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From the Ground Up: What does the evidence tell us about local experiences of transitional justice?

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**From the Ground Up:
What does the evidence tell us about local experiences of
transitional justice?¹**

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Abstract

Since the early 1990s, transitional justice has established itself as a field of study and practice. Proponents make normative links between transitional justice processes—for example, criminal trials, truth commissions and reparations—and broader societal and systemic outcomes, such as healing, reconciliation, peace and

¹ This article is based on an earlier, more detailed report with extensive annexes, which can be found on the Justice and Security Research Programme website: Anna Macdonald, “Local Experiences of Transitional Justice Mechanisms: What does the evidence tell us?” *Justice and Security Research Programme Working Paper 6* (2013).

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democracy. There is, however, a paucity of evidence on the actual effects and experiences of transitional justice interventions in war-affected and fragile places. This paper uses a bibliographic search methodology to pull together the extant evidence on local experiences of transitional justice interventions and finds that local perceptions and experiences of these processes are complex and do not conform with widely-held normative assertions about what transitional justice “ought” to accomplish. The implications for the transitional justice field are examined and recommendations for future research are proposed.

Introduction

In the aftermath of World War Two, Karl Jaspers, the German psychiatrist and philosopher, offered a series reflections on what it means to confront, cope with, and even recover from, a collective history of violence, suffering and mass crime. Against the backdrop of the Nuremberg trials, he boldly challenged his fellow citizens: “our only chance for salvation lies in total frankness and honesty... this path alone may save our soul from the life of a pariah. Whatever comes to us we must see it come. This is a daring spiritual and political act on the edge of the abyss.”² When these words were first spoken to a university audience in 1946, they encouraged a radical exposure to history, to wrongdoing, and to guilt. Today, the sentiments Jaspers expressed have, to some extent, been normalized in international relations and diplomacy. Confronting the past, allocating accountability and dispensing justice for wrongdoing at critical junctures in a nations history remains a tense, uncertain and morally fraught process, but it is a process that has been gradually institutionalized and professionalized under the broad umbrella of what today we call “transitional justice.”

Transitional justice is now associated with a set of processes, including criminal trials, truth commissions, amnesties, community-based dispute mechanisms and reparations; and a set of institutional

² Quoted in Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (Stanford: Stanford University Press, 2010), 19.

structures and regimes, including the International Criminal Court (ICC) and international humanitarian, human rights and criminal law.³ It is also an inter-disciplinary field of scholarly inquiry, offering perspectives from political science, anthropology, law, geography, sociology and education.⁴ Since the early 1990s, well over a billion dollars has been spent on transitional justice mechanisms.⁵ The former United Nations (UN) Secretary General Kofi Annan outlined the UN's normative commitment to transitional justice in his landmark report on the topic in 2004, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.⁶ Diplomats, international lawyers, politicians and scholars have echoed the refrain that transitional justice must be implemented in post conflict places—and increasingly in situations of *active* conflict—not only to ensure accountability for odious crimes but also to promote peace, reconciliation, truth and societal change.⁷ In 2011, the World Development Report made explicit links between transitional justice, security and development and the UN Human Rights Council established a mandate for a special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence of serious crimes and gross violations of human rights.⁸ Access to justice, including transitional justice, is now widely regarded as a crucial

³ Alexander Laban Hinton, *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Jersey: Rutgers University Press, 2011), 4.

⁴ For a thorough conceptual history of transitional justice see Paige Arthur, “How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31:2 (2009): 321–367; see also Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2002).

⁵ Harvey Weinstein, “Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief,” *International Journal of Transitional Justice*, 5.1 (2011): 1.

⁶ Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”,” *International Journal of Transitional Justice*, 3.1 (2009): 9.

⁷ Leslie Vinjamuri, “Deterrence, Democracy, and the Pursuit of International Justice,” *Ethics & International Affairs* 24.2 (2010): 191–211.

⁸ World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington DC: World Bank, 2011), 166.

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component of the post-2015, i.e. post Millennium Development Goals (MDG) agenda.

Despite the growth of the field and the proliferation of transitional justice practices, we still have a very rudimentary understanding of how these interventions *actually* affect people in the fragile and war-affected places where atrocities have been perpetrated and experienced.⁹ The first scholars to really engage with the “local” in transitional justice asked whether “universalistic assumptions about the benefits of justice accord with what people think on the ground?” and whether “adequate account is taken of non-western cultures and beliefs and local practices of justice?”¹⁰ Since then, edited collections and journal issues have been published that engage closely with how transitional justice is viewed from the bottom up, across cases.¹¹ But these are areas of inquiry that remain in their infancy.

A parallel development in the field has been a series of quantitative, large-N comparative studies, which employ datasets in order to try and establish causal links between transitional justice and broader, systemic statebuilding objectives such as peace, democratization, and human rights adherence.¹² These studies build

⁹ See for example, Oskar Thoms, James Ron, and Roland Paris, “The State Level Effects of Transitional Justice,” *Centre for International Policy Studies Working Paper* (April, 2008); Hugo van der Merwe, Victoria Baxter, and Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington DC: United States Institute of Peace Research, 2009); Special Edition: Transitional Justice on Trial: Evaluating its impact, in *International Journal of Transitional Justice* 4.3 (2010): 315-508; Weinstein, “Editorial Note,” *International Journal of Transitional Justice* 5.1 (2011): 1.

¹⁰ Eric Stover and Harvey Weinstein *My Neighbour, My Enemy: justice and community in the aftermath of mass atrocity* (Cambridge: Cambridge University Press, 2004); Laurel Fletcher and Harvey Weinstein “Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,” *Human Rights Quarterly* 32.1 (2008): 165.

¹¹ Rosalind Shaw, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and priorities after mass violence* (Stanford: Stanford University Press, 2010); Hinton, *Transitional Justice*, 4; Special Edition: Transitional Justice and the Everyday, in *International Journal of Transitional Justice* 6.3 (2012): 385-572.

¹² See, for example, Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington DC: United States Institute for Peace, 2010); Hun Joon Kim and Kathryn Sikkink, “Explaining the

upon the “justice cascade” theory, conceptualized by Ellen Lutz and Kathryn Sikkink as a “dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (like prosecutions) on behalf of those norms.”¹³ The argument follows that since the 1970s, there has been a proliferation of national, transnational and international criminal accountability for human rights crimes, and that this represents a “tipping point,” a moment where “a critical mass of actors has adopted a norm or practice, creating a strong momentum for change.”¹⁴ More recent studies have gone some way towards trying to measure the *effects* of individual criminal accountability for human rights abuses and other transitional justice mechanisms and so far, they have focused exclusively on macro-level outcomes. They therefore tell us very little about ground level experiences and we remain unclear about how, if at all, macro-level outcomes such as a human rights prosecution, actually relate to micro-level outcomes. A more problematic issue with the large-N, macro-level impact studies is that critics have pointed to several methodological and data problems plaguing them.¹⁵

In 2011-12, a research team at the Justice and Security Research Programme (JSRP), a research consortium based at the London School of Economics (LSE), designed a systematic bibliographic search methodology in an attempt to pull together the extant evidence base on local experiences of transitional justice in conflict affected and fragile places. It is hoped that such an exercise will tell us something about how those at the receiving end of transitional justice interventions understand, experience and interact with these processes.

Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54.4 (2010): 939-96.

¹³ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton: New York, 2011), 6.

¹⁴ *Ibid.*, 7.

¹⁵ See Thoms, Ron and Paris for a full review of these studies.

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The “local” here is understood broadly as studies of the sub-state—of communities and of individuals—and it is used interchangeably with “micro-level.” Cognizant of the dangers of conceptualising the local as a “level” and the implicit connotations with “remoteness, marginality and circumscribed contours,” the approach here was to borrow from Shaw *et al.*’s description of the local as a “standpoint based in a particular locality but not bound by it.”¹⁶ Thus, the analytical focus is on those people, or groups, who may be the actual or potential victims of war crimes, crimes against humanity and genocide, and the actual or potential recipients or beneficiaries of transitional justice interventions. At the same time, it is acknowledged that certain individuals and groups may have the agency (power and resources) to shape the transitional justice agenda, as well as be subject to it, whether as creators of transitional justice (e.g. local level justice and reconciliation institutions), or alternatively as perpetrators of injustice.

At issue is whether internationally promoted and generalized concepts (for example “truth,” “justice,” and “reconciliation”), and practices (for example truth commissions, trials, and amnesties), resonate in the societies in which they are being advocated for and implemented today. Some of these places are transitioning politically, some are transitioning from war to peace, and others are barely doing either. They are places as politically and culturally diverse as Columbia, Uganda, Timor-Leste, Afghanistan and Libya. The very word “justice” has no direct translation in many of these contexts and even where it does, individual and group perceptions about what justice actually means can range from access to healthcare to the ability to pay for a decent burial.¹⁷

This study carries with it two inherent tensions. The first is between the aim to generalize and the many specific, individual contexts examined. It must be stated then that this examination is nascent, not conclusive: it does not seek to impose a summary

¹⁶ Shaw, Waldorf and Hazan, 6.

¹⁷ Tim Allen, *Trial justice : The international criminal court and the Lord's Resistance Army*, (London: Zed Books, 2006); and Emily Winterbotham, *Healing the Legacies of Conflict in Afghanistan* (Afghanistan Research and Evaluation Unit, 2011).

judgment on whether transitional justice *works* or not. A positivist, results-orientated study would be problematic because it is not methodologically sound to compare or generalize across studies that are measuring different things in different ways in order to draw conclusions about whether transitional justice is, for example, “harmful” or “beneficial.”

The second tension is that this meta-analysis aims to examine local experiences through the broad normative lenses of what proponents argue transitional justice processes *ought* to achieve, and yet there remains a lack of what development experts and practitioners have termed a “theory of change.”¹⁸ We still do not have a clear enough understanding of who and what transitional justice is for and what it is designed to accomplish in any given context.¹⁹ Therefore, we risk measuring a particular TJ project against criteria it never intended to meet.²⁰ It is beyond the scope of this paper to make explicit the theories of change to which each TJ mechanism may subscribe and then to test whether such a change has been delivered. The approach taken here, more amorphously perhaps, is to synthesize some of the broader normative claims made about TJ processes and to assemble a guide to the existing empirical data, examining what it tells us about how transitional justice interventions are understood and experienced locally, and how contextual specifics may shape, alter or impact upon these interventions.

¹⁸ Danielle Stein and Craig Valters, “Understanding Theory of Change in International Development,” *Justice and Security Research Programme Working Paper 1* (2012); and Colleen Duggan, “Editorial Note,” *International Journal of Transitional Justice* 4.3 (2010): 315–328.

¹⁹ Duggan, “Editorial Note,” *International Journal of Transitional Justice* 4.3 (2010): 13.

²⁰ International Council on Human Rights Policy, *No Perfect Measure: Rethinking evaluation and assessment of human rights work*, (2012), 12. The author would also like to thank Pablo De Grieff for highlighting many of the points elaborated in this paragraph.

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Search methodology and findings

A mixed bibliographic search strategy, comprising three stages, was designed and conducted between June 2011 and November 2012. The first stage was a database-driven search. While there are a large number of existing databases, those selected for the searches are commonly accepted as the most important search engines for social sciences and typically the most relevant for the research question.²¹ Once the search strings had been devised and the search had been conducted, inclusion criteria were applied.²² Only studies published after 1983 were selected. This was the date of the first trials of the military juntas in Argentina, a point from which the transitional justice debate began gaining momentum.²³ Only studies published in English were selected—this was recognized as a major but unavoidable limitation, given resource constraints. Studies were also selected on the basis that they were interrogating the experiences of people living in war-affected and fragile locations. The total relevant yield from the database searches was 315 articles, books and papers.

