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Evaluating the Evaluators: Transitional Justice and the Contest of Values

Kirsten Ainley*

ABSTRACT[∞]

Despite an increase in scholarly efforts to evaluate transitional justice (TJ) programmes, there is little agreement over what TJ is, what effects it could be expected to have, or how TJ mechanisms should be judged. This article contributes to the literature on TJ evaluation by showing how differences in understanding of the nature and value of the 'justice' in TJ affect what is evaluated and how findings are interpreted. The article parses the values inherent in TJ evaluations (retributive, restorative and transformative justice, valuable for intrinsic or instrumental reasons) in order to think through the ways in which different value orientations lead to different appraisals. A broad sample of literature on the TJ programme in Sierra Leone is analyzed according to the value orientations it tends towards. The analysis finds that evaluations of Sierra Leonean TJ can be found displaying each of the six value orientations, with no agreement about the success of the TJ programme from within orientations, let alone across them. Additionally, it is argued that scholars and researchers are rarely explicit about their orientations, and there is insufficient consideration of the political implications of different value positions for prescriptions for future TJ programmes.

KEYWORDS: monitoring and evaluation, retributive justice, restorative justice, transformative justice, Sierra Leone

[A]INTRODUCTION

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[∞] I am grateful to the editors and reviewers at the *Journal* for providing generous and insightful feedback on the article during the review process and to participants at the 'Futures, Challenges and Transformations for Transitional Justice' workshop at the University of Minnesota Law School in 2016 for their comments on an earlier version.

Recent work on transitional justice (TJ) has exposed the difficulties both of establishing agreement over what TJ is and of evaluating its effects.¹ This article contributes to scholarship on evaluating TJ by showing how differences in understandings of the nature and value of ‘justice’ in TJ affect the focus of scholarly research and interpretation of its results. TJ is understood here to be a series of (usually legalized) political practices, in line with others who recognize TJ as something more than simply a legal project.² Judgements of the successes, failures and impacts of TJ are part of this political practice – assessments affect the kinds of TJ programmes which will be implemented in future. As politics is fundamentally about negotiating values and interests, this article parses the values inherent in TJ evaluation (and, by implication, in much TJ practice).³ The aim is not to present the ‘right’ values to hold in relation to TJ, but instead to think through the ways in which different value orientations lead to different appraisals of TJ programmes. The evaluation of evaluation (with ‘evaluation’ interpreted broadly here – see below) matters not just for academic reasons but also because TJ is increasingly commonplace.⁴ Transitional mechanisms have been mooted for all current conflicts and recent postconflict states, and TJ attracts a high level of donor funding and nongovernmental organization (NGO) support. Indeed, Makau Mutua claims that ‘in many circles, transitional justice has become an article of faith as a catalyst for reclaiming societies in political and social imbalance and dysfunction.’⁵ There is considerable demand from practitioners for policy advice on which TJ mechanisms should be funded and how they should be designed, and scholars have a responsibility to ensure that advice given is justified by the

¹ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”,’ *International Journal of Transitional Justice* 3(1) (2009): 5–27; 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): 355–376.

² Bell, *supra* n 1.

³ This position assumes ethics and politics to be inherently connected, and the pursuit of values to be part of politics.

⁴ Bell, *supra* n 1; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011); Ruti G. Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011).

⁵ Makau Mutua, ‘What Is the Future of Transitional Justice?’ *International Journal of Transitional Justice* 9(1) (2015): 1.

available evidence. But to do this, we have to understand what the evidence is, and why studies appear either to be contradictory or to talk past one another.

I use a broad sample of literature evaluating the TJ programme in Sierra Leone to illustrate my argument. Sierra Leone was chosen as an exemplar from a univariate class (states in which TJ programmes have been carried out) with attention paid to choosing a case in which there is a significant volume of relevant literature to analyze, and in which sufficient time has passed for conclusions to coalesce around particular value orientations. Sierra Leone is both generally representative of the class of cases (in the strict sense that it has had a TJ programme), while being, like all other TJ cases, distinctive. The question of whether my argument is generalizable to alternative cases is therefore an empirical one, but there is nothing inherent to the Sierra Leone case to suggest that the array of positions evident in scholarship would not be found for other TJ programmes.

The literature sample I examine in the article is not formally representative, as the concern is to explore the types of evaluative claims made rather than their frequency. The sample does, however, represent a wide range of work on Sierra Leonean TJ, drawn from a variety of disciplinary and professional perspectives, selected to represent as faithfully as possible the number of value orientations which exist in the field. It is mostly scholarly research, though appraisals by other influential actors (the UN Secretary-General [UNSG], NGOs, etc.) are included where relevant. The literature is characteristic of TJ appraisal in that, despite the time passed and the high volume of available research, there is surprisingly little agreement on what should count as success for transitional justice in the Sierra Leonean case and whether those standards have been reached.

[A]CHALLENGES OF EVALUATION

TJ is a burgeoning field – ploughing forward in practice but dogged by disagreements and controversies within conceptual and empirical studies of its nature and effects. Christine Bell notes that there is significant unease around

what the field's goals are and should be, and whether and when the practice is 'good'

(an extension of human rights discourse, or necessary to democratization or peace), 'bad' (imperialist, hegemonic, impunity serving or promoting a dangerous legal exceptionalism) or a value-neutral tool with which both 'good' and 'bad' goals can be pursued.⁶

This confusion arises partly because TJ is not a coherent field, but rather a term encompassing three potentially conflicting conceptions:

an ongoing battle against impunity rooted in human rights discourse; a set of conflict resolution techniques related to constitution making; and a tool for international state-building in the aftermath of mass atrocity.⁷

This lack of agreement on what TJ means is prevalent in both the general and case-based literature. Recent large-n studies exemplify the disagreements. Hunjoon Kim and Kathryn Sikkink, for instance, map the effects of human rights prosecutions and truth and reconciliation commissions (TRCs) on human rights protections and on deterrence of atrocity crimes (both of which they show to be positively correlated to the existence of TJ mechanisms).⁸ This is in contrast to Jack Snyder and Leslie Vinjamuri, who focus on TJ as a conflict resolution technique and suggest that amnesties are better able to guarantee durable peace than trials (in addition arguing that war crimes trials do little to deter atrocity crimes).⁹ Similarly, Geoff Dancy and Eric Wiebelhaus-Brahm are concerned with the impact of TJ, in this case TRCs, upon peace, arguing that truth commissions are associated with an increased risk of the resumption of conflict.¹⁰ Tricia Olsen, Leigh Payne and Andrew Reiter have a different conception again, seeing TJ as a potential contributor to democracy and human rights, but not measuring its effects upon peace. They conclude that single TJ mechanisms

⁶ Bell, *supra* n 1 at page 6.

⁷ *Ibid.*, 13.

⁸ Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,' *International Studies Quarterly* 54(4) (2010): 939–963.

⁹ Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice,' *International Security* 28(3) (2003/2004): 5–44.

¹⁰ Geoff Dancy and Eric Wiebelhaus-Brahm, 'Justice and the Peace: A Time-Sensitive Empirical Evaluation' (presented at the Annual Meeting of the International Studies Association, Montreal, March 2011).

do not have significant positive effects on human rights or democracy (indeed, TRCs used alone can have negative effects on human rights) and instead find that only combinations of mechanisms, including amnesties, have a positive impact.¹¹

These large-n studies are intended to provide robust assessments of the impact of TJ, without political bias, using positivist assumptions that the variables they are measuring have stable meanings and that causal relationships between them can be deduced.¹² Dancy categorizes such studies as ‘impact assessments’ (in contrast to ‘evaluations’), as they claim not to be committed to any prior set of values. However, impact assessment by means of indicators and statistics cannot avoid privileging some value orientations, despite its tendency to ‘replace political debate with technical expertise.’¹³ TJ is an inherently political practice, ill-suited to technical definitions. Both what counts as a transition (in itself inherently political, as it involves the (re)building and legitimation of power structures) and what counts as justice are essentially contested.¹⁴ TJ scholars are taking part in its politics by presenting assessments and evaluations of TJ programmes, something most acknowledge even if their work explicitly aims at the empirical measurement of TJ’s impact. Rather than trying to find common ground, this article maps out the differentiated value positions taken in the literature on a single case – Sierra Leone – in an attempt to explore why so many appraisals of TJ programmes seem to talk past each other.

