JUSTICE MOSAICS

How Context Shapes Transitional Justice in Fractured Societies

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Roger Duthie

Acknowledgments

About the Author

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About ICTJ

ICTJ assists societies confronting massive human rights abuses to promote accountability, pursue truth, provide reparations, and build trustworthy institutions. Committed to the vindication of victims' rights and the promotion of gender justice, we provide expert technical advice, policy analysis, and comparative research on transitional justice approaches, including criminal prosecutions, reparations initiatives, truth seeking and memory, and institutional reform. For more information, visit www.ictj.org

About the Research Project

This report presents the main findings of a multiyear research project conducted by the International Center for Transitional Justice on the challenges and opportunities of responding to serious and massive human rights violations in different contexts. The project commissioned 21 studies on a wide range of contextual issues, 12 of which are included in an ICTJ edited volume, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (New York: ICTJ, 2017), which is available in print or online at www.ictj.org/justice-mosaics

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Executive Summary

The contexts in which societies attempt to address legacies of massive human rights violations—by confronting impunity, seeking effective redress, and preventing recurrence—are integral to the concept of transitional justice. Such contexts can vary widely: they can include ongoing conflicts, post-authoritarian transitions, post-conflict transitions, and post-transitional periods. They can also differ in terms of institutional and political fragility as well as levels of economic and social development. Broad policy objectives in such contexts can range from rule-of-law promotion to conflict resolution, peacebuilding, vindication and protection of human rights, democratization, development, and social change.

As the term suggests, however, the contexts in which societies undertake transitional justice processes are usually to some degree *transitional*. This is important because transitions create opportunities for addressing past injustice, while at the same time they retain continuities with the past that pose constraints or obstacles for doing so. The fact that context varies is important because the broader context affects the objectives of transitional justice efforts as well as the processes through which they develop, which in turn affect the specific responses that are most appropriate and feasible in each setting. Here processes refer to the different ways in which ideas and movements develop, promote, and coalesce in demands for accountability, acknowledgment, and reform in the aftermath of massive human rights violations.

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

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

The *nature of armed conflict* includes variations in the armed actors involved and their motivations, and the type and scale of violence and human rights violations that are committed—all of which affect the justice responses that are appropriate and the kinds of trust they seek to restore. In addition, violence that is widespread during a conflict and persists at varying levels after peace can present challenges for achieving accountability, acknowledgment,

and reform. Contexts of armed conflict raise important questions about how transitional justice processes relate to conflict resolution and peacebuilding.

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

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

> The contexts in which societies undertake transitional justice processes are usually to some degree transitional. This is important because transitions create opportunities for addressing past injustice, while at the same time they retain continuities with the past that pose constraints or obstacles for doing so.

This report draws a number of conclusions that should be useful for promoting transitional justice processes in different—and difficult—contexts.

- *Defining transitional justice contexts*: Transitions bring opportunities that may not have existed during conflict or repression to address violations, but should not be defined strictly around formal peace agreements or regime changes, as change often begins before these events and persists long after them. Limited steps can be taken toward accountability, acknowledgment, and reform amid conflict and repression, recognizing that constraints on such efforts may persist into the post-transition period. Nevertheless, transition generally remains an important element of transitional justice.

- *Identifying and understanding contextual constraints*: Due both to continuities with the past and new challenges that accompany change, transitional contexts are characterized by constraints on transitional justice processes, often related to issues of scale and fragility. Weak state institutions, corruption, weak or compromised civil society, massive numbers of victims and perpetrators, political tradeoffs, and structural problems make for difficult contexts. While this does not mean that advocates of justice should back down in the face of risk and instability, such constraints should inform expectations and assessments of transitional justice efforts and outcomes as well as their relationships to interventions in fields such as peacebuilding, development, and humanitarianism.

- *Focusing on direct objectives and processes over measures*: Given the importance of context in addressing past human rights violations, it is important to promote the direct objectives of accountability, acknowledgment, and reform, and to understand and respond to the different processes and pathways through which these objectives may be achieved. There may be good reasons to support specific measures, such as criminal trials, truth commissions, reparations programs, and vetting and other forms of institutional reform,

but in specific contexts such measures, or combinations of them, may be unfeasible, inappropriate, or inadequate. Rather than promoting a "toolkit," sometimes it may be more effective to focus on the process: look for opportunities to put justice on the agenda, try to create spaces or entry points that may be utilized in the future, and promote innovative and appropriate responses, according to changing circumstances.

- *Contributing to broader objectives according to context*: Transitional contexts differ widely, with broad policy objectives that include vindicating the rights of victims and ensuring future respect of human rights, rule-of-law reform, peacebuilding, conflict resolution, humanitarianism, development, and democratization. Transitional justice processes can potentially contribute to or be in tension with these broader objectives in different ways, and they can be shaped to complement other interventions, such as human rights monitoring, demobilization and reintegration programs, humanitarian assistance, and development programming. Context also affects how justice processes can foster trust and reconciliation among individuals, groups, and state institutions.

- *Supporting actors, institutions, and conditions*: Supporting the actors, institutions, and conditions that advocate for and enable accountability, acknowledgment, and reform can be a way of promoting and shaping the processes that may achieve these objectives. Rule-of-law reform may build the capacity and integrity of the justice sector; support for civil society actors can help them develop approaches that are appropriate to local needs and political dynamics; reform of party systems can increase the likelihood that political parties facilitate consensus around processes; and addressing structural problems can help justice efforts achieve their objectives.

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

I. Transitional Justice and Context

Responses to massive and systematic human rights violations have a long history. While not always known as violations of "human rights," atrocities and other wrongs perpetrated during times of armed conflict or under repressive regimes have been addressed by societies, often during times of transition, throughout history in a variety of ways.[1] In the 20th century, leaders of the Nazi regime were prosecuted for war crimes and crimes against humanity at the post-World War II Nuremberg trials (both at the International Military Tribunal and the subsequent trials authorized by Control Council Law No. 10), while during political transitions to democracy in the 1970s through the 1990s countries as different as Argentina, Brazil, Chile, Greece, the Philippines, and South Korea began to address crimes such as illegal detention, torture, and enforced disappearances with trials, truth commissions, and compensation for victims. In the Southern Cone of South America, Argentina in the 1980s and Chile in the 1990s tried to deal with legacies of severe repression, but in the context of a relatively strong state, healthy economy, and educated victims.

In the 1990s, the Central American countries of El Salvador and Guatemala attempted to address abuses committed during destructive civil wars that had recently ended, seeking to promote the rule of law in contexts of weaker states and greater poverty, and in the latter profound racism against indigenous populations; South Africa tried to deal with the legacy of apartheid and armed conflict and achieve a degree of reconciliation; and the former communist countries of Eastern and Central Europe sought to consolidate democracy through constitutional and institutional reforms, including lustration processes for members and collaborators of previous regimes. At the same time, institutions of international justice, primarily the international criminal tribunals for the former Yugoslavia and Rwanda, attempted to prosecute those responsible for serious international crimes, including for genocide, alongside some domestic and local-level justice processes. Meanwhile, the establishment of the Rome Statue and the International Criminal Court (ICC) in 2002 was meant to do the same on a more permanent basis, linking states in a common system to fight impunity for the world's worst crimes.

An increased focus on criminal accountability that began in the 1990s may have peaked in the 2000s, adding to the existing expectations of transitional justice processes. In the 2000s, different transitional justice measures were advocated for or implemented in a range of countries, including Cambodia, Guatemala, Liberia, Nepal, Northern Ireland, Peru, Sierra Leone, and Timor-Leste, often following the conclusion of armed conflict and in contexts of state fragility and widespread poverty, while the ICC took on cases in the Democratic Republic of Congo (DRC), Central African Republic, Darfur, Kenya, and Uganda. In these contexts, disparate goals such as conflict resolution, reintegration of conflict-affected groups and individuals, state building, social and economic development, and corruption were among the processes to which transitional justice was often seen to potentially contribute.

In 2011, transitional processes in the Middle East and North Africa brought about efforts to address the past in countries like Tunisia, where both state corruption and human rights violations fueled the population's

anger and were seen as grievances to be addressed in transition, while the onset of armed conflict following decades of authoritarian rule in Libya, Syria, and Yemen ensures the need for such efforts there in the future. In 2016, the peace agreement ending the 50-year civil war in Colombia includes a system for seeking truth, justice, and reparation, but some transitional justice measures had already been attempted there for a decade, in a context of ongoing conflict.

States are obligated to respond to serious and systematic violations of international humanitarian, human rights, and criminal law in different ways and in different circumstances, including during armed conflict and in times of peace. Accountability, acknowledgment, and reform in response to such violations can therefore be justified as an obligation- and rights-based policy: ensuring human rights by responding to their violation can have an inherent value and does not necessarily need to be justified by its instrumental value in bringing about other outcomes—that is, in contributing to a change in the broader context.[2] The protection and vindication of victims' rights is a critical aim of transitional justice processes and indeed their most direct objective; it should not be subsumed under broader policy objectives.

> When the term *transitional justice* caught on, the thinking behind it may have emphasized transitions to democracy, but the country experiences that influenced the notion, and in which it would go on to be applied, represent a much wider range of contexts.

Nevertheless, it is clear that societies have grappled with the question of how to respond to atrocities and other serious human rights violations in a range of very different contexts. Ruti Teitel described transitional justice as having gone through a post-World War II phase, a post-Cold War phase associated with democratization, and a "steady-state" phase associated with general conditions of instability and violence.[3] Others have emphasized the role that transitions to democracy in particular played in the thinking of those who in the late 1980s initially discussed transitional justice as an "intellectual framework" for responding to past human rights violations. As responses to human rights violations, however, the various measures that came to be seen as comprising transitional justice—primarily, criminal prosecutions, truth seeking and memory initiatives, reparations, and institutional reform or guarantees of non-recurrence—were not initially understood in a transitional or large-scale context.[4]

In the early 1980s, for example, the UN Human Rights Committee established that in order to provide an effective remedy for individual victims of enforced disappearances, states were obliged to carry out effective investigations, prosecute those responsible if sufficient evidence warranted it, provide both compensation and all the information it could to the relatives of the victims, and take steps to ensure that relevant institutions did not commit the offence again.[5] In 1988, the Inter-American Court of Human Rights took the same position in its first cases from Honduras (the *Velásquez Rodríguez* case and the *Godínez Cruz* case) with respect to the state's obligations.[6] One of the crucial differences in countries like Argentina was that an *individual-remedy approach* was now being applied as a generalized policy to address *large-scale* violations of citizens by their own states.[7]

When the term *transitional justice* later caught on, the thinking behind it may have emphasized transitions to democracy, but the country experiences that influenced the notion, and in which it would go on to be applied, represent a much wider range of contexts, in which the objectives of the transition included not only democratization but also rule-of-law reform, constitutional reform, and peacebuilding.[8] Furthermore, the emphasis on the pursuit of justice for rights violations in these transitions varied as well. In the long run, however, important to the notion of transitional justice was the idea that transitional contexts created opportunities, shaped objectives, and brought constraints for responding to human rights violations.

