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## **Imagining justice for Syria : water always finds its way**

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## Transitional Justice Without Transition: The International Community's Efforts in Syria

*Lest we forget—Lest we forget!*<sup>1</sup>

The concept of transitional justice refers to the range of measures—judicial and non-judicial, formal and informal, retributive and reconciliatory—that may be employed by societies in response to a legacy of authoritarianism or mass violence following a period of political transition.<sup>2</sup> Most of the work around building a transitional justice response has historically occurred during the final phases of a conflict or in the post-conflict period, when the guns have fallen silent (although they may not always be fully holstered). The situation in Syria, by contrast, presents an interesting experiment at attempts by the international community to lay the groundwork for a credible transitional justice process pre-transition, while the conflict continued to rage. Indeed, many of these efforts carried with them the potential to facilitate or hasten the desired transition. Ever hopeful, the drafters of the Geneva Communiqué of June 30, 2012, one of the blueprints for a political settlement in Syria, affirmed that transitional justice should be an integral part of any transition.<sup>3</sup> These objectives were similarly central to the United States' policy vis-à-vis the conflict in Syria. Working primarily through the State Department and the U.S. Agency for International Development (USAID),<sup>4</sup> the United States deployed strategic messaging and multilateral engagement coupled with dedicated assistance programs to support a range of accountability and transitional justice projects focused on Syria.<sup>5</sup> Other donor states followed suit.<sup>6</sup>

These internationally-led projects reflected a number of overarching foreign policy priorities including the desire to send a clear message that perpetrators of international crimes, regardless of affiliation, would be held to account; provoke defections and deter further abuses; and begin to socialize the value of pursuing a holistic and inclusive transitional justice program, particularly when it comes to marginalized segments of society, victim groups that may have been singled out for special abuse, and other key Syrian stakeholders. These lines of effort were initiated with the goal of enabling a peaceful democratic transition, establishing future stability, and encouraging social cohesion among the myriad Syrian communities torn asunder by the conflict. Many of these initiatives did not depend upon Syrian consent or a multilateral consensus and so could be pursued notwithstanding President Bashar al-Assad's unapologetic intransigence and the

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<sup>1</sup> Rudyard Kipling, *Recessional* (1897), available at <https://www.poetryfoundation.org/poems/46780/recessional>. A version of this chapter appears in *THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY* (Hilly Moodrick-Even Khen et al., eds. 2019 (forthcoming)).

<sup>2</sup> See generally Paul Van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in *Security Governance in Post-Conflict Peacebuilding* 209 (Alan Bryden & Heiner Hänggi eds., 2005).

<sup>3</sup> Final communiqué of the Action Group for Syria, U.N. Doc. A/66/865-S/2012/522, annex (June 30, 2012) (“There also needs to be a comprehensive package for transitional justice, including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness.”).

<sup>4</sup> See Beth Van Schaack, *US Policy on Transitional Justice*, JUST SECURITY (June 29, 2016) (identifying State/USAID policy papers on the United States' approach to transitional justice); Department of State, *Transitional Justice Overview* (May 16, 2016), <https://www.state.gov/j/gcj/transitional/257566.htm>.

<sup>5</sup> Marie Soueid, *The Time to Address Transitional Justice in Syria is Now*, Center for Victims of Torture (May 3, 2017).

<sup>6</sup> See, e.g., United Kingdom, Foreign & Commonwealth Office, *Syria—Country of Concern*.

Russian Federation's propensity to veto any even mildly coercive measures proposed within the Security Council.