It soon became clear that some key literature, both academic and non-academic, was missing from the systematic database-driven search. A second search stage, a “snowball” technique, was therefore adopted. This involved an examination of relevant footnotes and bibliographies from the articles, books and papers that the database searches had yielded. The research team also examined the archives of the International Journal of Transitional Justice (IJTJ) since its creation in 2007 and the “grey” literature produced by the International Centre for Transitional Justice (ICTJ) since its creation

²¹ The following databases were selected: SCOPUS, ISI, IBSS, EBSCO (selecting Peace Research Abstracts, International Development Abstracts, International Political Science Abstracts, Race Relations Abstracts, Historical Abstracts, Criminal Justice Abstracts), African Journals Online, CIAO, Hein Online, West Law, Google Scholar, Refseek, LSE Library Catalog, COPAC, and WorldCAT.

²² For a detailed description of how the search strategy was devised, see Macdonald, 11-13.

²³ See for example David Pion-Berlin, “To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone,” in Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume 1 (Washington DC: United States Institute of Peace, 2005), 82.

in 2001. Preliminary results were crosschecked against the inclusion criteria. The snowball search produced an additional 67 citations.

Finally, to supplement the database and snowball driven searches a peer-led literature review was conducted. This involved identifying and selecting peers and authorities in the field, both scholars and practitioners. Twenty individuals were contacted with a request to identify at least five relevant sources, including books, articles, working papers and reports. Six replied and provided a total of 27 references (some of which were overlapping).²⁴ The peer-led search produced a literature that converged significantly with what had been yielded through the previous two searches. In total, it produced only 3 studies that had not already been identified.

Once the three search strategies had been completed, a more rigorous screening for inclusion of “local level” empirical data was undertaken. This led to the number of relevant citations being cut from 385 to 273. The 273 sources were then evaluated using an evidence-grading template, which had been devised using UK Department for International Development (DFID) evidence grading guidelines.²⁵ The template was designed to evaluate the literature based on the level and quality of empirical data employed to generate theories and arguments (<10%, 10-50%, >50%), according to the methodology used for data collection (quantitative using existing or new datasets; qualitative based on either interviews or observation; or “other”).

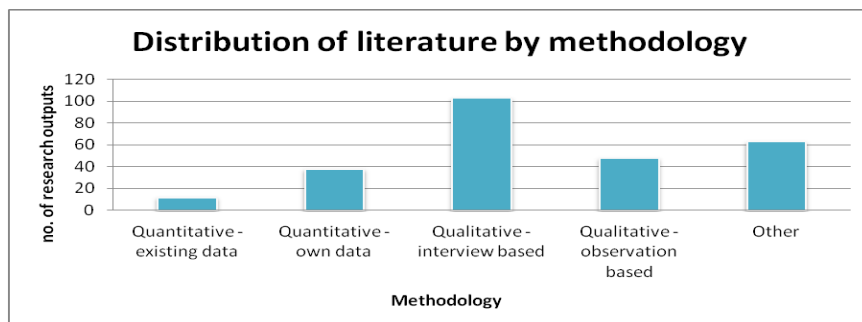
Of the 273 journal articles, books, and reports that were graded, 32% were coded as containing less than 10% empirical data; 36% as containing between 10-50% empirical data; and 32% contained 50% or more empirical data. Of those books, articles and reports that contained more than 10% empirical data, 6.6% were recorded as quantitative using an existing data set; 21% were

²⁴ Thank you to Mark Freeman, Hugo van der Merwe, Chandra Sriram, Oskar Thoms, Leslie Vinjamuri and Harvey Weinstein for generously sharing their recommendations.

²⁵ This was developed at the London School of Economics (LSE) by Anouk Rigterink using the DFID evidence grading guidelines and with input from JSRP partners. See “JSRP evidence grading template” in Macdonald, 86.

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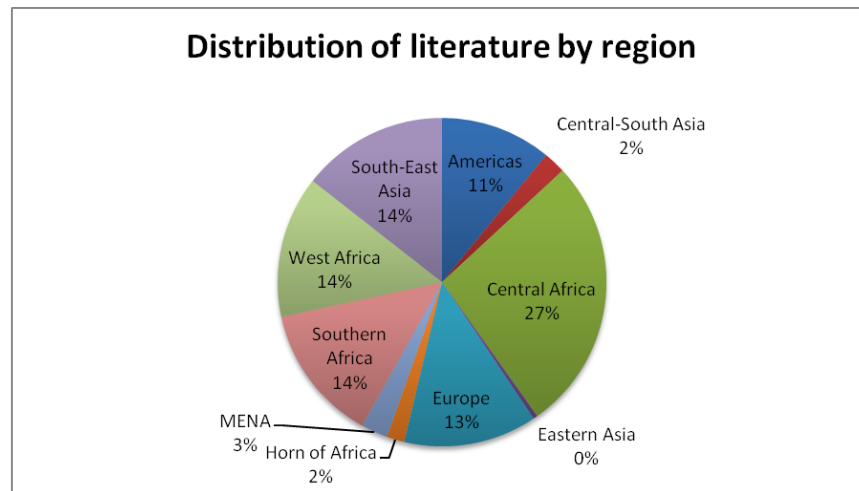
recorded as quantitative using an original dataset; 26.9% were recorded as qualitative, observation-based; 56.9% were recorded as qualitative, interview based and 34.8% were recorded as “other.” These percentages add up to more than 100% because individual works were often coded as containing more than one methodology.²⁶ Overall, then, studies based on primary research were most commonly qualitative, employing interview and focus group methodologies. The “other” category refers to empirical data derived from archival literature, government reports and films, for example, and is well represented because it tended to be used as a method in conjunction with one of the other four approaches listed above.



In terms of country and regional distribution of individual case studies, a lot of case study material was gathered on the former Yugoslavia (13). If single case studies on Bosnia and Herzegovina (9), Serbia (4), Croatia (1) and Kosovo (3) are included, that number rises to thirty. This area experienced the first major experiment in pursuing justice during conflict in the form of the International Criminal Tribunal for the former Yugoslavia (ICTY). Regionally, Central Africa was the most highly represented area (62). Southern Africa (32) and West Africa (31) were also well represented. This is perhaps not surprising given that all of the International Criminal

²⁶ As a percentage of all 273 papers, including those with less than 10% empirical data, 4.4% were classed as quantitative using an existing data set; 10.3% were classed as quantitative gathering own data; 17.6% were qualitative (observation based). 37.7% were qualitative, interview based and 23.1% were classed as “other.”

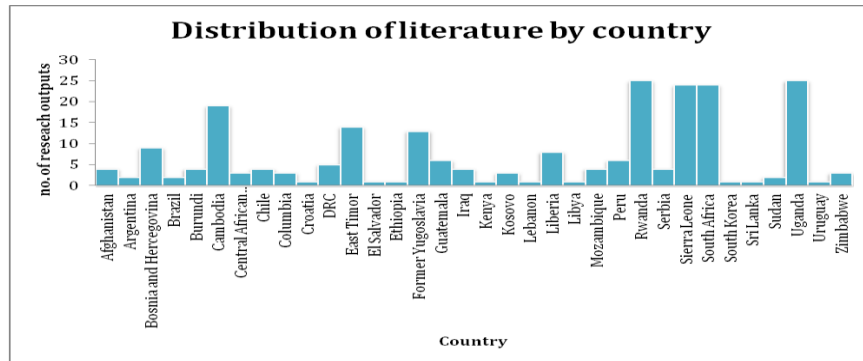
Court's official investigations and active cases are in Africa (Uganda, DRC, Libya, Central African Republic, Sudan, Kenya, Côte d'Ivoire, Mali); and this is a region that has seen multiple attempts to pursue justice after and during mass conflict in contexts where peace remains fragile and uncertain.



Despite this, there was a huge variation in volume of research per country, particularly within broader sub-Saharan African regions. Rwanda (25), Sierra Leone (24), Uganda (25) and South Africa (24) make up the majority of studies in this area, while Central African Republic (3), DRC (5) and Kenya (1) were noticeably under-researched when the literature search was conducted in 2011-12, and Chad, another country where transitional justice processes have been widely debated, was not represented at all. Although these areas probably are under researched it is also likely that some literature was not identified because it was not published in English. This may also be the case in other places which did not appear to have generated much relevant literature, in particular Guatemala (6) and Columbia (3). Finally, it was striking that Middle East and North African countries (MENA) were so under-represented in the literature. Despite transitional justice being a key theme during the Arab Spring

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uprisings, this has been a relatively recent development and the searches did not produce any existing literature relevant to the criteria.²⁷



A frequent set of responses to the longer version of this study is along the lines of, “Surely there has been something published on Lebanon or Nepal?” or “What about the role that identity politics play?” The review is somewhat restricted by its methodology; the methodology was designed to be as systematic and transparent as possible, comprising a formal search of web-based databases complemented with requests to experts in the field to identify key literature, and snowball searches of bibliographies and references. A combination of these methods mitigated the shortcomings of each but there are still cases where relevant literature may not have been captured.

Below is a summary and analysis of the existing state of empirical knowledge on the local experiences and effects of transitional justice processes in war-affected and fragile spaces. Although reference is not made to every study that the literature search yielded, some key works are identified.²⁸ These were selected

²⁷ It is, of course, quite possible that relevant material has been published subsequently, although a peer-led search on this area in December 2012 did not produce any results.

²⁸ For a short summary of each study that was reviewed, there is an annotated bibliography which can be accessed at

because they had a strong evidence base (as measured during the grading exercise) and/or because they appear to fit or generate broader theories. Selecting particular studies for further examination in this way does inject a degree of author subjectivity into the study but it also allows for the two criteria above to be met, whilst also ensuring some geographic spread in the studies under discussion.

The analysis of findings is divided up by transitional justice process. Each section begins with an overview of the key normative and theoretical debates relevant to each process, followed by a review of the evidence based literature. General findings and conclusions are drawn together at the end of the paper.

Trials

Trials for conflict-related crimes—genocide, war crimes and crimes against humanity—can be pursued by various means, including domestic courts, hybrid tribunals and international tribunals and courts. Trial advocates argue that widespread benefits will result from legal prosecution, including accountability, truth, reconciliation, peace, deterrence and promotion of the rule of law. A major justification for the creation of the ICTY was the argument that legal accountability for war crimes would lead to sustainable peace in the region.²⁹ The preamble to the Rome Statute, which established the International Criminal Court in 2002, also recognizes a link between accountability and peace in its statement, “[r]ecognising that such grave crimes threaten the peace, security and well-being of the world.”³⁰ Thus trials are perceived to have a retributive *and* utilitarian function: the logic follows that credible threats of punishment will change the calculations of potential perpetrators, re-enforcing

<http://www.lse.ac.uk/internationalDevelopment/research/JSRP/downloads/JSRP6.AnnBib.pdf>

²⁹ Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal,” *Human Rights Quarterly* 20.4 (1998): 737–816.

³⁰ Preamble to the Rome Statute of the International Criminal Court, 1 July 2002.