As the notion started taking shape, transitional justice, wrote Teitel, was associated with "a conception of justice that was imperfect and partial" and exhibited a "close relationship between the type of justice pursued and the relevant limiting political conditions."[9] José Zalaquett, a Chilean lawyer and member of the truth commission set up to investigate the Pinochet regime's crimes, argued that measures that may have been "straightforward from the standpoint of human rights norms could have undesired political implications, which in turn would affect human rights adversely. Human rights organizations were thus unavoidably drawn into the ambiguities of transitional situations."[10] This did not mean, however, as Juan Méndez argued, that taking political constraints into account had to "necessarily result in realpolitik and surrender of principle."[11] According to Paige Arthur, transitional justice represented "a new sort of human rights activity," "a response to concrete political dilemmas human rights activists faced in what they understood to be 'transitional' contexts." Transitions combined "practical challenges" and "causal beliefs" about facilitating transitions with "principled beliefs" about human rights.[12]

Understood as a particular subfield of human rights work or as a distinct field altogether, then, the notion of transitional justice has not just been about responding to human rights, it has also been inherently about the context of those responses. Arguably, transitional justice can be distinguished from other responses to human rights violations by two features: the violations it responds to are massive and systematic, and the context in which it occurs is one of transition, including but not only through change of government. The scale and nature of the violations is important from a contextual perspective, because it is highly unlikely in any setting that an effective remedy could be provided for every victim or that every perpetrator could be held accountable.

The transitional context is important for three reasons: it opens up *opportunities* to respond to violations that might not have existed under an authoritarian regime or during an active armed conflict; the responses are seen to make a potential contribution to certain *objectives*, such as the vindication and protection of human rights, reconciliation, democratization, rule of law, or peacebuilding, depending on the context of transition; and, at the same time, a transition presents specific obstacles or *constraints*, whether they be political, institutional, or material, which may ebb and flow over time.

> Measures that are labelled as transitional justice are sometimes enacted during ongoing conflict or repression, after a transition has occurred, when no transition (democratic or otherwise) has occurred, or in the absence of authoritarianism or armed conflict altogether.

Debate about transitional justice is often about its defining features—the nature of the transitional context in which it is implemented and the nature of the injustice it seeks to redress. One issue concerns the notion of transition itself. Periods of political transition can be difficult to delimit, and they may fail to describe the time periods when societies in fact respond to serious violations. Measures that are labelled as transitional justice are sometimes enacted during ongoing conflict or repression, after a transition has occurred,[13] when no transition (democratic or otherwise) has occurred, or in the absence of authoritarianism or armed conflict altogether.[14] This has implications because, for example, in the absence of democratization, transitional justice can be used "to reinforce illiberal ideologies and consolidate power of illiberal regimes."[15] Lars Waldorf points out the many problems associated with the term *transition*, but usefully describes them as "'critical junctures' involving attempted democratization or attempted peacebuilding . . . typically initiated by extraordinary legal moments."[16]

Some prefer notions such as *dealing with the past* to *transitional justice*, "in order to emphasize the long-term nature of the process . . . and to allow for the possibility that such a process will not be a linear transition from 'A' to 'B' but rather an ongoing and complicated set of negotiations and dialogues between many different actors."[17] Dealing with the past would appear to be the more accurate phrase for policies meant to address historical injustices in countries such as Australia, Canada, and the United States, even if those cases involve measures of truth, memory, and reparation. That said, it is also unhelpful to strictly define transitions around changes of regime or peace agreements. Change usually begins well before either of these phenomena and usually continues long after. Questions about transitions are especially pertinent when thinking today about whether and how transitional justice could and should be applied in countries such as Syria, where a peace agreement may be difficult to envisage, and Mexico, where crimes against humanity may have been committed by state and non-state actors but where the violence is seen in a framework of organized crime, rather than armed conflict.[18]

A second issue is whether the subject matter of transitional justice tends to be defined too narrowly: if focusing on violations of civil and political rights, rather than economic, social, and cultural rights, reinforces a hierarchy of rights and misguidedly narrows the universe of victims and perpetrators; if focusing on only the most serious violations misunderstands the dynamics of violence and its prevention; or if focusing only on civil and political human rights makes the field overly legalistic, technical, and apolitical, leading it to ignore equally significant forms of injustice and structural problems, such as inequality and poverty.[19] This set of issues also relates to context. Where and when transitional justice processes unfold affects what will be foremost among victims' and citizens' justice claims—enforced disappearance, massacres, sexual and gender-based violence, collaboration with repressive authorities, forced displacement, corruption, segregation, land and property dispossession, and/or other abuses. It affects whether victims and citizens will want to hold accountable state authorities, non-state armed actors, neighbors, and/or corporations, and with what or whom relationships and trust need to be restored. And it affects if, when, and to what extent states and civil society groups have the institutional capacity, material resources, and political will or opportunity to pursue these different justice claims.

A third set of questions is about how context affects the relationship between specific processes of transitional justice and the broader objectives to which they may contribute. By the mid-2000s, the field had consolidated around a specific set of measures, in part as a result of the 1997 UN "Principles to Combat Impunity" and the 2005 updated version,[20] which were based on the rights to truth, justice, and reparation and guarantees of non-recurrence; the 2004 UN Secretary General's Report on Rule of Law in Conflict and Post-Conflict Societies, which emphasized prosecutions, reparations, truth-seeking, and institutional reform;[21] and the 2006 UN "Basic Principles and Guidelines on Reparation."[22] To a certain extent, transitional justice came to be understood as a set of specific measures, rather than a set of objectives and the processes through which they may be achieved. According to one view, a set of justice measures that was initially designed to address violations in one context has become a "toolkit" that is pushed by international actors in all kinds of other contexts in which it is less useful and potentially harmful, a "diffusion of a counter-productive one-size-fits-all activism concept."[23]

The ways in which different contexts call for different combinations of objectives, such as the vindication of victims´ rights and ensuring ongoing respect for human rights, rule of law, peacebuilding, or democracy, that give rise to different processes can be neglected in favor of attempts to fit a single set of measures into every context. If in political transitions, transitional justice processes are seen as contributing to democratization, to what extent can they be seen in the aftermath of armed conflict to contribute to peacebuilding—or during ongoing conflict to the resolution of that conflict? Authoritarian regimes commonly engage in vertical violence, carried out by state institutions against citizens, which creates the need to rebuild trust between citizens and institutions. Fragile and conflict-affected contexts are more likely to involve horizontal violence, carried out between citizens and non-state actors. In such different contexts, what types of trust or reconciliation can

justice processes foster? How should processes be shaped with these objectives in mind? In post-conflict or ongoing conflict settings, "there has been little formal connection between transitional justice initiatives and the staples of postconflict peacebuilding programming, either in theory or in practice."[24]

A final set of questions is about challenges and expectations. While transitions often create opportunities to respond to human rights violations of the past, the particular transitional context will present obstacles and challenges, both technical and political, which can be overlooked or underestimated. In 2004, the UN Secretary General's Report on Rule of Law in Conflict and Post-Conflict Societies characterized these contexts as ones "marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population," with deficits in political will, institutional independence, technical capacity, resources, and public confidence.[25] Pablo de Greiff, the UN Special Rapporteur for truth, justice, reparation, and guarantees of non-recurrence, has drawn attention to the developmental preconditions for transitional justice processes to be both feasible and effective, as has previous research on the relationship between transitional justice and development.[26] But the political challenges can also be underestimated. Vasuki Nesiah contends that "the field [of transitional justice] has operated as if it were a sphere of technical engagement rather than a political intervention grappling with contextual imperatives."[27] In difficult contexts, in which human rights violations are facilitated or enabled by broader institutional, political, economic, social problems, should we expect transitional justice processes to do less or to do more?

Context is a critical factor in identifying the objectives, challenges, and opportunities for initiating and shaping transitional justice processes. It is also relevant for assessing the flaws, limitations, and value of the concept of transitional justice and its relation to broader notions, such as dealing with the past or transformative justice. Calls for transitional justice to be more context specific—and more attuned and aligned to national and local context, in particular the political context—are common. While it is true that some of the boundaries of the field have been pushed in response to practical difficulties faced in new political contexts,[28] we still need a better understanding of how transitional justice processes unfold in a range of contexts.[29]

> This report identifies four main categories of contextual factors—the nature of conflict, the nature of institutions, the nature of political settlements (including actors such as civil society and political parties), and the nature of economic and social structures—and the implications of these for transitional justice.

One study of transitional justice processes in seven countries by Laurel Fletcher, Harvey Weinstein, and Jamie Rowen identified eight factors that appeared to significantly influence the ways in which countries responded to mass violations: the strength and legitimacy of legal institutions, the strength of pre-conflict democracy, the legacy of colonialism, the failed or decimated character of the state, international intervention, commitment to address the past interventions to address structures and power inequities, and time. Their findings suggest that "multiple factors influence the nature of transitional justice mechanisms selected by any one particular country and the manner in which such interventions unfold." The authors of the study conclude that "perhaps the most important finding from this analysis is that transitional justice mechanisms offered in a mechanical manner will be less successful if context is ignored."[30]

This report attempts to further demonstrate and categorize some of the contextual factors that are most relevant to transitional justice processes. It identifies four main categories of contextual factors—the nature of institutions, the nature of conflict, the nature of political settlements (including actors such as civil society and political parties), and the nature of economic and social structures—and the implications of these for transitional justice. One of the

major challenges faced in the field is what UN Special Rapporteur de Greiff has called the "implementation gap," by which he refers to the frequency with which measures to address past human rights violations are proposed and even designed but go unimplemented or only partially implemented.[31]

This report illustrates some of the explanations for this gap, but also suggests a number of ways of reducing it. One of the key points it makes is that implementation is difficult because contextual factors change slowly and incrementally. Institutions and structural inequalities can take decades to change, and political settlements can carry divisions and violence over from conflict to peace. Transitions bring both change and continuity. The tension between human rights principles and contextual opportunities must always be kept in mind. It is argued here that while the concept of transitional justice has value in part because it emphasizes its context, the practice of transitional justice needs to do more to adapt to that context.