This effort at pre-transition transitional justice has been fraught with challenges, uncertainty, and some controversy.<sup>7</sup> For one, many transitional justice practitioners argue that any transitional justice program must develop organically from within the affected society itself, with international involvement largely limited to the provision of technical assistance and funding rather than the imposition of a fully-formed agenda. It has been difficult, however, to ensure that any course of action is Syrian-led when it is unclear which Syrians will be in a position to lead such a process. In addition, secure access to the country has been largely foreclosed, so most work had to be done on the periphery—in refugee camps and neighboring countries, within the diaspora, and with Syrians courageous enough to brave a border crossing. Furthermore, many of these projects were conceptualized and initiated in an era when Assad appeared to be operating from a position of growing weakness, suggesting that the war might be coming to a close. These wartime endeavors became infinitely more complicated with the subsequent metastasis of the conflict following the emergence of the Islamic State in Iraq and the Levant (ISIL) on the battlefield and the involvement of Western superpowers who are at once allies (against ISIL) and adversaries (vis-à-vis the regime). The field of transitional justice developed with rebel groups and civil wars in mind; rarely have practitioners applied their tools to more unconventional armed organizations, such as terrorist organizations or organized criminal groups. More thinking needs to be done on how traditional transitional justice mechanisms might be adapted, if at all, to such actors.<sup>8</sup> Prospects for a fulsome transitional justice process appear even dimmer now, as it becomes increasingly apparent that Assad will remain in power in some capacity, at least in the immediate future.

Notwithstanding the pre-transition work that has been achieved to date, much will remain to be done once the war is at a close, bearing in mind that wars do not necessarily end abruptly, sporadic hostilities may continue even after “peace” is formally declared, and divided societies often see “conflict” as an exacerbated episode in a long history of violence.<sup>9</sup> What can be achieved from the perspective of transitional justice will depend on the composition of the next Syrian regime and the role of Assad, who has become a symbol of sectarian repression and is unlikely to countenance robust justice or truth-telling processes. Whether Assad will be open to making a genuine commitment to reconciliation and the rehabilitation of victims remains to be seen. In a twist on the idea of “victor’s justice,” a transitional justice program can also solidify a dictatorial regime and promote selective narratives, as has been seen in Rwanda, Bangladesh, and elsewhere. With Assad still in the picture, the most enduring legacy of the international community’s pre-transition transitional justice enterprise will likely prove to be twofold. First, the international community has invested heavily in groups engaged in the documentation of abuses with an eye towards preserving a cache of evidence that can be tapped into once accountability mechanisms and other transitional justice processes go forward. Second is the creation of a cadre of Syrian practitioners with enhanced skills in managing the challenges and promises of transitional justice.

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<sup>7</sup> See Paul Seils, *Towards a Transitional Justice Strategy for Syria*, ICTJ Briefing (Sept. 2013) (“Unless the minimum levels of political commitment and openness are demonstrated, along with sufficient degrees of security..., detailed policy planning and implementation is perhaps best deferred.”).

<sup>8</sup> Cale Salih et al., *The Limits of Punishment Transitional Justice and Violent Extremism*, Institute for Integrated Transitions (May 2018).

<sup>9</sup> See Graham Brown, Arnim Langer & Frances Stewart, *A Typology of Post-Conflict Environments*, Centre for Research on Peace and Development (Sept. 2011) (identifying “peace milestones” to mark the cessation of conflict).

It will be for these actors to decide what is feasible and what is desirable and whether and how to involve the international community to achieve the desired balance between the two.

This chapter engages these issues in three parts. It first provides a brief history of the field of transitional justice with an emphasis on the increasing “internationalization” of the field. It then surveys the emerging empirical literature evaluating the impact of various transitional justice interventions and their ability to prevent a recurrence of political violence and rebuild fractured societies. It closes with a discussion of the various lines of effort pursued by the international community and civil society groups in Syria in order to lay the groundwork for a genuine transitional justice process once the conflict is over. This chapter focuses on more restorative transitional justice mechanisms; previous chapters have discussed the various models that were contemplated to promote criminal accountability. With Assad still in power at the end of the conflict, there may be limited opportunities for international engagement in this regard. Syrians across the political spectrum will have to determine for themselves whether the field of transitional justice has anything to offer as they work to rebuild their society and the body politic.