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acceptable norms and consolidating political stability.³¹ It is further argued that formal prosecution will provide an authoritative “rendering of the truth,” which subsequently forms a foundation for the envisioning and realisation of civil stability and national reconciliation.³² Finally, criminal justice, it is argued, serves the needs of victims, offering a direct therapeutic and moral response to the pain they have suffered.³³

As has been noted, there is very little empirical data to support normative and theoretical claims about the benefits of domestic, hybrid and international war crimes trials.³⁴ The two most powerful and enduring criticisms of war crimes trials are, firstly, that such efforts will perpetuate a war or de-stabilize post-war efforts to build a secure peace.³⁵ Secondly, that the intersection between law, politics and power means that justice will always be compromised in favour of political settlements because nations are the actors, the legislators, the executives, as well as the judges of international law.³⁶

³¹ Payam Akhavan, 743-51; Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume 1 (Washington DC: United States Institute of Peace, 2005), 128; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (Boston: Beacon Press, 1998), 123; Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation,” *The Yale Law Journal* 106.7 (1997): 2030-1.

³² Akhavan; Teitel; Kritz; Jaime Malmud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?” *Human Rights Quarterly* 12.1 (1990): 11-13; Diane Orentlicher, ‘settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,’ *Yale Journal of International Law* 100.8 (1991): 2546.

³³ Kritz, 128; Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (London: Times Books, 1998), 49; Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), 19.

³⁴ Laurel Fletcher and Harvey Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24.3 (2002): 584.

³⁵ Leslie Vinjamuri and Jack Snyder, “Trials and Errors: Principles and Pragmatism in Strategies of International Justice,” *International Security* 28.3 (2003): 5-44.

³⁶ Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (New York: Cornell University Press, 2009); Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); Victor

What the evidence tells us

There appears to be a leaning in the local level empirical literature towards examining victim-survivor perceptions of trial processes and the factors that shape them. These find mixed and interesting results. In his interview based study of the Municipality of Prijedor in north-western Bosnia and Herzegovina (BiH), Refik Hodzic found that personal experiences of being included or excluded from the process shaped views on the ICTY and the Court of BiH.³⁷ He noted that those who testified enjoyed a short-term “therapeutic” effect, while those who were excluded, based their views on insufficient or incorrect information from the media or word-of-mouth.³⁸ Despite this, both types of victim shared growing scepticism about the ability of the ICTY and the Court of BiH to provide justice for victims and deter future crimes.³⁹ Studies such as these are, of course, only representative of a certain place at a certain time. One way of getting around this limitation is via longitudinal research, so it is encouraging that two scholars have undertaken interesting baseline studies in Kenya and Cambodia at the outset of international legal proceedings in those places.⁴⁰

A striking finding across studies is the apparent disconnect between international legal priorities, and frameworks, and local understandings of justice. In Timor-Leste, for example, Erica Harper analysed 116 interviews with a range of individuals, from the general public to employees of UN Transitional Administration in Timor-Leste (UNTAET), and found that local perspectives on evidence and

Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008).

³⁷ Refik Hodzic, “Living the Legacy of Mass Atrocities: Victims” Perspectives on War Crimes Trials,” *Journal of International Criminal Justice* 8.1 (2010): 123-4.

³⁸ *Ibid.*, 123-25.

³⁹ *Ibid.*, 124.

⁴⁰ David Backer, Joseph Lahouchuc, and James Long, “Addressing the Post-Election Violence: Micro-Level Perspectives on Transitional Justice in Kenya,” *Oxford Working Papers* (2010); James Gibson, Jeffrey Sonis, and Sokhom Hean, “Cambodians’ Support for the Rule of Law on the Eve of the Khmer Rouge Trials,” *International Journal of Transitional Justice* 4.3 (2010): 377–396.

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due process diverged considerably from those of the UN.⁴¹ For the East Timorese population, for example, she found that guilt was based upon a “shared sense of knowing” rather than an “objectively applied” legal process.⁴² In her study of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Tara Urs came to similar findings.⁴³ Her ethnographic study conducted between May 2005 and April 2007 involved 117 interviews in rural areas of Cambodia. Urs found that 20 per cent of those she interviewed showed resistance to engaging with the Court, and noted that people’s reluctance was consistent with cultural notions of hierarchy and a feeling that the Court was “above” ordinary people. Furthermore, she found that legal concepts such as defence rights, reasonable doubt and evidentiary standards were both unfamiliar and alienating to the general Cambodian population.⁴⁴ In a similar vein, Tim Kelsall, in an anthropological study of the Special Court for Sierra Leone (SCSL), noted that the court “failed in crucial ways to adjust to the local culture in which it worked.”⁴⁵ Kelsall noted, for example, that the Court ‘sidestepped’ the issue of magic and the occult during the trial and elected to judge only what it deemed “material.” This western-centric view, he suggests, does little to ensure that “judicial decisions make sense to the communities in which they are made.”⁴⁶

There is very little data in the extant literature to support or challenge normative arguments that suggest causal links between trials and deterrence, individual and social healing, or reconciliation at the micro-level. In 2004, Eric Stover and Harvey Weinstein published *My Enemy, My Neighbour*, an edited collection which brought together ten inter-disciplinary teams over a period of four

⁴¹ Erica Harper, “Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice,” *Journal of Conflict and Security Law* 10.2 (2005): 149–185.

⁴² *Ibid.*, 165.

⁴³ Tara Urs, “Imagining locally-motivated accountability for mass atrocities: voices from Cambodia,” *International Journal on Human Rights* 7:4 (2007): 61-99.

⁴⁴ *Ibid.*, 70, 77.

⁴⁵ Tim Kelsall, *Culture under cross-examination: international justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009), 3.

⁴⁶ *Ibid.*, 170.

years to examine the micro-level impacts of the ICTY and the ICTR.⁴⁷ The editors found no clear links between criminal trials and reconciliation.⁴⁸ They argued that international tribunals worked best in conjunction with a variety of other measures including local initiatives that proved more attentive to social integration and reconstruction and to the needs and wishes of those most directly affected by violence.

Since then, studies which have attempted to understand the relationship between trials and peacebuilding and reconciliation—largely in the context of the ICTY—have come to different conclusions. James Meernik, for example, carried out statistical analysis of existing monthly time series “event” data, drawn from local press reports in Bosnia, from January 1996 to July 2003.⁴⁹ Controlling for other factors, he used this to test the effects that prominent arrests and verdicts had on levels of inter-ethnic conflict and cooperation in Bosnia.⁵⁰ Meernik found that the ICTY had a very limited effect on improving relations among Bosnia’s ethnic groups and no statistically significant effect on societal peace. On the other hand the actions of the EU and to a lesser extent NATO and the US were found to be statistically significant and had a stronger impact. Payam Akhavan reached more positive conclusions. He analysed the ICTY through an examination of political reactions to major court decisions and in particular, the indictments of key Serbian politicians.⁵¹ He found that the Serbian public were largely “indifferent” to the indictments and that the ICTY was successful in moderating politics and marginalizing ultra-nationalist leaders.⁵² Finally, in a series of studies based on multiple research methods including surveys, interviews, case studies, oral histories, archival

⁴⁷ Stover and Weinstein.

⁴⁸ Ibid., 11.

⁴⁹ James Meernik, “Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia,” *Journal of Peace Research* 42.3 (2005): 271–289.

⁵⁰ Ibid., 283.

⁵¹ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities,” *American Journal of International Law* 95.7 (2001): 7-31.

⁵² Ibid., 13-14.

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materials and ethnography over a ten year period (1998-2008), Lara Nettlefield found that the ICTY had a positive effect on democratisation in Bosnia and played a particularly positive role in the creation of new post-war political identities based on the rule of law and in mobilising civil society groups that lobby for justice and accountability.⁵³

The bibliographic search threw up a number of survey-based transitional justice studies.⁵⁴ The surveys attempt to measure public attitudes, perceptions and experiences at specific times, and in specific places, where transitional justice policy—and particularly *trials*—are being proposed or have already been implemented. Where the sample size is sufficiently large, the surveys can also provide comparative information on various constituencies, including, for example different ethnic groups within a broader population. With varying degrees of success the surveys have attempted to define local interpretations of “justice,” preferences for transitional justice mechanisms, and how those mechanisms should be administered, e.g. locally, nationally or internationally.

Weinstein *et al.* offer a general overview of population based surveys they have conducted in the Balkans, Iraq, Uganda, and Rwanda.⁵⁵ They found that in all countries, people’s ethnic identity strongly influenced their attitude towards trial processes.⁵⁶ In Bosnia Herzegovina, for example, attitudes towards the ICTY were viewed through a nationalist lens. Serbs and Croats felt negative about judicial proceedings because they believed that their group was being singled out for prosecution, whilst Bosniaks expressed more positive feelings.⁵⁷ Local politics also played a key role in shaping responses:

⁵³ Lara Nettlefield, *Courting democracy in Bosnia and Herzegovina: The Hague Tribunal’s impact in a postwar state* (New York: Cambridge University Press, 2010), 15.

⁵⁴ For a full list of these surveys and a summary of their key findings, see Macdonald, 91-96.

⁵⁵ Phuong Pham, Patrick Vinck, Kaba Kinkodi, and Harvey Weinstein, “Stay the Hand of Justice: Whose Priorities Take Priority?” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, eds. Rosalind Shaw, Lars Waldorf, and Pierre Hazan, (Stanford: Stanford University Press, 2010), 27-49.

⁵⁶ *Ibid.*, 46.

⁵⁷ *Ibid.*; see also Stover and Weinstein.

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the Rwandan Patriotic Front's (RPF) victory in Rwanda, the US invasion of Iraq and the relationship between President Museveni's government in Uganda and the International Criminal Court all influenced attitudes towards the form transitional justice should take. In Rwanda, Uganda, Iraq, Central African Republic (CAR), Democratic Republic of Congo (DRC), and Cambodia, the surveys reported a profound lack of awareness of and confidence in formal legal structures and this shapes people's attitudes towards these processes.

Large scale surveys enable us to "recognize the heterogeneity of survivors" by examining responses across large geographical areas.⁵⁸ By investigating the significance of ethnicity, exposure to violence, demographic factors and other crucial differences, patterns begin to emerge. It is often implied, for example, that the practice of "forgiving and forgetting" is a cultural given across Africa. The results of three surveys on northern Uganda published in 2005; 2007 and 2010, however, indicated that something more complex was happening.⁵⁹ The use of certain terms in surveys, can, however, be misleading and may lead to ethnocentric interpretations. For example, a 2005 survey in northern Uganda found that 76% of respondents felt that those responsible for abuses should be held "accountable."⁶⁰ To a western audience "accountability" may connote a formal legal process. The respondents, however, specified

⁵⁸ Stover and Weinstein, 38.

⁵⁹ Phuong Pham, Patrick Vinck, Marieka Wierda, Eric Stover, and Adrian di Giovanni, *Forgotten Voices: A Population Based Survey of Attitudes about Peace and Justice in Northern Uganda*, International Center for Transitional Justice and Human Rights Center, University of Berkeley (2005); Phuong Pham, Vinck, Patrick Vinck, Eric Stover, Amy Moss, and Marieka Wierda, *When the War Ends: A population based survey on attitudes about peace, justice and social reconstruction in Northern Uganda*, Human Rights Center, University of California, Berkeley, Payson Center, and International Center for Transitional Justice (2007); Phuong Pham and Patrick Vinck, *Transitioning to Peace: A population based survey on attitudes about social reconstruction and justice in Northern Uganda*, Human Rights Center, University of California, Berkeley (2010).