The literature discussed in the article is ‘evaluative’ in a very broad sense. I follow Colleen Duggan’s definition of evaluation as

an applied inquiry process that collects and synthesizes evidence that ‘culminates in conclusions about the state of affairs, value, merit, worth, significance or quality of a

¹¹ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: US Institute of Peace Press, 2010).

¹² Dancy, *supra* n 1.

¹³ Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance,’ *Current Anthropology* 52(3) (2011): 83.

¹⁴ Dustin N. Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,’ *International Journal of Transitional Justice* 9(1) (2015): 150–169; Fionnuala Ní Aoláin and Colm Campbell, ‘The Paradox of Transition in Conflicted Democracies,’ *Human Rights Quarterly* 27(1) (2005): 172–213. See also, Bell, *supra* n 1, on essentially contested concepts and TJ.

program, product person, policy, proposal or plan. Conclusions made in an evaluation encompass both an empiric aspect (that something is the case) and a normative aspect (judgment about the value of something).¹⁵

The literature cited is evaluative in that it collects and synthesizes evidence in various forms (including evidence about meaning and experience) in order to draw conclusions about the value, merit, worth, significance or quality of the TJ programme in Sierra Leone, or some part of it. Unlike Dancy, I include impact assessments as evaluative, to the extent that they draw conclusions about the value, merit or significance of a programme.¹⁶ The article itself is evaluative in that it collects and synthesizes evidence about the notions of justice present in scholarship on the Sierra Leone TJ programme, in order to draw conclusions on the quality of the research in terms of attentiveness to, and implications of, different value orientations.

This use is controversial as it risks collapsing distinctions between different types of scholarly research on TJ and undermining their phenomenological contributions.¹⁷ 'Evaluation' increasingly means something more formal and specific than I intend here – positivist social scientific research, often using experimental methods like randomized control trials or counterfactual analysis. The UN Evaluation Group defines it as follows:

an assessment, conducted as systematically and impartially as possible, of an activity, project, programme...It analyses the level of achievement of both expected and unexpected results by examining the results chain, processes, contextual factors and causality using appropriate criteria such as relevance, effectiveness, efficiency, impact and sustainability. An evaluation should provide credible, useful evidence-based information that enables the timely incorporation of its findings, recommendations and

¹⁵ Colleen Duggan, 'Editorial Note,' *International Journal of Transitional Justice* 4(3) (2010): 318, citing Deborah Fournier, 'Evaluation,' in *Encyclopedia of Evaluation*, ed. Sandra Mathison (Thousand Oaks, CA: Sage Publications, 2005).

¹⁶ Dancy, *supra* n 1.

¹⁷ I am grateful to an anonymous reviewer for this point, and for their warning against rendering all TJ research 'evaluative.'

lessons into the decision-making processes of organizations and stakeholders.¹⁸

However, this type of evaluation is ontologically, epistemologically and methodologically distinct within the broader range of work I take to be evaluative, and some of the scholars I cite below have little interest in contributing to evidence-based policy making. They may seek to understand TJ in relation to culture, local meanings and experiences or global political and economic structures, and indeed some are deeply critical of mainstream TJ practices.¹⁹ All that they have in common is an interest in seeing justice done appropriately, or in critiquing situations in which justice is done badly. The vocabulary of 'evaluation' is therefore used with hesitation, but retained as it signals the importance of the values which underlie appraisals.²⁰

[A]SIERRA LEONE

After a brutal civil war from 1991 to 2002, in which an estimated 70,000 people lost their lives, 2.6 million were displaced, countless others were victims of atrocity crimes and political and social structures were destroyed, Sierra Leone established a multifaceted TJ programme.²¹ The Sierra Leonean TRC was set up as part of the 1999 Lomé Peace Agreement, which provided for a TRC alongside a general amnesty. Just over a year after the Agreement was signed, the then president of Sierra Leone, Tehjan Kabbah, wrote to the UN Security Council (UNSC) on 12 July 2000, requesting an ad hoc tribunal to be set up in the country. The Special Court for Sierra Leone (SCSL) was established in January 2002. Concurrently, Sierra Leonean communities and civil society drew upon a range of informal and traditional

¹⁸ UN Evaluation Group, *Norms and Standards for Evaluation* (2016), 10. See also, World Bank, 'The Strategic Impact Evaluation Fund (SIEF),' <http://www.worldbank.org/en/programs/sief-trust-fund> (accessed 22 July 2017).

¹⁹ Simon Robins, 'Mapping a Future for Transitional Justice by Learning from Its Past,' *International Journal of Transitional Justice* 9(1) (2015): 181–190.

²⁰ Given the broad understanding of 'evaluation,' I use it interchangeably with 'appraisal' in this article.

²¹ Mary Kaldor, with James Vincent, 'Case Study: Sierra Leone. Evaluation of UNDP Assistance to Conflict-Affected Countries,' <http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf> (accessed 22 July 2017), 6.

mechanisms, including community-level restorative justice processes and customary law, to promote reconciliation. Finally, there has been a reparations programme.²²

The Sierra Leonean case is held up by many commentators as an example of TJ success, and certainly various country indicators suggest it has recovered surprisingly robustly after a devastating war. In 2012, the US described Sierra Leone as 'one of the most stable countries in a volatile region.'²³ Compared to other sub-Saharan states, the growth rate of the Sierra Leonean economy was extremely healthy from the end of the war until the Ebola crisis in 2014, and the country's GDP growth is now back on track following the Ebola-related decline.²⁴ As well as a strengthening economy, Sierra Leone also shows signs of having a strong polity. The 2007 presidential elections saw the country's first peaceful handover of power from the ruling party to the opposition and took place without the presence of UN peacekeepers. In 2012, the third general election since the end of the civil war was held, again without significant unrest.

Despite the relatively unambiguous country indicators and the rich appreciation of the Sierra Leonean context displayed by many who publish on the case, evaluation of the TJ programme in Sierra Leone has formed no consensus around whether TJ contributed positively to the postconflict recovery, or how such a contribution could be proven.²⁵ A wide

²² The Sierra Leonean TJ programme is described in more detail in Kirsten Ainley, Rebekka Friedman and Chris Mahony, eds., *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone* (London: Palgrave Macmillan, 2015).

²³ US Department of State, 'U.S. Relations with Sierra Leone,' 2014, <https://www.thefreelibrary.com/U.S.+relations+with+Sierra+Leone.-a0412799116> (accessed 22 July 2017).

²⁴ For World Bank statistics on Sierra Leone, see, <http://data.worldbank.org/country/sierra-leone> and <http://www.worldbank.org/en/country/sierraleone/overview> (both accessed 22 July 2017). The International Monetary Fund's outlook is more circumspect, but recognizes that Sierra Leone is recovering faster than other Ebola-affected states. International Monetary Fund, 'Regional Economic Outlook,' 2016, <https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo0416.pdf> (accessed 22 July 2017).

