fullard’s discussion of the South African TRC’s treatment of racism focused victim claims in Madeleine Fullard, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence*, CSVR (2004).





Victims remembered in Cambodia's Memorial Museum- Photo by Rudina Jasini for Impunity Watch

Finally, in many contexts who is or isn't a victim may be difficult to define as victims may also be perpetrators. In other words, it's important to recall that victims are also political actors. In Peru the discourse of 'innocent victims' contributed to how transitional justice processes were also instrumentalised by the government's political/ military agendas, demonizing those associated with the Shining Path and legitimizing the state's human rights violations in the name of "counterterrorism". In this vein, the 2005 reparations law excluded those who had been "members of subversive organizations" from the category of victim, and accordingly from eligibility for reparations. The message seemed to be that only "innocent victims" had rights; others were fair game for the Peruvian state's abuses.⁵⁸ Complexities such as these trouble easy formulas for victim centred processes. As the Peruvian case exemplifies, the definition of victim, and the way the discourse of victimhood gets deployed, have significant impacts. Transitional justice actors therefore have to analyse the political landscape to ensure they do not contribute to formats that lead to differentiated citizenship and compromised human rights.

Some have argued for a greater focus on the complexity of victimhood, specifically on the blurring lines between victims and perpetrators in some contexts. The Hutu in Rwanda and Serbians in the former Yugoslavia are a good example of this.⁵⁹ Some groups may see themselves as historic victims or structurally marginalized, even if they do not qualify as victims according to international legal criteria in the more proximate conflict. Attending to this layered complexity is important to ensure that the process of determining the guilt and innocence in the proximate conflict will not be experienced as another round of victimization that exacerbates the conflict and deepens marginalization. Sensitivity to historic grievances would encourage political responses that are better aimed at deterring future conflict.

4.2 Redefining a 'Holistic' Approach

A second distinctive and promising dimension of the field of transitional justice is its focus on a holistic approach to justice. In the dominant discourse this has often meant a multipronged focus on criminal

⁵⁸ P. 105-6 of Kimberly Theidon, "Histories of Innocence" in Rosalind Shaw and Lars Waldorf (eds.), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Stanford University Press: CA (2013).

⁵⁹ Mahmood Mamdani, *When Victims Become Killers*, Princeton University Press: Princeton (2001).



justice, truth seeking, reparations and reform. As the field developed the holistic was invoked to go beyond a sole focus on criminal justice and convey an appreciation for the complexity of anti-impunity struggles. As discussed in our brief historical detour however, with the consolidation of the field, the holistic approach became equated with what was referred to as the ‘four’ pillars of transitional justice. This engendered a concomitant institutional fetishism that disseminated the ‘pillars’ as a pre-packaged menu.⁶⁰ Moreover, too often it has also meant that there is a historical immediacy to establishing these institutions.⁶¹ Yet sustaining positive long-term impact requires a more nuanced approach. How different transitional justice initiatives relate to each other in different contexts needs to be considered as not all initiatives may be relevant everywhere and these institutions are tools not goals. If the broader goal is the struggle against structures of impunity, then the relevance of different interventions should be assessed in terms of what is relevant to particular political contexts. In this way, we may better understand ‘holistic’ by abandoning institutional rigidity in favour of a more strategic and contextually grounded appreciation of the multiple dimensions of structural impunity.

The prefix ‘structural’ thus flags how we may redefine the term ‘holistic’ to convey the interrelationship between many domains of justice struggles.⁶² It also conveys the need to strategize regarding transitional justice interventions with attention to the relationship between transitional justice and the broader context. When interventions are advanced as if they have inherent merit with little attention to the local political context they can have adverse consequences. For instance, many activists, scholars and humanitarian agencies in Darfur have faulted the ICC for issuing genocide indictments against President Bashir in ways that were indifferent to the sensitive political dynamics in Sudan,⁶³ including the impact on the peace process⁶⁴ and the relationship⁶⁵ between the ICC’s actions and the broader humanitarian context. The fallout from these indictments led to the expulsion of humanitarian agencies from Darfur which exacerbated the humanitarian crisis.⁶⁵ The focus on Bashir as an individual and the narrowly defined focus on prosecutions also drew attention away from engagement with other underlying causes of the Darfur conflict. These included environmental justice issues in the region and the roots of the crisis

⁶⁰ It was noted in the “Making Transitional Justice Matter” meeting that in the field, the term holistic is already burdened as part of the transitional justice dogma regarding the package of institutional mechanisms. This was a compelling intervention and accordingly we need to redefine ‘holistic’ in ways that are open-ended and relevant to the political context.

⁶¹ Ibid. It was also urged that “ideas of comprehensive, holistic, integrated approaches” are “undeliverable policy stipulations” that have “become one of the biggest potential distractions in the field.” At the same time, it was noted that the term holistic continues to be useful in opening up the discussion in a context where there is still an overwhelming focus on individualized criminal prosecutions.

⁶² Ibid. In the South African context, holistic perspective requires situating “the truth commission in relation to other changes. The constitution for example, in my view remains the biggest transformation project.”

⁶³ For instance, “Mahmood Mamdani, a long term critic of the ICC, has argued that responsible intervention in Darfur requires a more complex politically calibrated approach. He argues in particular that “Anyone wanting to end the spiralling violence would have to bring about power-sharing at the state level and resource-sharing at the community level, land being the key resource.” Mamdani, “the Politics of Naming: Genocide, Civil War, Insurgency,” *London Review of Books* 8 (March 2007)

⁶⁴ There was concern for instance that the ICC’s actions was callously indifferent to the political import of its actions and the prospect that it might adversely impacted the peace process by providing an incentive to the rebels to delay coming to a deal: ‘The methods that the Court followed had a dangerous impact in signalling a message to the armed rebel groups that they should not reach peace with this government because its president is wanted by international justice, which will definitely lead to the government’s fall, and therefore there is no need to talk to the government which is perceived to have the international community against it. This is the most dangerous thing with this court.’ Dealy, ‘Interview: Sudan’s President Omar Al-Bashir’, *Public Broadcasting Service*, 14 Aug. 2009, available at: www.pbs.org/newshour/bb/africa/july-dec09/bashir- full_08-13.html.

⁶⁵ Alex de Waal, “Moreno Ocampo’s Coup de Theatre.” *African Arguments* (2008), available at: <http://africanarguments.org/2008/07/29/moreno-ocampos-coup-de-theatre/> [accessed 9 February 2016]; See also De Waal, ‘Darfur, the Court and Khartoum: The Politics of State Non-Cooperation’, in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society (2008).



in global warming and inter-community conflict fuelled by the shrinking acreage of arable land.⁶⁶ There have been similar criticisms of the adverse impact of narrow approaches to transitional justice in contexts such as Uganda⁶⁷ and Sierra Leone.⁶⁸ Today the dramatic increase in migration underscores the inter-related nature of different dimensions of conflict (their enabling conditions and their consequences), and concomitantly, the folly of focussing on narrowly crafted interventions that are insensitive to the complexity of the political landscape.

In all of these contexts, interventions that restricted the focus of transitional justice may not only have compromised other dimensions of justice, they also eroded the effectiveness of transitional justice measures. Thus increasingly, local communities are arguing for a more deeply holistic approach that attends to the mutually reinforcing dimensions of justice. When focused not just on acts of extraordinary violence but the conditions of impunity then transitional justice and social justice emerge as more deeply intertwined. From the Philippines to Tunisia, there is a more concerted effort to push against a received repertoire of transitional justice interventions, and more focus on addressing the hierarchies of power that enabled and profited from abuse. This includes tracking the relationship between entrenched military, political and economic interests, which is highlighted for example by the focus on “guarantees of non-recurrence” advanced by the Special Rapporteur on transitional justice.⁶⁹ In other cases, it means that questions of economic crimes are linked to questions of physical violence, as in the mandates of the Tunisian and Liberian truth commissions. Furthermore, questions that were formerly zoned to the development field are now seen to be linked to questions of transitional justice. Finally, it implies that anti-impunity efforts can be advanced not only by traditional human rights activists focused on civil and political rights, but also by unions and movements for land reform. The powerful Tunisian trade union UGTT opposition to ‘economic reconciliation’ offers an interesting example.⁷⁰ Thus even while the consolidation of the field has brought greater definition of what transitional justice is; there has also been some effort to deepen and extend the field’s prioritization of a holistic vision of justice. The aim is that this will address the connective tissue between human rights abuses addressed by transitional justice processes and the systemic abuses addressed by social justice struggles focused on the broader ecosystem of abuse.⁷¹

4.3 An Ethos of Experimentation

A third dimension of the transitional justice tradition that could potentially address some of the challenges that have been flagged is the experimental ethos. The field of transitional justice was

⁶⁶ Mahmood Mamdani *Saviours and Survivors. Darfur, Politics and the War on Terror*, Pantheon Books: NY (2009).

⁶⁷ For instance, many democracy activists in Uganda argue that the single minded effort to prosecute Joseph Kony and the LRA strengthened the anti-democratic thrust of the Museveni government and US militarization in the region. See Adam Branch, “International Justice, Local Injustice,” *Dissent* 51(3) (2004); and Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics and Int’l Affairs* 21(2) 179 (2007).

⁶⁸ In Sierra Leone, the divorcing of transitional justice from the broader social justice agenda has been faulted for exacerbating the developmental challenges the country is grappling with. Rosalind Shaw “Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment” in Rosalind Shaw and Lars Waldorf, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Stanford University Press: CA (2013) and Rosalind Shaw, “Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone,” *The International Journal of Transitional Justice*, 1 183–207 (2007).

⁶⁹ “Making Transitional Justice Work”, The Hague (26- 27 November 2016)

⁷⁰ See Vanessa Szakal, *The Presidency’s Incurable Faith in Economic Reconciliation* (October 2015), available at: <http://nawaat.org/portail/2015/10/09/the-presidencys-incorrigible-faith-in-economic-reconciliation/> [accessed 9 February 2016].