⁶⁰ Pham, Vinck, Kinkodi and Weinstein, "Stay the Hand of Justice," 4.

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that perpetrators could be held accountable through a variety of measures including “reconciliation.”⁶¹

Truth Commissions

Truth commission advocates argue that this form of transitional justice provides a “narrative” truth rather than a “forensic” one and, as such, it achieves a sense of “historical justice.”⁶² By conducting official investigations into past abuses, truth commissions reveal not just what happened but also how and why. As Priscilla Hayner has argued, a significant advantage of truth commissions “lies in their ability to delineate a broad perspective on causes and patterns of violence.”⁶³ This, proponents suggest, allows them to go much further in their investigations and conclusions than is generally possible in any trial of individual perpetrators. Moreover, truth commissions—with their analytical focus on state and society—are well placed to recommend institutional and legal reforms that might prevent future human rights violations.⁶⁴ It is also argued that truth commissions can support other transitional justice mechanisms. They can, for example, provide evidence in support of reparations policies.⁶⁵

As TRCs proliferated in the 1990s, a theory of “truth” was developed which highlighted the importance of closing the gap between knowledge and acknowledgement of human rights violations and mass killings.⁶⁶ This was supported by psychological research,

⁶¹ Pham, Vinck, Wierda, Stover, and di Giovanni, *Forgotten Voices*, 5.

⁶² Tristan Anne Borer, *Telling the Truths: Truth Telling and Peace Building in Post Conflict Societies* (Notre Dame: University of Notre Dame Press, 2006); Thoms, Ron and Paris, 22.

⁶³ Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2010), 16.

⁶⁴ *Ibid.*, 58; Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,” *Law and Contemporary Problems* 59.4 (1996): 141-44.

⁶⁵ Kritz, “Coming to Terms, 141-44.

⁶⁶ Naomi Roht-Arriaza, “Introduction,” in *Transitional justice in the twenty-first century: Beyond truth versus justice*, ed. Naomi Roht-Arriaza (New York: Cambridge University Press, 2006), 3.

especially with torture survivors, which suggested that victims were helped by telling their story to a sympathetic listener and that the truth was intrinsically important.⁶⁷ Proponents suggested that the cathartic effects experienced by individuals could be transposed onto society as a whole and that discovery of the truth would help restore social trust and achieve societal reconciliation.⁶⁸

The South African TRC has been central in shaping modern attitudes towards truth commissions. As one practitioner remarked, after the South African TRC, it seemed as if “the world has become besotted with truth commissions.”⁶⁹ There is, however, a growing literature that challenges normative assumptions about truth commissions, arguing that these too can be very remote from local realities.⁷⁰ From Peru to Cambodia to Sierra Leone, scholars have highlighted the danger of what one termed the “tyranny of total recall” in places where, for example, silence has an important social function.⁷¹ Rosalind Shaw, meanwhile, has traced the genealogy of truth commissions and finds their genesis in a western tradition of confession that has no immediate resonance in contexts such as Sierra Leone, where a factually accurate depiction of the past is less important to reconciliation than the “attainment of a cool heart.”⁷² On a more practical level, it has been noted that truth commission recommendations are often ignored, “not because they are unworkable, but because those commissions are inherently weak institutions with short life spans.”⁷³

⁶⁷ Minow, 69; Roht-Arriaza, 4.

⁶⁸ Fletcher and Weinstein, 29.

⁶⁹ Quoted in Hazan, 33.

⁷⁰ Hayner, 186.

⁷¹ Kimberly Theidon, “Editorial Note,” *International Journal of Transitional Justice* 3.1 (2009): 295.

⁷² Rosalind Shaw, “Memory Frictions: Localising the Truth and Reconciliation Commission in Sierra Leone,” *International Journal of Transitional Justice* 1:2 (2007): 183-207; Kelsall, 14; Kimberly Theidon, “Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru,” *Journal of Conflict Resolution* 50.3 (2006): 433-457.

⁷³ Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,” *Social and Legal Studies* 21.2 (2012): 1-16.

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What the evidence tells us

It is now fifteen years since the South African TRC issued the first five volumes of its final report and an abundance of literature has been produced in that time. Only a small amount of this is empirically grounded work that sets out to understand the local experiences of the TRC. The empirical literature is methodologically varied, employing representative cross-sectional national surveys; longitudinal panel studies, analysis of victim's hearings and ethnographic research. Much of this literature challenges the widespread approbation of the South African TRC, chipping away at its mythical status and trying to understand in more detail how it was actually perceived and experienced by victims, survivors and the population at large. The results are mixed but an interesting finding across studies appears to suggest that victims and survivors placed emphasis on "truth" over "reconciliation" and when the latter appeared to be prioritized by the state to the neglect of the former, confidence in the process waned.

A study by David Backer on the TRC is a rare example of longitudinal research on a transitional justice process.⁷⁴ Using panel surveys with 153 victims of apartheid era violations conducted in 2002-3 and again in 2008, Backer captured the effect of the TRC over time. He found that approval of the unique conditional amnesty offered by the TRC was at first 'surprisingly high' (57.5%) but it "fell dramatically" by 2008 (20.4%).⁷⁵ Backer concluded that respondents' earlier support for amnesty was "a reluctant, contingent concession that coexisted with a basic interest in seeing at least a degree of accountability."⁷⁶ Using multivariate regression models, Backer found that decline in support for the TRC was most clearly associated with an increased feeling that the amnesty was not fair and

⁷⁴ David Backer, "Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa," *International Journal of Transitional Justice* 4.3 (2010): 443-456.

⁷⁵ *Ibid.*, 443.

⁷⁶ *Ibid.*, 453.

a general sense that individualized “truth recovery” had been inadequate.

In a book produced over an eight year period, which brought together a series of evidence based contributions from acknowledged experts, editors Audrey Chapman and Hugo van der Merwe set out to respond empirically to the question: did the TRC deliver?⁷⁷ There is a recognition that the TRC contributed to South Africa’s transition but the over-arching argument, drawn from the evidence, is that the commission veered too far from its most important mandate, which was to investigate and understand the causes and consequences of political violence in South Africa. Both Hugo van der Merwe and Audrey Chapman, in their separate studies of victim hearings and human rights hearings, found that support for the amnesty was motivated by a desire to find out more information.⁷⁸

Another general finding, across studies, was that perceptions were largely divided along racial lines. In 2001, James Gibson carried out a representative cross-sectional national survey of 3727 respondents in an attempt to measure the “acceptance” of truth as promulgated by the TRC; the awareness of the TRC’s activities; and confidence in the TRC.⁷⁹ A key, underexplored finding was that, of the racial groups studied, black South Africans exhibited the highest degree of “truth acceptance,” but the lowest degree of “reconciliation.” The lack of correlation between the two highlights important connections between truth and reconciliation and challenges normative assumptions that the former will lead to or at least aid the latter. In the Chapman and van der Merwe collection,

⁷⁷ Audrey Chapman and Hugo van der Merwe, *Truth and Reconciliation in South Africa: Did the TRC deliver?* (Philadelphia: University of Pennsylvania Press, 2008).

⁷⁸ Audrey Chapman, “The TRC’s Approach to Promoting Reconciliation in the Human Rights Violations Hearings,” in *Truth and Reconciliation in South Africa: Did the TRC deliver?* eds. Audrey Chapman and Hugo van der Merwe, 45; and Hugo van der Merwe, “What Survivors Say About Justice: An analysis of victim TRC hearings,” in Chapman and van der Merwe, in *Truth and Reconciliation in South Africa: Did the TRC deliver?* eds. Audrey Chapman and Hugo van der Merwe, 23.

⁷⁹ James Gibson, “Does truth lead to reconciliation? Testing the causal assumptions of the South African Truth and Reconciliation Process,” *American Journal of Political Science* 48.2 (2004): 501-17.

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meanwhile, Gunnar Theissen's analysis of public opinion polls conducted by research institutions in South Africa between 1992-2000 found that from the outset opinions on the TRC were divided along racial lines, and that these divisions became sharper over time.⁸⁰

In both South Africa and Peru—albeit in different ways—scholars have identified large gaps between meta and micro narratives around truth and reconciliation. Research suggests that due to various political and practical restraints, truth commissions have been more effective at developing a “macro truth” of past violations and crimes, while neglecting the micro experiences of communities and individuals.⁸¹ This chimes with the findings of Richard Wilson who produced the first major anthropological study of the TRC in 2001.⁸² A key finding, based on twelve months of ethnographic study over a four year period (1995-98), both “inside” and “outside” of the TRC was that the concept of reconciliation was deployed from the top down, leaving insufficient “space” to discuss commonly held feelings of vengeance and desires for retribution. In Peru, the national-local gap was evident but in reverse. Kimberly Theidon's anthropological research revealed a disconnect in the confrontational discourse of political elites and the micropolitics of reconciliation practiced by “intimate enemies” at the local level.⁸³ Around the time of the final report of the Truth Commission in 2003, the political leadership were distancing themselves from the very notion of reconciliation while the Shining Path still existed, whereas Theidon's own respondents in the affected Ayacucho region of the country were developing “conciliatory practices” that were “very successful” in terms of

⁸⁰ Gunnar Theissen, “Object of Trust and Hatred: Public Attitudes Towards the TRC,” in *Truth and Reconciliation in South Africa: Did the TRC deliver?* eds. Audrey Chapman and Hugo van der Merwe, 236.

⁸¹ Audrey Chapman and Patrick Ball, “Levels of Truth: Macro Truth and the TRC,” in *Truth and Reconciliation in South Africa: Did the TRC deliver?* eds. Audrey Chapman and Hugo van der Merwe, 143.

⁸² Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

⁸³ Kimberly Theidon, “Justice in Transition: The Micropolitics of Reconciliation in Post-War Peru,” *Journal of Conflict Resolution* 50.3 (2006): 433-457.

reincorporating *arrepentidos* and in “breaking the cycle of revenge” in these areas.⁸⁴

As was the case with the trial literature, single case studies comprise the bulk of the relevant literature on truth commissions. In Sierra Leone, Rosalind Shaw questioned whether a truth commission was culturally appropriate in a society marked by cultural practices of forgetting and moving on.⁸⁵ In her “multi-sited” ethnography, she found that the imperatives of “truth telling,” institutionalized through the TRC were often external to Sierra Leonean communities and influenced more by global developments in transitional justice than by the locally-rooted practices of the participants themselves. Whilst those who engaged with the TRC did manage to transform “truth-telling” into new techniques of forgetting and remembering, even the best “creative efforts” could not transform the TRC into a mechanism that would respond to local needs.⁸⁶

In another study of local understandings, interpretations and evaluations of the TRC in Sierra Leone, Gearoid Millar found that the primary characteristic influencing perceptions proved to be educational status.⁸⁷ His research was based on ten months of participant observation and sixty-two semi-structured interviews with the residents of Makeni in northern Sierra Leone. Millar found that non-elites held “overwhelmingly negative” attitudes towards the TRC and that this was largely due to a “disconnect between what the TRC did and what local people expected of it.”⁸⁸ Millar argued that “a norm in Makeni is that words such as help, support, remember and appreciate all mean to provide resources or money.”⁸⁹ By using such terms in its ‘sensitisation’ campaign, the TRC was inadvertently misrepresenting its role and function. Interestingly, the study found

⁸⁴ Ibid., 451, 454.