²⁵ This is not to say that GDP growth and peaceful elections are the *sine qua non* of postconflict success, or that marketization and democratization necessarily support rather than hinder recovery, but rather to note that even if such indicators are accepted as positive, there is no agreement over whether TJ contributed to them. See, Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,' *Global Society* 21(4) (2007): 579–591 on the ways that critiques of the wider liberal peace project also apply to TJ, and Kieran Mitton, 'A Pragmatic Pact: Reconciliation and Reintegration in Sierra Leone,' in Ainley, Friedman and Mahony, supra n 22, for a more circumspect assessment of postconflict recovery in Sierra Leone.

range of factors are claimed within the literature to demonstrate the success or failure of TJ mechanisms, with no strategies offered to adjudicate between rival foci and methods of appraisal.²⁶ In order to understand contradictory or incomparable evaluations, a framework of value positions is outlined below into which research on TJ in Sierra Leone can be positioned. Such a framework is not intended to adjudicate between different approaches to TJ (there is no correct value position from which to appraise TJ), but can help to understand why appraisals differ and how to evaluate the evaluators.

[A]VALUE FRAMEWORK FOR TJ EVALUATION

Dancy argues that evaluation is characterized by comparison to normative ideals.²⁷ This section outlines what those ideals are, establishing that the TJ literature can usefully be divided according to the conceptions of justice (reparative, restorative, transformative) and the conceptions of the value of justice (intrinsic versus instrumental) inherent within the scholarship.

[B]Justice

Ruti Teitel defines TJ as ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.’²⁸ In fact, TJ is characterized by a variety of conceptions of justice which do not always suggest legal responses as the most appropriate way for justice to be achieved. There are three principal ways in which justice tends to be understood in the study and practice of TJ: as retributive, restorative or transformative.²⁹

²⁶ Kirsten Ainley, ‘Evaluating the Success of Transitional Justice in Sierra Leone and Beyond,’ in Ainley, Friedman and Mahony, *supra* n 22.

²⁷ Dancy, *supra* n 1.

²⁸ Ruti G. Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Journal* 16 (2003): 69.

²⁹ Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence,’ *International Journal of Transitional Justice* 3(1) (2009): 28–48, popularized the three-part distinction in the TJ literature. This distinction maps broadly onto the standard distinctions between retributive, restorative and distributive justice in legal and political theory, though transformative justice proponents have a relatively radical vision of just distribution. Missing from the TJ justice triad is procedural justice, which is treated here, for simplicity, as a way to express the intrinsic value of retributive justice. In contrast, some see procedural justice as an important form of justice in and of itself (e.g., William Nelson, ‘The

Retributive justice generally refers to instances of rule breaking and the subsequent efforts to establish facts about the incident/s, determine who is to blame and administer some form of punishment where appropriate. Retributive justice characterized phase one of the growth of TJ, according to Teitel, and is the approach most likely to be taken by lawyers (given that the rules retributive justice is concerned with in the practice of TJ are laws).³⁰ As Bell notes, 'from a legal perspective, transitional justice can be viewed as a subfield of human rights law, humanitarian law and/or international criminal law, and as an attempt to increase the reach of these regimes into transitional contexts.'³¹ When justice is understood as retributive, then justice is done through authoritative legal institutions, the gold standard being trials.

Restorative justice is concerned less with rule breaking and more with how to put the situation right when people or relationships have been harmed. It focuses on who has been hurt (with groups or communities understood as victims, alongside individuals), what their needs are and who has obligations to meet their needs (which may or may not include the original perpetrators of the harm). Teitel argues that the leading model of justice in phase two of TJ was restorative, with a move away from trials and towards mechanisms designed to foster truth and reconciliation.³² Restorative justice should (though does not always) take seriously the ways in which affected parties understand, value and operationalize concepts such as justice and reconciliation.

Very Idea of Pure Procedural Justice,' *Ethics* 90(4) (1980): 502–511), and it is possible (though less common in the literature) to evaluate truth commissions, reparations programmes and so on according to the fairness of their procedures rather than the fairness of their outcomes. Dancy, *supra* n 1, separates TJ evaluations into those concerned with process and those concerned with outcomes. However, prior value positions have been taken in the work he cites as to what just processes would consist of, meaning these positions fit relatively unproblematically into the framework discussed here without the need for a separate category.

³⁰ Teitel, *supra* n 28.

³¹ Bell, *supra* n 1 at 22.

³² Teitel, *supra* n 28. The mechanisms of justice do tend to differ according to the conception of justice driving the TJ programme. For instance, trials are the gold standard of retributive justice and truth commissions tend to be seen as delivering restorative justice, but there is no logically necessary relationship between conception of justice and mechanism. Trials are also claimed to deliver some forms of truth, and truth commissions can be retributive. Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

Transformative justice is a more ambitious conception of justice, as it concerns the ways in which social structures and institutions enable harms, and how those structures and institutions might be transformed to prevent such harms in future.³³ Calls for TJ as transformation can be traced to Louise Arbour's argument that 'transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.'³⁴

Wendy Lambourne described the nature of transformative TJ as follows:

long-term, sustainable processes embedded in society and adoption of psychosocial, political and economic, as well as legal, perspectives on justice. It also, even more so than restorative justice, involves identifying, understanding and incorporating cultural approaches to justice that coexist with dominant western worldviews and practice.³⁵

The increasing popularity of transformative justice in TJ literature and practice suggests it should be thought of, contra Teitel, as phase three of TJ.³⁶

[B]The Value of Justice

Justice can be valued principally for its intrinsic qualities or for the consequences it is thought to bring, for instance, deterrence, peace, reconciliation or reparation. Justice might also be valued for its role in expressing or communicating particular values, such as the rule of law, and for 'the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.'³⁷ Expressivism, as this position is known, is omitted here as a separate category for two reasons: firstly, it is associated principally with a retributive

³³ There is some disagreement about whether transformative justice is a subcategory of restorative justice. See, Kay M. Harris, 'Transformative Justice: The Transformation of Restorative Justice,' in *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tifft (London: Routledge, 2006). I take no particular philosophical position on this, but find it useful to break the two categories apart when parsing claims in TJ research.

³⁴ Louise Arbour, 'Economic and Social Justice for Societies in Transition,' *International Journal of Law and Politics* 40(1) (2007): 3.

³⁵ Lambourne, supra n 29 at 28. See also, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, MA: Blackwell, 2002); Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections,' *Third World Quarterly* 29(2) 2008: 275–289.

³⁶ Teitel's phase three concerns TJ as 'steady-state,' i.e., normalized as part of postconflict policy and embedded in international political and legal practice. Teitel, supra n 28.

³⁷ Drumbl, supra n 32 at 173.

conception of justice, rather than mapping across all three conceptions, and secondly, it is possible to be an expressivist – to hold that trials, convictions and punishment carry important expressive qualities – while also valuing justice intrinsically and/or for its consequences.³⁸

Justice can be valued intrinsically in all three conceptions, though intrinsic positions are more prevalent for those who hold a retributive conception. Retributivism (i.e., the valuing of retributive justice for its intrinsic properties) holds that justice is a matter of moral desert – people who commit wrongful acts deserve a proportionate punishment. Impunity, or the failure to administer retributive justice, is a moral wrong. The administering of punishment, in this view, is good in itself, without reference to the consequences of the punishment. It also follows from this view that the punishment of innocent individuals is wrong, no matter what the consequences.³⁹ In terms of evaluating transitional justice, a retributivist would favour TJ programmes in which criminal trials took place, guilty verdicts were rendered and sentences passed.