⁷¹ As noted earlier, this entails paying attention to transnational dynamics of conflict. It also entails addressing state actors as well as non-state actors such as multi-national corporations.



historically one that was birthed in ways that prioritized innovative approaches to justice. Arguably, the truth commission was itself originally a product of such innovation, when amnesties and other challenges made prosecutions difficult in the Southern Cone. Moreover, the truth commission's institutional development was shaped by creative human rights activism in its first decade. The South African commission's public hearings offer a remarkable example of such innovation. Similarly, memorials have often been built and used in imaginative ways as civil society led catalysts for anti-impunity efforts. In many contexts, even when traditional transitional justice efforts are not on the table, memorials have kept alive the memory of atrocities in the public sphere.⁷² Gacaca courts, although not problem free, offer another example.⁷³ Other innovations include the CIGIC in Guatemala and RECOM in the Balkans. Most other experimental initiatives have been more small scale and community based rather than state led. For instance, the Fambul Tok initiative in Sierra Leone was a community based initiative that involved "family circles" of storytelling as part of "a new, community-led approach to post-war reconstruction that walks alongside ordinary people, helping them reawaken cultural practices of acknowledgement, apology and forgiveness."⁷⁴ The Greensboro truth commission in North Carolina offered an interesting example of a process to deal with a history of racially biased policing and judicial decision-making.⁷⁵ The Ardoyne project in Northern Ireland was a victim testimony based project that honoured victim's voices, while also highlighting the failures of the Bloomfield Report that emerged from the British government convened Victim Commission.⁷⁶ These initiatives have offered enormously interesting approaches even in the most inhospitable conditions.

Even while the dominant transitional justice discourse has privileged a technocratic approach and developed blue prints and best practices, there is thus an older tradition focused on creative community based approaches. This tradition of innovation has often been born of constraints – be it political constraints or constraints of institutional power and financial resources. Moreover, it has often been community led with local activists working in solidarity with transnational actors but without being crowded out by professionalized expertise. This has meant that these innovative traditions have been

⁷² See IW Discussion Document *Memory for change*, available at: http://www.impunitywatch.org/docs/Discussion_document_Memory_for_Change-Nov_2014.pdf [accessed on: 9 February 2016].

⁷³ In fact, Gacaca initiatives are perhaps the best known example of such innovation. The Gacaca process in Rwanda for instance was an instructive alternative to the privileged mechanisms of the international transitional justice field. Gacaca was not problem free in relation to due process norms and other concerns though. On the one hand, Gacaca was an innovative response to a complex challenge in addressing accountability for the genocide and the thousands of people who had been incarcerated awaiting trial. It addressed questions of impunity innovatively in a challenging context that had to deal with the scale and intensity of genocide while plagued with enormous resource constraints. On the other, Gacaca was also used by the government to consolidate its power and entrench impunity for its own actions; flagging a process as unconventional does not mean we should not ask critical questions regarding legitimacy issues. Ultimately, Gacaca was a complex process that was both a remarkable achievement, and a process that was remarkably manipulated as an instrument of victor's justice. Thus, rather than being dismissed as not falling within the privileged institutional repertoire of transitional justice, Gacaca warranted closer engagement by the human rights community. Undoubtedly, it is an engagement that carried risks and required on going political analysis and critical assessment. However, this is equally true of international mechanisms. In fact, an assessment of the first 15 years of the ICTR's work, made the argument that the ICTR also delivered only a form of victim's justice; that notwithstanding tensions with the Kagame government this international transitional justice institution turned a blind eye to credible accusations against the RPF for violations against Hutu citizens. See David Taylor, *Genocide in Rwanda: The search for justice 15 years on*, available at: http://www.asser.nl/upload/documents/DomCLIC/Docs/Commentaries%20PDF/Taylor_Genocide%20in%20Rwanda_EN.pdf [accessed 9 February 2016].

⁷⁴ Fambul Tok *About-us*, available at: <http://www.fambultok.org/about-us> [accessed 9 February 2016].

⁷⁵ *The Greensboro Truth and Reconciliation Commission*, available at: <http://www.greensborotrc.org> [accessed 9 February 2016].

⁷⁶ Ardoyne Commemoration Project, "Ardoyne: the untold truth," (2002), available at: <http://cain.ulst.ac.uk/issues/victims/ardoyne/ardoyne02a.htm#intro> [accessed 9 February 2016].



much more political, – and perhaps in synergy with the more holistic orientation. They have defined anti-impunity strategies through contextual analysis of the socio-political environments.



Monument in Guatemala- photo by Frank de Ruiter for Impunity Watch

This commitment to challenging impunity has fuelled creativity in negotiating with the complexity of those conditions in ways that take “radical”, if “incremental”, steps.⁷⁷ In that vein these innovative strategies have also required a nuanced analysis of the political context in order to pursue institutional experiments that can create political opportunities even in difficult conditions. Indeed their innovation and inspiration lies precisely in the fact that they have had to be creative and courageous in developing mechanisms that empower victims and challenge impunity in difficult conditions. These projects learned from other contexts and other experiences but did not equate learning with replication; rather they brought an imaginative and contextually relevant approach to learning.

4.4 The Politics of Transnational Solidarity

From the Pinochet case in Chile to Guatemala, the transitional justice field has always had an important tradition of transnational solidarity. In many contexts, international actors have worked in collaboration with local activists in playing a catalytic role in expanding the opportunities that come with transitional justice processes. When international actors work in solidarity with local human rights activists they have helped such groups augment their voice and strengthen accountability processes. In an age of ‘slacktivism’⁷⁸ and ‘market friendly human rights’⁷⁹ we often see invocations of transnational solidarity that are destructive – recent controversies over Kony2012, celebrity activism and the work of ‘Save

⁷⁷ Roberto Mangabeira Unger argues that progressives work towards social change by focussing not on the *scale* of change but the *direction* of change – and in that vein, he advocates for radical if incremental steps. See “Democracy Realized: A Progressive Alternative,” available at: <http://robertounger.com/english/pdfs/demore.pdf> [accessed 13 march 2016].

⁷⁸ Camila Soto, *Online Advocacy or Slacktivism? New Technologies in International Human Rights Advocacy*, (2014). Dissertation, Stanford University.

⁷⁹ Upendra Baxi, “Market Fundamentalisms: Business Ethics at the Altar of Human Rights,” *Human Rights Law Review* 5 (1) 1-26 (2005).

Darfur’ and Nicholas Kristoff are examples.⁸⁰ Yet there are also many important instances of transnational solidarity that are below the media radar, but absolutely significant in playing a catalytic role expanding the political opportunities that attend transitional justice processes.⁸¹ As noted already, when international actors work in solidarity with local human rights activists they have helped such groups augment their voice and strengthen accountability processes. The most significant role in this regard has been that of human rights and social justice activists, including those involved with non-governmental organizations⁸² and universities.⁸³ In some cases, this kind of solidarity has also been seen with funders such as the work of Ford foundation in conjunction with CELS in Argentina⁸⁴ or in conjunction with Chilean activists struggling against Pinochet during the military dictatorship.⁸⁵ In these contexts international actors have contributed to local ownership of transitional justice processes and helped advance local justice priorities.

⁸⁰ Teju Cole, *The White-Saviour Industrial Complex*, the Atlantic (2012). See also Makau Mutua’s article on SVS into this conversation – see Makau Mutua, “Savages, Victims and Saviours,” *Harvard Int’l Law Journal* 42 (1) 201-45 (2001).

⁸¹ Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W.W. Norton & Company: NY (2011).

⁸² Such as the *Centre for Constitutional Rights Work vis-a-vis the Movement for the Survival of the Ogoni People* (MOSOP) and other Ogoni organizations, available at: <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [accessed on 9 February 2016].

⁸³ Such as the CUNY human rights clinic vis-a-vis Haitian women’s organizations, available at: http://www.peacewomen.org/assets/file/Resources/NGO/vaw_haitianwomencontinuetofightagainstrape_madre_january2011.pdf [accessed on 9 February 2016].

⁸⁴ It was noted that “Argentina is a positive example of where international actors have not been working in vacuum” but were led by local actors with a strong political vision who were strategic about when to bring-in international partners and funders. “Making Transitional Justice Work”, The Hague (26-27 November 2016).

⁸⁵ Ford funded exiled human rights activists, scholars and other groups who played a catalytic role in fighting for human rights and accountability. See Margaret E. Keck, Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press: US (1989) See also Yves Dezalay, Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* University of Chicago Press: US (2002).



5. Rethinking Dominant Approaches

In the preceding section we examined heterodox traditions that contributed to some of the success of the transitional justice field in opening space for justice struggles. We now turn to dimensions of the dominant approach that have cramped this space and had an adverse impact on justice struggles. This raises fundamental questions regarding the dominant direction in the field and goes to the rationale for this study. A central finding of this report is that the focus on a technical assistance model that depoliticizes the field of intervention has been deeply damaging to struggles against structures of impunity. Relatedly, the field has narrowed the focus of transitional justice in several ways that have limited its effectiveness and legitimacy. This includes the neglect of structural and transnational dimensions of struggles against impunity, and the reliance on M&E indicators that are abstracted from political context. Thus in the section that follows we analyse the limitations of dominant approaches, and make recommendations for new directions.

5.1 Political Dimensions of Challenging Impunity

Engaging with the field of transitional justice through the policies and practices framed through notions of ‘technical assistance’ has undermined attention to the fundamentally political nature of challenging impunity. Comparative learning and transnational solidarities have been critical dimensions of the human rights field. When channelled through a depoliticizing ‘technical assistance’ lens however, it has often hindered learning about context, defeated innovation and significantly weakened the effectiveness of such engagements. With the consolidation of the transitional justice field within international institutions and the development of a globally mobile community of professionals, transitional justice has become not only an arena of human rights activism but also an area of ‘technical expertise’.