II. Institutional Context

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

Institutions have been defined as the rules and practices through which societies are organized, and within which a range of agents or actors function. Institutions can be formal and national ones, such as the rule of law, constitutions, judicial systems, security sectors, and financial systems, as well as more local and informal ones, such as community justice and reconciliation practices. Where formal institutions are weak, institutional corruption may generate different outcomes or local institutions may function as substitutes.[32]

The field of transitional justice, contends Waldorf, is often theorized and practiced in ways that underestimate the importance of institutions and overemphasize the agency of human rights advocacy. This has begun to change, however, as demonstrated by the *2011 World Development Report: Conflict, Security, and Development* and the examination of guarantees of non-recurrence by de Greiff.[33]

Institutional context needs to be taken into account when selecting, designing, implementing, and assessing transitional justice policies and processes, at least in part because transitions usually involve a certain amount of institutional continuity, "no matter how seemingly dramatic the rupture with the past."[34] Institutions tend to be resistant to change and subject to path dependency. Weakly institutionalized contexts, in particular, see a relatively high degree of institutional borrowing, a disconnection between rule writers and those holding power, a limited bureaucratic capacity and territorial reach, and high levels of social and economic inequality. Policymaking in such contexts can be volatile and based on short-term thinking, contributing to institutional instability.[35] This means that transitional justice can become subject to rapid institutional design and institutional borrowing, weak enforcement, spoilers, high levels of local suspicion of state authorities, and clientelism and corruption that can undermine implementation.[36]

From the standpoint of individual transitional justice measures, as Waldorf and others argue, amnesties can create political costs and legal obstacles for attempts to criminally prosecute perpetrators of human rights violations. But even without amnesties, criminal trials are often severely hampered by lack of credibility, capability, and

access and resource constraints in legal institutions, as in countries such as Burundi, Cote d'Ivoire, the DRC, and Uganda. For reparations, a lack of implementation is often the result of limited institutional capacity, technical resources, fiscal capacity, and other structural factors. Institutional reform measures, like vetting processes, are often hindered by limited capacity in personnel management, information management, due-process guarantees, and resources, as seen in Kenya, Liberia, and Sierra Leone. Truth commissions may be less constrained by institutional weaknesses, but their institutional environment can present implementation problems and administrative delays, disincentives for participation, and difficulty in implementing recommendations.[37] For some commissions, a weak institutional environment may mean that "a subpoena may not be enforced or de facto powers may mock any effort by the commission, making it look weak and ineffective."[38]

Constitutions are formal, national-level institutions that can provide an important part of the context in which transitional justice processes are designed, shaped, and assessed. As Juan Méndez explains, constitutions "contain a framework for the administration of transitional justice specific to that community's context and become the mandate against which the legitimacy of transitional justice mechanisms and initiatives will be measured."[39] A constitution may include a mandate to do transitional justice, contain "explicit enabling norms," or create obligations by incorporating international law into domestic jurisdiction. A constitution can also impose significant constraints on carrying out transitional justice measures, which depend for their legality on the interpretation of constitutional principles.[40]

> Local justice and reconciliation practices, based on local community beliefs, norms, and traditions, have become more prominent in the field of transitional justice, particularly in such countries as Burundi, Mozambique, Rwanda, Sierra Leone, Timor-Leste, and Uganda.

For constitutions established during transitions, the nature of that framework will likely depend on the nature of the transition.[41] In South Africa, for example, writes Christine Bell, where the transition from apartheid rested on a compromise between the African National Congress and the former regime, the 1993 Interim Constitution directly linked amnesty to the broader process of bridging the past and the future through state building.[42] And according to Gabor Halmai, when East Germany was incorporated into West Germany at the end of the Cold War, the constitutional framework for addressing its past became the fully developed constitutional system of West Germany. This allowed for the implementation of a more comprehensive set of measures than in countries like Hungary, where, as part of a negotiated transition, a non-democratically elected parliament amended the previous constitution. Both East Germany and Hungary implemented vetting processes, with constitutional courts helping to settle constitutional standards or preventing the misuse of the processes for political purposes—for example, by balancing the rights of individuals to informational self-determination with the general population's rights of public access to public data.[43]

At the local level, community-based institutions in the form of practices can also provide a framework for responding to human rights violations. Legal pluralism, which characterizes many societies, can play a particularly prominent role in conflict-affected settings. In the 1990s, explain Lisa Denney and Pilar Domingo, security and justice reforms promoted by international actors such as the UK Department for International Development, United Nations Development Programme (UNDP), the Organization for Economic Cooperation and Development (OECD), and the World Bank, which had conventionally focused on state institutions, began paying more attention to legal pluralism as a way to legitimate reforms by grounding them in local context.[44] Local justice and reconciliation practices, based on local community beliefs, norms, and traditions, have since become more prominent in the field of transitional justice, particularly in such countries as Burundi, Mozambique, Rwanda, Sierra Leone, Timor-Leste, and Uganda.[45]

Local Transitional Justice Practices in Sierra Leone and Uganda

Communities in Sierra Leone undertook a range of local practices to repair social ties in the aftermath of conflict and to reintegrate perpetrators of crimes (both adults and children) back into their communities. Reintegration was seen as an important element of reconciliation, given the widespread displacement caused by the conflict. Practices included spiritual and traditional ceremonies that often focused on perpetrators, but have also been used for survivors of wartime rape to restore the victim's status in the community. While not formally linked, Sierra Leone's Truth and Reconciliation Commission attempted to integrate local reconciliation practices and conflict resolution approaches into its work.

A range of local practices have been used in northern Uganda to reconcile communities and appease ancestral spirits over social transgressions committed during conflict. These practices include *mato oput*, a collective reconciliation process; *nyono-ton gweno*, used to welcome home family members, as part of returnee-reintegration ceremonies for former members of the Lord's Resistance Army (LRA); and *gomo tong*, used to resolve inter-clan disputes. Often supported by international NGOs, these practices have been embraced by the country's amnesty law as well as by the 2007 Agreement on Accountability and Reconciliation between the government and the LRA.

For more, see Lisa Denney and Pilar Domingo, "Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field," in Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies.

These practices, suggest Denney and Domingo, do not necessarily take the form of legal-rational state institutions through which the international community prefers to pursue justice, but local customary structures are often seen by citizens to have more legitimacy and to provide a greater sense of identity than state-led ones. They can represent an intricate system of social responsibility and order at a level of governance that is closer to people's day-to-day lives. They are, of course, not without flaws and limitations from an institutional standpoint. Local justice processes, for example, raise concerns about due process, particularly if the justice practice is punitive. They also tend to be run by those who hold power within a community, to the detriment of those who hold less, typically women and youth. Finally, they are based on practices that were designed to address more common forms of violence and therefore may be inappropriate for addressing systematic and widespread atrocities.[46]

Institutional corruption can also form part of the transitional context, affecting transitional justice efforts in adverse ways. Under an authoritarian regime or during conflict, writes James Cohen, maintaining a patriarchal network or a system linked to local or transnational criminal networks often requires monopolizing state assets and repressing those who challenge the status quo. State security institutions, such as the police and military, can play a role in perpetuating this arrangement if it is in their economic interest. This type of corruption can represent a form of institutional continuity throughout and after transitional periods. It can stifle transitional justice directly, if corrupt networks resist accountability processes in order to protect themselves or to keep stolen assets secret and the means to generate illicit revenue intact, or indirectly, as it undermines civic trust in public institutions that transitional justice processes seek to foster. Corruption tends to persist on its own, but it is also often tolerated by policymakers in the interests of stability: in countries such as Afghanistan and the DRC, for instance, such tolerance is likely to have contributed to cultures of impunity and further human rights abuses.[47] Democratic transitions like those in Africa in the 1990s, which were often transitions from neo-patrimonial autocracies, "sometimes lead to state fragility or failure, meaning that the very state institutions upon which transitional justice measures depend are weak or absent."[48]

During transitions, state, local, and informal institutional factors, such as constitutions, local practices, and corruption, bring both continuities with and breaks from the past. The continuities can put constraints on transitional justice processes, but the breaks can create opportunities—both to pursue accountability and acknowledgment and to contribute to institutional reform or formation. Transitions are often periods of institutional reform that can facilitate, and be facilitated by, transitional justice processes. While it is possible that those processes can strengthen the capacity or authority of state institutions, however, it is much more likely that they can improve the legitimacy of institutions, an element that donors have often underemphasized in development and peacebuilding work.[49]

The UN Principles for Combating Impunity—which grew out of and helped consolidate the understanding of transitional justice as a specific set of objectives—call for justice, truth, and reparation, as well as measures that function as "guarantees for non-recurrence" of gross human rights violations. These measures are heavily focused on institutional reform, including administrative reforms (vetting, civilian oversight and control, complaint procedures, and training) of state institutions, such as the military, security, police, and intelligence, and the judiciary, as well as legislative reforms that aim to ensure respect for the rule of law and the protection of human rights.[50] While not all of these reforms are understood to be transitional justice processes, they certainly are intended to complement those that are. They therefore directly make up part of the institutional context of transitional justice.

Transitional justice processes themselves may contribute to the reform of institutions, potentially increasing perceptions of their integrity and legitimacy. Vetting processes, for example, can remove compromised personnel, dismantle criminal networks, and signal the willingness of institutions to commit to protecting rights, as in the armed forces. They have been employed as part of the creation of a new civilian police force in El Salvador after 1992; the certification of police and reappointment of judges in Bosnia and Herzegovina after 1995; the vetting of the national police in Liberia from 2004 to 2006; and the vetting of judges, magistrates, and police in Kenya from 2012–2015.[51] As Waldorf summarizes, domestic criminal trials may contribute to the rule of law by delegitimizing past crimes, recognizing the rights of victims, expressing norms, increasing the capacity of the justice sector, and fostering trust in justice institutions.[52] Truth commissions reports often contain findings and recommendations regarding institutional failure and reform, particularly focusing on the human rights compliance and democratic accountability of the justice and security sectors. But while such recommendations may have contributed to improving institutions in Chile and El Salvador, they have mostly been ignored by governments, including in Kenya, Liberia, and Sierra Leone.[53]

The process through which transitional justice measures are designed and implemented can also affect institutions. Such measures can demonstrate the state's commitment to the rule of law—for example, if they operate in compliance with its requirements, such as due process, evenhandedness, nondiscrimination, presumption of innocence, and procedural fairness.[54] Consultation and participatory processes may also make a difference, by empowering local populations to advocate their interests and hold powerful actors accountable, although where measures such as trials are perceived to be selective and/or unfair, as in Cote d'Ivoire, the DRC, Rwanda, and Uganda, they are unlikely to foster civic trust in institutions.[55] Overall, it is difficult to demonstrate the empirical impact of transitional justice processes on institutions like the rule of law, but data on transitions in Latin American suggest that prosecutions at least are "compatible (not in conflict) with the process of strengthening rule of law."[56]

III. Conflict as Context

While the notion of transitional justice as initially conceived may have emphasized its role in political transitions from authoritarianism to democracy, the practice of transitional justice has unfolded in a range of contexts. Less examined as a contextual factor than democratic transitions, transitions from armed conflict have particular implications for the objectives, opportunities, and challenges of transitional justice. With fewer post-authoritarian transitions occurring today and civil wars continuing, these implications may become even more relevant.[57]

Ongoing conflict and post-conflict situations raise questions about the extent to which transitional justice processes can contribute to conflict resolution and peacebuilding processes. The nature of the conflict and political violence relate to the types of human rights violations to be addressed, the types of trust or reconciliation that need to be fostered, and the appropriate measures to do so. The nature and scale of the conflict and the ways in which violence can often persist into transitional periods create difficulties for justice processes. Transitional justice is now seen to be an integral part of the UN post-conflict reconstruction and peacebuilding agenda,[58] but the particular implications of conflict and post-conflict settings for responding to massive human rights violations are under explored.[59]

Contexts of political violence can vary widely, including intra-state wars, inter-state wars, non-state armed conflicts, military coups, electoral-related political violence, and one-sided violence, all of which can involve widespread human rights abuses.[60] Nevertheless, this range of contexts, particularly those that qualify as intra-state or civil wars, can present particular challenges for transitional justice processes that may not be as salient in the aftermath of repression by an authoritarian regime. For example, as Paul Williams explains, the nature and dynamics of the parties to an armed conflict are often complex, messy, and shifting, involving factionalized neo-patrimonial regimes, poorly disciplined armies, a range of non-state actors, and child soldiers. Armed conflict can be characterized by organized armed groups with a coordinated military strategy, as in the former Yugoslavia, or by weak and diffuse organization, as in Sierra Leone. All of this can potentially complicate questions of responsibility and the distinction between combatants and non-combatants, creating methodological difficulties for measures like truth commissions in investigating patterns of violence.[61]