It is also relatively common to see retributive justice justified according to its instrumental value – its tendency to bring about good consequences. In terms of TJ evaluation, such good consequences might include deterrence, the incapacitation of certain actors and (though far less frequently in international justice) rehabilitation. They also include the spread of the rule of law. They would not, on this view, include truth or peace, which are seen as more likely good consequences of restorative justice.⁴⁰

Restorative justice is often valued for its consequences rather than for its intrinsic properties, but one can nevertheless find some examples of the latter. These centre particularly on the idea of restorative justice as ‘victim-centred.’ Justice, in this account, is

³⁸ Joshua Kleinfeld, ‘Reconstructivism: The Place of Criminal Law in Ethical Life,’ *Harvard Law Review* 129(6) (2016): 1485–1565.

³⁹ Alec Walen, ‘Retributive Justice,’ in *Stanford Encyclopedia of Philosophy Archive*, ed. Edward N. Zalta (Winter 2016 Edition), <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/> (accessed 22 July 2017).

⁴⁰ This differs from consequentialist justifications of international criminal justice, some of which claim that retributive justice mechanisms can lead to peace, stability and democracy. Leslie Vinjamuri, ‘Deterrence, Democracy, and the Pursuit of International Justice,’ *Ethics and International Affairs* 24(2) (2010): 191–211.

valued because restoring the dignity and status of victims within the justice process is viewed as morally appropriate, quite apart from any good consequences it might bring. A great deal of TJ evaluation concerns the role of victims within the process.

While it would be unusual to find a restorative justice approach which does not see some intrinsic (moral) value in restoring the dignity of victims, most of these approaches also emphasize the consequences of doing justice. These consequences might include the resolution of conflict, the provision of ‘truth,’ particularly about the root causes of conflict, and ‘reconciliation’ at the individual or societal level. They might also include restitution of those harmed (via a reparations programme), building stable state institutions, promoting liberal values and, perhaps counterintuitively, supporting the rule of law through amnesty rather than trials.⁴¹

Like restorative justice, transformative justice is most likely to be valued principally for its results, that is, for the extent to which it brings about transformation. Such transformation includes consequences which tend to be overlooked by other approaches – in particular challenges to gendered structures of power (a more far-reaching goal than just the participation of women in a justice process), the healing of trauma, and economic transformation or development.⁴² However, Lambourne implies that context-sensitivity is of intrinsic value within this approach.⁴³ Paul Gready and Simon Robins’ ‘bottom-up’ approach also sees intrinsic value in the processes of justice:

transformative justice is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and

⁴¹ Kieran McEvoy and Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy,’ *Journal of Law and Society* 39(3) (2012): 410–440.

⁴² Fionnuala Ní Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice,’ *International Journal of Transitional Justice* 6(2) (2012): 205–228; Christine Bell and Catherine O’Rourke, ‘Does Feminism Need a Theory of Transitional Justice? An Introductory Essay,’ *International Journal of Transitional Justice* 1(1) (2007): 23–44; David Mendeloff, ‘Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice,’ *Human Rights Quarterly* 31(3) (2009): 592–623; Magdalena Zolkos, ‘Redressive Politics and the Nexus of Trauma, Transitional Justice and Reconciliation,’ in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (London: Routledge, 2014); Sharp, *supra* n 14.

⁴³ Lambourne, *supra* n 29.

analysis of the lives and needs of populations.⁴⁴

This is not just a claim about the justice of procedures, but an assertion that justice cannot truly be done if it is imposed from the outside.

There are six possible value positions suggested by the foregoing analysis – valuing each of retributive, restorative and transformative justice for its intrinsic or instrumental value. These positions are analogous to ideal types, in that the differences between them are amplified in order to better understand the value orientations which lie behind scholarship (notwithstanding that value orientations are abstract rather than empirically observable). Also analogous to inquiry using ideal types, few examples of TJ appraisals sit squarely within any one category. However, most tend towards one or two of them and examples of features of value orientations which don't 'fit' into the categories are instructive in and of themselves.

[A]EVALUATING TJ IN SIERRA LEONE

In the following sections a selection of work appraising the TJ programme in Sierra Leone is discussed in terms of the six categories outlined above. The article concludes by considering what can be learned about TJ evaluation by doing so.

[B]Retributive Justice for Its Intrinsic Value

International institutions, justice practitioners and lawyers often praise or criticize the TJ programme in Sierra Leone with reference to impunity. For instance, the UNSC has commended the Special Court for 'strengthening stability in Sierra Leone and the sub-region and bringing an end to impunity.'⁴⁵ To have ended impunity successfully, on this account, the retributivist mechanism within the TJ programme, the SCSL, would need to have prosecuted

⁴⁴ Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice,' *International Journal of Transitional Justice* 8(3) (2014): 2. See also, Nagy, supra n 35, for an argument that standardized forms of TJ do not take sufficient account of context, and therefore fail to confront harms such as gender inequalities and structural violence.

⁴⁵ UNSC, 'Security Council, in Statement, Strongly Commends Special Court for Sierra Leone, Urges Robust Financial Support as Historic Body Moves into Final Stages of Work,' 9 October 2012, <http://www.un.org/press/en/2012/sc10787.doc.htm> (accessed 22 July 2017).

the persons who bore the greatest responsibility for serious violations of international humanitarian and Sierra Leonean law committed in Sierra Leone since 30 November 1996 – as stated by the SCSL’s mandate. But there is controversy within evaluations of TJ over whether this happened. Brenda Hollis, for instance, argues that the SCSL’s work is to be commended as it prosecuted both those who were judged by the Office of the Prosecutor to bear a high level of responsibility and also those against whom sufficient evidence could be found.⁴⁶ Sceptics of this position point out the range of other, unprosecuted actors that evidence suggests could be among the most responsible. President Kabbah (as Hinga Norman’s senior in the chain of command), President Blaise Compaoré of Burkina Faso (who funded and armed the Revolutionary United Front, or RUF), and Muammar Gaddafi (on whose territory the RUF was formed, and who was responsible for funding much of their fighting in Sierra Leone) could all be argued to have enjoyed impunity for war crimes due to their relationships with states funding the SCSL.⁴⁷ Also ignored were Economic Community of West African States Monitoring Group forces, who participated in looting and bombarding civilian targets; private military companies such as Sandline and Executive Outcomes; states and private actors supplying arms to fighters and corporations mining diamonds.⁴⁸

The value of justice in itself might also come from the quality of its processes.⁴⁹ Evaluations undertaken by lawyers often judge the extent to which TJ processes were inclusive, fair, free from political interference,⁵⁰ and observant of the highest legal standards.⁵¹ International criminal justice ‘firsts’ also feature frequently in evaluations of TJ in its retributive

⁴⁶ Brenda Hollis, ‘Evaluating the Legacy of the Special Court for Sierra Leone,’ in Ainley, Friedman and Mahony, supra n 22.

⁴⁷ Chris Mahony, ‘A Political Tool? The Politics of Case Selection at the Special Court for Sierra Leone,’ in Ainley, Friedman and Mahony, supra n 22.

⁴⁸ Truth commissions can also be evaluated for their contribution to reducing impunity, though this is rare. Chris Mahony and Yasmin Sooka, ‘The Truth about the Truth: Insider Reflections on the Sierra Leonean Truth and Reconciliation Commission,’ in Ainley, Friedman and Mahony, supra n 22, is an example in the case of Sierra Leone. Ainley argues in favour of truth commissions contributing more regularly to retributive justice goals. Kirsten Ainley, ‘Excesses of Responsibility: The Limits of Law and the Possibilities of Politics,’ *Ethics and International Affairs* 25(4) (2011): 407–431.

⁴⁹ As noted, procedural quality is not treated here as a separate conception of justice, but as a reason to value justice.

⁵⁰ Mahony, supra n 47; Mahony and Sooka, supra n 48.