Much of the literature on transitional justice from within the field is focused on how to establish transitional justice institutions in a range of contexts. Indeed conflict itself is seen as an adequate catalyst for the relevance of transitional justice processes (with allowance for variation in timing and sequence). Thus often post-conflict human rights interventions travel in the form of a menu of transitional justice institutions, understood by the field as universally relevant but with local context determining timing and sequencing. In short, transitional justice is seen as a pragmatic process of engineering well-functioning institutions and the relevant knowledge is framed as technical assistance – namely, neutral, apolitical and professionalized. The resultant ‘how to’ literature that dominates the field includes lists of recommendations that are said to enhance transitional justice processes and, concomitantly, lists of warnings regarding obstacles that may jeopardize transitional justice processes. The professionalization of the field has also meant that there are privileged approaches to advancing norms and policies of justice truth and reparations that have become designated as the ‘knowledge’ shared through technical assistance and capacity building.⁸⁶

⁸⁶ For instance, the “EU’s Policy Framework on support to transitional justice” emphasizes the equation of transitional justice with “legacies of war crimes, genocide, crimes against humanity and other gross violations of human rights” (p. 3) – this understanding of transitional justice is dominant but not exclusive and arguably different communities may choose different priorities. For instance, there is increased focus in many contexts of economic exploitation, including those intertwined with human rights abuse (such as the actions of Shell in Ogoni land, Nigeria) and a contextually oriented transitional justice policy will be able to accommodate multiple and diverse visions of transitional justice. This possibility is recognized in the AU framework for TJ which suggests that we may “Expand the Mandate of Transitional Bodies to include Socio- Economic and Cultural Rights” p.20 of African Union Transitional Justice Framework (AUTJF), Draft (April 2014).



I want to highlight a few different concerns with the predominance of a technical assistance model. Firstly, some obstacles arise when transitional justice is approached as a matter of technical assistance with inadequate attention to political context, and the questions of local relevance, legitimacy and effectiveness that are entailed in context specific considerations. When a technical assistance framework interprets recommendations for an inclusive process as a ‘context free’ check-list of best practices, it may defeat democratization more than it advances it.

A recurrent concern is that while the field presents itself as decrying blue prints for transitional justice, the technical assistance model engenders precisely such a de-contextualized approach.⁸⁷ The very proliferation of best practice lists, transitional justice tools and handbooks have tended towards establishing a canonical approach to the field and a coterie of ‘faithocrats’ (to borrow Paul Krugman’s term for this anti-political technical idolatry).⁸⁸ It is an approach that can (and arguably has) narrowed the potential of transitional justice processes by privileging models that are legible to the field. In this way dominant approaches get naturalized as techniques and advocates with agendas bear the mantle of technocrats with professional purpose, and those professionalized human rights experts get valued over human rights activists.⁸⁹

In some cases this has been the route for inhibiting innovation and context specific approaches. Indeed it can deter innovation, marginalize alternative ‘knowledges’ and displace local activists and local capacity. For instance, best practice lists regarding legalistic approaches to due process have rendered the international transitional justice community suspicious of unconventional approaches that may not fit dominant due process norms, even if they have other virtues specific to the local context. This suspicion of the unconventional extends from large-scale sui generis innovations like Gacaca courts and small-scale efforts to modify local traditions such as explorations of community based accountability processes by the Acholi in dealing with human rights abuse in Uganda.⁹⁰ The privileging of state action such as prosecutions and official commissions may have distracted from and marginalized community-based institutional experiments that are more creative if incremental investments in long-term anti-impunity momentum. Another instructive example can be found in the international response to the transitions in the MENA region where transitional justice was approached as it were part of a post-conflict checklist of activities for human rights professionals and the international post-conflict industry. Big international comparative transitional justice conferences were held in Tunisia and Egypt in 2011, to “introduce” the canonical concept of transitional justice to the region, and a range of international actors, including the UN and

⁸⁷ Significantly, even when there is recognition of the need to pay attention to context, the field is so deeply habituated to the claim to apolitical neutrality that it is often caught in internally contradictory calls for apolitical contextual analysis. For instance, Makau Mutua rightly calls for ICC to pay more attention to the political context of Kenya, Uganda, Sudan, and the Central African Republic; yet the very same article that calls for political analysis of the internal dynamics in each of these countries to inform the ICC’s work also advocates for the ICC to depoliticize its decision making process. See Makau Mutua, *The International Criminal Court in Africa: Challenges and Opportunities*, NOREF Working Paper, available at: <http://www.ciaonet.org/attachments/17119/uploads> [accessed on: 9 February 2016].

⁸⁸ Paul Krugman, *Faithocrats* New York Times, 14 July 2015, available at http://krugman.blogs.nytimes.com/2015/07/14/faithocrats/?_r=0 [accessed 13 March, 2016].

⁸⁹ As Ruben Carranza notes, this hierarchy gets very concrete manifestation in the “higher incomes enjoyed by transitional justice professionals versus the near-subsistence resources of local activists. The disparity in the valuation of labor – that of ‘internationals’ versus ‘locals’ (and the hiring of internationals to head local offices) – creates and reinforces a class structure in the transitional justice/human rights field that isn’t based on any correspondence with production – if production is measured by the duration, intensity and risks of working in a country’s context.” [Email to author 2/4/2016].

⁹⁰ Rosalind Shaw and Lars Waldorf (eds.), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Stanford University Press: CA (2013) and Tim Allen and Anne MacDonald, *Post-Conflict Traditional Justice: A Critical overview*, JSRP: London (2013), available at: http://eprints.lse.ac.uk/56357/1/JSRP_Paper3_Post-conflict_traditional_justice_Allen_Macdonald_2013.pdf [accessed 9 February 2016].



NGOs, sprang into action to advise the new authorities, without much preceding analysis on whether the political context was ripe for transitional justice or whether there were alternative methods to advancing the struggle against impunity that were not captured by the transitional justice syllabus. The transitional justice approaches that were pushed by the international community in these contexts contained most of the mechanics of transitional justice, but these were not always adapted to the intricacies of the local context. Thus even if reproducing the blue print is faster, it is often more important to focus on the path to the goal, however slow moving.

Challenging impunity requires developing a complex understanding the political dynamics of local structures, and engaging in ways that are creative and responsive to the opportunities and constraints of those contexts.⁹¹ The technical assistance model treats transitional justice institutions as paths to a goal rather, than opportunities for socially transformative action against the structures of impunity. Rendering the family of transitional justice institutions into technical blue prints that need to be faithfully reproduced neglects how combating impunity necessarily entails complex, political engagements that are creative, flexible and alert to both history and context. For instance, in countries as diverse as the Philippines, Peru, Tunisia and Guatemala, revelations of corruption by the political leadership gave momentum to transitional justice initiatives.⁹² In all of these contexts, when politically engaged anti-impunity activists saw vulnerabilities in the dominant structure of impunity they were able to rethink strategies and highlight the historical linkages between corruption and repression in ways that were responsive to new political opportunities.⁹³ They advanced political analyses that drew connections between accountability for corruption and accountability for human rights abuse. These examples of local leadership, contextually relevant expertise, and politically engaged approaches to transitional justice stand in contrast to the dominance of a depoliticized technical assistance framework and the privileging of ‘universally relevant’ expertise.

When transitional justice processes have functioned like mechanical exercises for the international post-conflict industry, transitional justice actors have been ill-prepared to respond to efforts by powerful actors to protect impunity through campaigns to discredit, stall and defeat anti-impunity efforts.⁹⁴ In some contexts activists refashioned themselves as ‘experts’ who could speak an internationalized discourse and engage in international human rights fora. These dynamics exacerbated inequalities within civil society in a number of contexts, while also narrowing agendas to those that would fit within the terms of a privileged transitional justice discourse privileged by the UN or powerful international NGOs. In sum, the technical assistance approach to transitional justice encourages de-politicized and de-contextualized engagements. It defines expertise as professionalized and internationally mobile knowledge rather than knowledge that is situated in activist commitments and knowledge of local context; it favours models that

⁹¹ Arguably the language of ‘challenging impunity’ is itself already compromised by the baggage it has acquired in the transitional justice field in recent years. The notion of challenging impunity has sometimes been equated with depoliticized accountability initiatives, narrowly defined goals, and processes dominated by prosecutions. In this sense, challenging impunity can be seen as compatible with steering away from analysis of the structures of impunity that we have highlighted in this report. See Karen Engle et. al(eds.) *Anti Impunity and the Human Rights Agenda* Cornell University Press: NY (2016).

⁹² For instance, note reparations campaigns against the estate of Ferdinand Marcos in the Philippines, criminal prosecutions against Fujimori in Peru, and the public protests calling for political reform and the resignation of Molina and other leading political figures in Guatemala.

⁹³ The expertise of locally grounded activists and scholars could be likened to ‘metis’ – a term James Scott borrows from the Greeks to indicate that deep knowledge of historical circumstances that can have a practical relevance that escapes the best laid plans of high modernism. See James Scott, *Seeing Like a State*, Yale University Press: US (1998)

⁹⁴ For instance, these limitations partly characterized the work of the ICTY in the Balkans and of the ICC outreach office in Kenya and may have contributed respectively to the legitimacy crisis of the Special Tribunal in the Balkans and the defeat of the ICC’s case against Kenyatta.



are already legible to the field and its ‘best practices’, rather than innovations that may extend or challenge the field as we know it.

5.2 Structural Factors Enabling and Shaping Human Rights Abuse

A second obstacle that has jeopardized the impact of transitional justice processes is the neglect of the structural factors that enabled and shaped human rights abuse in a particular context, i.e. the architecture of impunity. The dominant approach to transitional justice prioritizes gross violations of civil and political rights and institutionalizes this priority in truth commission mandates, agendas for prosecutorial policies, criteria for reparation beneficiaries etc. transitional justice institutions have been structured to prioritize gross human rights abuses, commonly defined to include killings, disappearances and torture by individuals. These priorities have often shaped the agendas of prosecutors and other actors involved with post-conflict criminal justice. The Rome Statute’s focus on individual responsibility for war crimes, crimes against humanity and genocide reflect a further narrowing of prosecutorial priorities. Truth commission mandates often focus on gross human rights violations (such as killings, disappearances and torture), even when these histories of may be intertwined with other serious human rights violations. These can arise from economic exploitation and dissent against systemic injustices that may be more challenging to investigate or prosecute. Similarly, even while recognizing that many people have been victimized by a long-standing conflict, reparation programs establish narrow criteria for beneficiaries – criteria that exclude many victims.