Conflicts involving non-state armed groups present particular challenges for transitional justice processes. These groups—including armed opposition groups, paramilitary groups, terrorist groups, vigilante or self-defense groups, mafia-type organizations, urban gangs, and mercenaries—can have a wide range of different structures and ideologies, and operate according to different incentives than governments.[62] They also do not necessarily fit in the same legal frameworks, with different legal standards—human rights law, international humanitarian law, international criminal law, or composite regimes—potentially applicable in different situations. The international legal framework for transitional justice, argues Annyssa Bellal, remains state centric and has not yet fully adjusted to the power and control of non-state actors.[63]

The motivations of armed groups also matter. As Rachel Kerr explains, in the conflicts in Angola, the DRC, and Sierra Leone economic incentives were an important motivation, alongside political grievances. This raises questions about how transitional justice should address economically motivated crimes—on the one hand, creating an opportunity to draw attention to the ways in which indirect support from foreign governments and corporations can play a role in fueling conflicts in which abuses are committed and, on the other hand, presenting a challenge to establishing the legal basis for jurisdiction for certain crimes and the evidential basis for convictions.[64]

In addition, different incidences of violence and armed conflicts can interrelate, meaning that responding to violations in one place may provoke repercussions in another. When conflict spills across borders in the form of movements of non-state armed groups or displaced populations, it creates difficulties for holding perpetrators accountable and providing redress to victims. There are also political and logistical challenges for regional justice processes, which, as Williams puts it, can be "hugely problematic in terms of attributing legal responsibility and establishing jurisdiction."[65]

> The scale and nature of the crimes and human rights violations committed during armed conflict are often different from those under authoritarian regimes, involving a different balance of horizontal and vertical violence, overlapping groups of perpetrators and victims, and numerous past cycles of violence.

Finally, the scale and nature of the crimes and human rights violations committed during armed conflict are often different from those under authoritarian regimes, involving a different balance of horizontal and vertical violence, overlapping groups of perpetrators and victims, and numerous past cycles of violence.[66] In contexts of horizontal violence, violations are often more widespread and committed by all sides, victim-perpetrator categories overlap, children are used as combatants, and violence is committed between citizens, as opposed to or alongside the vertical violence committed more commonly by a state against its citizens. This type of violence, suggests Clara Ramírez-Barat, can leave as a legacy particularly sharp social divisions, especially at the local level, as former enemies as well as perpetrators and victims can end up living as neighbors. Widespread violence in conflict is also often targeted at civilians living in remote and marginalized rural areas (as opposed to the urban middle classes often targeted by authoritarian regimes), which can make accessing justice a challenge for victims.[67]

Local justice and reconciliation practices are relevant here not just for institutional reasons but because of the nature of violence during armed conflict in fragile state settings. The dynamics of this violence, its aftermath, and other factors at the local level, including local norms, preferences, and expectations and the needs of vulnerable groups, can be difficult for international and national actors to fully understand.[68] Local justice processes can be appropriate in contexts of greater horizontal violence, contend Denney and Domingo, because their objectives are different than those of national level transitional justice measures: the former focus on rebuilding community-level social fabric and trust between citizens, rather than between citizens and state institutions.[69] Local justice practices in places such as Sierra Leone and northern Uganda have emphasized reconciliation, community involvement, and reintegrating former combatants, particularly former child combatants. They tend to focus more on restoring social harmony and order than on achieving justice and addressing impunity, however, and are generally developed from practices meant to address common forms of violence, rather than exceptional forms, like widespread atrocities. Where conflict involves such exceptional violence, then, local justice processes may be insufficient or problematic from an accountability, acknowledgment, and reform standpoint.[70]

The types of armed conflict and political violence in which atrocities are committed, as contextual factors, have implications for responding to those atrocities. A related but under-examined question is how the

discourse used to frame violence has such implications—in particular the discourses of "terrorism" and "counterterrorism" and "violent extremism" and "countering violent extremism." This has become an especially salient issue since the attacks of September 11, 2001, but it had a long history before that. Bell discusses how every armed conflict has a "meta-conflict"—a conflict over what the conflict is about—in which each position presupposes a different set of solutions. In this way, competing discourses over the legitimacy and morality of actors and their actions can have implications for transitional justice processes. In Northern Ireland, for example, the meta-bargain involved an agreement to disagree, which created insufficient consensus for a comprehensive transitional justice policy.[71] Armed republicanism in Northern Ireland was long framed as "terrorism," which after the peace agreement contributed to resistance among one side of the conflict to reconciling with the other.[72]

More broadly, argues Marie Breen-Smyth, the term terrorism is commonly used by states to delegitimize non-state armed actors, and counterterrorism measures can deter peace processes, in turn hindering transitional justice. In the international context of the global "war on terror," numerous countries have "re-branded" their enemies as targets of counterterrorism, curtailing the prospects for non-military settlements of those conflicts. More generally, the rhetoric around terrorism and extremism maintains a "bifurcated and polarized framing of conflict," which undermines opportunities for negotiated settlements, reduces the political space for engagement, and creates an atmosphere of fear and exclusion, as in Sri Lanka. The discourse of "terrorism" may therefore constrain transitional justice processes through its effect on peace processes or by limiting their contribution to reconciliation.[73]

The way in which the nature and discourse of conflict affects transitional justice efforts will depend in part on the timing of those efforts. While the notion of transition, as argued here, is critical to the concept of transitional justice, in certain cases transitional justice processes are undertaken while armed conflict is still ongoing. One can argue that, by definition, the context of ongoing conflict precludes the use of such measures from being understood as transitional justice, or, conversely, that the use of such measures during conflict suggests that transitions in reality begin before a formal peace agreement has been signed. Nevertheless, given the general consensus that "positive peace" is not achieved simply with the cessation of official conflict, and that certain amounts of violence often continue, the context of ongoing conflict brings into relief some of the challenges that conflict and violence create for transitional justice processes as well as some of the opportunities it creates for contributing to resolving conflict.

In Colombia, the armed conflict involving the state and several non-state armed groups lasted more than five decades. During this conflict, in response to justice claims for crimes such as massacres and dispossession of land, the government and civil society have debated and implemented to varying degrees a series of transitional justice measures in the past decade. There are a number of potential benefits to such efforts, argue Rodrigo Uprimny Yepes and Nelson Camilo Sánchez, particularly in terms of setting the stage for future peace processes. In Colombia, these have included introducing a set of core legal standards that can help to bring the parties to the conflict together around certain discussion points; empowering victims, recognizing them as stakeholders, and making their rights central to public debate about dealing with the past; and, through the expression of grievances, exposing structural problems, such as land dispossession and inequality, and the need for broad reforms to accompany future transitional justice processes.[74]

> The way in which the nature and discourse of conflict affects transitional justice efforts will depend in part on the timing of those efforts. While the notion of transition is critical to the concept of transitional justice, in certain cases transitional justice processes are undertaken while armed conflict is still ongoing.

But ongoing conflict can, at the same time, present a range of obstacles that make it more difficult for transitional justice processes to achieve their objectives. As Uprimny and Sánchez explain, these include the risk of violence against both victims making justice claims and those advocating for and implementing justice measures (in Colombia, this is particularly the case for land restitution leaders); the practical and political difficulties brought about by an ever-expanding universe of victims; challenges in evidence collection and other technical processes; sequencing difficulties, when, for example, land restitution or other redress measures are most needed in areas where safety is most lacking; the risk of losing momentum and public support, if expectations go unrealized and compromises do not appear to lead to the end of the conflict; the prioritization of military strategy over justice aims; distinguishing humanitarian from reparative justice measures; and, most broadly, balancing justice—especially criminal justice—policy with the need for peace and the opportunity for political solutions.[75] Overall, it can said that transitional justice cannot achieve one of its fundamental aims while conflict is ongoing—that is, drawing a line between the violent past and a future based on respect for human rights.[76]

The challenges associated with pursuing accountability in the midst of violence do not necessarily end when formal peace has been achieved, however, as peace agreements do not always signal the end of crime and human rights violations. As Mats Berdal puts it, "the end of wars very rarely, if ever, marks a definitive break with past patterns of violence."[77] In countries such South Africa, Guatemala, and El Salvador, violence and criminality have persisted during and after transitional periods, often reaching levels close to or above what was experienced during the conflict. This violence and criminality can threaten gains made by transitional justice processes, as it can penetrate, hollow out, and undermine public trust in institutions, weaken support for democracy, and provoke hostility among citizens to the defense of human rights and the rule of law.[78] Furthermore, alliances between organized crime and armed groups that form during conflict tend to be difficult to dismantle, blurring the distinction between war and peace,[79] with organized crime groups often among the first to oppose transitional justice efforts.[80]

This continuity of violence has implications for the success of transitional justice processes. But it also means that such processes may sometimes miss an opportunity to reduce violence in the long run by drawing an artificially clear line between political violence and criminal violence. In South Africa, for example, Graeme Simpson argues that the marginalization and alienation that led people to participate in "political" violence were similar to those that led people after the end of apartheid to engage in "criminal" violence; by drawing a line between these types of violence, the truth commission may have limited its contribution to strengthening the rule of law and an understanding of the social and economic dynamics underlying widespread and persistent violence.[81]

In contexts of armed conflict and post-conflict transitions, then, the notion of conflict transformation should be useful to transitional justice advocates and practitioners. Conflict transformation, which "seeks to establish mechanisms to transform violent conflict into non-violent forms of handling and resolving conflict," emphasizes the importance of, among other tasks, "conflict analysis." This type of analysis considers the "context, root-causes, the nature of the post-conflict phase, conflict dynamics and its historical dimension, giving and in-depth insight into where a specific society stands at a given moment in time," as well as "actor mapping," all of which can help conceive and design transitional justice processes that make the most sense and do the least harm in the given circumstances.[82]

IV. Political Context

The nature of institutions and conflict are important contextual factors for transitional justice processes, but they are very much tied up with a third factor, which is the political context, or the nature of the "political settlement" that is established during and after a transition. As discussed above, numerous authors have emphasized the importance of political conditions, implications, and dilemmas to the notion of transitional justice. In transitions to democracy, the political context depends on the way in which the end of an authoritarian regime comes about, whether through negotiation or collapse, and the balance of power that results. In transitions to peace, the political context depends on the way in which the war ends, whether through military victory or negotiated agreement, and the balance of power that results.[83] In all cases, there will be political opportunities and political constraints, space to advocate justice and change as well as the risk of creating instability. The existence of opportunity does not mean that it will lead to perfect justice, and the existence of constraints does not mean that advocates of justice should back down. They do mean, however, that the political context should be central to advocating, designing, implementing, and assessing efforts to achieve accountability, acknowledgment, and reform.