⁵¹ Hollis, supra n 46.

form (from both intrinsic and instrumental perspectives) – the first court to conclude a trial against a sitting head of state, the first criminalization of the use of child soldiers and forced marriage, and so on.

The Special Court is the first modern international court located in the country where the prosecuted crimes were committed. It is also the first such tribunal that was created by a bilateral treaty, co-existed with a truth and reconciliation commission, has a far-reaching outreach programme, and relies mostly on national staff.⁵²

The background assumptions from an intrinsic orientation are that the quality of justice is increased by these firsts – that they are a sign of progress. Wayne Jordash and Matthew Crowe, however, question the quality of the justice processes within the SCSL and express profound concerns over the use of SCSL decisions as a precedent in future trials.⁵³

[B]Retributive Justice for Its Instrumental Value

The key consequences claimed in evaluative work tending towards this value orientation concern deterrence and spreading the rule of law. The president of the International Centre for Transitional Justice, David Tolbert, said on the Charles Taylor trial:

The SCSL's judgment has...provided a strong signal to those who want to commit horrific crimes through surrogates and puppets: they may not easily hide behind complicated legal constructs and are more certain to face the bar of justice.⁵⁴

The UNSC commends the Court for 'contributing to the restoration of the rule of law throughout [Sierra Leone and Liberia] and the region.'⁵⁵

⁵² Sigall Horowitz, 'Transitional Criminal Justice in Sierra Leone,' in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 43.

⁵³ Wayne Jordash and Matthew R. Crowe, 'Comparing Fairness and Due Process in the RUF and CDF Cases: Consequences for the Legacy of the Special Court for Sierra Leone,' in Ainley, Friedman and Mahony, *supra* n 22.

⁵⁴ David Tolbert, 'The Impact of Charles Taylor's Verdict,' *Al Jazeera*, 2 October 2013, <http://www.aljazeera.com/indepth/opinion/2013/10/impact-charles-taylor-verdict-201310112386948327.html> (accessed 22 July 2017).

⁵⁵ UNSC, *supra* n 45.

Deterrence claims are particularly hard to substantiate and tend to be asserted more than proven within evaluations.⁵⁶ Rule-of-law outcomes are more readily observable. Hollis, for instance, argues that the SCSL contributed to rule-of-law outcomes in the domestic legal system through participation of Sierra Leonean staff in the work of the Court, capacity-building and training programmes, and the creation of the Sierra Leone Legal Information Institute.⁵⁷ Opposing evaluations note, in contrast, that no one has been prosecuted in the Sierra Leonean domestic system for war crimes or crimes against humanity committed during the conflict, suggesting a very limited spillover effect.⁵⁸

Another type of evaluation made in this vein concerns the contributions that courts in particular can make to international jurisprudence. Hollis and Valerie Oosterveld outline the successes of the SCSL in terms of generating jurisprudence that can be used by other international courts on forced marriage, sexual slavery, the use of child soldiers and attacks on peacekeepers.⁵⁹ The commendable ‘firsts’ also feature here – they are claimed to have positive consequences for the international justice project more broadly, as their appearance in Sierra Leone is assumed to make it more likely that they will be possible/built upon elsewhere.

A final focus of evaluation which favours an instrumental retributive conception of justice is the microeconomics of TJ mechanisms. Some work has been done on the cost of retributive justice, the problems of the voluntary contributions funding model of the SCSL, the subjecting of accountability mechanisms to market-based rationality, and the consequences of witness payments at the Court.⁶⁰ It is an area about which contradictory claims are made

⁵⁶ Kate Cronin-Furman, ‘Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity,’ *International Journal of Transitional Justice* 7(3) (2013): 434–454.

⁵⁷ Hollis, *supra* n 46.

⁵⁸ Human Rights Watch, ‘World Report: Sierra Leone,’ 2007, <http://pantheon.hrw.org/legacy/wr2k7/index.htm> (accessed 22 July 2017).

⁵⁹ Hollis, *supra* n 46; Valerie Oosterveld, ‘Evaluating the Special Court for Sierra Leone’s Gender Jurisprudence,’ in *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, ed. Charles Chernor Jalloh (Cambridge: Cambridge University Press, 2014).

⁶⁰ Stuart Ford, ‘How Leadership in International Criminal Law Is Shifting from the U.S. to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts,’ *Saint Louis University Law Journal* 55 (2011): 953–1000; Sara Kendall, ‘Marketing Accountability at the Special Court for Sierra Leone’ and Jennifer Easterday, ‘The Consequences of Witness Payments at the Special Court for Sierra Leone,’ in *The Sierra Leone Special Court and Its Legacy: The Impact for Africa*

about the SCSL in particular (the other TJ mechanisms in Sierra Leone cost far less). Some argue that the Court, as a hybrid model, should, in principle, be more cost-effective than international criminal tribunals set up under the auspices of the UNSC.⁶¹ Others note that the SCSL has, in practice, been tremendously expensive.⁶² At a total cost of close to \$250 million for the trials of 13 indictees, the consequences of doing justice would have to be significant to justify spending the money on trials rather than on, for instance, infrastructure and development projects.⁶³

[B] Restorative Justice for Its Intrinsic Value

In a recent piece on the future of TJ, Mutua asserts the centrality of victims to TJ, suggesting that their engagement is intrinsically valuable to the process:

While sanctions play an important role in signalling a rejection of impunity – and impose responsibility on the individual wrongdoer – they nevertheless are not truly victim-centred. They are society’s revenge against the perpetrator, but may bring little comfort to the victim. The question is how should transitional justice deal with the injured soul of the victim, and the corruption of the nation’s moral fiber?⁶⁴

This position is supported by the UNSG:

and International Criminal Law, ed. Charles Chernor Jalloh (Cambridge: Cambridge University Press, 2014); Jordash and Crowe, *supra* n 53; Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Pretoria: Institute for Security Studies, 2010).

⁶¹ Rachel Kerr and Jessica Lincoln, ‘The Special Court for Sierra Leone: Outreach, Legacy and Impact,’ Kings College London War Crimes Research Group, 2008, <http://www.kcl.ac.uk/sspp/departments/warstudies/research/groups/wc/sfinalreport.pdf> (accessed 22 July 2017).

⁶² Antonio Cassese ‘Report on the Special Court for Sierra Leone,’ 12 December 2006, <http://www.rscsl.org/Documents/Cassese%20Report.pdf> (accessed 22 July 2017); Theresa M. Clark, ‘Assessing the Special Court’s Contribution to Achieving Transitional Justice,’ in *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, ed. Charles Chernor Jalloh (Cambridge: Cambridge University Press, 2014).

⁶³ Figures were calculated using the estimate of US\$222.9 million from Charles C. Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ *Michigan Journal of International Law* 32(3) (2010): 395–460, plus additional expenditure within the post-2010 annual reports of the president of the SCSL. The budget of the Sierra Leonean domestic justice system is around US\$13 million per annum according to Justin Sandefur and Alaina Varvaloucas, ‘Was the Charles Taylor Trial Worth the Price Tag?’ 31 May 2012, <http://www.cgdev.org/blog/was-charles-taylor-trial-worth-price-tag> (accessed 22 July 2017).

⁶⁴ Mutua, *supra* n 5 at page 5. Mutua also suggests that public support has good consequences: ‘Ultimately, transitional justice processes can become more effective if they are backed by contending political elites and have deep and broad purchase within the general population,’ page 7.