In most cases a focus on gross violations of civil and political rights alone has proved inadequate in capturing the historical record. For instance, in response to pressure from civil society groups, the South African TRC modified its plans for individual public hearings and also instituted thematic hearings on the collective impacts on women, youth etc. Nevertheless the South African TRC has been criticized for how its individualizing focus distorts the historical record of systemic crimes.⁹⁵

There is a need to develop a broader understanding of serious human rights violations and, relatedly, to develop institutional capacity to address collective, as well as individual crimes. Attention should not be focused on specific abuses but also on systemic abuses that can be investigated in context. In addition, individual violations may sometimes be designed to have a collective impact. Disappearing a particularly outspoken individual for instance, can have a chilling effect on dissent in the society as a whole. Moreover, a narrowly legalistic focus on incidents that are human rights violation may leave intact the structures that enabled them, including ones that empowered the beneficiaries of human rights abuse and reproduced the vulnerability of human rights victims.

While there is some discussion in the field surrounding root causes of human rights abuse, the dominant approach to the problem of impunity is often defined in ways that manage conflict and deter deeper social change. For instance, the ICC in Northern Uganda focused on the violations committed by the LRA, including killings, abductions, and rape; it could however not respond to the effects of 20 years of displacement and internment of the civilian population into IDP camps, where many more were dying from malnutrition, disease or other indirect consequences of the conflict than were being killed by the LRA. The Timor-Leste truth commission incorporated innovative approaches to assess the direct impact of

⁹⁵ See Madeleine Fullard, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence*, CSVR (2004); Fiona Ross, *Bearing Witness*, Pluto (2003); Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC),” *Diacritics* 32 (3-4) (2002)



Indonesian policies regarding food distribution to assess famine and health crisis related deaths and the indirect impact of the occupation more generally. It attributed 20% of deaths to armed conflict and 80% to malnutrition, famine and illness.⁹⁶ The numbers are windows into a broader story connecting death from physical violence to death from entrenched social injustice and exploitation – or what Rob Nixon has termed ‘slow violence’ to refer to how structures render the lives of the poor vulnerable and disposable in incremental but catastrophic ways.⁹⁷ Often death from physical violence is itself a symptom of the larger structures. In sum, even when human rights violations are investigated or prosecuted, they need to be situated in terms of their root causes, enabling structures and systemic consequences so that transitional justice processes are not focused only on the symptoms of abusive conditions.

The focus on civil and political rights has many companion biases. For instance, the field is largely oriented towards a focus on incidents of extraordinary violence rather than more systemic violations. These are enabled by and reproduce a power relation that render some communities routinely vulnerable to human rights violations and benefits others with routinized impunity for those violations. Moreover, the structural nature of human rights abuse is neglected because typically the problem is defined in terms of individual cases of human rights violations, and the individual perpetrators and victims involved in the particularities of that case. An excessive focus on ethics (the moral condemnation of perpetrators for example) or on legalism (defining the problem in terms of the criminal justice dimensions of accountability for instance) can get in the way of a socio-political analysis of the social structures of violations and impunity. All of the factors noted here (the individual dimensions, the cases of extraordinary violence, the ethical and legal aspects of a violation etc.) are important. However, if they individually or collectively displace and de-prioritize analysis of the structures that enable human rights violations and entrench impunity, they limit the impact of transitional justice processes.⁹⁸

In some cases particular notions of catastrophic violence on the body can become a *cause celebre* that elides systemic patterns of violations and abuses that do not fit that picture of catastrophe. For instance, arguably, sexual violence has become such a *cause celebre* for the transitional justice field. That focus has become mainstreamed within transitional justice institutions through a range of initiatives including Security Council policy commitments,⁹⁹ jurisprudence on sexual violence in international courts,¹⁰⁰ outreach and collaboration with those working on sexual violence and funding streams supporting work on sexual violence. At the same time we haven’t seen systematic engagement with other historically marginalized communities. In fact little attention has been paid to the systemic nature of factors such as indigeneity, race, religion and class in mapping vulnerability to human rights abuse or impunity vis a vis responsibility for human rights abuse. In some cases these issues were avoided because they were

⁹⁶ Thanks to Ruben Carranza for pointing me to these statistics [Email to author 02/04/2016].

⁹⁷ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* Harvard University Press: Cambridge, MA (2011).

⁹⁸ Antjie Krog, *Inappropriate Text for an Appropriate Evening, Keynote Address* at Sunday Times 2015 Literary Awards, available at: (<http://bookslive.co.za/blog/2015/06/29/an-inappropriate-text-for-an-appropriate-evening-read-antjie-krogs-keynote-address-from-the-2015-sunday-times-literary-awards/>) [Accessed 13 March, 2016]. Mahmood Mamdani, A Diminished Truth? In Wilmot James and Linda Van de Vijver, (eds.) *After the TRC: Reflections on Truth and Reconciliation in South Africa*, Ohio Univ. Press (2001) and Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the South African Truth and Reconciliation Commission.” *Diacritics*, Volume 32, (3-4) 33-59 (Fall-Winter 2002).

⁹⁹ For instance, in 2000 the Security Council passed Resolutions 1325 on Women Peace and Security; the following decade saw a host of resolutions focussed on violence against women in contexts of conflict including SCR 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013).

¹⁰⁰ See the ICC’s *policy paper on sexual violence in conflict*, available found at: <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [accessed 9 February 2016]. For a broader summary of international jurisprudence on sexual violence see Mark Kersten’s article in Justice in Conflict “*Prosecuting Sexual Violence-Some Steps Forward, but Still a Long Way to Go* (2014) available at: <http://justiceinconflict.org/2014/03/10/prosecuting-sexual-violence-some-steps-forward-but-still-a-long-way-to-go/> [accessed 9 February 2016].



perceived to be a threat to reconciliation. For instance, the South African truth commission employed a race neutral definition of human rights in convening human rights hearings; it is thus striking that race is systematically elided in this account of the crimes of apartheid.¹⁰¹ In some cases, the focus on victims of sexual violence has itself crowded out other issues by absorbing institutional resources. This has been particularly significant when sexual violence was treated as separate from other significant aspects of gendered abuse.¹⁰² For instance, the Peruvian commission report paid attention to sexual violence and the need for accountability for acts of sexual violence with Peruvian transitional justice processes. The Peruvian women's groups however criticized the report for neglecting a host of other gendered dimensions of the Peruvian human rights record (such as conflict related displacement) that may not itself capture attention as an act of extraordinary violence on the body.¹⁰³ The focus on events entailing extraordinary violence, rather than the continuities with contexts of ordinary violence, can narrow the remit of accountability processes.

As noted earlier, the individualization of human rights violations can also perform this narrowing and distract from a systemic focus. For instance, it could be argued that the focus on the monstrosity of Charles Taylor's responsibility in the war in Liberia and Sierra Leone, and the sensationalism of the trial, with supermodels and actresses as witnesses, may have distracted from the much wider problems. These include corrupt one-party politics, the support that system and Taylor enjoyed through alliance with powerful Western nations, and the formation of RUF and its violent rebellion. This violence was fed through the political economy of the international trade in timber, diamonds and such, which fuelled those conflicts, engendered vulnerabilities and generated profits.¹⁰⁴ This trade itself was located in systemic patterns of power and exploitation at a national and international level. Challenging the impunity that Taylor had enjoyed was important but arguably, the individualization, moralization and legalization of that project by the Special Court for Sierra Leone worked to shield the socio-political systems that anchored and shaped those violations from challenge; thus many pillars in the architecture of that system remain strong today.

A systemic focus on structure is different from a focus on poverty alone – arguably they are related but addressing poverty is not the same as addressing structural power relations. Thus increasingly some policy makers and social scientists correlate poverty and conflict and argue that the poor will be disgruntled and more inclined to conflict over scarce resources.¹⁰⁵ This is often then translated into income generation projects and other poverty alleviation programmes. Yet abuse and impunity are enabled by structural power and thus the conflict risk resides with institutional arrangements that have enabled some groups, whether local or global elites, to accumulate significant wealth. The structures that enable such accumulation and the structures that entrench impunity feed each other and in many such contexts, beneficiaries of the system have been invested in entrenching those enabling conditions, including through human rights abuse. Socio-political analysis of the architecture of both abuse and impunity – the

¹⁰¹ Madeleine Fullard, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence*, CRSV.

¹⁰² This is partly for sexist reasons that depoliticize gender issues as ones of humanitarian moralism or see rape and other bodily violations as being the terrain of innocent victims.

¹⁰³ Interviews conducted by the author with Peruvian feminists. See p.4-5 and 9 of Nesiya et. al, *Truth Commissions and Gender: Principles, Policies, and Procedures*, ICTJ (2007).

¹⁰⁴ Business and Human Rights Resource Centre, *DLH Lawsuit (re Liberian Civil War)*, available at: <http://business-humanrights.org/en/dlh-lawsuit-re-liberian-civil-war> [accessed 9 February 2016] and Alice Blondel's article in *Le Monde Diplomatique*, *How Timber Fuels the World's Worst Conflicts: The Logs of War* (2004), available at: <http://mondediplo.com/2004/01/15timber> [accessed 9 February 2016].

¹⁰⁵ Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About it*, Oxford University Press: NY (2007).



granular analysis of the how the system works in its localized details, as well as macro analysis of the wider historical and global arc - is a critical starting point. In some cases commission reports move in that direction. For instance, the Sierra Leone commission did important work linking details of gendered dimensions of property law with the political economy of the diamond trade as part of the “truth” regarding the drivers of vulnerability, abuse and impunity. As we noted earlier, the Timor-Leste commission developed new research methodologies to study. This is an instance of the powerful potential of transitional justice institutions to make these connections and expose how established hierarchies of power and the abuses are enabled and reproduced through those structures. However, if the focus of transitional justice institutions remains trained on the symptoms rather than the underlying systems, we will fail to launch a more fundamental challenge against impunity and vulnerable communities will remain vulnerable. Indeed in some cases they may even demobilize victim organizations and human rights movements by domesticating their energies into prosecution and commission processes that do not go beyond the symptoms of abuse.