⁸⁵ Shaw.

⁸⁶ Shaw, 207.

⁸⁷ Gearoid Millar, “Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to “Why” through a Qualitative Case Study Analysis,” *International Journal of Transitional Justice* 4 (2010): 477-496.

⁸⁸ Ibid., 498, 492.

⁸⁹ Ibid., 492.

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that the TRC had a much more “positive effect” amongst the local educated elite, who comprised an “interconnected group of professionals, NGO workers and self-professed “civil society” leaders”—all of whom had been “incorporated into the post-war NGO establishment.”⁹⁰ This study suggests that the differentiated impact of the TRC in Sierra Leone was partly attributable to educational status, the resulting level of exposure to dominant global norms and degree to which one can benefit directly from these.

Amnesties

Amnesties are central to debates about transitional justice and their function is highly contingent on circumstances. Christine Bell describes how, in Central and South America, where impunity was understood as a root cause of recurring conflict, accountability measures were regarded as essential to a healthy transition. In contrast, in Liberia and Sierra Leone, broad amnesties were included in peace deals in recognition that conflicts were caused largely by structural conditions including state failure and the privatisation of power by warlords.⁹¹

There is a lively and inconclusive debate amongst international lawyers about whether amnesties are permissible under international law at all.⁹² As early as 2000, the UN opposed the amnesty provision of the Lomé Peace Accord for Sierra Leone. The Rome Statute of the ICC also enables a “claw-back” on amnesty where beneficiaries have taken up arms again.⁹³ International human rights organisations have argued that amnesties, and particularly blanket amnesties, are pernicious: they entrench and encourage

⁹⁰ Ibid., 493.

⁹¹ Bell, 13-14. The Lomé Peace Accord was signed in Sierra Leone on July 7, 1999 and it called for a TRC in exchange for a general amnesty, however, the amnesty was repealed after the creation of the Special Court for Sierra Leone.

⁹² Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the peace and justice divide* (London: Hart Publishing, 2008); and Mark Freeman, *Necessary Evils: Amnesty and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

⁹³ Ibid., 14.

impunity and will lead to a recurrence of human rights violations.⁹⁴ The evidence suggests, however, that amnesties are still very much a part of the “legal landscape.” Louise Mallinder’s impressive Amnesty Law Database demonstrates that despite the so-called “justice cascade,”⁹⁵ over 420 amnesty processes have been introduced during the 1945-2007 period, with many of them occurring since the establishment of *ad hoc* tribunals. Indeed, over 66 amnesties were introduced between January 2001 and December 2005.⁹⁶

What the evidence tells us

One of the striking findings across the evidence-based literature was the extent to which experiences of amnesties were contingent on other processes. In both South Africa (as has been noted above) and Uganda, for example, perceptions towards amnesties appeared to alter in the presence (hypothetical or otherwise) of other transitional justice processes, including reparations and criminal prosecutions for high-level perpetrators. James Gibson’s survey of South African public’s attitude towards amnesty investigated local perception and impact.⁹⁷ The research was based on a nationally representative survey of 3727 South Africans conducted in 2000/2001. It was designed as a social science “experiment” in which the respondent was asked whether amnesty was “fair” for four different categories of

⁹⁴ For recent examples, see Human Rights Watch, “Afghanistan: Repeal Amnesty Law,” March 2010; available from <http://www.hrw.org/news/2010/03/10/afghanistan-repeal-amnesty-law>; see also Human Rights Watch, “Thailand: No Amnesty for Human Rights Abusers,” August 2013; available from <http://www.hrw.org/news/2013/08/04/thailand-no-amnesty-rights-abusers>.

⁹⁵ The “justice cascade” was a term coined to describe the proliferation of transnational litigation, institutional change and region-wide policy reform from the mid-1980s onwards, in response to the so-called dirty wars in Central and Latin America in the 1970s and 1980s. See Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The evolution and impact of foreign human rights trials in Latin America,” *Chicago Journal of International Law* 2.1 (2001): 1-33.

⁹⁶ Mallinder, *Amnesty, Human Rights and Political Transitions*.

⁹⁷ James Gibson, “Truth, justice, and reconciliation: Judging the fairness of amnesty in South Africa,” *American Journal of Political Science* 46.3 (2002): 540–556.

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people—people who fought against apartheid; the victims; their family and “ordinary people like you”—in four hypothetical scenarios. The scenarios were designed to represent principles of procedural, retributive, restorative and distributive justice. In both the survey and the interview the respondents overwhelmingly found the amnesty to be “unfair,” not only to the victims and their families but also to “ordinary citizens.”⁹⁸ Perceptions of the “fairness” of amnesty changed by nearly 40 percentage points when other forms of justice were present. Monetary compensation for the victims and their families had the strongest influence on perceptions of fairness in granting amnesties, however, other types of justice—particularly procedural (which is defined as the opportunity for victims to discuss their injuries publicly) and restorative (apologies)—were also influential.⁹⁹ This study appears to challenge some of the existing assumptions regarding truth telling and non-prosecution. It also appears to show that ‘strict economic instrumentalism is not the only motivating factor in judging amnesty’ and people are also concerned about receiving symbolic and “non-material” justice.¹⁰⁰

In Uganda, the Refugee Law Project at Makerere University (RLP) conducted a survey of local perceptions of the Ugandan Amnesty Act, which came into force in 2000.¹⁰¹ The study examined the effectiveness of amnesty in achieving long-term reconciliation. Conducted in 2005, the survey questioned 409 people who had experienced the northern Ugandan conflict first hand. Additional interviews were carried out in other areas where the Amnesty Act was applied as well as the capital. The study found that the Amnesty Act was widely perceived as a “vital tool for conflict resolution” and long-term reconciliation.¹⁰² However, public opinion also demanded greater opportunities for truth telling to accompany the amnesty. The government’s inconsistent position towards the Amnesty Act and

⁹⁸ *Ibid.*, 545.

⁹⁹ *Ibid.*, 550.

¹⁰⁰ *Ibid.*, 554.

¹⁰¹ Lucy Hovil and Zachary Lomo, “Whose Justice? Perceptions of Uganda’s Amnesty Act 2000,” Working Paper 15, *Refugee Law Project* (2005).

¹⁰² *Ibid.*, 1.

subsequent pursuit of criminal prosecution for high-ranking rebel leaders were cited as factors that hindered the Amnesty Act from performing its reconciliatory function.

Reparations

Post-conflict reparations can be both material and/or non-material and they may take an individual or collective character. They can entail full restitution, compensation, formal apologies, rehabilitation and guarantees of non-repetition.¹⁰³ The status of reparations in the transitional justice “toolbox” was boosted by the creation of the Victim’s Trust Fund as part of the ICC.¹⁰⁴ In theory, request for reparation can be directed at any level of society: the state, local government, private actors, individual perpetrators of mass atrocity or the international community. Reparations programmes, do, however, have a very poor implementation record. Of the eighty-four transitions that took place between 1970 and 2004, reparations were only implemented in fourteen cases.¹⁰⁵

Louise Arbour, the former Chief Prosecutor of the ICTY and ICTR, argues that unless transitional justice provides redress for social and economic grievances, it will lack impact and will fail to “attack the sources of legitimate grievances that, if unaddressed, are likely to fuel the next conflagration.”¹⁰⁶ Whilst she is not alone in holding this belief, such suppositions remain speculative. On the one hand, it has been argued that post-conflict reparations can influence reconciliation and social reconstruction at the community level.¹⁰⁷ This is clearly evidenced by the current trend in research and practice to develop conceptual links between transitional justice and

¹⁰³ Pablo De Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006); Roy Brooks, ed., *When Sorry Isn't Enough* (New York: New York University Paperback, 1999).

¹⁰⁴ Linda Keller, ‘seeking Justice at the International Criminal Court: Victims’ Reparations,’ *Thomas Jefferson Law Review* 29.2 (2007): 189.

¹⁰⁵ Olsen, Paine and Reiter, 53; Waldorf.

¹⁰⁶ Waldorf, 172.

¹⁰⁷ Quirine Eijkman, “Recognising the Local Perspective: Transitional Justice and Post-Conflict Reparations,” *Global Jurist* 10.3 (2010): 8.

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development, and to supplement the focus on legal-institutional reforms with socio-economic interventions.¹⁰⁸ On the other hand, it has been suggested that reparations programmes can create serious tensions between those groups and individuals deemed deserving of compensation and those who are not.¹⁰⁹

In an accurate summation of attitudinal survey findings, Lars Waldorf tells us that “reparations are the most victim-centred transitional justice mechanism.”¹¹⁰ It is abundantly clear from the evidence that in almost every survey the search identified, affected populations prioritize reparations and compensation over other processes including, for example, trials. This may be because both monetary and non-monetary reparations are central to the kinds of customary justice processes that exist outside of formal state law in many contexts. It may also be indicative of a very pragmatic sense that criminal justice for “extraordinary” crimes such as genocide will not ameliorate the everyday structural injustices that blight people’s lives and require some form of socio-economic redress.¹¹¹

What the evidence tells us

So, we know that reparations are a popular intervention in theory and we also know that they are rarely implemented. Beyond that, we know very little about what works, what does not work and what the unintended consequences of reparations and compensation for mass crimes might be. A common conclusion in evidence-based studies of reparations is the need for a better examination of the practical design, implementation and impact of reparation programmes.¹¹² In Peru, South Africa and Chile, the evidence suggests that reparations

¹⁰⁸ Waldorf; Pablo De Greiff and Roger Duthie, eds., “Transitional Justice and Development: Making Connections,” *Advancing Justice Series*, International Center for Transitional Justice (2009).

¹⁰⁹ Jon Miller and Rahul Kumar, eds. *Reparations: Interdisciplinary Inquiries* (New York: Oxford University Press, 2007).

¹¹⁰ Waldorf, 177.

¹¹¹ *Ibid.*

¹¹² Lisa Laplante and Kimberly Theidon, “Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru,” *Human Rights Quarterly* 29.1 (2007): 230.

programmes were divisive. Anna Crawford Pinnerup has completed the most in-depth analysis of the impact of the South African TRC's policy for Urgent Interim Reparations (UIR), launched in 1998.¹¹³ She undertook 30 qualitative, semi-structured interviews, roughly half with recipients of the UIR and the other half with community leaders involved with the process. Victims reported that many of those who did not receive UIR, became "jealous or mad", and sometimes "threatened violence." The majority of those who did receive UIR reported increases in family and community conflicts linked to their acquisitions. Similar findings were reached in a study in Chile. A research team that studied the impact of reparation measures on the families of Mapuche victims observed that, in very poor communities, economic reparations disrupted family relations and negatively affected family and community networks. Those that were interviewed felt that non-monetary forms of compensation that had a stronger link to cultural conceptions of reparation would have been more appropriate.¹¹⁴ In Bosnia, on the other hand, policies of house restitution and compensation for property loss appear to have had some success, partly because they were attuned to local needs but also because they had basis in domestic law and enjoyed international support.¹¹⁵ Despite an awareness that reparations and compensation are a high priority for victims, we remain unclear about whether transitional justice mechanisms are well served to carry out these interventions, or whether such a task is better suited to longer term development and peace-building programmes, and where, if at all, the programmatic links might exist between the two.¹¹⁶

¹¹³ Anna Crawford-Pinnerup, "An Assessment of the Impact of Urgent Interim Reparations," in *From Rhetoric to Responsibility: Making reparations to the survivors of past political violence in South Africa*, eds. Brandon Hamber and Tlhoki Mofokeng (Braamfontein: Centre for Study of Violence and Reconciliation, 2000).