### **The Field of Transitional Justice**

The goals animating the field of transitional justice are as varied as they are ambitious: they encompass promoting accountability for gross and systematic violations of human rights, preventing a recurrence of such violations, rebuilding social cohesion, rehabilitating victims, and restoring trust in formerly abusive institutions. Transitional justice practitioners draw from a stylized toolkit of mechanisms that respond, in various measure, to these objectives and that are susceptible to localization and syncretic adaptation.<sup>10</sup> These include trials (both civil and criminal); truth commissions, which focus on understanding the causes and consequences of violence and offering victims an opportunity to bear witness;<sup>11</sup> the vetting of perpetrators from positions of trust and power (a.k.a. lustration); reparations devoted to the rehabilitation of victims; the memorialization of suffering and survival; and systemic legal and institutional reform. These different interventions can be layered and sequenced in different ways such that they complement, or complicate, each other.<sup>12</sup>

In addition to addressing the immediate violence, modern efforts at transitional justice often aim to respond to the root causes of conflict, which in some cases may extend as far back as the colonial or post-colonial period. This includes surfacing communal grievances asserted by marginalized segments of society with respect to the perceived or actual unequal allocation of resources and public goods.<sup>13</sup> For example, although inspired by the 2007-8 post-election violence, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) had a mandate to examine the allocation of property and political violence dating back to the post-colonial period.<sup>14</sup> Many

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<sup>10</sup> See Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUMAN RIGHTS Q. 321-67 (2009).

<sup>11</sup> See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011).

<sup>12</sup> Conor Hartnett, *The Relationship between Truth-Seeking and Prosecution*, International Centre for Ethnic Studies 8 (2016) (presenting three models of interaction between truth commissions and criminal trials).

<sup>13</sup> See M. CHERIF BASSIOUNI, THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE (2007) (Principle 9: “States shall engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights, and support good governance.”).

<sup>14</sup> See Sec. 5, The Truth, Justice and Reconciliation Commission Act, No. 6 (2008), Kenya Gazette Notice No. 8737 (Kenya). See generally RONALD C. SLYE, THE KENYAN TJRC: AN OUTSIDER’S VIEW FROM THE INSIDE (2018) (discussing elements of the TJRC).

transitional justice programs will also encompass a transformative agenda of institutional reform dedicated to aligning security and justice institutions with democratic and human rights principles. Such far-reaching institutional reforms may go beyond conventional transitional justice approaches and merge with peacebuilding, development, or poverty-reduction agendas aimed at instantiating the rule of law and redressing persistent economic exclusion and inequality.<sup>15</sup> Together with other expressions of remorse by the state, these reforms can serve as guarantees of non-recurrence, which are considered crucial to realizing the transformative potential of transitional justice.<sup>16</sup> Collectively, these measures are designed to address the myriad impacts of authoritarianism and conflict in a way that facilitates a transition to a sustainable peace.

Notwithstanding this common menu of options, every post-conflict society has its own unique manifestations of violence, history of grievances, cultural traditions, and political realities. As a result of this contextual heterogeneity, bespoke solutions are inevitable and “isomorphic mimicry” is not recommended.<sup>17</sup> We now recognize that different approaches might be warranted depending on whether the society is emerging from an armed conflict (whether international or domestic), a history of authoritarianism or repressive rule, cruelty at the hands of non-state actors, or cycles of grassroots sectarian violence. Similarly, the level of institutional and economic development will have implications for the transitional state’s ability to assign legal responsibility, deliver reparations, and implement meaningful reform.<sup>18</sup> Indeed, transitional justice works differently in weakly institutionalized post-conflict settings than in post-authoritarian contexts where the problem is often an executive whose power is too centralized and pervasive.<sup>19</sup> In these former settings, experts recommend integrating transitional justice measures within broader institution-building efforts. It may also be valuable to explore the use of local and customary dispute resolution measures that encompass restorative processes and offer opportunities for pragmatic bargaining;<sup>20</sup> address the fate of the disappeared and their loved ones left behind to facilitate closure and enable the resolution of inheritance and personal status disputes; and untangle alliances between the military and the political realm.<sup>21</sup>

Furthermore, transitional justice practitioners have learned that they are playing a long game; transitions take many years to unfold, and transitional justice responses will need to follow suit. Indeed, in many societies, transitional justice has become inter-generational, with the children and grandchildren of victims and survivors pushing for transitional justice responses in the face of

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<sup>15</sup> See Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT’L J. TRANSITIONAL JUST. 28 (2009); TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS (Pablo de Greiff & Roger Duthie eds., 2009).

<sup>16</sup> Clara Sandoval, *Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition*, in JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES 166, 170 (Roger Duthie & Paul Seils eds., 2017).