In some contexts, transitional justice processes have sought to develop innovative paths to address structural issues. For instance, the South African TRC is best known for its individual victim hearings and clearly this was the central anchor of its work. However, as noted earlier, even as the commission was functioning, civil society groups criticized the commission for not addressing the structural dimensions of apartheid. They argued that focussing on individual victims and perpetrators neglected the larger story about life under apartheid for all South Africans – namely, that it was a racialized system that rendered some as structural beneficiaries while others were structurally vulnerable. Stories that focused on individual violations ignored larger patterns of human rights violations and institutional complicities that helped reproduce and entrench the system. In response to these criticisms, the South African TRC introduced thematic and institutional hearings that proved a novel window into the structural dimensions of apartheid. These hearings were able to offer a complex window into how apartheid impacted particular groups (such as women or youth for instance), as well as into how different social institutions (such as the church or political parties for instance) functioned in the context of apartheid. The introduction of these hearings offers one small effort in an institution and in a field that tended to neglect structural factors but its significance must not be underestimated. These hearings are interesting and important because they offer an instructive example of a home-grown innovation that responds to the specifics of its context. They also evidence how even the most established institutions can be open and responsive to civil society criticisms. Equally, however, they also offer an example of a transitional justice process making an attempt, however modest, to address the structural factors enabling human rights abuse and impunity. The institutional and thematic hearings highlighted historical and structural dimensions of apartheid. This helped offer a basis for shaping institutional reform and making recommendations for social change.

For transitional justice policies and practices to better address the priorities of local communities in ways that are sustainable and effective, would require attending to the relationship between structural marginalization and vulnerability to human rights abuse. It may require a focus on patterns of continuity and discontinuity regarding systemic abuse over a period of time, rather than a narrow focus on instances of extraordinary physical violence. A more complex approach to a victim centred orientation may also require strategies that go beyond legalistic, monolithic and individualized notions of victimhood to situate victims in patterns of collective discrimination and social marginalization on account of factors such as class, race, indigeneity, religion etc. The particular factors that shape such vulnerability will vary from context to context and to this extent the human rights priorities that any particular transitional justice process engages with will also be defined contextually. Ethnicity, language and region may therefore be particularly significant for any Sri Lankan transitional justice initiative addressing the three decade long



war; whilst gender and nationality may be the most pertinent indicators of vulnerability when addressing the abuses suffered by comfort women in World War II. Concomitantly, shaping transitional justice agendas to attend to the relationship between structures of power and patterns of human rights abuse also requires going beyond a focus on perpetrators alone. It means looking at beneficiaries of human rights violations and developing anti-impunity initiatives that aim at the nexus between beneficiary and perpetrator.¹⁰⁶ It would require going beyond limited temporal mandates that restrict the focus to the human rights violation to look also at the preconditions or enabling conditions of the violation and impunity.

5.3 Transnational Dimensions of Accountability

Today questions of migration, debates about “terrorism”, and such, are already exposing the limits of approaching questions of justice and accountability within the boundaries of the traditional nation-state. The dominant approach to transitional justice typically defines its work through the geographical and historical horizons of the nation state and its proximate history such as the duration of a civil war or dictatorship. The nation-state becomes the frame of reference for the institution investigating human rights violations, identifying victims, perpetrators and root causes. For instance, the work of truth commissions has often been described as a process of national reckoning, grappling with a nation’s past in order to shape its future. Accordingly, mandates are usually framed through bounded events such as the duration of a civil war or a military dictatorship. Truth commission mandates typically restrict their geographic and historical mandate accordingly. For instance the mandate of the influential Rettig Commission in Chile was asked to investigate actions “committed by (Chilean) government agents or people in their service” for the duration of the military dictatorship, “September 11, 1973 and March 11, 1990” because “the moral conscience of the nation demands” that these truths be “brought to light”.¹⁰⁷ Rules establishing statutes of limitation and national jurisdiction boundaries also limit prosecution initiatives to national actors. Reflecting a similar focus on nation-state referenced approaches to accountability, typically reparation programmes are funded from the national treasury rather than foreign aid, even from countries that may bear some transnational responsibility for the human rights record.¹⁰⁸ Moreover, the limited temporal mandate that dominates the field conceives of monetary reparations as restitution to the pre-human rights violation status quo rather than redistribution pushing further back to engage with the economic preconditions or enabling conditions of impunity.

The focus on the nation state is significant when it can advance accountability and challenge the abuse of power by national actors; it can also better contribute to strengthening national institutions and deepening local justice traditions. However, in many cases the responsibility for human rights abuse and

¹⁰⁶ As noted earlier, this focus on victims and perpetrators, and the concomitant exclusion of beneficiaries, was an important early criticism of the South African truth commission by Mahmood Mamdani in “Reconciliation without Justice,” *Southern African Review of Books* 46 (Dec. 1996). This criticism has since been highlighted in the analysis of a number of cases and commissions.

¹⁰⁷ See the United States Institute of Peace, *Report of the Chilean National Commission on Truth and Reconciliation*, available at: http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report_Part1.pdf [accessed 9 February 2016].

¹⁰⁸ The role of the US and the UK in the military dictatorship in Chile as discussed further below is an example of this. Despite these foreign entanglements however Chile self-funded its reparation programme. To date, Chile has spent over US\$3 billion on reparation. Argentina has spent over US \$2 billion (these figures may compute differently in US\$ terms today due to devaluation). See ICTJ, *ICTJ Program Report: Reparative Justice* (2013), available at: <https://www.ictj.org/news/ictj-program-report-reparative-justice>. [accessed 9 February 2016].



the consequences of such abuse may extend beyond national boundaries.¹⁰⁹ In such cases, the geographically and temporally restricted approach to human rights abuses may not fully capture the complexity of the historical record. Accordingly, some transitional justice institutions have pushed beyond their mandates to investigate transnational dimensions of accountability – such as the Guatemalan truth commission’s investigation of the US role in human rights abuses in Guatemala or the Liberian commission’s effort to take testimony from exile communities in the USA. Similarly, in some cases, institutions have pushed beyond the temporal limitations such as in the effort of the South African TRC’s final report to situate apartheid in the history of English and Dutch settler colonialism in South Africa. Some have suggested that we replace the term ‘post-conflict’ with ‘post-violence’ to draw attention to the fact that the temporal dimensions of large scale violence is not the same as the temporal dimensions of the underlying conflict.¹¹⁰ Thus even when there may need to be more urgent action to address the scale and intensity of violence, we also need to develop a long-term agenda to address the longer term conflict. In most cases, initiatives developed to address the violence are important but inadequate to addressing the more socio-politically complex conflicts that gave rise to the violence. These cases are the exception.

In general the field of transitional justice has resisted efforts to go beyond holding national actors responsible, and has been sceptical of the transnational and historical framing. The field has opted for a more contained approach to addressing impunity. This approach however offers a biased, reductive and partial representation of human rights abuse; it may defeat the core animating goals of Transitional Justice. In some cases, inadequate attention to transnational dimensions of the conflict has compromised truth seeking. For instance, in South Africa, tracing of the disappeared has suffered from inadequate attention to cross-border dimensions of apartheid era disappearances such as mass graves in Namibia.¹¹¹ In Chile, the commission suffered from a mandate focussed solely on Chilean perpetrators. As noted above the Rettig Commission foregrounded national actors and the duration of the Pinochet dictatorship; yet it is now well established that US military, political and economic support to opponents of Allende begun at least in 1970 and intensified after Pinochet’s 1973 coup.¹¹² In this and other cases, the national boundaries on the investigation of responsibility curtail the truth about the role of foreign powers. In other cases, inadequate attention to transnational dimensions of the conflict has compromised justice – for instance, there has been no justice process that has effectively pursued international actors (such as the Americans, British and Russians) for war crimes in Afghanistan.¹¹³ The Afghan Independent Human Rights Commission developed a conflict mapping report on violations in Afghanistan from 1978 to 2001, which offered some account of Soviet violations. There is however yet to be even a minimalist investigation of the conduct and policies of the US and its allies post-2001. These geographic and temporal limitations on accountability have compromised the field of transitional justice as a whole.

¹⁰⁹ This is particularly true of globally powerful actors such as the USA as well as regionally powerful actors such as India. For instance, the India has had significant responsibility for human rights abuse across the sub-continent – from the Indian Peace Keeping Force in Sri Lanka to a long history of military and political support to actors responsible for human rights abuse in Nepal.

¹¹⁰ For instance, see Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press: NY (2009)

¹¹¹ Gary Baines, *Breaking Rank: Secrets, Silences and Stories of South Africa’s Border War*, Rhodes University: Grahamstown (2007), available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.529.2334&rep=rep1&type=pdf> [accessed 9 February 2016].

¹¹² See the George Washington University National Security Archive, Peter Kornbluh, *Chile and the United States: Declassified Documents Relating to the Military Coup, September 11, 1973*, available at: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB8/nsaebb8i.htm> [accessed 9 February 2016].

¹¹³ Shaheen Whyte, “Afghanistan’s forgotten war crimes,” *The Drum* (2013), available at: <http://www.abc.net.au/news/2013-10-28/whyte-afghanistans-forgotten-war-crimes/5048982> [accessed 9 February 2016].