The political settlement process, according to Bell, refers to the reconstruction of the state and the reconfiguration of "how power is held and exercised," which involves political bargaining through formal and informal processes.[84] The transitional context is integral to the notion of transitional justice, in part because this context provides an opportunity: the context is often one of "political rupture," explains Clara Sandoval, which brings about a new configuration of political forces that can challenge an old one that has lost political power and/or legitimacy. This can create opportunities to address past human rights violations and for transitional justice measures to contribute to the transformation of the ideologies and structures that permitted or consented to atrocities.[85] It can present a "window of opportunity," after which the idea of justice measures "may lose a sense of urgency or priority in comparison with other elements of a normalized political agenda. After a short time, the period of social mobilization and political fluidity of a transition may tend toward seeking stability, as a new political balance takes hold or sometimes as spoilers, weakened at the time of the agreements, reclaim political space."[86]

At the same time, however, transitions are periods of political contestation and bargaining, particularly when they involve negotiated settlements, which put constraints on transitional justice processes. As Bell explains, transitional justice has a complicated relationship with political settlements, in which both domestic and international actors engage according to different incentives and interests. Transitional justice measures are often part of a "tapestry of tradeoffs" made as part of an agreement on the new configuration of power.[87] Continuities with the previous political settlement and governing arrangements, the potential to destabilize peace processes in highly politicized and insecure environments, the relatively limited power of victims and their organizations, and the varying and conflicting interests and alliances of different local, national, and international actors—all of these factors have implications for the feasibility, effectiveness, and legitimacy of transitional justice processes.[88] According to one

view, understanding the interaction between politics and law in different conditions "is increasingly the mission of the research program on transitional justice."[89]

Just as with institutions and violence, transitions from authoritarianism and armed conflict are marked by some degree of continuity with regard to the prevailing political settlement. "Rupture-like" transitions, as experienced by East Germany, writes Halmai, may be more likely to have a wider array of transitional justice measures than in negotiated transitions, as in Hungary and Poland, where the previous regime may retain enough power to avoid accountability.[90] In post-conflict contexts, governments are often "coming to grips with violations committed in great part under their own watch."[91] There may therefore be a lack of consensus on the direction of the transition. Peace agreements generally serve to limit or end armed conflict, explains Bell, allowing the parties to the conflict to pursue their political aims through new institutional arrangements, but it can be unclear whether a return to the status quo, reform, or transformation is underway. In this context, transitional justice processes can become both responses to contestation and vehicles for ongoing political bargaining.[92]

The political context has relevance not only for the feasibility of justice processes, but also for advocacy strategies, as research by ICTJ on truth commissions in peace processes suggests.[93] Regarding consultations, for example, where there is an "active social mobilization in favor of accountability, targeted discussions to obtain specific proposals may be sufficient," but "when political leaders quickly create a weak, politically dependent, or non-credible institution, advocating for consultation and slowing down a process can be useful to empower marginalized sectors and dampen efforts to impose ill-prepared initiatives."[94] The degree of consensus around the need for justice also affects decisions about the appropriate instrument for creating specific measures, as an executive decree may bring more certainty for a commission and its mandate than legislative reform, as illustrated in Morocco and Nepal, respectively. Where a conflict ends in extreme division, like the partition of territory, "it is not apparent that in such circumstances truth commissions with a 'national reconciliation' mandate will contribute to reconciliation across groups."[95] The political context also has ramifications for the relationships among different justice measures, as political resistance to one measures can affect the viability of all measures if they are advocated as a package, as has occurred in Burundi.[96]

> In contexts of political contestation, relevant actors will engage with or avoid justice issues according to their interests and incentives. This includes national actors such as non-state armed groups, political parties, civil society groups, religious actors, labor unions, and international actors, like donors.

The institutional context is relevant here, because when pre-existing democratic institutions are weak or non-existent, postwar politics may be more likely to reproduce the polarization and cleavages of the war, and state institutions are more likely to be captured by partisan interests.[97] The nature of an armed conflict often emerges from the nature of prior state-society relations, argues Williams; when a regime's legitimacy is challenged it may instrumentalize disorder and violence to assert its authority, including atrocities.[98] In post-conflict contexts, then, the neo-patrimonialism and social exclusion that contributed to the onset of conflict often remain, and the political order that replaces the pre-conflict government may not have made a clean break with the past. This type of political settlement, argue Denny and Domingo, is likely less the result of bottom-up contestation or mass protest than of national and international forces. It may not be driven by the democratic demand that would be more likely to call for accountability for abuses.[99] In these contexts, local justice mechanisms are the outcome of choices about what is politically possible, not just weak national institutions. Furthermore, local practices themselves are not devoid of politics, as those in charge tend to be powerful members of the community.[100]

Nevertheless, despite such constraints, argues Bell, it is likely that past violations will be raised in political bargaining at multiple points before and during a transition, for practical and principled reasons.[101] For example, pre-transition human rights monitoring in countries such as South Africa, Guatemala, and El Salvador, as well as debates on the discourse to be used to describe the nature of violence and the parties to the conflict (for example, whether violence is "political" or not, or whether it constitutes "terrorism" or not, as discussed above), in negotiations affect how that past violence is addressed in the future.[102] In South Africa, discussions about political prisoners and political violence "began to tell a story about the nature of the past conflict and create a certain pathway dependency for how the past would be dealt with," helping to "determine the contours" of the future truth commission.[103] Each time the past is addressed, Bell argues, it opens up debates, provokes resistance, mobilizes new constituencies around justice claims, and prompts legal strategies that may affect how transitional justice is enacted in the future.[104] Furthermore, as Briony Jones and Thomas Brudholm emphasize, resistance to transitional justice should not be reduced to the actions of spoilers who necessarily fear being on the losing end of such processes; instead, resistance can be "profoundly complex and morally or politically legitimate"—as when outcomes such as forgiveness or reconciliation are seen to be demanded of victims—and provide a prism through which we can better understand the power dynamics of each context.[105]

Past experiences in rule-of-law reform and conflict transformation suggest the importance for any policy intervention of tools such as "actor mapping," "stakeholder analysis," and "political economy" analysis.[106] It is clear again, however, that institutional and political contexts are connected:

> A broader state capacity with the ability to resolve societal conflict is dependent on creating alliances and networks that agree on a political settlement and on the 'rules of the game' for the framework of the state. Creating such alliances and networks takes time, and it is a fallacy to think that they can be sustained by installing the 'right' type of formal institutions without considering the compromises, negotiations and resistance that this would generate in any society even more so in fragile and conflict-ridden settings.[107]

With regard to transitional justice processes, their efficacy and long-term impact may be greatest when they have "emerged from local social movements and actors embedded in social movements and victims' communities took on leading roles."[108] In this context of political contestation, relevant actors will engage with or avoid justice issues according to their interests and incentives. This includes national actors such as non-state armed groups, political parties, civil society groups, religious actors, labor unions, and international actors, like donors. Analysis of such actors demonstrates how transitional justice can provide an arena for political competition.

For non-state armed groups, the question of amnesties can be critical. In some cases, explains Bellal, the fear of criminal prosecution may be a factor pushing non-state armed groups to continue to fight, while amnesties may be among the only ways to bring such groups to the negotiating table. A "contextual approach" to amnesties could require that they be legitimate, have widespread political consensus, and be accompanied by nonjudicial transitional justice measures.[109] There are risks with even limited amnesties, however. In Burundi, for example, "temporary immunities" given to members of armed forces and non-state armed groups in 2003 are still in place for political and other crimes. From the perspective of preventing recurrence, it is also important to see non-state armed groups not only as perpetrators of violations but also as actors that may make a positive contribution to transitions and should be allowed to take joint ownership of demobilization and reintegration programs and transitional justice measures. In Northern Ireland, for instance, former combatants have helped to implement and participate in transitional justice.[110]

Political parties, as Ken Opalo explains, can potentially serve as focal points around which elites and voters can articulate their views and reactions to transitional justice issues, playing an important role through their

power to shape public opinion.[111] In practice, however, political parties that emerge in post-conflict contexts can reinforce, rather than overcome, wartime cleavages—often representing the political wing of former armed groups, lacking strong connections to their bases of support, and susceptible to extremist positions. While parties can provide platforms for building the political consensus that transitional justice processes may require to achieve their objectives, conflictual party politics can conversely create incentives for leaders to politicize justice processes and to provide cover for perpetrators within parties by encouraging groups to approach transitional justice as collectives, especially when backed by geographically concentrated ethnic groups.[112] Political parties' contestation of transitional justice measures, argues Sandra Rubli, is likely to be made up of a combination of self-interest (avoiding being held accountable) and an expression of particular conceptualizations of justice, truth, and reconciliation.[113]

The Contingent Role of Political Parties in Kenya, Liberia, and Uganda

Kenya responded to its 2007–08 post-election violence by setting up a truth commission and a formal inquiry meant to expose the organizers of the violence, enacting a new constitution, and making a commitment to national reconciliation and reparations. By the 2013 election cycle, however, political parties had abandoned these initiatives to focus on building political alliances. The lack of a stable party system meant that no party or alliance had the incentive to commit to comprehensive transitional justice.

Transitional justice efforts in Liberia centered around the 2006–2009 work of the truth commission. The persistence of wartime cleavages, however, even after the 2005 elections, and the failure to build consensus among different political parties ensured that the truth commission's findings and recommendations would be subordinated to political concerns. Once in power, leaders were willing to tolerate, but not commit to, transitional justice processes.

In Uganda, the 2007 Agreement on Accountability and Reconciliation between the government and the Lord's Resistance Army called for formal and informal community justice, reparations for victims, and the establishment of a body to examine the sources and consequences of the conflict in northern Uganda. However, the country's single-party political environment has precluded the implementation of a credible and inclusive transitional justice process.

For more, see Ken Opalo, "The Contingent Role of Political Parties in Transitional Justice Processes," in Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies.