<sup>17</sup> Human Rights Council, Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Thirty-Sixth Session, transmitted by Secretariat, U.N. Doc. A/HRC/36/50, ¶ 33 (Aug. 21, 2017) (considering the implementation of transitional justice in weakly-institutionalized post-conflict settings).

<sup>18</sup> International Center for Transitional Justice, *Justice in Context: Paradigms of State and Conflict* (2019).

<sup>19</sup> A/HRC/36/50, *supra* note 17, ¶ 29.

<sup>20</sup> See Susanne Schmeidl, *The Quest for Transitional Justice in Afghanistan: Exploring the Untapped Potential of Customary Justice*, 27 J. FÜR ENTWICKLUNGSPOLITIK 43 (2011).

<sup>21</sup> A/HRC/36/50, *supra* note 17, ¶ 60.

impunity, enforced amnesia, and gaps in the evidentiary record and their own personal histories.<sup>22</sup> In Spain, for example, there was no formal acknowledgment of the crimes of the Franco era; rather a thick line was drawn and the society moved forward.<sup>23</sup> Only now are segments of the country revisiting this choice—attesting to the fragility of an imposed silence.<sup>24</sup>

### *A Short History of Transitional Justice*

Although tracing its roots to the post-World War I and II periods, transitional justice emerged as a distinct field of study and policymaking in the 1980s when formerly authoritarian states began to transition to democracy and improvised ways to address their lived history of human rights abuse, political repression, ethnic persecution, authoritarianism, and mass violence.<sup>25</sup> While the end of the Cold War heralded a wave of transitions around the globe, the epicenter of this movement emerged in Latin America where societies in Central and South America began to openly engage with a legacy of violence by instituting a range of transitional mechanisms, most notably amnesties and truth commissions. In Eastern Europe—where repression was less overtly violent and more bureaucratic in nature—societies experimented with lustrations and other transparency initiatives, such as opening the files of the security services.

In many of these contexts, the prosecution of those deemed responsible for the commission of international or domestic crimes was foreclosed, either legally—due to the existence of an amnesty or other “full-stop” law<sup>26</sup>—or as a practical matter—because responsible individuals retained enough political or military power to jeopardize the transition if legal accountability was pursued too vigorously.<sup>27</sup> The Salvadoran amnesty law, which was eventually declared unconstitutional, is instructive. Article 1 stipulated that “[a]bsolute, full and unconditional amnesty shall be granted to all persons, whether nationals or aliens, who participated in any manner in committing political crimes, related common crimes or common crimes carried out by at least 20 persons, prior to January 1, 1992.”<sup>28</sup> In the face of such blockages, actors developed an array of institutional innovations, including truth and reconciliation commissions and lustration programs, that fell short of criminal accountability but still responded to some of the felt needs of victims for

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<sup>22</sup> Katja Seidel, *Practising Justice in Argentina: Social Condemnation, Legal Punishment, and the Local Articulations of Genocide*, 27 J. FÜR ENTWICKLUNGSPOLITIK 64 (2011).

<sup>23</sup> See Rafael Escudero, *Road to Impunity: The Absence of Transitional Justice Programs in Spain*, 36(1) HUM. RTS. Q. 123 (2014).

<sup>24</sup> See *Asociación para la Recuperación de la Memoria Histórica*, <http://memoriahistorica.org.es/> (exhuming mass graves, developing an archive of victims dating from the Franco era, and filing suits before the U.N. Working Group on Enforced Disappearances).

<sup>25</sup> See generally Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, in *The Legacy of Abuse: Confronting the Past, Facing the Future* (Alice Henkin ed., 2002); Ruti Teitel, *Transitional Justice Genealogy*, 166 HARV. HUM. RTS. J. 69 (2003).

<sup>26</sup> *Ley de Punto Final*, Law No. 23,492 of 12 December 1986 (Arg.). This Full Stop Law set a deadline for the initiation of new prosecutions. When hundreds of cases were initiated, the legislature passed a Due Obedience Law that granted amnesty to members of the military except the top leaders. *Ley de Obediencia Debida*, Law No. 23,521 of June 7, 1987 (Arg.). Both decrees were repealed, although without retroactive effect; they were later declared unconstitutional. AMNESTY INTERNATIONAL, ARGENTINA: THE FULL STOP AND DUE OBEDIENCE LAWS AND INTERNATIONAL LAW (Apr. 2003).