International engagement with local processes carries both opportunities and challenges. In the most egregious cases, such as the Iraqi High Tribunal, this has been used to ignore violations by the United States and other international actors and focus narrowly on national actors, with little regard for the pivotal role of international actors in providing military and other support to those same national actors. Here transitional justice becomes not a challenge to impunity but a path to institutionalizing double standards that offers impunity to powerful nations. Indeed with international transitional justice agendas carving out a zone of impunity for international actors they appeared to add yet another layer of trans-national injustice. It carries continuities with the fraught moral economies of colonial projects for the ‘improvement’ of colonial subjects in the name of ‘civilization’, ‘modernization’, ‘liberalization’ and the like. Accordingly, many observers of the Iraq tribunal heard echoes of a colonial pattern of interventions; the tribunal instrumentalised accountability processes as an adjunct to its geo-political and military ambitions.¹¹⁴



Mothers of Srebrenica meeting former Dutchbat members in October 2007- *courtesy of PAX*

In similar fashion, transitional justice processes such as the International Criminal Court or the Sierra Leone Special Court focused on prosecuting local warlords but not the multinational companies implicated in widespread human rights abuse in countries such as the DRC or Sierra Leone. They ignored the transnational dimension of human rights culpability and distorted the accountability processes in ways that seem to insulate multinational corporations. Multinational companies have had an exploitative presence in much of Africa (a presence often described in the global South as ‘neo-colonial’) and their alliance with local perpetrators has served to empower the latter and entrench impunity. Thus when multinational companies and their leadership are insulated from transitional justice processes, the legitimacy of these processes are fundamentally undermined and carry the taint of neo-colonial logics. The current legitimacy crisis of the ICC in Africa is not unrelated to these double standards – not just the

¹¹⁴ There are also more proximate analogies with the racialized deployment of criminal justice in the United States where criminalization becomes, simultaneously, a weapon advancing police abuse against black men and a weapon advancing police impunity for abuse.



perception of double standards but *actual* double standards in the operation of the machinery of international justice.

The work of the Sierra Leone Special Court is particularly interesting because one of its most prominent trials was one where the Court went beyond the nation state to address the cross border responsibility of Charles Taylor. Yet regrettably, its handling of cross border responsibility was limited and biased. This could have been a case that opened the doors to an investigation of how Taylor's outsized role in the region was sustained for so long. It could have looked at how he was empowered and protected by a complex network of transnational structures of impunity that included the military and political assistance of states like the US, and the economic power of multinational corporations like Firestone.¹¹⁵ Yet, the Sierra Leone Special Court was uninterested in the transnational structures of impunity that produced and protected Taylor for so long. Arguably, one unfortunate legacy of the Special Court's handling of the Charles Taylor case, is a story of individual accountability becoming the decoy that distracted from, or even entrenched, the impunity of the US and other global powers.¹¹⁶ The resistance to trace these transnational lines of responsibility may often be driven by ideological reasons. There have however also been frequent allusions to the practical benefits of a more local or national focus. If this more contained approach is delegitimized and ineffective because it appears to carve a zone of impunity for international actors, it is the 'contained' approach that may turn out to be most impractical.

The linking of questions of legitimacy to questions of transnational justice has become particularly significant because of the international dimensions of the field. This includes its laws and norms, the profile of activists and professionals, and the profile and reach of international institutions such as the ICC and the Security Council. In many areas, the global nature of the transitional justice field is a strength; it has engendered comparative learning and transnational solidarities that have been crucial to the dynamic of the field. At the same time, the reach and impact of transitional justice processes have depended crucially on these processes enjoying legitimacy in their immediate contexts and the larger global contexts in which they are observed and followed. Thus for instance, double standards in the attention of international institutions can corrode legitimacy and blunt the reach of transitional justice initiatives. Colonial legacies in shaping contemporary problems, including the hierarchies embedded into global governance institutions make questions of transnational discrepancies particularly meaningful in undermining legitimacy. Indeed from Kenya to Sri Lanka, the double standard in international accountability efforts have played into the hands of those seeking to cynically raise the nationalist flag to insulate those in power. Thus the problem with the double standard is not only the impunity that attends

¹¹⁵ For instance, there is clear evidence of the CIA facilitating military support to Charles Taylor not only in relation to Sierra Leone, but also in relation to Liberia itself, including assistance in escaping jail and launching a coup. See Nick Allen, *Liberian despot Charles Taylor worked with US intelligence* (2012), available at: www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9021153/Liberian-despot-Charles-Taylor-worked-with-US-intelligence.html [accessed on: 9 February 2016]. The CIA reportedly also enabled his involvement in neighbouring countries such as Burkina Faso (where he reportedly arranged for the assassination of Thomas Sankara with the assistance of the US and France - see Paula Akugizibwe's article on This is Africa, "*Debt is a Cleverly Managed Reconquest of Africa-Thomas Sankara*" (2012), available at: <http://thisisafrika.me/debt-cleverly-managed-reconquest-africa-thomas-sankara> [accessed on: 9 February 2016].

¹¹⁶ Taylor cited his long history of collaboration with the West at his trial – his own goals may have been self-interested but that collaboration goes to the heart of the legitimacy crisis that haunts international courts. The Sierra Leonean and Liberian truth commissions went further than the Special Court but again with some telling limitations. For instance, in Liberia local civil society activists were interested in having the truth commission investigate the role of Firestone and its responsibility for human rights violations, including through its close collaboration with the Taylor regime. However, the international community (that controlled the purse strings for the Liberian TRC) was reluctant to pursue these linkages – see the ProPublica report, *Fire Stone and the Warlord*. Frontline (18 November 2014), available at: <http://www.pbs.org/wgbh/frontline/film/firestone-and-the-warlord/> [accessed on 10 February 2016].



abuses committed by powerful countries in the global North. The double standard also functions to derail anti-impunity strategies in many countries in the global South. I have already alluded to how the ICC's focus on the global South, and Africa in particular, have exacerbated North-South tensions in how the field is received. While the contemporary transitional justice field may have been born in Southern Cone, it is New York, Geneva and The Hague that are perceived to be driving the policy and legal developments in the field. Against this backdrop, the fact that permanent members of the Security Council (and key US allies such as Israel and Saudi Arabia) may be responsible for some of the worst human rights atrocities, while enjoying the greatest impunity, has only compounded the question of double standards and the resultant legitimacy crisis of the field. This crisis is part of the eco-system within which transitional justice processes are advocated for, established and implemented, and has an enormously significant impact on their transformative potential.¹¹⁷ Thus for these and other reasons it would be difficult to advance transitional Justice goals if we kept our focus only on national dimensions and domestic actors, rather than international dimensions and global actors.

5.4 Civil Society Leadership of Transitional Justice Initiatives

Transitional justice practitioners frequently recommend that there should be efforts to ensure that transitional justice processes are inclusive and democratizing processes. Minimally, this is a recommendation that such institutions are established in ways that are subject to public dialogue rather than authoritarian diktat or secretive 'justice' processes that present the public with a *fait accompli*.¹¹⁸ More significantly however, it is a recommendation that such institutions are operationalized in ways that are accessible and open to civic engagement. For instance, in the context of ordinary criminal justice processes, justice is often defined in terms of what is proven and refuted within the four walls of a courtroom. However, in the transitional justice context, the legitimacy of criminal justice processes extends beyond the facts of any particular trial to whether they can be part of a broader opening for the reclaiming of public space.¹¹⁹ Truth commissions have come to hold particular significance partly because they are instruments that complement the focus on individual cases in larger political and historical context with a macro picture of human rights. In this vein, they can be important doors for catalysing democratic engagement with a country's human rights history. For instance, the South African TRC's innovation of public hearings have been celebrated and widely reproduced in truth commissions that followed because they served to make the work of the TRC part of quotidian democratic dialogue in South Africa. Yet significantly, twenty years after the South African transition, many argue that the TRC brought premature closure on many issues that have continued to fester. Rather than be a platform for greater civil society leadership, the TRC may have helped anoint the ANC's management of the transition and the demobilization of the liberation struggles against apartheid.¹²⁰ Thus recent protests by workers and students across the country argue that the transitional institutions such as the TRC brought a change in government but not decolonization. A parallel argument can be made regarding Sri Lanka in the mid-90s –

¹¹⁷ Recent examples can be seen in the one-sidedness of many of the accountability debates on Syria, which have tended to focus on the culpability of the Bashar Al-Assad regime or the ISIS, and have often not included the Syrian opposition. A proposal to have an international investigation into war crimes in Yemen tabled by The Netherlands in the recent Human Rights Council was also stifled by the GCC and its backers. Instead, it was proposed that the Yemeni government in exile, itself a party to the conflict, initiate an investigation.

¹¹⁸ For instance the Peruvian human rights community protested when the government announced the name of the commissioners without open dialog and civil society input; the government had to then revisit those appointments and add names advocated for by human rights groups. Similar dynamics accompanied commissioner appointments in Liberia.

¹¹⁹ See: Mark Osiel, *Making Sense of Mass Atrocity*. Cambridge University Press: NY (2009).

¹²⁰ It was noted in the meeting that in South Africa there was a broader assumption "that when you have a change of regime, the violence stops. But if you don't address the root causes, then the problem continues." Impunity Watch, Ministry of Foreign Affairs, IDLO, conference. Proceedings of "Making Transitional Justice Work", The Hague (November 26).



that civil society engagement helped establish truth commissions to address disappearances but the commission became an end in itself that demobilized social movements.¹²¹

Moments of transition offer a unique opportunity for social change so when transitional justice processes gain democratic traction they have the potential for political momentum and for more transformative change. Yet they can also curb that change by domesticating civil society into outreach programmes and civil society consultations. Strengthening civil society leadership would require greater focus on community-based approaches that draw on local traditions of justice. Accordingly, civil society consultations should be ways of shaping transitional justice policies rather than using such consultations to get civil society buy-in for pre-planned policies by state actors or international actors. This once again underscores the importance of rethinking the philosophy of ‘technical assistance’ and globally mobile professional expertise. Comparative learning and transnational norms can be constructive complements to those community-based approaches without equating globally mobile professional ‘expertise’ with the most relevant knowledge in the transitional justice field. A commitment to strengthening local civil society leadership may also entail support for unofficial processes that may allow greater community ownership than state sponsored transitional justice initiatives. Thus it may call for more attention to arenas such as memorialization that allow for “bottom-up and locally-led initiatives”, including in contesting “official collective memory discourse” through innovative memorials.¹²² This includes engagement not only with NGO-ised or elite civil society actors who could speak in an internationalized language of transitional justice, but also with those civil society actors who may advance justice agendas and priorities that do not translate into that language because of indigenous (or other alternative) epistemologies. It also requires making space for civil society actors who may advance agendas whose radicalism sits uncomfortably with the dominant professionalized discourse.¹²³

Finally, one important aspect of the international dimension of transitional justice that is of particular relevance is that policy initiatives by the security-council and other powerful actors have implications for the strength of civil society across the globe. The health and vibrancy of civil society is often spoken of as vulnerable to authoritarian governments and domestic considerations and divorced from the international dimensions. Yet there are at least three elements of international policy orientations that have had adverse impacts on civil society in many countries over the last couple of decades. Firstly, counter terrorism policies led by the Security Council and powerful states from the global North have had

¹²¹ Alan Keenan and Vasuki Nesiah, “Human Rights and Sacred Cows: Framing Violence, Disappearing Struggles,” in Neve Gordon ed., *From the Margins of Globalization: Critical Perspectives on Human Rights*, Lexington Books: Lanham, Md (2004); See also Deborah Posel and Graeme Simpson (eds.) *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* Wits University Press: SA (2002).