A comprehensive [TJ] strategy should also pay special attention to abuses committed against groups most affected by conflict, such as minorities, the elderly, children, women, prisoners, displaced persons and refugees, and establish particular measures for their protection and redress in judicial and reconciliation processes.⁶⁵

Of the groups listed, women play probably the most significant role in evaluations of TJ processes. Until recently, women's participation in TJ (in positions of authority within justice mechanisms as well as in their capacity as victims) has been seen as important in so far as it upholds the moral value of gender equality or inclusivity, as well as the intrinsic unjustness of excluding women from justice processes, rather than on evidence that such participation leads to valuable consequences.⁶⁶ Evaluative work on women's participation in the TJ processes in Sierra Leone follows this pattern: women's participation is assumed to be intrinsically good (and the lack of it bad). The role of consequences is more complex. Binaifer Nowrojee commends the SCSL and the TRC for their gender-sensitive strategies to facilitate women's participation, and predicts positive consequences of these strategies.⁶⁷ Like Nowrojee, Kelli Muddell assumes women's participation to be a necessary factor in justifying justice processes and commends the SCSL and the TRC for unusually gender-inclusive practices and also for positive consequences flowing from these practices.⁶⁸ However, these positions value justice principally for its intrinsic value – the claimed consequences are suggested more than evidenced – and the strong impression is given that women's participation is necessary as a

⁶⁵ 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General,' UN Doc. S/2004/616 (2004), 9 [hereinafter 'Rule of Law']. See also, William A. Schabas, 'The Sierra Leone Truth and Reconciliation Commission,' in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006).

⁶⁶ Bell and O'Rourke, supra n 42; Vasuki Nesiiah et al., 'Truth Commissions and Gender: Principles, Policies, and Procedures,' 2006, https://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf (accessed 22 July 2017). The recent global study of the implementation of UNSC 1325 found positive consequences to women's participation, suggesting that evaluations of the gendered nature of TJ according to its consequences will be more prevalent in future scholarship. UNWOMEN, 'Preventing Conflict: Transforming Justice Securing the Peace,' 2015, <http://www.refworld.org/docid/5724aba34.html> (accessed 22 July 2017).

⁶⁷ Binaifer Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims,' *Harvard Human Rights Journal* 18 (2005): 85–105.

⁶⁸ Kelli Muddell, 'Capturing Women's Experiences of Conflict: Transitional Justice in Sierra Leone,' *Michigan State Journal of International Law* 15(1) (2007): 85–100.

matter of justice even if good consequences cannot be demonstrated. For instance, Jamesina King contrasts the relatively extensive participation of women in the peace process, TRC and reparations scheme (which is seen as valuable) with the relatively disappointing consequences of that participation.⁶⁹ Michelle Staggs Kelsall and Shanee Stepakoff argue that the SCSL silenced women through its failure to allow particular evidence of sexual violence, and that this silencing was both indicative of systemic biases against victim-witnesses in the Court and had deleterious consequences for the individual women involved.⁷⁰ There is, once again, little agreement to be found within scholarship from this perspective.

Research tending towards this orientation also values public engagement with the TJ process more generally, often highlighting its importance both intrinsically and because of its potential consequences. The UNSG argues that ‘the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out. Local consultation enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims,’ citing Sierra Leone as an example of a more open and consultative trend.⁷¹ Conversely, Gearoid Millar observes that the Sierra Leonean and western conceptions of truth and the power of God in the healing process were so different that many Sierra Leoneans saw the TRC as redundant.⁷² Rosalind Shaw’s research also highlights the importance of TJ resonating with the public. She argues that the Sierra Leonean public had little interest in the TJ mechanisms, and some groups even organized to prevent public TRC participation, as the truth-telling norms being promoted were in opposition to established communal practices of healing and social coexistence.⁷³ Justice

⁶⁹ Jamesina King, ‘Gender and Reparations in Sierra Leone: The Wounds of War Remain Open,’ in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marín (New York: Social Science Research Council, 2006).

⁷⁰ Michelle Staggs Kelsall and Shanee Stepakoff, “‘When We Wanted to Talk about Rape’: Silencing Sexual Violence at the Special Court for Sierra Leone,” *International Journal of Transitional Justice* 1(3) (2007): 355–374.

⁷¹ Rule of Law, p. 7.

⁷² Gearoid Millar, ‘Between Western Theory and Local Practice: Cultural Impediments to Truth-Telling in Sierra Leone,’ *Conflict Resolution Quarterly* 29(2) (2011): 177–199.

⁷³ Rosalind Shaw, ‘Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone,’ US Institute of Peace Special Report No. 130 (2005).

could not be served, in this view, as the model of justice being promoted did not map onto understandings of justice among the Sierra Leonean public.

[B]Restorative Justice for Its Instrumental Value

This seems by far the largest category within work on evaluating TJ, as there are now many types of good consequences which it is claimed that TJ can bring about (including via women's participation, as discussed). Elin Skaar identifies the most common areas on which TJ programmes are expected to impact as 'democratisation, rule of law, increased respect for human rights, human rights culture, violence reduction, peace, reconciliation.'⁷⁴ Oskar Thoms and colleagues regard the impact of TJ on six areas as the most important to assess:

- (1) Respect for the core human rights to life and the inviolability of the human person, otherwise known as 'personal integrity rights';
- (2) Political violence;
- (3) Rule of law;
- (4) Democratization;
- (5) Popular perceptions of regime legitimacy;
- (6) A political culture of human rights and diversity.⁷⁵

These lists illustrate some of the tensions within the TJ field – they fail to distinguish between the types of justice which might logically be claimed to bring about the consequences. Rule of law consequences are claimed to result from retributive justice (dealt with above). The focus in this section is on truth, reconciliation and reparation.

One of the main outcomes examined in evaluative TJ literature is the provision of 'truth.' TRCs and, increasingly, courts are judged on whether they have provided a truthful and authoritative record of a conflict and the crimes that took place within it. This is something the Sierra Leonean TRC is particularly commended for – it published an extremely detailed report, along with a shorter version for secondary schools and another directed at children. Chris Mahony and Yasmin Sooka, for instance, applaud the TRC for its account of key

⁷⁴ Elin Skaar, Camila Gianella Malca and Trine Eide, *After Violence: Transitional Justice, Peace, and Democracy* (London: Routledge, 2015), 21.

⁷⁵ Oskar N.T. Thoms, James Ron and Roland Paris, 'The Effects of Transitional Justice Mechanisms,' Centre for International Policy Studies Working Paper (2008), 26.

incidents within Sierra Leone.⁷⁶ However, they are critical of the extent to which it was able to illuminate the role of external actors and events, in large part because of the politics of its establishment, and its failure to consider larger systemic issues such as the impact of structural adjustment on Sierra Leonean society and the increasing concentration of power in the executive within a system of patrimonial politics. Tim Kelsall argues that the truth was rarely told at the TRC, partly because of fears around whether telling the truth could render witnesses liable to prosecution at the SCSL.⁷⁷

It is also relatively common to see the SCSL commended for providing a full and authoritative record – for finding ‘truth’ – which is a reminder that mechanisms of justice do not always map neatly onto conceptions of justice.⁷⁸ Theresa Clark, for instance, sees the SCSL as having contributed to the establishment of two forms of truth, forensic and social or dialogue truth, but doing little to establish narrative or personal truth.⁷⁹ However, the Court could only hear evidence related to its cases, and lawyers presented information in attempts to convict or exculpate clients rather than to paint an accurate picture of the conflict. Jordash and Crowe suggest the SCSL was incentivized to produce a false record that demonized the RUF and valorized Kabbah in order to support the transitional government and please donors.⁸⁰

Evaluative research is also interested in ‘reconciliation’ as a consequence of TJ, though this is harder to operationalize. Rebekka Friedman, for instance, looks at the extent to which the TRC achieved societal reconciliation, observed as political trust and solidarity.⁸¹ She rejects the notion that the TRC could have brought about personal healing (a consequence sought by some who take a transformative view of justice) as an unrealistic expectation for a

⁷⁶ Mahony and Sooka, *supra* n 48.