¹¹⁴ Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile," in *The Handbook of Reparations*, ed., Pablo De Greiff, 55.

¹¹⁵ Eijkman, 94.

¹¹⁶ "Donor Strategies for Transitional Justice: Taking Stock and Moving Forward," Report of a Workshop held on 15-16 October 2007 in London, convened by UK Department for International Development and the International Center for Transitional Justice.

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“Traditional” justice

The most well-known example of this form of transitional justice is the use of *gacaca* courts in Rwanda to deal with the backlog of cases resulting from the 1994 genocide. There has also been a well-documented debate about the codification of rituals in northern Uganda to deal with the violence perpetrated by the Lord’s Resistance Army (LRA) during a twenty-year long civil war, which began in 1986.¹¹⁷ What actually counts as “traditional” justice, however, remains rather vague. Other adjectives such as customary, informal, community based, grass-roots, indigenous and local are all sometimes used interchangeably.¹¹⁸ Many activists and some scholars believe that traditional justice is not just an alternative or possible supplement to more formal transitional justice processes. Rather, they take the view that a fully integrated approach is to transitional justice is best, one in which conventional legal processes are not privileged. The view is premised on the belief that neither formal trials nor truth commissions are sufficiently attentive to social integration and reconstruction.¹¹⁹ It is also suggested that justice built on established customs of reconciliation and compensation is more appropriate and practical in close-knit community settings, where people remain dependent on continuous social and economic relationships with their neighbours.¹²⁰

¹¹⁷ Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London: Zed Books, 2006); Adam Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” *Ethics and International Affairs* 21.2 (2011): 179–198.

¹¹⁸ Tim Allen and Anna Macdonald, “Post Conflict Traditional Justice: A Critical Overview,” Working Paper no. 3, *Justice and Security Research Programme* (February, 2013).

¹¹⁹ Joe Alie, “Reconciliation and traditional justice: tradition-based practices of the Kpaa Mende in Sierra Leone,” in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, eds. Luc Huyse and Mark Salter (Stockholm: IDEA, 2008); and James Latigo, “Northern Uganda: tradition-based practices in the Acholi region,” in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, eds. Luc Huyse and Mark Salter (Stockholm: IDEA, 2008).

¹²⁰ Joanna Stevens, “Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems,” Prison Reform International (2001).

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The “local” has become positively signified in much of the transitional justice literature. It has been argued that a romantic enthusiasm for using traditional justice practices in post-conflict settings has created a knowledge gap that has “produced decision making based on weak data, ex-ante evaluation and speculation.”¹²¹ Critics have warned against the “facile” embrace of community-based processes and have highlighted the unintended consequences of reifying and providing external support for local rituals.¹²² It has also been pointed out that traditional processes can be patriarchal, discriminatory towards women and young people, and readily captured and manipulated by the state in order to advance its interests.¹²³ International human rights organisations and legal scholars have also raised issues of capacity, questioning whether community-based systems are capable of dealing with atrocities committed on a vast scale in places like Sierra Leone or northern Uganda.

What the evidence tells us

While customary laws and “homegrown” responses to mass violence have been selectively deployed to complement more formal transitional justice processes, for example in Sierra Leone and Timor-Leste, they have also been developed as standalone transitional justice mechanisms. It is said that post-genocide Rwanda “responded to mass violence with mass justice,, creating 11,000 community courts based on *gacaca*, a modernized form of a traditional dispute resolution practice.”¹²⁴ There is a fierce debate around the functioning, role and effects of the *gacaca* courts in Rwanda, and scholars who have

¹²¹ Luc Huyse and Mark Salter, “Introduction,” in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, eds. Luc Huyse and Mark Salter (Stockholm: IDEA, 2008).

¹²² Theidon, “Justice in Transition,” 296; Allen, *Trial Justice*, 98; Branch, “Uganda’s Civil War and the Politics of ICC Intervention.”

¹²³ Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict*; Allen, *Trial Justice*; Lars Waldorf, “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,” *Temple Law Review* 79.1 (2006): 1–88.

¹²⁴ Waldorf, “Mass Justice for Mass Atrocity,” 3.

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undertaken extensive fieldwork in the country draw different conclusions about community-based justice in this context.

Broadly speaking both Bert Ingelaere and Lars Waldorf argue that the modern *gacaca* courts are controlled by the Rwandan government and have been used by an increasingly oppressive and authoritarian state to regulate reconciliation and justice processes across Rwanda. Lars Waldorf's qualitative study is based on in-depth fieldwork including interviews with *gacaca* officials and participants and observation of *gacaca* trials from 2002 to 2006.¹²⁵ Bert Ingelaere's ethnographic study is based on twenty months of fieldwork in Rwandan villages between 2004 and 2009.¹²⁶ He followed *gacaca* proceedings (over 2000 trials) in ten locations in different areas. Ingelaere's research team engaged with roughly 1,300 "ordinary" Rwandan peasants through surveys, focus group discussions, individual and life story interviews and informal encounters. The argument follows that the state has interfered in the hearings in order to collectivize the guilt of all Hutu and, in doing so, has coerced Rwandans into publicly sharing the details of the genocide, thus violating a cultural and pragmatic inclination towards silence.¹²⁷ Thus legislation and realpolitik has transformed the original *gacaca* institution into something qualitatively different: spurious legalistic procedures, state control and forced participation has meant that the modern *gacaca* process bears only partial resemblance to that on which it was supposedly modelled.

Phil Clark's research provides a more nuanced picture of the discrete communities in which *gacaca* operated including analysis of local personal and power relations and religious and other cultural beliefs and practices.¹²⁸ Clark's research covered eleven communities

¹²⁵ Ibid.

¹²⁶ Bert Ingelaere, "Does the truth pass across the fire without burning? Locating the short circuit in Rwanda's *Gacaca* courts," *The Journal of Modern African Studies* 47.4 (2009): 507.

¹²⁷ Waldorf, "Mass Justice for Mass Atrocity," 7, 78-87; Ingelaere, "Does the truth pass across the fire without burning?" 521-25.

¹²⁸ Phil Clark, *The Gacaca Courts, post-genocide justice and reconciliation in Rwanda: justice without lawyers* (Cambridge: Cambridge University Press, 2010).

in five provinces over the full duration of the *gacaca* courts. His book draws on 459 interviews with all relevant categories of actors in *gacaca* combining “high” and “low” investigations and including multiple interviews with the same individuals over the seven year period. Clark also includes analysis from first hand observations of 67 *gacaca* hearings.¹²⁹ Clark’s findings suggest that there is a risk in attempting to draw generalisations about local experience, as “*gacaca* in one village can differ enormously from *gacaca* in another only a kilometre away” in terms of conduct, vibrancy of debate and ‘societal impact’ of the hearings.¹³⁰ He argues that while it is important to recognize the traumatic impact of *gacaca* for many, the argument regarding silence risks essentializing Rwandan culture and stands in contrast to his own experience of wide ranging and animated public debate at many of the *gacaca* hearings. Furthermore, in his analysis, arguments about the government’s role in *gacaca* tend to neglect the “importance of individual and communal agency in *gacaca* and the vital role of the general population in running and shaping the institution, often with highly unpredictable results.”¹³¹

Luc Huyse and Mark Salter’s edited collection provides a rare comparative overview of community-based transitional justice processes in five African countries: Rwanda, Burundi, Mozambique, Uganda and Sierra Leone.¹³² Whereas most edited collections draw out general trends in a non-systematic manner, Huyse and Salter adopt an empirical case study approach. The methodology of each study is different but all research is carried out against a common checklist of issues and topics developed by the editors. Huyse and Salter give what they call a “cautious analysis” of “actual” and “potential” strengths and weaknesses of traditional justice practices.¹³³ They highlight the “relative effectiveness” of traditional mechanisms, arguing that indigenous conflict resolution tools do

¹²⁹ Ibid., 8-9.

¹³⁰ Phil Clark, “Book Reviews,” *International Journal of Transitional Justice* 4.1 (2010): 142.

¹³¹ Clark, *The Gacaca Courts*, 87.

¹³² Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict*, 108.

¹³³ Ibid., 204.

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have an added value and positive effect particularly with regard to the transitional justice goals of healing and social repair.¹³⁴ One common concern, however, across cases, was that traditional justice can also reconstitute pre-conflict structures of exploitation. Huysse and Salter highlight the persistent ethnic, religious, generational and gender hierarchies and divisions that complicate and limit the effectiveness of traditional practice.

It is clear that local rituals and customs are important for populations caught up in violent conflict and dealing with its aftermath. However it also appears to be the case that those local rituals and customs do not form a coherent alternative to formal national and international processes and that traditional justice cannot be harnessed to the transitional justice agenda in a straightforward way.¹³⁵ A striking finding is the heterogeneity of attitudes and experiences towards customs and rituals within and between different groups. This should guard against what Adam Branch has called the “ethnojustice” agenda, which mistakenly views traditional systems of justice as “a single, coherent and positive system... universally, consensually and spontaneously adhered to by all members of that culture.”¹³⁶

A new focus in the transitional justice literature on “everyday” methods of social repair in conflict and post-conflict communities is perhaps an implicit recognition of the problems associated with talking about “traditional” justice and an acknowledgement that the term is usually a misnomer.¹³⁷ This represents a departure from a focus on the “traditional” towards a more bottom up examination of the “mundane” and unspectacular reparative and restorative activities that people in affected communities undertake.¹³⁸ These can include spirit possession and

¹³⁴ Ibid., 208.

¹³⁵ Allen and Macdonald.

¹³⁶ Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011), 163.

¹³⁷ IJTJ Special Issue 6.3.

¹³⁸ Pilar Alcala and Erin Baines, “Editorial Note,” *International Journal Transitional Justice*, 6:3, (2012): 386.

ritual cleansing; community exhumation; silence, forgetting and forgiveness. The emphasis in the literature is not on whether these processes are effective or ineffective but rather that they are often the only game in town; they are what is *actually happening* outside of the narrow reach of international and state-sanctioned transitional justice processes.

This literature also tells us what happens when formal and external transitional justice norms and processes interfere with or engage with local beliefs and practices. Rosalind Shaw, Lars Waldorf and Pierre Hazan's volume, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, goes further than any other in providing an analytical framework to understand the "local" in transitional justice.¹³⁹ They use a place-based approach to depart from the "model of collision" between the local and the universal to a "model of engagement."¹⁴⁰ This underscores the importance of exploring the complex encounter between international norms, national agendas and local practices in particular contexts.¹⁴¹ The collection itself includes qualitative, ethnographic, participatory and interview-based analysis in nine diverse countries, ranging across Central and South America, Eastern Europe, Africa, the Middle East and South East Asia. It also examines a range of transitional justice mechanisms, from truth commissions to trials to "customary" practices.

As well as noting the shifting perspectives of justice over time, and the potentially important role of silence, which is sometimes the "only form of security to which people have access," the editors identify general trends in local engagement with transitional justice.¹⁴² In particular, risk is inherent in imposing the "victim" and "perpetrator" dichotomy in intrastate conflicts originating in part from structural violence. In the case of Uganda, Sierra Leone and Peru, the authors found that this legalistic division had adverse effects on truth-telling, peacebuilding and reconciliation

¹³⁹ Shaw, Waldorf and Hazan.