¹²² Impunity Watch, *Memory for Change: Discussion Paper* (2014) pp. 2, available at: <http://www.impunitywatch.org/docs/Discussion document Memory for Change-Nov 2014.pdf> [accessed 8 February 2016].

The Monument for the Disappeared in Sri Lanka does this by recognizing the dignity of each life, including those denigrated by the state as “terrorist”. It also serves as an annual gathering point for victim groups and human rights activists calling on the state to take more action in pursuing truth, accountability and reparations in relation to disappearances. See the website Friends and Relatives of the Disappeared, available at: <http://www.disappeared-ha.blogspot.com> [accessed 8 February 2016].

¹²³ For instance, see Sally Merry’s discussion of the homogenizing dynamics of women’s organizing on the international plane in engineering a shared sense of “the importance of the international domain, universal standards, and procedures for decision making” For instance, she notes that a women’s group is more likely to get consultative status and a seat at the table in discussions regarding international documents if it can show that “it is promoting the goals of the UN.” This, in turn, “improves their ability to fundraise” because “participating in these meetings” will “provide information on donor agendas. Sally Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University of Chicago (2006) pp. 31, 48 and 53. Also elaborated on in Vasuki Nesiah “Uncomfortable Alliances: Women, Peace and Security,” in Ania Loomba and Ritty Lukose *South Asian Feminisms*, Duke University Press: Durham (2012).



ripple effects across the world. When governments were able to frame opposition in the language of terrorism, this background counterterrorism policy framework empowered measures that monitored, controlled and weakened independent civil society.

Secondly, structural adjustment policies advanced by the IMF, the World Bank and sometimes UNDP, often functioned to weaken unions who were otherwise the most powerful critical voices in a robust civil society. In some cases, structural adjustment packages included a push for countries to dismantle strong labour laws that sustained unions and in other cases the effect of structural adjustment policies weakened unions, and concomitantly, weakened critical scrutiny and contestation of structures of impunity.

Finally, as already noted, the political economy of funding and the broader approach of international funding agencies to work “as patrons not partners” also served to weaken civil society and discourage independence. Funding is not only a process of writing checks; often it is also used as a path through which the donor imposes conditionalities (explicitly or implicitly) and exercises oversight. In Liberia for instance, the UNDP served as a vehicle for donors to channel funds and seek to ensure that the running of the commission was accountable to international actors. In this case, the international community in general and UNDP in particular, were accused of birthing alternative civil society groups when the existing ones did not comply with donor priorities and their indicators for success. As we discuss further below, a commitment to strengthening local civil society leadership will require rethinking the M&E models that shape funding philosophy to prioritize local initiatives and bottom up accountability over top down accountability and state or donor agendas. Civil society is diverse and not all civil society actors are fighting impunity; however, a robust civil society, with all its messiness and internal differences, is a prerequisite for transitional justice process with effective and sustainable impact.

5.5 Locally Relevant Approaches to Monitoring and Evaluation

Definitions of success are political questions so how we measure impact and develop indicators of success is a high stakes endeavour. The field of transitional justice has relied on what I refer to as ‘top-down’ indicators of success – i.e. indicators of success that are visible and quantifiable from the outside, and concomitantly, conditionalities that can be imposed from the outside. In any particular context there are multiple and diverging priorities, nationally and internationally. Yet the dominant indicators in the field are ‘top-down indicators that are visible from 30,000 feet above the ground through best practice lists and due process norms. The challenge is that even if transitional justice institutions are established in ways that comply with due process norms and the advice of technical experts, if they are not situated in a strategy to wrestle with and weaken the structures enabling human rights violations, these institutions might have little to contribute in the long term struggle against impunity. However, the field has not invested in methodologies for monitoring and evaluation that are locally embedded barometers for socio-politically transformative anti-impunity strategies.

Transitional justice processes are fraught and complicated so measuring impact is difficult. These challenges emerge in the research literature in ways that raise meta-philosophical debates. For instance, “how does one measure whether transitional justice processes delivered on justice, truth seeking or reconciliation, when these are themselves such deeply contested concepts?” They also manifest in the everyday work of transitional justice practitioners’ engagement with funding indicators as they seek to



satisfy donors that they will be contributing to transitional justice.¹²⁴ It is methodologically difficult to connect the dots between intervention and result in a complex social context. Transitional justice processes do not take place in laboratory conditions isolated from other local, national and transnational dynamics; in such a context, tracking cause and effect is challenging. The wheels of transitional justice turn slowly and make it difficult to identify short-term indicators of long-term processes. The theory of change entailed by that longer view is difficult to adapt to the quick turnaround of donor funding cycles. This is more geared towards project funding than the much longer term questions of fundamental transformation of the society.

The issues that transitional justice processes seek to address, like the abstractions of truth or justice, and accompanying goals such as the empowerment of victims or the weakening of a political establishment that drove a civil war, are non-quantifiable. This may require analysis of power relations and ideologies that exceed the categories of perpetrator/victim and of violation/compliance with human rights laws and norms. The dynamics of social change are also difficult to programme or predict.¹²⁵ Thus the goals, strategies and indicators that were contained in funding applications may be rendered moot as political circumstances change. Yet the dominant logic in assessing funding applications rewards initiatives that entail detailed plans outlining goals, strategies and indicators for advancing transitional justice. It may however be much more important to reward initiatives that are agile, creative and responsive to changing dynamics. Indeed the linear log frames for monitoring and evaluating programmes may “stifle innovation and penalize adaptation.”¹²⁶ This also conveys the challenges of the ‘empirics gap’; we have information on what is easier to measure (such as how many cases have been resolved), and little guidance on the issues that are most important to assess (such as the legitimacy of the process).

The discussion of monitoring and evaluating is also necessarily a discussion of funding policies. In many cases international actors have had a significant role because they have controlled the purse strings in ways that allow top-down accountability greater leverage than bottom-up accountability. In such cases this can function to undermine the democratization of transitional justice processes by displacing local actors, particularly victims and other marginalized groups.

Earlier in this report we have cited examples regarding Liberia, the Sierra Leone Special Court and the ICC’s action in Uganda. The significance of donor funds in driving transitional justice work means that these dominant modalities of measuring impact also shape the course of transitional justice work. Darren Walker, the Director of the Ford Foundation has recently reflected that too often donors function “as patrons not partners”.¹²⁷ They privilege top-down accountability to those paying the bills over bottom-up accountability to those most affected, thereby focussing on “short term initiatives not long term institutional health”.¹²⁸ Walker acknowledges the significant role that funders have occupied in the “ecosystem” in which civil society works, and in particular, how dominant donor modalities have engendered

¹²⁴ Colleen Duggan, “Show me your impact”: *Challenges and Prospects for Evaluating Transitional Justice*, International Development Research Centre (2009), available at: <http://www.cpsa-acsp.ca/papers-2009/Duggan.pdf> [accessed 8 February 2016].

¹²⁵ Reina C. Neufeldt. *‘Frameworkers’ and ‘Circlers’ - Exploring Assumptions in Peace and Conflict Impact Assessment*, Berghof Research Centre for Constructive Conflict Management (2007), available at: <http://www.berghoff-handbook.net> [accessed 7 October 2007].

¹²⁶ Colleen Duggan, “Show me your impact”.

¹²⁷ Darren Walker, “How Can We Help You? The value of civil society” State of Civil Society Report (2016), available at: http://civicus.org/images/SOCS2015_ESSAY27_HowCanWeHelp.pdf [accessed 8 February 2016].

¹²⁸ Ibid.



pathologies in that eco-system such that CBOs compete with each other for scarce funding on isolated projects rather than on solidaristic social movements.

Survival has often required that CBOs tailor their work to fit the funder's pet projects rather than being "loyal" to their "mission and principles".¹²⁹ Yet survival on these terms has also reproduced the vulnerability of CBOs and compromised their ability to contribute to transitional justice processes. In resource scarce environments, money significantly augments the distorting effect of top-down indicators and impacts which civil society groups are sustainable in the long run. In some cases, international engagement via funding has (inadvertently) served to amplify inequalities within local civil society by allowing elite, westernized urban NGOs to play an outsized role. This is because they are adroit in engaging with the international community and submitting funding applications in ways that are responsive to donor agendas.¹³⁰ Less cosmopolitan, grassroots organizations who cannot (or will not) fit their agendas into a transnational transitional justice idiom will be increasingly marginalized or scripted as speaking to local interests and agendas rather than ones that we may see as foundational to justice. Thus another dimension of the 'empirics gap' that I referenced earlier is that we measure projects and organizations rather than the eco-system itself. To measure impact in ways that take the long and complex view of transitional justice's transformative potential would require that we develop approaches to measure more sustainable and less sustainable eco-systems and the contributions that donors, multi-lateral organizations, powerful countries and others at the apex of the eco-system have on the dynamics of the system as a whole.