The media can also play an important, but ambivalent, role in transitional justice processes by sharing information and framing public debate. In some cases, the media can undermine transitional justice processes by polarizing the political context, entrenching divisions, facilitating misperceptions, and reinforcing the root causes of conflict and abuse. In other cases, it can support and promote processes by articulating new societal values and highlighting victims' rights. In South Africa, for instance, the media contributed positively to the work of the truth commission, while in Peru and the former Yugoslavia it played a more negative role in covering trials or truth telling. As Refik Hodzic and David Tolbert put it, "transitional justice efforts rely on the media to encourage consensus making about the past."[114]

Civil society actors have been instrumental players in both authoritarian and post-conflict transitions, even while some have also been responsible for, or complicit in, past human rights violations, making them potentially important actors in transitional justice processes, both as participants and subjects.[115] Despite this, however, most donor funding to transitional justice goes to state or UN bodies; "in many countries, civil society actors are woefully underfunded and excluded from initial strategy setting, which may have negative effects on the local ownership and legitimacy of a [transitional justice] process and its potential for fostering social change."[116]

Given recent trends in development aid practices, including calls for more control of development strategy and delivery by recipient governments, there is reason to believe this situation will continue.[117] Furthermore, as Thomas Carothers points out, contexts of state fragility often feature systemic exclusion, including the "closing of space for civil society," which involves efforts by governments to "block foreign funds from flowing to activists within the country."[118] In countries like Uganda advocating for transitional justice "in the streets" can be dangerous due to this reduced space for NGOs.[119] There is also, of course, a political dimension to civil society, as a place where different actors compete for resources and influence, which transitional justice processes can affect, both positively and negatively—potentially demobilizing more radical social movements or reinforcing mistrust.[120]

Two types of civil society actors that have been relatively neglected in terms of their roles in transitional justice processes are religious actors and labor unions. According to Ioana Cismas, religious actors are often called on to participate in transitional justice processes at least in part because of their potential to bring them legitimacy, embed international accountability norms in local contexts, and build capacity, among other roles.[121] It may be expected that notions of reconciliation and forgiveness may drive the involvement of some religious actors in transitional justice processes, and while this may be true to an extent, their political and economic interests appear to be at least as relevant. Whether such actors remain silent or take a spoiling or enabling approach can be explained in part by their past conduct (whether they were responsible for or complicit in human rights violations) and past treatment (whether they were subject to violations by others). Furthermore, religious actors are not necessarily, as some might expect, the main promoters of amnesties, sometimes working against them, and often advocating criminal justice.[122]

Explaining the Role of Religious Actors in Romania, Rwanda, Solomon Islands, Tunisia, and Libya

In post-communist Romania, the Greek Orthodox Church was driven by its past victimhood and its own economic interests to advocate for property restitution, while the Romanian Orthodox Church was reluctant to engage in transitional justice processes due to its own economic interests and to disclosing its past activities, including its collaboration with the former regime.

In Rwanda, the involvement of churches in the 1994 genocide eroded their legitimacy, which is partly why the state was reluctant to call on religious actors to assume any visible positions in transitional justice processes, although the churches did promote reconciliation at the grassroots level.

In the Solomon Islands, church groups filled a void left by a weak and corrupt state, providing practical help and emergency relief during the conflict and grassroots efforts for reconciliation and transitional justice afterwards. An umbrella NGO of Christian churches pushed for a truth commission to be established and held public hearings.

In Tunisia and Libya, individuals who were said to expound Islamist ideologies were victimized and their organizations excluded from political processes under the Ben Ali and Gaddafi regimes. After 2011, this past victimhood was a key factor in the prioritization of vetting laws among Islamist political parties in both countries.

For more, see Ioana Cismas, "Reflections on the Presence and Absence of Religious Actors in Transitional Justice Processes: On Legitimacy and Accountability," in Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies.

Within civil society, labor unions are often among the strongest and best organized actors, often playing important roles in political transitions. In transitional justice processes, explain Eva Ottendörfer, Mariam Salehi, Irene

Weipert-Fenner, and Jonas Wolff, unions can be active participants, but also subjects to the extent that they suffered or were complicit in violations. Labor unions tend to have limited importance in transitional justice processes, however, in part because they may not consider transitional justice to be a primary aim of their work or an important means of making their demands heard, preferring other avenues of negotiating with the state. As with religious actors, complicity in injustice in the past as well as close alliances with the current regime are also likely to affect their approach to transitional justice in the present.[123]

Examining the Role of Labor Unions in Argentina, South Africa, and Tunisia

In Argentina, the labor movement's contributions to transitional justice reflected its ambivalent role in the 1976–1983 military dictatorship and its own organizational interests. Thousands of labor leaders had been imprisoned, forcibly disappeared, or killed by the military regime, and labor played a significant role first in the transition to democracy and then as subjects of transitional justice. Prominent cases addressed by the National Commission on the Disappearance of Persons, for example, included those of victimized labor leaders and delegations. But some labor leaders had also collaborated with the regime. Ultimately, labor's stance towards transitional justice was shaped by its political alliances.

In South Africa, the Congress of South African Trade Unions (COSATU) suffered intense repression under apartheid, but its proximity to the ruling political party, the African National Congress, since the transition has led it to take ambivalent positions towards transitional justice processes. COSATU was present at the country's truth commission's hearings as both subject and participant, and it called for reparations from corporations that profited from the apartheid system. But it has also followed the government line by opposing litigation against corporations.

In Tunisia, labor's relations with the regime were ambivalent, as the Tunisian General Labor Union was aligned with the Ben Ali regime but not fully coopted by it. The union has since played an important mediating role in the process of democratization, and its participation in transitional justice processes has focused on violence committed against its members. It directly participated in the National Dialogue on Transitional Justice, but it later withdrew from official transitional justice processes in dissatisfaction, preferring to use its own channels to influence politics and policy.

For more, see Eva Ottendörfer, Mariam Salehi, Irene Weipert-Fenner, and Jonas Wolff, "Labor Unions and Transitional Justice: An Exploratory Study on a Neglected Actor," in Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies.

International actors that intervene in transitional contexts affect the balance of power as well and, as Bell argues, should be seen as part of political bargaining processes in which transitional justice processes are negotiated. International criminal law can be understood to sometimes take on a "strategic instrumentalist role," she suggests, punishing individuals who disrupt peace processes and transitions, as with the Special Court for Sierra Leone and former Liberian President Charles Taylor and the Revolutionary United Front; the ICC and members of the Lord's Resistance Army in Uganda and President Omar Al-Bashir in Sudan; and the International Criminal Tribunal for the former Yugoslavia and former Serbian President Slobodan Milosevic. According to Bell, the "shadow of the ICC has formed an important backdrop to peace negotiations in the very different contexts of Colombia and Uganda, shaping and constraining negotiations." Regional human rights systems also influence national transitional justice measures, such as the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European Court of Human Rights.[124]

The role of donors and their political and resource commitments to transitional justice are also very much connected to domestic political contexts.[125] Fragile and conflict-affected states, explains Elena Baylis, are difficult environments for development work because of the risks they bring, including the concern that aid could be

diverted to ongoing conflict or shift political dynamics in unforeseeable ways.[126] Donors may therefore be reluctant to explicitly engage with transitional justice processes because of the risk that it might undermine their other work, preferring to support rule-of-law initiatives more broadly, or they may label what could be seen as transitional justice work as something else, such as human rights or capacity-building activities.[127] When international assistance does go to transitional justice processes, it is often distributed to a "standard list" of professional NGOs, rather than to supporting political activities or broader social movements.[128] This can have a "distorting effect" in local contexts, exacerbating inequalities in local civil society,[129] and leading civil society actors to advocate for donors' conceptions of justice, which may not resonate locally, as previously described.[130]

One study suggests that the context of political negotiations and the level of domestic support constitute "a better predictor than the strength of legal institutions of whether and when a country will pursue criminal accountability as a form of transitional justice."[131] While it may be the case that political resistance to transitional justice processes reduces over time,[132] those who understand different measures to comprise a "toolkit" of technical interventions that is applicable in every situation are likely to underestimate the strength of that resistance. More broadly, suggests a report by the Folke Bernadotte Academy, rule-of-law programming designed by external actors often fails to engage with societies or communities at the political level, "especially in contexts of complex political transition or where the legacy of past violence looms."[133] Local advocates, on the other hand, are more likely to know the political context as well as the risks they face in challenging it, even if they do not always have the power to do so successfully.

V. Social and Economic Structural Context

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

Given the common structural problems and related grievances of societies in transition,[134] it is often argued that transitional justice processes should address those structural problems in addition to the violence and repression committed against individuals and groups. As Sandoval notes, while the 2004 UN Secretary General's Report on the Rule of Law and Transitional Justice emphasized the importance of addressing root causes of conflict for preventing its recurrence, the 2010 UN Guidance Note on Transitional Justice contends that transitional justice measures should strive to take account of root causes of conflict and repression and address all rights violations.[135] Furthermore, the 2011 UN Secretary General's Report on the Rule of Law and Transitional Justice also calls for transitional justice mechanisms to be part of efforts to realize economic and social rights.[136] It is true that, at a minimum, the absence of structural change in the aftermath of massive violations undermines the ability of transitional justice processes to achieve their objectives.

For example, as Sandoval explains, gender justice requires not just providing compensation to victims for sexual or gender-based violence but also changing the underlying conditions so that such violence never happens again and victims are not continuously stigmatized—hence, the Inter-American Court of Human Rights' articulation, in its *González et al ("Cotton Field") vs. Mexico* case, of the relevance of "the context of structural discrimination" and the need to award transformative reparations capable of addressing structural discrimination.[137] As it stands, however, writes Kerr, patterns of persistent gender-based violence provide evidence of continuing underlying social and economic injustice in post-conflict environments. In countries like Sierra Leone, the attention brought to gender-based violence criminal justice and truth telling may help to bring about a degree of gender-sensitive legal reform, "although there is still a long way to go."[138]

Development refers to processes aimed at improving the socioeconomic conditions of people as well as the interactions of people and other actors within an economic, social, and political system,[139] while *human development* and *rights-based development* emphasize the distributive justice and human rights elements of development outcomes and processes. The relevance of accountability, acknowledgment, and reform for massive human rights violations to broader processes of development has been increasingly recognized.[140] In regard to the potential of transitional justice to reduce marginalization, de Greiff has argued that massive rights violations can reduce people's capacity for agency and social coordination generally, both of which reduce their engagement with and

claims on institutions, but that the recognition and trust that transitional justice may foster can help to reverse this, not just for victims.[141]

In its Sustainable Development Goal (SDG) 16, the UN's post-2015 Development Agenda highlights the need to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." SDG 16's emphasis on justice and institutions is relevant for transitional justice, especially with regard to the rule of law and access to justice; effective, accountable, and transparent institutions; and the reduction and prevention of violence, all of which can be among the objectives of transitional justice processes. SDG 16 also refers to the reduction of illicit financial flows and corruption, the return of stolen assets, and combating organized crime, to which transitional justice measures may contribute, depending on their mandates. Other SDGs relate to health, education, gender, decent work, and inequality, issues on which transitional justice also has a bearing.[142]

Resilience is a related contextual factor that can be relevant to transitional justice. As Eric Wiebelhaus-Brahm explains, resilience refers to a system's level of inherent stability and its ability to return to stability after a crisis. Social resilience in peacebuilding contexts is seen to involve elements such as psychosocial recovery, shared systems of meaning, interdependence, social cohesion, and broad and inclusive governance. Development practitioners connect greater degrees of reconciliation, trust, and rule of law with more resilient societies.[143]

Wiebelhaus-Brahm argues that transitional justice processes can promote or undermine resilience, depending on their design and implementation. Reparations, for example, which may be limited in their ability to affect material resources and the distribution of wealth at national levels, may have real effects at lower levels of aggregation: collective reparations can provide support to communities in healthcare and education, while individual benefits can increase household resilience. Reparations for marginalized populations may help to build vertical social capital, strengthening connections between citizens and state institutions. Transitional justice processes may also foster horizontal and bridging social capital, or trust between citizens and groups, helping to overcome divisions and create a sense of community. But transitional justice may also undermine resilience, he warns, if it ends up strengthening bonding social capital (only within groups), diverting attention and resources away from measures that could reduce vulnerability, reducing technical expertise, or empowering illegitimate power structures at the local level.[144]

The idea of *transformation* can also help us to examine transitional justice within social and economic structures. *Transformative justice* has been proposed as a concept capable of incorporating—yet expanding beyond—transitional justice, one that would emphasize local agency and resources, process over outcomes, and "the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global levels."[145] It can be argued that the notion of transitional justice itself should prioritize local agency and process and that the notion of transformative justice to a certain extent conflates with development.[146] It is, as Sandoval contends, nevertheless important both to think about the transformative potential of transitional justice processes and to understand the limits and possibilities of the contribution that transitional justice can make to major social changes, such as the reduction of structural inequalities, discrimination, and poverty.[147]

> It is important both to think about the transformative potential of transitional justice processes and to understand the limits and possibilities of the contribution that transitional justice can make to major social changes, such as the reduction of structural inequalities, discrimination, and poverty.