¹⁴⁰ Ibid., 5.

¹⁴¹ Ibid., 3.

¹⁴² Ibid., 11.

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efforts.¹⁴³ This finding ties into other research, which argues that people often occupy “ambiguous victim-perpetrator statuses” which include bystanders, collaborators, informants, forced perpetrators, forced combatants, victims turned perpetrators, perpetrators turned victims.¹⁴⁴ Shaw found that in Sierra Leone, the perpetrator/victim categories failed to recognize the complexity of the “moral grey zones” of the civil war; increased ethnic animosities; and neglected the underlying ‘structural violence,’ which caused the war in the first place.¹⁴⁵

Multi-mechanism and “holistic” transitional justice

For both normative and practical reasons, scholars and policymakers now tend to see the range of potential transitional justice mechanisms as conceptually complementary. Scholars and others have questioned the efficacy of narrow prosecutions without any institutional effort to promote a broader historical understanding of events; the value of truth commissions to victims without any scope for legal redress; the risk that reparations might be interpreted as “blood money” without some corresponding form of accountability; and the appropriateness of international judicial structures without corresponding national and local accountability processes.¹⁴⁶ There is an appreciation that the broader aims of transitional justice will only be met by what one scholar refers to as the “interweaving, sequencing and accommodating (of) multiple pathways to justice.”¹⁴⁷ The desire for a holistic approach is essentially an aspiration whose applicability and efficacy has rarely been tested. As so often in discussions of justice, normative notions of what is inherently believed to be right shape perceptions, rather than evidence about what has been occurring. However, it has also been suggested that more pragmatic motivations may also be in play: a more “holistic” approach encompasses broader

¹⁴³ Ibid., 8-9.

¹⁴⁴ Erin Baines, “Complex political perpetrators: reflections on Dominic Ongwen,” *The Journal of Modern African Studies* 49 (2009): 164; Theidon, “Editorial Note,” 451.

¹⁴⁵ Shaw, Waldorf and Hazan, 144.

¹⁴⁶ Fletcher and Weinstein.

¹⁴⁷ Roht-Arriaza, 8.

peacebuilding and development objectives, which tend to be better funded.¹⁴⁸

It is striking that despite a general consensus on the need for a “holistic” approach there are very few studies that interrogate the interplay and impact of multiple transitional justice mechanisms in particular contexts. Many studies make reference to corresponding processes but there have been few attempts to systematically analyse the micro-level effects of deploying a package of measures simultaneously. There is also a lack of information about how transitional justice processes interact with concurrent development and peacebuilding programmes, for example security sector reform (SSR) or rule of law (RoL) initiatives. This is despite a call from both scholars and practitioners for policy areas and programming to become less hermetic.¹⁴⁹ What the current evidence tells us is that the relationship between different processes can be difficult and that this can result in competition, tension and mistrust.

What the evidence tells us

In Timor-Leste, Elizabeth Stanley’s interview-based study concluded that, while the Commission for Reception, Truth and Reconciliation (CAVR) achieved a high level of participation and made a “vital contribution to peacemaking” at first, its “good” work was slowly “downgraded” by the failings of other transitional justice initiatives and particularly the “inability to challenge Indonesian impunity or provide redress for serious crimes.”¹⁵⁰ The trial process was perceived as deeply flawed: most of the convicted were low-level combatants rather than the “big fish” Indonesian officials who orchestrated the repression; investigative units were poorly resourced; judges incompetent and proceedings a ‘shambles.’¹⁵¹ Elizabeth Drexler

¹⁴⁸ Waldorf, “Anticipating the Past,” 172.

¹⁴⁹ Ibid.; see also Chandra Sriram, Jemima Garcia-Godos, Johanna Herman, and Olga Martin-Ortega, *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, (London: Routledge, 2012).

¹⁵⁰ Elizabeth Stanley, *Torture, Truth and Justice: The Case of Timor-Leste* (New York: Taylor & Francis, 2008), 131-2.

¹⁵¹ Ibid., 92.

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came to similar findings in her anthropological examination of the “dense interconnections between institutions and representations” of transitional justice in Timor-Leste.¹⁵² Drexler analysed three transitional justice institutions, the ad hoc tribunal in Jakarta; the internationalized Special Panels; and the CAVR. She found that both the tribunal and the Special Panels supported a “civil war” narrative that focused on threats to Indonesian national integrity and state sovereignty. As such they became “theatres for military impunity,” creating feelings of frustration and antipathy amongst Timorese.¹⁵³ The CAVR meanwhile, was criticized by individuals who felt under pressure to accept statements from perpetrators that “were not as complete or remorseful as they had hoped.”¹⁵⁴ Both studies share the conclusion that the conditions that enabled mass violence to occur in the first place also structured the transitional justice process, and that the underlying causes of the violence “remain invisible in official institutions and representations of historical and legal truth.”¹⁵⁵

Nicola Palmer’s work on post-genocide Rwanda examined the practices of international, national and localized criminal courts and argued that although compatible in law, in practice “the result has been a stratified and at times competitive set of criminal courts.”¹⁵⁶ Her research draws on in-depth analysis of ICTR judgments as well as 146 semi-structured interviews with judges, lawyers, witnesses and suspects from the ICTR; the national Rwandan courts; and the *gacaca* community courts. Her interpretative cultural analysis revealed how the judges and lawyers of each court tended to have “divergent” interpretations of the role and objectives of transitional justice in Rwanda. The ICTR was concerned with developing international

¹⁵² Elizabeth Drexler, “Addressing the legacies of mass violence and genocide in Indonesia and East Timor,” in *Genocide: truth, memory and representation*, eds. Alexander Laban Hinton and Kevin Lewis O’Neill (Durham: Duke University Press: 2009), 219-247.

¹⁵³ Ibid., 225, 228.

¹⁵⁴ Ibid., 229.

¹⁵⁵ Ibid., 203.

¹⁵⁶ Nicola Palmer, “Transfer or Transformation? A Review of the Rule 11 bis Decisions of the International Criminal Tribunal for Rwanda,” *The African Journal of International and Comparative Law* 20.1 (2012): 3.

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criminal case law and the national courts were more focused on domestic legal reform, meanwhile while *gacaca* personnel saw the role of local courts as providing a historical or “truth” account of the genocide. This important and unique research examining the interplay of different transitional justice mechanisms in Rwanda via interviews with those directly involved in the process highlights the challenges of effective cooperation and complementarity where a “package” of transitional justice processes is deployed.

General Findings and Conclusions

Local perceptions and experiences of transitional justice processes are complex and do not conform with widely held normative assertions about what transitional justice “ought” to accomplish. A review of evidence-based literature exposes normative and theoretical claims about the benefits and disadvantages of transitional justice as simplistic, inaccurate and sometimes misleading.¹⁵⁷ The evidence base is made up primarily of qualitative interview based and ethnographic work, a lot of which is high quality; and public attitude surveys, some of which employ sophisticated quantitative techniques. Despite this, there have been insufficient attempts to combine diverse methodological and epistemological approaches to the study of transitional justice. Individual pieces of research can be very high in quality but the overall picture is less satisfying. Once the evidence is reviewed, we are left with a patchwork, fragmented understanding of how transitional justice is understood and experienced in local spaces. Perhaps this is to be expected, given the highly context specific nature of both the atrocities committed and the way in which transitional justice interventions may be experienced in any given locale. Despite this, the final section will draw together some general findings from the evidence review, many of which were touched upon above but will be elaborated on more below.

¹⁵⁷ See Shaw, Waldorf and Hazan, 3-26; Hugo van der Merwe, “Delivering Justice During Transition: Research Challenges,” in Hugo van der Merwe, Victoria Baxter, and Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace, 2009), 115-143, 129.

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Translating concepts

The ethnographic evidence tells us that the concept of justice is very difficult to translate. In many fragile and conflict affected places, the term “transitional justice” has little currency or resonance. In Acholiland in northern Uganda, for example, an area where transitional justice debates became particularly tense after the ICC issued its first ever arrest warrants for five Lord’s Resistance Army commanders in 2004, there is no word for “justice.”¹⁵⁸ Any research design that enforces concepts, imposes definitions or whitewashes crucial contextual differences is clearly problematic. It perpetuates a troubling hierarchical paradigm, which understands the local as the static receiver of global norms and knowledge. A more accurate and honest starting point is to understand, through a deep contextual, cultural and linguistic engagement with ordinary people, local notions of justice related concepts. This requires creativity and a willingness to re-examine preconceived ideas. It may require reframing the questions that researchers have asked in the past: it may, for example, be easier to get at an understanding of senses of “injustice” than “justice” or it may be more practical to begin by asking people about locally recognized concepts around “not being treated the right way”, “revenge” or the notion of needing to “cool” pain in one’s heart.¹⁵⁹ To date, this kind of approach has been lacking in a lot of transitional justice research. The result is that the dominant transitional justice narratives articulated by donors, the UN and human rights NGOs have largely marginalized the voices of ordinary people.

¹⁵⁸ Allen, *Trial Justice*, 16.

¹⁵⁹ See for example Emily Winterbotham. During the pilot phase of JSRP research in northern Uganda in August/September 2012, the research team had numerous discussions with local researchers and experts about how to define and conceptualize “justice.” In general it was found that the concept of “injustice” was easier to think about.

Measurement problems

It is true that the “great rush”¹⁶⁰ to results-based evaluation of transitional justice is ill advised but it is also important to acknowledge that transitional justice does not lend itself easily to assessment. As Colleen Duggan has described, the current demand for linear cause-effect linkages is problematic and “attribution obsession” has led to an unhelpful focus on “impact data often at the expense of process.”¹⁶¹ Demonstrating that transitional justice processes have achieved or failed to achieve a range of social goals in highly complex environments where multiple interventions are on-going is a daunting research task. Clearly, difficulties related to understanding impact afflict all policy interventions but transitional justice does appear to suffer these measurement problems *acutely*. Even when the scorned linear “cause-effect” approach is set aside and replaced by context-sensitive and systems approaches, understanding and attributing effects and experiences remains very challenging.

It is important to identify why this may be the case and what transitional justice policy makers and scholars can do about it. Clearly the assumed, yet often untested transitional justice “outcomes” including, for example, “peace” or “accountability” or a ‘sense of justice’ are much more amorphous than certain interventions in say, education or health policy, where an indicators such as literacy rates or maternal mortality are more quantifiable. But this is still not getting to the crux of the matter. There is a fundamental, existential problem with transitional justice: it does not really know what it is. There are, as Paige Arthur has argued, “no clear theories of transitional justice and the term has no fixed meaning.”¹⁶² It is difficult, if not impossible, to delineate what and whom transitional justice is for and what it is meant to achieve.¹⁶³

¹⁶⁰ ICHRP, 12.

¹⁶¹ Duggan, 323.

¹⁶² Arthur, 359.