Ironically, even efforts to emphasize local ownership have been compromised by the need for enhanced visibility at the 30,000 feet above ground level. This is visible in the cottage industry of consultations, polls, surveys, which have been mainstreamed within the transitional justice field, and that often replicate rather than contest power asymmetries and top-down control. Too often these are used to 'perform' local ownership and counter or appease calls for more genuine local ownership. Thus the task going forward is to develop more complex assessment strategies – for instance, can transitional justice initiatives be assessed according to their relationship to social movements? If we had an acute awareness of local political contexts, these judgements may be possible even if they cannot fit into a donor log frame. This may be a better indicator of local ownership than an NGO consultation workshop. To tilt the scales to local ownership in this way would require that donors themselves relinquish some of their power by developing bottom-up accountability goals and M&E indicators that are calibrated to account for power asymmetries and evaluator biases. Reorienting towards bottom-up accountability may carry some short-term risks for donors. In the longer term however, it may mean that donors benefit from the fact that they do get trusted in the contexts where they work as genuine 'partners not patrons'. To that end, bottom-up accountability measures may be the approach that has better yield and sustainability. If we see transitional justice as a political process that seeks transformative social change, perhaps M&E will also be directed at evaluating a political strategy rather than more discrete project outcomes. This again may require that donors invest more in deepening local partnerships so that they can develop more

¹²⁹ The language of 'eco-system' is valuable because it conveys the multiplicity of factors (political economy, the strength of social movements, institutional histories, bureaucratic capacities etc.) and their inter-dependence.

¹³⁰ Vasuki Nesiah "Uncomfortable Alliances: Women, Peace and Security," This article also references Seira Tamang's argument that ironically "civil society promotion initiatives have "reinforced the structural inequalities of caste, ethnicity, gender and religious belief" in Seira Tamang, "Civilising Civil Society: Donors and democratic space in Nepal," *Himal South Asia* 16 (7) (2003) p.20, available at: [http://www.martinchautari.org.np/files/seira_tamang_7\(2\).pdf](http://www.martinchautari.org.np/files/seira_tamang_7(2).pdf) [accessed 8 February 2016].



locally anchored analysis of political context and can be more responsive to changing political circumstances.

A final dimension of ‘top-down’ indicators is that too often in the field of transitional justice there has been a conflation of transitional justice with ‘transition’ as such. This has understated, or even brushed over the fact that different social groups have divergent and contradictory interests and agendas for the transition. For instance, it may be difficult to reconcile the significant differences in the interests of victims and civil society groups with the interests of the beneficiaries that are embedded in the structural architecture of impunity. Such beneficiaries may not only be perpetrators but also elites who profit from smooth transition without radical transformation. Divergent interests, perspectives and agendas may ensure continued tensions that trouble and complicate the transition. There is a tension between promoting post-conflict governance and smooth transitions on the one hand, and the more messy political, bottom-up accountability oriented, local civil society led, human rights focused transitional justice processes on the other. It is critical that the international human rights community watch for and guard against that slippage from anti-impunity work to post-conflict governance work. While these may be related, too often the former gets sacrificed for the latter. This goes to a central dimension of the paradox that grounds this study: on the one hand, transitional justice has gained particular prominence as the ‘conflict’/‘post-conflict’ space has gained increased policy attention and resources; on the other hand, it is precisely the focus on conflict as the central dimension of context that has cramped the anti-impunity agenda (understood as structures of impunity rather than narrowly as individual criminal accountability). If transitional justice processes are anchored to this anti-impunity agenda (rather than a governance agenda) they could help tilt the scales in favour of vulnerable groups and civil society activists rather than elite groups and state officials during the transition. Transitional justice however, is often promoted as if the task is to manage and control these differences by channelling those legitimate differences so that they are domesticated (one may say depoliticized) into institutions and procedures that smoothen the transition, and facilitate governance in ways that tile the scales in the other direction. For these reasons, it may be important to not conflate transitional justice and the governance of transition - and particularly, to be alert to the divergent stakes in emphasizing accountability vs. governance. It is surprising how easy it is to lose sight of the fact that the central goal of the transitional justice field is to challenge structures of impunity.



6. Conclusions

The idea of supporting a ‘political strategy rather than a project’ has now become a familiar mantra. If taken seriously it does connect to the radical rethinking called for by all of the other issues we have raised here regarding a political analysis of the structural architecture of impunity. A focus on transformative social change that connects the dots between human rights abuses, their root causes and structures of impunity would require that donors use a longer time frame in assessing the work of different strategies. It also requires more openness to unexpected consequences, positive and negative. Indeed all of these questions regarding the relationship between norms, practices and policy frameworks emphasize the importance of on-going socio-political analysis in assessing what is desirable and feasible, and from whose perspective. Abstract normative analysis or politically neutral technical analyses do not permit us to get in the trenches of what is at stake with different strategies. We need to encourage and support a rethinking of the building blocks of these settled approaches, and draw inspiration from the experimental ethos highlighted above.

As we move forward with these lessons, an assessment of the overall impact of a more political and context centred approach will require a fundamental reorientation of many of the assumptions that have become part of the common sense policy. For instance, the 2015 “EU’s Policy Framework on support to transitional justice” asserts the importance of case-by-case context specific approaches but then it goes on to assert that “early engagement in transitional justice processes is desirable as it provides a signal against impunity and paves the way for justice and rule of law.” Yet presumably we cannot know this in advance of a political analysis of the context, the structures that enabled human rights abuse, and those that maintain impunity. A contextual analysis will require that we do not go into an environment with assumptions about transitional justice paths and that we are open to diverse and unexpected trajectories. From ideas about technical assistance to notions of best practices and comparative learning, the familiar approaches that have solidified as part of the policy common sense in the field will need to be rethought. Ensuring that comparative learning provides a useful resource rather than a road map can be challenging if policies are not drafted in collaboration with local activists and anchored in contextual analysis of political opportunities and constraints. In some cases, important insights have been lost in translation when institutionalized. For instance, everyone pays deference to claims about the need for civil society and victim consultation – yet surveys and consultation workshops have frequently been approached as procedures for managing victim expectations and channelling civil society agendas. Thus too often these procedures and surveys have substituted for the more complicated and messy yet more fundamentally democratic need to take seriously local priorities and defer to local civil society leadership. Accordingly, a dynamic and contextually rooted approach to transitional justice paths and possible trajectories will adapt to changing circumstances and be open to innovation in addressing new challenges.

It is significant that the African Union is developing its own policy initiatives regarding transitional justice; this is partly motivated by a sense that regional approaches may prove more responsive to local concerns. Moreover, the collective strength of regional processes may offer a more promising platform from which to hold international actors accountable. They may also be better positioned to address contexts such as the Great Lakes region where the dynamics of human rights violations and the structures of entrenched interests are better addressed through political analysis of the region and the interplay of political, military and economic interests across borders. Clearly the legitimacy crisis of the ICC and long term concerns regarding the legacy of colonial attitudes and interests that dominate the human rights



movement have fuelled the turn to regional institutions in Africa.¹³¹ If this regional turn leads to greater focus on the international dimensions of human rights violations and their role in creating the enabling conditions of human rights violations, it may in fact strengthen local, regional and international anti-impunity efforts.

Local legitimacy requires ensuring that the heterogeneity of local context is appreciated and all conflict spaces are not treated as homogenous. To this end it requires that transitional justice initiatives are shaped through socio-political analysis of local context, and its attendant constraints and opportunities. This requires that transitional justice processes be agile initiatives that can be responsive to shifting contexts rather than formal and formulaic technical projects. Given the transnational context within which transitional justice operates, enhancing local legitimacy would also require greater and more visible efforts to contest North-South double standards in terms of accountability. This necessitates not only a focus on the actions of powerful states, but more nuanced understanding of the current and historic relationship between international and national actors in terms of responsibility for human rights abuse and the need to develop transitional justice initiatives that seek to address those layers of responsibility.

Some have argued that this broader vision overburdens transitional justice institutions – yet, these institutions are not ends in themselves, and arguably, the current approach has oversimplified and thereby undermined the potential work of transitional justice processes. Too often institutional fetishism and a depoliticized model of technocratic engagement has distracted from and defeated the political focus on fighting structures of impunity.¹³² Long term legitimacy and effectiveness has been compromised when these processes have left the structures of impunity intact. Accordingly, the broader vision advocated for in this report is a necessity and not a luxury if transitional justice processes are to open up hierarchies of power to accountability.

In sum, the scoping study suggests that an effort to address the legitimacy crisis of the transitional justice field, and enable transitional justice initiatives to become more effective and sustainable, will require revisiting our approaches from the macro to the micro, and from donors to practitioners. The transitional justice field has had many achievements over the last two and half decades and has a tradition of dynamism and innovation that will serve it well as it moves forward in ways that are driven by an ethos of learning that is sensitive to the complexities of political context and open to new opportunities and approaches.

¹³¹ See Makau Mutua, “Savages, Victims, and Saviours: the Metaphor of Human Rights,” *Harvard International Law Journal* 42 p. 20 (2001).

¹³² Many civil society activists concur with this analysis. For instance, it was noted that “At some point transitional justice was a tool to deal with transitions in which gross human rights violations became central to the discussion. Transitional justice became fetishized, and also became an obstacle to be more flexible. In some way I think transitional justice or Justice in transitions is a tool. We should not think of transitional justice as an end in itself.” Minutes from general discussion, Proceedings of “Making Transitional Justice Work” Conference convened by Impunity Watch and the Netherlands Ministry of Foreign Affairs, IDLO, The Hague (November 26).



The publication has been made possible by:



Ministry of Foreign Affairs of the
Netherlands

Impunity Watch is a Netherlands-based, international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts research on the root causes of impunity that includes the voices of affected communities to produce research-based policy advice on processes intended to enforce their rights to truth, justice, reparations and non-recurrence. IW works closely with civil society organisations to increase their influence on the creation and implementation of related policies.

Contact us:

Impunity Watch

Email: info@impunitywatch.org

Twitter: [@ImpunityWatch](https://twitter.com/ImpunityWatch)

www.impunitywatch.org

© Impunity Watch 2016

impunity 
watch