It makes conceptual sense in many cases for transitional justice processes to address not just civil and political rights violations but also economic, social, and economic rights violations when the latter are massive and serious and the "economic crimes" or "economic violence" that contribute to atrocities.[148] From a transformative standpoint, however, it is important to note, first, that certain transitional justice measures may be poorly suited to adequately address or rectify root causes, like structural inequality,[149] and, second, that extending the scope of transitional justice to address economic and social issues is not the same as making it transformative.[150]

Whether or not transitional justice contributes to transformation depends on its context. According to Sandoval, fundamental social change occurs where political, social, economic, and cultural changes result in the transformation of both the dominant ideology—"a set of beliefs about what is right and wrong that permeates everyday life"— and the structures that previously supported conflict and repression. Ideological transformation, however, can be generational. Transitional justice processes, for their part, can contribute to structural changes but those must combine with other structural changes to help to change ideologies. Reparations measures, for example, cannot remove root causes, like gender discrimination, by themselves, but they can contribute to, promote, trigger the broader change that is needed to do so, or at a minimum avoid reinforcing such discrimination in their design and implementation.[151] The main lesson of one study was that "one activity or strategy cannot do it all: in order to achieve the grand objective of just and sustainable peace, there is a need for many actors working at different levels to carry out different activities in parallel," suggesting that transitional justice processes "need to be complemented by other potentially transformative interventions that have an impact at the socio-political level."[152]

It is important to remember, however, that contexts of social and economic structural problems also create challenges for seeking accountability, truth, and reform, just as institutions, violence, and political settlements do. As Wiebelhaus-Brahm points out, post-conflict societies are often limited in terms of their capacity and resilience, with violence having destroyed social capital and destroyed or diverted resources, leading policymakers to prioritize low-cost justice measures or to seek the support or interventions of international donors or international institutions. Low levels of trust may also mean that groups are more likely to perceive transitional justice measures to be targeting them; and in more vulnerable countries shocks and crises may more easily disrupt, derail, or distract from transitional justice processes. In contrast, in societies where basic needs are being met and more resources are available, a government is likely to be in a stronger position to respond to justice claims, while civil society is likely to be in a better position to participate and advocate.[153]

The connections between social and economic structures and the objectives of and challenges faced by transitional justice processes is relevant from a donor perspective. For international donors, transitional justice is often seen as a component of justice and rule-of-law programming, which is part of their development agenda.[154] Donors engage with transitional justice at least in part because it aligns with their institutional mission: they see transitional justice as a means to other ends. UNDP, for example, explicitly articulates its interest in transitional justice in terms of its rule of law and capacity building in fragile and conflict affected states.[155] The OECD, European Union, the World Bank, the US Agency for International Development, and the Swedish International Development Cooperation Agency have also all identified transitional justice as a critical element of development.[156]

While donors and transitional justice advocates often point to the contribution that transitional justice processes can make to addressing social and economic structural problems, some argue that efforts to seek justice for a narrow set of civil and political rights violations or atrocity crimes can, in fact, hinder broader efforts to change the structures that allowed those violations and crimes to happen in the first place, including relevant national or global structures. The argument is that in focusing entirely on one aspect of a problem, transitional justice measures may distract from, deprioritize, or shield the broader contextual issues and structures that enable violations,[157] or that transitional justice efforts and their advocates may ignore social and economic problems

or preclude or obscure efforts to address them.[158] In practice, transitional justice has often been implemented too narrowly, too legalistically, and without adequate exploration of the links between atrocities and social and economic structures. Imbalances between corrective and distributive justice, supported by external donors and actors, may have shifted capacity and resources from broader social movements to more narrowly focused human rights NGOs.

In some countries, however, these processes have been deprioritized, with "a focus on economic or technical development issues to the detriment of attention to political and security concerns, as well as a near complete neglect of transitional justice."[159] Furthermore, transitional justice processes should be designed and implemented such that they investigate and draw attention to, rather than obscure or distract from, the links between atrocities and social and economic structures—and many have attempted to do so.[160] In practice, this would ideally be done more frequently and effectively, but to expect that national processes aimed at accountability, acknowledgment, and reform can on their own effectively address the responsibility or complicity of global elites, military superpowers, and international economic structures may in itself be to underestimate the political element of contextual constraints and consequent limitations of responding to massive violations.

VI. Conclusions

The contexts in which societies attempt to address legacies of massive human rights violations are integral to the concept and practice of transitional justice. Contexts vary widely, however, from post-authoritarian transitions to post-conflict transitions to ongoing conflicts to post-transitional periods. That the context is usually to some extent a transitional one is important because change creates opportunities for addressing past injustice, while continuities with the past present constraints or obstacles for doing so. That the context varies is important because it affects transitional justice's objectives—both immediate and long term—and processes, which affect the specific responses that are most appropriate and feasible in each setting.

Transitional justice practitioners are often called on to take context into greater consideration when advocating and shaping transitional justice processes. This report has examined some of the main contextual factors that have significant implications for transitional justice: the institutional context, the nature of conflict and violence, the political context, and economic and social structural problems.

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

The nature of armed conflict includes variations in the armed actors involved and their motivations, and the type and scale of violence and human rights violations that are committed, all of which affect the justice responses that are appropriate and the kinds of trust they seek to restore. In addition, violence that is widespread during conflict but persistent at varying levels after peace can present challenges for achieving accountability, acknowledgment, and reform. Contexts of armed conflict raise questions about how transitional justice processes relate to conflict resolution and peacebuilding.

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

Finally, underlying social and economic structural problems often constitute contexts of inequality, marginalization, and discrimination, which both facilitate massive human rights violations and create obstacles for responding

to those violations. Notions such as development, resilience, and transformation are useful in thinking about the extent to which transitional justice processes are affected by, and can at the same time address, root causes of violations and contribute to broad change.

These contextual factors have important implications for those seeking accountability, acknowledgment, and reform in response to massive human rights violations, leading to the following conclusions:

1) *Defining transitional justice contexts*: Transitional justice processes usually depend on the context being to a certain extent transitional, but those advocating such efforts should not wait for those contexts to be ideal. Transition is significant because it brings some form of change, which is often necessary in order for there to be opportunities to develop and shape processes that may not have existed previously, during ongoing armed conflict or repression.

But transition should not be defined strictly around peace agreements and regime changes, because change is pushed for and often begins before those events and persists long after. Experience has shown that limited steps can be taken toward justice while conflict and repression are ongoing. Furthermore, even with official transitions, continuity with the past as well as new challenges will put constraints on transitional justice efforts. In many cases, these constraints will persist into post-transition periods. Transitions present opportunities and challenges for addressing injustice, both of which are integral to the notion of transitional justice.

2) *Identifying and understanding contextual constraints*: Due both to continuities with the past and new challenges that accompany change, transitional contexts are "imperfect,"[161] characterized by constraints on transitional justice processes. Whether it is during conflict, as part of an immediate transition, or even decades afterwards, issues of scale and fragility will present challenges. Weak or nonexistent institutions, widespread corruption, massive numbers of victims and perpetrators, different types of violence, necessary political tradeoffs, a wide array of actors with different interests and organizational capacities, and broad structural problems, such as gross inequality, discrimination, and levels of poverty—all of these factors make for difficult contexts.

Transitional justice processes therefore can be ambivalent, contested, and contingent, functioning necessarily in an "imperfect manner;" because of this, they should be understood in the long term.[162] Transitional justice processes that are out of sync with the institutional, security, political, social, and economic contexts are less likely to achieve their objectives.[163] Assessing these contexts, then, is necessary but difficult for external actors.[164] While this does not mean that advocates of justice should back down in the face of risk and instability, such constraints should inform expectations and assessments of transitional justice efforts and outcomes.

3) *Focusing on direct objectives and processes over measures*: Given the importance of context, it is important to promote the immediate objectives of accountability, acknowledgment, and reform—and to understand and respond to the different processes and pathways through which these objectives may be achieved. There may be good reasons to support measures such as criminal trials, truth commissions, reparations programs, and vetting, but in practice contextual factors may sometimes make such measures unfeasible or inappropriate. Rather than promoting a formula, toolkit, or blueprint, it may be more effective to focus on process: look for opportunities to advance discussions, shape the ways in which past injustice is in fact being dealt with, put the issues on the agenda and keep them there, try to create spaces for entry points, and develop innovative ways of dealing with legacies of past violations, according to changing circumstances.[165]

When specific measures are appropriate, sequencing in some form may be more appropriate than attempting a simultaneous implementation of multiple measures, given that different measures have different contextual

preconditions.[166] Guarantees of non-recurrence are a promising and underemphasized notion that overlaps with transitional justice and combating impunity, but even that is often thought of in terms of specific measures, rather than general principles or objectives.

4) *Contributing to broader objectives according to context*: While objectives such as accountability, acknowledgment, and reform may be fairly consistent, the broader context in which these are sought will affect broader policy objectives, which will affect the processes that are most feasible and appropriate and the contribution they may make to change. Transitional contexts differ widely, with objectives that include vindication of the rights of violated victims, human rights protection, rule-of-law reform, peacebuilding, conflict resolution, conflict transformation, development, state building, good governance, and democratization. Transitional justice processes can potentially contribute to, or be in tension with, these broader objectives in different ways. They should be shaped and assessed, then, according to these objectives. They can, for example, complement other transitional interventions or at least minimize the tensions between them, such as human rights monitoring, demobilization and reintegration programs for ex-combatants, humanitarian assistance and durable solutions for displaced persons, and development programming to reduce marginalization and poverty.[167] Context also affects the more direct goals and outcomes of justice processes—for example, in terms of whether they can foster trust and reconciliation between citizens and state institutions and/or among citizens themselves and among groups.

5) *Supporting the actors, institutions, and conditions that can facilitate accountability, acknowledgment, and reform*: Given the relevance of context, it may be possible to indirectly support or shape transitional justice processes by supporting the actors, institutions, and conditions that more directly enable them. For example, rule-of-law reform may build the capacity and integrity of the justice-sector institutions that carry out criminal prosecutions. Support to civil society actors, particularly empowering victims and groups, can help them to advocate for justice processes that are appropriate to local needs and political dynamics and that ensure the participation of victims and marginalized groups.