⁷⁷ Tim Kelsall, ‘Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone,’ *Human Rights Quarterly* 27(2) (2005): 361–391.

⁷⁸ See, *supra* n 32.

⁷⁹ Clark, *supra* n 62.

⁸⁰ Jordash and Crowe, *supra* n 53.

⁸¹ Rebekka Friedman, *Competing Memories: Truth and Reconciliation in Sierra Leone and Peru* (Cambridge: Cambridge University Press, 2016).

truth commission. Kelsall outlines the ways in which the TRC provided sometimes unanticipated reconciliatory moments, through ritual rather than truth seeking.⁸²

Finally, in this category, are reparations as a consequence of justice.⁸³ Reparations were probably the aspect of the TJ programme that was most important to most Sierra Leoneans yet there is surprisingly little evaluation of the TJ programme which examines its failure to adequately provide reparations.⁸⁴ Evaluations which do consider reparations find the scheme to be wanting, as many people testified at the TRC or the SCSL because they expected it to materially improve their lives in some way (often because they had been led to expect this by community leaders, NGOs or the government).⁸⁵ In fact, ex-combatants were aided before victims, and most victims only received US\$100.⁸⁶ In terms of evaluating the interaction between TJ mechanisms, Clark notes that the SCSL had a negative impact on the reparations process in a number of ways. Most importantly,

it is not unreasonable to assume that the cost of the court depleted the international resources available for reparations thus directly detracting from the reparations provided to the Sierra Leonean victims.⁸⁷

The SCSL cost around \$250 million and was mostly funded through voluntary contributions, but when the reparations fund managers sought voluntary contributions to the reparations programme, they could only raise US\$4.4 million.

[B] Transformative Justice for Its Intrinsic Value

⁸² Kelsall, *supra* n 77.

⁸³ Reparations can be viewed as a mechanism of TJ rather than just a consequence of it. However, as the reparations programme in Sierra Leone was so closely tied to the recommendations of the TRC, it is treated as a consequence here.

⁸⁴ Edward Conteh and Maria Berghs, “‘Mi at Don Poil’: A Report on Reparations in Sierra Leone for Amputee and War-Wounded People,” Amputee and War-Wounded Association, 2014, <http://disability-studies.leeds.ac.uk/files/library/AWWA%20Report%20on%20Reparations.pdf> (accessed 22 July 2017); poverty statistic taken from ‘Losing Out: Sierra Leone’s Massive Revenue Losses from Tax Incentives,’ April 2014, <http://www.christianaid.org.uk/images/Sierra-Leone-Report-tax-incentives-080414.pdf> (accessed 22 July 2017).

⁸⁵ Kelsall, *supra* n 77; Rosalind Shaw, ‘Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone,’ *International Journal of Transitional Justice* 1(2) (2007): 183–207.

⁸⁶ Maria Berghs, *War and Embodied Memory: Becoming Disabled in Sierra Leone* (Aldershot: Ashgate, 2012); Conteh and Berghs, *supra* n 84.

⁸⁷ Clark, *supra* n 62 at 765.

Context-sensitivity was argued above to be an intrinsically valuable feature of transformative justice. Research criticizing TJ mechanisms for failing to reflect local political, legal and cultural contexts conceives of justice as intrinsically valuable to the extent to which it is attentive to context.⁸⁸ Such literature generally criticizes the top-down nature of global TJ practice, its legalist character and its prioritization of liberal state building and rule-of-law work over the promotion of social and economic rights and individual and societal healing.⁸⁹ Justice, in this view, should be locally owned and TJ programmes should engage meaningfully with local institutions and traditions in order to constitute justice in specific contexts.⁹⁰ Kelsall claims that transitional justice in Sierra Leone failed to connect with stakeholders or engage Sierra Leonean culture because the global TJ community attempted to draft in a one-size-fits-all TJ template.⁹¹ Megan MacKenzie and Mohamed Sesay document the power asymmetries which resulted in Sierra Leone having little choice in, or power over, its own TJ process.⁹² This type of research often tends towards both intrinsic and instrumental justification, making it hard to fit even approximately into the value positions outlined here. Shaw, for example, maintains that speaking of the war in public in Sierra Leone undermines established processes for healing and reconciliation at the village and familial levels.⁹³ However, as is the case with research on women's participation, there is a sense in this category that even if good consequences of context-sensitivity cannot be demonstrated, justice processes which reflect local political, legal and cultural contexts are intrinsically valuable.

⁸⁸ Such research is often not explicitly advancing a 'transformative justice' agenda. Some examples conceive of justice more in restorative terms, though all tend to be concerned with socioeconomic dimensions of justice to some extent, which pushes them towards the transformative conception.

⁸⁹ See, e.g., Mohamed Sesay, 'Harmonizing Customary Justice with the International Rule of Law? Lessons from Post-Conflict Sierra Leone,' in Ainley, Friedman and Mahony, supra n 22; Shaw, supra n 73; Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010).

⁹⁰ Shaw, supra n 73; Lambourne, supra n 29.

⁹¹ Kelsall, supra n 77; Tim Kelsall *Culture under Cross Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2006).

⁹² Megan MacKenzie and Mohamed Sesay, 'No Amnesty from/for the International: The Production and Promotion of TRCs as an International Norm in Sierra Leone,' *International Studies Perspectives* 13(2) (2012): 146–163.

⁹³ Rosalind Shaw, *Memories of the Slave Trade: Ritual and the Historical Imagination in Sierra Leone* (Chicago, IL: University of Chicago Press, 2002).

[B] Transformative Justice for Its Instrumental Value

The key consequences those who favour this position would expect to see are long-term changes in political, social and economic structures. In terms of political structures, William Schabas judges the TJ programme in Sierra Leone to have struggled because, unlike TJ in South Africa, it was not

part of a much broader social transformation, driven by an extremely dynamic civil society...this sad conclusion inevitably limits the potential of the Sierra Leonean TRC to influence the future of this troubled country.⁹⁴

The verdict on social structures is often similar. Here, scholars concerned with the gendered dimensions of the TJ programme note that the limited victories for women's rights which were won during TJ have not been translated into the posttransition.⁹⁵

The impact of TJ on economic structures is one of the most underresearched aspects of the Sierra Leonean TJ programme, and indeed of TJ programmes more broadly. Transformative justice advocates note that scholars rarely assess TJ alongside development indicators or attempts to correlate TJ to changes in the protection of socioeconomic rights. By focusing on political and civil rights, 'TJ renders the continuity of socioeconomic dimensions of conflict irrelevant for the democratic legitimation of the new regime.'⁹⁶ Hugo van der Merwe reaches a similar conclusion:

This focus [on providing justice only for acts deemed to be politically motivated] effectively sidelines the more common economic or social abuses that generally occur in oppressive regimes – abuses that may well be the underlying reason for conflict

⁹⁴ Schabas, *supra* n 65 at 40.

⁹⁵ Valerie Oosterveld, 'Sexual and Gender-Based Violence in Post-Conflict Sierra Leone: The Contribution of Transitional Justice Mechanisms to Domestic Law Reform,' in Ainley, Friedman and Mahony, *supra* n 22; Valerie Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties,' *Journal of International Humanitarian Legal Studies* 2(1) (2011): 127–158.