¹⁶³ For contrasting views on the coherence of transitional justice as a “field” of study and practice see Bell, above, and Pablo De Greiff, “Theorizing Transitional

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This problem is compounded by the fact that transitional justice policy lacks a clear “theory of change,” that is, it has no clear understanding of how change works. Therefore, even if ends are identified, it is unclear how we get there.¹⁶⁴ This contributes to the “basket approach” that scholars, campaigners and practitioners take towards transitional justice. The broad parameters of a normative imperative exist; all that awaits is the substance that will bring it to life. So, everything and anything can be piled in, from criminal accountability, to societal healing, to socio-economic redress, to ritual cleansing. The intentions of proponents are generally good and the research is sometimes based on evidence but over-burdening transitional justice without revising it conceptually risks turning this sub-discipline, field or “non” field into a basket *case*. There is a big analytical leap between saying, “this is what transitional justice should do” and, “this is what transitional justice is capable of doing.”¹⁶⁵ In a recent special edition of the *International Journal of Transitional Justice*, for example, the editors discuss the possibilities for “re-conceptualising transitional justice to consider the practices and processes with which people live through violence and seek to make sense of and resist violence.”¹⁶⁶ It is not clear whether the authors mean that transitional justice should be equated with everyday practices and processes of social repair, or whether it should simply take them into account. If the former, a word of caution is necessary. We lack information about how communities recover after mass violence, and in particular, we lack information about the contribution that transitional justice plays in this process. Transitional justice, although rather fluid and hard to define, is still a loaded term with specific meanings attached to it. Anachronistically subsuming all reconstructive practices under the transitional justice framework may distort their meaning and may misrepresent the societies in question. This is not to undermine the importance of

Justice,” in *Nomos vol. LI Transitional Justice*, eds. Melissa S. Williams, Rosemary Nagy and Jon Elster (New York: NYU Press, 2012).

¹⁶⁴ van der Merwe, Baxter and Chapman; Duggan.

¹⁶⁵ Waldorf, “Anticipating the Past.”

¹⁶⁶ Alcalá and Baines, 387.

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“everyday” modes of social repair; on the contrary, understanding these processes is essential – but they do not need the transitional justice label assigned to them in order to provide validity or legitimacy. Often, links may exist between these processes and macro transitional justice narratives; but in other cases, such links will be harder to substantiate.

Methodological and epistemological divides

A lack of theoretical and conceptual reflection has meant that transitional justice has become a term of “wholly uncertain meaning.”¹⁶⁷ In a recent article, Timothy Garton Ash raises similar points about the notion of “multiculturalism.” The questions he asks could equally be applied to transitional justice: “Does it refer to a social reality? A set of politics? A normative theory? An ideology?”¹⁶⁸ We do not really know and until there is more reflection and dialogue around these central questions, it will be hard to understand what policies described as transitional justice are really supposed to achieve. This pressing task is by no means impossible, but it will require academics and practitioners to be willing to reconsider the ground on which their work rests, rather than simply defend their “turf” and its inclusion within the paradigm.

Without strong conceptual roots and a solid theoretical grounding within which to situate analysis, and without clarity on intentions, scholars tend to direct their attention arbitrarily to the level of social or institutional structure that they are interested in or that they would like to see transitional justice efforts address.¹⁶⁹ Scholars interested in institutional design and implementation of truth commissions may orient their focus towards an analysis of the final report’s reception. Success here is often defined by the extent to which the commission fulfilled its mandate. Those interested in

¹⁶⁷ Timothy Garton-Ash, “Freedom and Diversity: A Liberal Pentagon for Living Together,” *New York Review of Books* (November 2012).

¹⁶⁸ Ibid.

¹⁶⁹ Geoff Dancy, “Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice,” *International Journal of Transitional Justice* 4.3 (2010): 361.

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macro-level state analysis concentrate on whether accountability processes have aided or jeopardized peaceful transitions and democratic consolidation. Micro-level studies, meanwhile, focus on sub-state, community and individual perceptions and experiences of transitional justice.

Leading on from this is a methodological and epistemological divide in transitional justice research. Macro-level research focusing on the linkages between TJ and systemic properties such as regime stability or democratic consolidation tends to be positivist; is much more likely to employ quantitative techniques; and is also more likely to contain a comparative element.¹⁷⁰ Micro-level research which examines local engagement and responses to transitional justice tends to be qualitative; is much more likely to have an interpretative approach and is therefore rarely comparative in any systematic sense. Because studies “vary sharply” in both epistemology and methodology, it is very difficult to “coordinate or talk about important lessons that have been learned so far.”¹⁷¹

Ethnographic studies provide a strong analytical basis for understanding the “local” in transitional justice but they are only illustrative and findings are often at odds or contradictory even for research that is undertaken in the same locality. There is very little comparative research interrogating how transitional justice plays out at the sub-national level, especially across communities and administrative units, as well as between rural and urban areas.¹⁷² Broadly speaking, ethnographies tend to present a negative picture of transitional justice processes, perhaps because the analytical emphasis is on the need to complicate and problematize existing “top-down” approaches to transitional justice. The focus tends to be on the cultural and political difficulties in implementing transitional justice policies and a critique of methodological processes that do not take sufficient account of local contexts. A general shortcoming in

¹⁷⁰ Thoms, Ron and Paris; van der Merwe, Baxter and Chapman.

¹⁷¹ Dancy, 366.

¹⁷² David Backer, “Cross National Comparative Analysis,” in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, eds. Audrey Chapman, Hugo van der Merwe and Victoria Baxter (Washington, DC: USIP Press), 23.

qualitative, interpretative work is that despite a general call to recast and remodel transitional justice policy and institutions, none of the studies employ research techniques that demonstrate conclusively that transitional justice has a decisively negative impact at the micro-level.¹⁷³

With ethnographic approaches there is also a risk of settling for a description of local realities and an abjuration of clumsy international interventions without an interrogation of problems associated with everyday practice. The everyday is also a site of violence, contestation and discrimination.¹⁷⁴ There is a danger in the ethnographic work and particularly in the “everyday” approach to understanding transitional justice that scholars are making a virtue of necessity. The literature highlights a need to describe what is actually happening on the ground. The conclusion commonly drawn is that policymakers need to engage more seriously with the practical justice provision that is part of people’s everyday realities in ordinary places. But beyond that, there is little sense about whether these processes are locally desirable or whether they are more aptly described as locally present. There is not much clarity on whether the everyday practices that are being described are regarded as interim measures that exist in the absence of a functioning state or as a viable, long-term formula for contextually relevant accountability and reconciliation.

Meanwhile, large-N data-driven positivist research, claims to tell us broadly whether accountability mechanisms decrease human rights abuses, for example, but cannot tell us why, how or when. Those causal mechanisms and dynamics can only be understood through a deep contextual engagement with the underlying social, political and economic dynamics in any given place. Indeed, despite an increase in large-n, macro-level impact assessments, there has been little effort to understand whether positive findings in relation to, for example, democratisation and rule of law actually percolate down to the micro-

¹⁷³ Shaw, Waldorf and Hazan, 3; Dancy, 371.

¹⁷⁴ Alcalá and Baines; Tim Allen and Laura Storm, “Quests for therapy in northern Uganda: healing at Laropi revisited,” *Journal of Eastern African Studies* 6:1 (2012): 22-46.

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level. We are unclear about whether effects diverge, converge or bear little, if any, relationship across levels of society.¹⁷⁵ The fact that a transitional or post-conflict regime has a new human rights framework tells us very little about whether society as a whole is on a new trajectory and in particular how communities and individuals understand and perceive these changes and whether this is reflected in everyday activity and behaviour. It is perfectly plausible that the same policy may have positive macro-level effects but negative micro-level effects; the potential of amnesty legislation to lead to such an outcome has been widely suggested. This does, however, provide interesting opportunities for future mixed methods and mixed epistemological research. For example, if analysis of a dataset tells us that human rights prosecutions improve human rights protections, this can and should be explored further by in-depth qualitative work, on the ground, which examines local perceptions and experiences of these apparent improvements and changes.

Over-reliance on snapshots and surveys

With important exceptions, the evidence-based literature does not provide a strong sense of the dynamic effects transitional justice processes over both the short and long term. There is a serious lack of baseline data which is a problem endemic in most social science research.¹⁷⁶ Perhaps worryingly, public attitude surveys are referred to frequently in the transitional justice literature as “evidence” of timeless public perceptions, priorities and as a barometer for the success of initiatives. cursory reference to findings in these surveys often appears as a “nod” to including the “local” in research. These studies face several limitations, however—not least that they represent a ‘snap-shot’ in time—and should not be viewed as definitive, enduring assessments of public attitudes towards peace and justice. Research that captures circumstances, attitudes and behaviour before a transitional justice process is initiated will allow for a more accurate assessment of actual impacts on a variety of

¹⁷⁵ Thoms, Ron and Paris, 6.

¹⁷⁶ Duggan, 322.

social environments and sectors as the time goes on. The few longitudinal studies that do exist provide a valuable insight into how effects develop over time and—in some cases—how long term impacts can deviate substantially from short-term outcomes.

Neglected themes

Given the broad consensus that transitional justice should comprise a “package” of measures and the existence of simultaneous TJ measures in countries such as Rwanda, Sierra Leone and Timor-Leste, it is surprising that there is so little analysis examining the interplay, role and impact of multiple processes at the national level, let alone the sub-national level. This is an area in which transitional justice scholarship is failing to keep up with transitional justice policy and programming. Recently, systematic quantitative comparisons have provided a better gauge of the relative impact of different combinations of measures on systemic macro-level properties. However, the vast majority of qualitative single and comparative studies concentrate on a single mode of transitional justice. Whilst the evidence review prioritizes an understanding of the local it is also acknowledged that that some of the most interesting questions for practitioners are about how transitional justice is experienced across the political and social spectrum in any given context and how these experiences fit together.

Although the evidence base for assessing the local experiences of transitional justice policy is generally limited, there is a particular lack of empirical research on certain themes. There is a stark lack of research on the experiences of women, children and minorities in transitional justice programmes. As yet we have a poor understanding of the differentiated impacts of these processes on specific groups.¹⁷⁷ We do not have a clear understanding of the relationship between transitional justice policy and the media. We lack research on the role that the media plays in transitional justice debates at the local level. There is very little empirical research that makes the connection between transitional justice and other

¹⁷⁷ Ibid.

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peacebuilding interventions at the micro level. Again, this is surprising given that transitional justice is commonly implemented alongside other peacebuilding and security measures, including DDR, SSR and rule of law measures. Studies that do exist suggest that the relationship between transitional justice and DDR/SSR is a complicated one and provide a clear agenda for further research. Linked to the above is a lack of clarity on how transitional justice policies are experienced by perpetrators and ex-combatants. This, again, is surprising because conceptually, a central dilemma in transitional justice is the need to balance consideration for victims and survivors with the reality that former perpetrators may be a source of resistance and backlash.¹⁷⁸ Understanding the way in which the latter experience, engage with and are affected by transitional justice should be a pressing concern for transitional justice scholars. Finally, it is important to point out that presently, the transitional justice knowledge base relies on a biased country sample.¹⁷⁹ Scholars and policymakers risk drawing lessons from a handful of well-documented examples that are not transferrable across cases. A corollary is that certain countries where transitional justice processes have been proposed or implemented are seriously under-researched: these include Lebanon, Central African Republic, Democratic Republic of Congo and Chad.

Research into transitional justice has undoubtedly progressed rapidly in the last three decades, but many questions still remain. To answer them, we not only need to expand our field of analysis, we also need to question the assumptions, paradigms, and frameworks that have brought us this far.

¹⁷⁸ Backer, "Cross National Comparative Analysis," 62.

¹⁷⁹ Backer, "Cross National Comparative Analysis," 61.