However different processes unfold, they may be more likely to promote resilience when designed and implemented by local actors and in ways that accentuate the existing strengths of the social system. Those local actors may be more likely to support processes if they participate in their design. International interveners, in contrast, often lack the capacity, expertise, and legitimacy to make the right political judgments in local contexts.[168] Support can also go towards increasing the likelihood that political parties facilitate, rather than hinder, legitimate transitional justice processes through the creation of parties based on crosscutting cleavages, rooted in society and broad-based coalitions that can foster consensus.[169] Finally, reducing social and economic structural problems, like inequality, can be an important step toward ensuring that transitional justice processes both achieve their immediate objectives and contribute to long-term social change.[170]

Endnotes

1.   See, for example, Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

2.   See Juan E. Méndez, "Accountability for Past Abuses," *Human Rights Quarterly* 19, no. 2 (1997): 255–282; Leslie Vinjamuri, "Review of Kathryn Sikkink's *The Justice Cascade: How Human Rights Prosecutions are Changing the World*," *Journal of Human Rights* 11 (2012): 283–288.

3.   Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69–94.

4.   Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 327.

5.   United Nations Human Rights Committee Case No 30/1978, *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v Uruguay*; Case No. 84/1981, *Guillermo Ignacio Dermig Barbato and Hugo Haroldo Dermig Barbato v Uruguay*; case 107/1981 , Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay; Case No 45/1979 *Pedro Pablo Camargo v Colombia*; Case No 161-1983 *Joaquin David Herrera Rubio v Colombia*; Case 146/1983 and 148-153/1983, *John Khemraadi Berboeram et al v Suriname*.

6.   Case of *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); case of *Godínez Cruz v. Honduras*, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989).

7.   Thanks to Paul Seils for the point made in this paragraph.

8.   In what Teitel describes as the second phase, transitional justice aims "shifted from the earlier goal of establishing the rule of law through accountability to the goal of preserving peace," but did keep the human rights rhetoric. Teitel, 80–81.

9.   Teitel, 76, 69.

10.   José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," in *State Crimes: Punishment or Pardon* (Justice and Society Program of the Aspen Institute, 1989), 24, cited in Arthur, "How 'Transitions' Reshaped Human Rights," 336.

11.   Méndez, 256.

12.   Arthur, "How 'Transitions' Reshaped Human Rights," 326, 357, 363.

13.   See Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University Press, 2010).

14.   See Thomas Obel Hanson, "The Time and Space of Transitional Justice," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs (Edward Elgar, 2017); Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice* 9 (2014): 156.

15.   Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," 156.

16.   Lars Waldorf, "Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Context," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: ICTJ, 2017), 46, referring to, among others, Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13, no. 1 (2002).

17.   Briony Jones, Elisabeth Baumgartner, and Sidonia Gabriel, "A Transformative Approach to Dealing with the Past," swisspeace Essential, February 2015, 6.

18.   Open Society Justice Initiative, "Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico," Open Society Foundations, New York, 2016, www.opensocietyfoundations.org/sites/default/files/undenialble-atrocities-2nd-edition-20160808.pdf

19.   See Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (London; Hart Publishing, 2008); Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-economic Wrongs," *Social and Legal Studies* 21 (2012): 1–16; and Dustin N. Sharp, ed., *Justice and Economic Violence in Transition* (New York: Springer, 2014).

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23.   Leslie Vinjamuri and Jack Snyder, "Law and Politics in Transitional Justice," *Annual Review of Political Science* 18 (2015): 308.

24.   Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," 151, 154.

25.   UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General, S/2004/616*," August 23, 2004, 3. See also Vinjamuri and Snyder, "Law and Politics in Transitional Justice," 310.

26.   UN General Assembly, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence," A/68/345, August 23, 2013, at 12. See also Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

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29.   Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," 157.

30.   Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective," *Human Rights Quarterly* 31 (2009): 190, 208–209.

31.   United Nations, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence," UN Doc. A/69/518, 14 October 2014, para. 6, 13, cited in Waldorf, "Institutional Gardening in Unsettled Times," 54.

32.   Waldorf, "Institutional Gardening in Unsettled Times," 43.

33.   Ibid., 42.

34.   Fiona Mackay, "Nested Newness, Institutional Innovation, and the Gendered Limits of Change," *Politics & Gender* 10 (2014): 552–53, quoted in Waldorf, 44.

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48. Arthur, "How 'Transitions' Reshaped Human Rights," 361.

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51. UN General Assembly, "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/67/368, September 13, 2012, 13–18.

52. Waldorf, "Institutional Gardening in Unsettled Times," 57, citing others including: Ezequiel González-Ocantos, "Evaluations of Human Rights Trials and Trust in Judicial Institutions: Evidence from Fujimori's Trial in Peru," *International Journal of Human Rights* 20, no. 4 (2016), 445–70; Pádraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (London: Routledge, 2013); Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006); and UN General Assembly, "Report of the Special Rapporteur," A/67/368.

53. Waldorf, "Institutional Gardening in Unsettled Times," 58, citing Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London: Routledge, 2011); Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge, 2011); González; and UN General Assembly, "Report of the Special Rapporteur, A/67/368.

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62. Annyssa Bellal, "Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, 237; Williams.

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64. Kerr, 128.

65. Williams; Kerr, 127; Ramirez-Barat, 9; Sriram, Martin-Ortega, and Herman.

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84.   Bell, 85; Waldorf, "Institutional Gardening in Unsettled Times," 49; Denney and Domingo, 213–214.

85.   Clara Sandoval, "Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, 178–180; Halmai.

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87.   Bell, 92.

88.   Bell; Sandoval; Williams; Kerr.

89.   Vinjamuri and Snyder, 305, 306.

90.   Halmai.

91.   Méndez, 258.

92.   Bell, 95.

93.   González, 5.

94.   Ibid.

95.   Ibid., 6, 7.

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97.   Waldorf, "Institutional Gardening in Unsettled Times," 47.

98.   Williams.

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100.   Ibid., 224.

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102.   Bell; Breen-Smyth.

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121.   Ioana Cismas, "Reflections on the Presence and Absence of Religious Actors in Trasitional Justice Processes: On Legitimacy and Accountability," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, 304–305.

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123.   Eva Ottendörfer, Mariam Salehi, Irene Weipert-Fenner, and Jonas Wolff, "Labor Unions and Transitional Justice: An Exploratory Study on a Neglected Actor," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*.

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125.   Waldorf, "Institutional Gardening in Unsettled Times," 49.

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129.   Nesiah, 15–16.

130.   See Kerr.

131.   Fletcher et al., 212.

132.   Ibid., 216.

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134.   Kerr, 130–131.

135.   Sandoval, 169; UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General, S/2004/616*," para. 4; United Nations, "Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice," principle 9, March 2010, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

136.   UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General," S/2011/634, para. 52.

137.   Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, November 16, 2009, preliminary objections, merits, reparations and costs, para. 450, cited in Sandoval, 170–172, who also refers to Ruth Rubio-Marín, "The Gender of Reparations in Transitional Societies," in *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, ed. Ruth Rubio-Marín (Cambridge: Cambridge University Press, 2009); and Rodrigo Uprimny Yepes, "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice," *Netherlands Quarterly of Human Rights* 27, no. 4 (2009): 638, 635–647.

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139.   Owen Barder, "What Is Development?," August 16, 2012, www.cgdev.org/blog/what-development.

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141.   UN General Assembly, Report of the Special Rapporteur, A/68/345, 6.

142.   UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, October 21, 2015, Goals 16, 3, 4, 5, 8, 10.

143.   Eric Wiebelhaus-Brahm, "After Shocks: Exploring the Relationships between Transitional Justice and Resilience in Post-Conflict Societies," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, 142, citing Brian Walker et al, "Resilience, Adaptability and Transformability in Social Ecological Systems," *Ecology and Society* 9 (2004).

144.   Wiebelhaus-Brahm, "After Shocks," 154–156. See Kerr.

145.   Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice* 8, no. 3 (2014): 340.

146.   "On the one hand," writes Mark Drumbl, "perhaps transitional justice can become transformative justice. On the other hand, perhaps transformative justice should simply remain something else—separate and self-contained. The solution might not always be to cram additional tasks onto the shoulders of an extant postconflict legal institution. The solution might not be to say that transitional justice can do more, and the even more, in an endless conjunctive and additive carnival. The solution may instead be to say that transitional justice has its limits. And that the value of transformative policy does not depend on its underlying, or purported, transitionality." "The catch-all nature of what constitutes transitional justice is all the more exposed insofar as it is advanced by influen-

tial actors, including the UN, as an integral part of postconflict and peacebuilding strategies." Mark A. Drumbl, "Transitional Justice Moments," *International Journal of Transitional Justice* 10 (2016): 208, 210.

147.   Sandoval, 185–192.

148.   See Roger Duthie, "Transitional Justice, Development, and Economic Violence," and the other chapters in Sharp, *Justice and Economic Violence in Transition*, 165–201.

149.   Wiebelhaus-Brahm, "After Shocks," 151. Mark Osiel writes: "There has been a longstanding fear that once we start down the path of plumbing the structural sources of wrongdoing, any notion of moral responsibility for a given incident of misconduct—any notion suitable for purposes of sanctioning, at least—soon dissolves into social scientific explanation. We resist this result especially with mass atrocity, because the magnitude of the wrong elicits in us strong moral sentiments, reactive attitudes, which make us unwilling to settle for a value-neutral diagnosis of impersonal sociological structures." Mark Osiel, "Choosing Among Alternative Responses to Mass Atrocity: Between the Individual and the Collectivity," *Ethics and International Affairs* (2015).

150.   Sandoval, 175.

151.   Sandoval, 171, citing United Nations, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, June 2014, http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf, and Rubio-Marin.

152.   Jones, Baumgartner, and Gabriel, 20.

153.   Wiebelhaus-Brahm, "After Shocks," 149–152.

154.   Baylis, 372.

155.   Ibid., 381.

156.   See Organization for Economic Cooperation and Development, "Supporting Statebuilding in Situations of Conflict and Fragility," Policy Brief, June 2011; European Union, "The EU's Policy Framework on Support to Transitional Justice," November 2015, US Agency for International Development, "USAID Strategy on Democracy, Human Rights, and Governance," June 2013, 22; Helena Sancho, "Using Transitional Justice to Promote Development," Development Trends, Swedish International Development Cooperation Agency, April 2014, at 2; World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington DC: World Bank, 2011), 16, 125, 251.

157.   Nesiah, 36–40.

158.   See Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice," *International Journal of Transitional Justice* 2 (2008): 266–291; Gready and Robins.

159.   World Bank, *World Development Report 2011*.

160.   See Sharp, *Justice and Economic Violence in Transition*.

161.   Kerr, 134.

162.   Bell; Kerr; Sandoval.

163.   Waldorf, "Institutional Gardening in Unsettled Times," 61.

164.   Bell, 103.

165.   Denney and Domingo; Bell; Nesiah, 5; Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice,* ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006).

166.   Waldorf, "Institutional Gardening in Unsettled Times," 62.

167.   See previous ICTJ research: Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf, eds., *Disarming the Past: Transitional Justice and Ex-combatants* (New York: SSRC, 2009); Roger Duthie, ed., *Transitional Justice and Displacement* (New York: SSRC, 2012); and de Greiff and Duthie, *Transitional Justice and Development*.

168.   Wiebelhaus-Brahm, "After Shocks;" Waldorf, "Institutional Gardening in Unsettled Times;" Bell.

169.   Opalo, 297–298.

170.   Sandoval; Fletcher et al., 218.

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