⁹⁶ Hannah Franzki and Maria Carolina Olarte 'Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective,' in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (London: Routledge, 2014), 203. See also, Thomas Bundschuh, 'Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity,' *International Journal of Transitional Justice* 9(1) (2015): 10–32.

over political power in the first place.⁹⁷

Millar, in one of the few evaluations to interrogate Sierra Leonean conceptions of justice, argues that:

The presentation of truth through public hearings had no discernible impact on the ability of such people to live a better life, whether now or in the future, and, therefore, was not experienced as providing a 'sense' of justice.⁹⁸

Elisabeth Hoffman concurs, noting that neither the TRC nor the SCSL, despite the money spent on them, 'has succeeded in fundamentally changing the daily lives of Sierra Leoneans.'⁹⁹ That said, it may be that evaluations of structural change in Sierra Leone are premature – Lant Pritchett and Frauke de Weijer argue that such change takes between 15 and 30 years in fragile states.¹⁰⁰

[A]EVALUATING THE VALUE FRAMEWORK

At first sight, the value framework outlined above does not seem to have a great deal of utility. Evaluations of Sierra Leonean TJ can be found in each category, and there is no agreement about the success or otherwise of the Sierra Leonean TJ programme (or even individual TJ mechanisms) from within value positions, let alone across them.¹⁰¹ No one perspective is logically or obviously superior to others, meaning that the exercise of dividing up the scholarship according to value positions does not help us to reach any general conclusions in evaluating the case.¹⁰²

⁹⁷ Hugo van der Merwe, 'Delivering Justice during Transition,' in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (Washington, DC: US Institute of Peace Press, 2009), 117.

⁹⁸ Gearoid Millar, 'Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice,' *Human Rights Review* 12(4) (2011): 529.

⁹⁹ Elisabeth Hoffman, 'Reconciliation in Sierra Leone: Local Processes Yield Global Lessons,' *Fletcher Forum of World Affairs* 32(2) (2008): 131.

¹⁰⁰ Lant Pritchett and Frauke de Weijer, 'Fragile States: Stuck in a Capability Trap?' World Development Report 2011 Background Paper (Washington, DC: World Bank, 2011).

¹⁰¹ Instrumental conceptions of the value of justice appear to outweigh intrinsic conceptions in the Sierra Leonean case. However, given that the literature sample is not formally representative, this observation is anecdotal at this stage.

¹⁰² Clark's conclusion is a good illustration of this, finding that the SCSL had positive, negative and neutral impacts on different aspects of justice: '[the Court] enhanced the degree of truth and accountability...detracted from the goal of reparations and added little to the goal of reconciliation.' Clark, *supra* n 62 at page 768.

That said, the exercise does advance scholarship in a number of ways. The lack of agreement within any of the value positions is surprising, and helps to explain why TJ evaluation can be so frustrating a field for both scholars and practitioners. Even dividing research according to which of six different perspectives it most closely reflects does not resolve disagreements about whether TJ was a success in a case, which should be relatively straightforward to evaluate. Additionally, the exercise demonstrates that, despite a relatively significant amount of discussion within the conceptual literature on TJ on the different meanings of justice, the retributive/restorative/transformational distinction is rarely mentioned in evaluative work on TJ. Explicit consideration of intrinsic versus instrumental justification is also rare. Following Dancy's argument that comparison to an ideal is inherent to evaluation, the preceding analysis of the literature on Sierra Leone suggests that evaluators are not attentive to, or perhaps even aware of, the ideals that lie behind their judgements.¹⁰³ The study also confirms Vinjamuri and Snyder's observation that the justifications for TJ do not map neatly onto different professional or disciplinary identities.¹⁰⁴ Lawyers do not all justify TJ on the basis of legal principle, nor political scientists on the basis of consequences.

The variety of, and lack of attention to, value positions helps to explain why evaluations differ as widely as they do. Additionally, there is little systematic consideration in the scholarship of whether the ideals to which the Sierra Leonean case is held are realistic, and under what circumstances. Kenneth Rodman and David Harris are unusual in thinking through the conditions of possibility for the TJ programme in Sierra Leone which it should be evaluated against, that is, an externally backed transitional government strong enough to override a prior amnesty, the political weakness of the RUF and the disappearance of the Armed Forces Revolutionary Council.¹⁰⁵ There is little point in judging TJ mechanisms according to standards

¹⁰³ This point is specific to ideals about the nature and value of justice, rather than a more general argument that TJ scholars lack attention to or awareness of the way that values influence research.

¹⁰⁴ Leslie Vinjamuri and Jack Snyder, 'Law and Politics in Transitional Justice,' *Annual Review of Political Science* 18 (2015): 303–327.

¹⁰⁵ Kenneth A. Rodman, 'Justice Is Interventionist: The Political Sources of the Judicial Reach of the Special Court for Sierra Leone,' *International Criminal Law Review* 13(1) (2013): 63–91; David Harris, *Sierra Leone: A Political History* (London: Hurst, 2013).

they could never have attained, yet there is limited discussion in the literature of how to understand the constraints on various ideals of justice in any given case.

Reflection on the value framework also brings into view both the necessity of principled justifications for TJ, and the potential uses of such justifications as political tools. Despite the trend that Vinjamuri documents towards the instrumental justification of postconflict justice, Thoms and colleagues find that the evidence for TJ producing either positive or negative consequences is extremely weak.¹⁰⁶ This means that evaluators have to rely, explicitly or otherwise, on principled justifications.¹⁰⁷ Yet these principled justifications are precisely what the large-n literature was a response to: scholars wanted to move beyond a faith in the intrinsic value of justice to measure the consequences of TJ programmes. Proponents of such views are right to be wary of principled justifications, as they can be used to elide uncomfortable truths about justice, or to justify a paternalist and patriarchal approach. For those who take a retributive view of justice, the context of any given transitioning state generally matters very little. War crimes law applies to all equally, and those who commit the gravest crimes should be tried and punished, regardless of context. The law itself is presented as neutral and universal. Yet war crimes law has its own context – its own history, blindspots and relationships with, for instance, colonialism, liberalism and the global economy – but by presenting law as universal and equally applicable everywhere and to all, retributivists can avoid engagement with politics. They can also avoid considering their own positions of privilege in the debate. These arguments often come from those who are not materially affected by the nature or outcome of the TJ programme in question. Conversely, scholars who see justice as principally transformative are critical of universalist positions, noting that law is applied to, and impacts on, different contexts in different ways. But context-sensitivity can also be used politically, for instance, moves in various African states to reinstate sitting head-of-state immunity in transitional legal processes. The argument above suggests that large-n work

¹⁰⁶ Vinjamuri, *supra* n 40; Thoms, Ron and Paris, *supra* n 75.

¹⁰⁷ Examples of this are given in Kirsten Ainley, 'Justifying Justice: Verdicts at the ECCC,' 16 September 2014, <https://justiceinconflict.org/2014/09/16/justifying-justice-verdicts-at-the-eccc/> (accessed 22 July 2017).

cannot free the field from such tensions: justice is too contested a concept to be amenable to value-free impact assessment.¹⁰⁸ And, of course, TJ is only one part of postconflict programmes. TJ mechanisms also interact with peacebuilding and development policies, disarmament, demobilization and reintegration programmes, security sector reform and so on. This makes TJ more difficult to evaluate (as evaluations should take into account the wider contexts of TJ), and consequences harder to disentangle.

Even if agreement is unlikely to be reached on the meaning and value of justice, or on whether or not TJ in Sierra Leone or elsewhere was a success, *tout court*, scholars should be aware of, and reflect critically upon, the value orientations inherent in their evaluations. An awareness on the part of scholars of their background assumptions about what justice is, why it should be valued and what measure of it is possible in any given case should help to produce robust and comparable (although not commensurable) research on the merit and quality of transitional justice programmes.

¹⁰⁸ Dancy, *supra* n 1, comes to a similar conclusion.