<sup>27</sup> José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, 13 HAMLINE L. REV. 623, 644 (1990) (discussing the political realities that may constrain the full implementation of transitional justice principles).

<sup>28</sup> See, e.g., General Amnesty Law for the Consolidation of Peace, Legislative Decree 486, Mar. 20, 1993 (El Sal.). This decree extended an earlier and more limited amnesty that excluded those involved in serious human rights violations.

redress and reform. At the time, these measures were often seen as a second-best alternative to a more robust retributive response. Today, we recognize not only the inherent limitations of the system of criminal justice when it comes to the rehabilitation of survivors and the repair of societies but also that these alternative responses can have value in and of themselves.<sup>29</sup> So, while the transitional justice field originally produced a menu of archetypal mechanisms that seemed to require states to choose between competing options—either amnesty or accountability; justice or peace; truth or reconciliation—in contemporary transitions, the various interventions can be layered, coordinated, and sequenced in ways that reflect what is politically and fiscally feasible at the time to achieve the optimal balance between peace, justice, and reconciliation.<sup>30</sup> In this way, the attitude of “forgive and forget” and the demand for “no peace without justice” are increasingly being reconciled in modern transitional justice efforts.<sup>31</sup>

### ***The Internationalization of Transitional Justice***

Many transitional justice institutions have emerged from the bottom-up, as survivor and victim groups demanded some acknowledgement of their experience with violence. Others were the result of negotiations involving transitional governmental and nongovernmental actors forging a grand political compromise to end hostilities and embrace peace.<sup>32</sup> In the early days of the field, outsiders played a more limited role in helping to design and implement these measures. No longer. The international community—including the United Nations,<sup>33</sup> treaty and regional bodies,<sup>34</sup> individual donor states,<sup>35</sup> non-governmental organizations, and transnational norm entrepreneurs—increasingly play a role in cajoling, funding, advising, and leading states in transition to implement some form of transitional justice in order to entrench democratic values and a hard-won peace.<sup>36</sup> In this way, the field of transitional justice has become progressively internationalized and technocratic, although tensions between national and international actors have been a characteristic of the field since its inception.

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<sup>29</sup> See generally Eric Brahm, *Uncovering the Truth: Examining Truth Commission Success and Impact*, 8 INT’L STUD. PERSPECTIVES 16 (2007) (discussing potential contributions of truth commissions to transitioning states).

<sup>30</sup> See Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427, 435 (2007) (noting that transitional justice policymaking used to be presented in “dichotomous terms” which belies the degree of evolution that occurs over time); Laurel Fletcher, Harvey M. Weinstein & Jamie Rowen, *Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009).

<sup>31</sup> See Mark Osiel, *Choosing Among Alternative Responses to Mass Atrocity: Between the Individual and the Collectivity*, ETHICS & INTERNATIONAL AFFAIRS (Sept. 2015).

<sup>32</sup> See RUTI G. TEITEL, TRANSITIONAL JUSTICE 213 (2000) (noting that transitional justice involves “a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change.”).

<sup>33</sup> U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (Mar. 2010).

<sup>34</sup> See Par Engstrom, *Brazilian Post-Transitional Justice and the Inter-American Human Rights System*, Latin American Centre Seminar Series St Antony’s College, Oxford (Feb. 14, 2014).

<sup>35</sup> See generally ANNIE R. BIRD, U.S. FOREIGN POLICY ON TRANSITIONAL JUSTICE (2015) (noting how transitional justice became instantiated as a core diplomatic tool of the United States); ZACHARY KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS (2016) (presenting the U.S. role in the development and dissemination of a range of transitional justice mechanisms).

<sup>36</sup> See Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence on his Global Study on Transitional Justice, ¶ 90, U.N. Doc. A/HRC/46/50/Add.1 (Aug. 7, 2017) (calling on the international community to support transitional justice efforts) [hereinafter *Global Study*].



Under the banner of promoting the rule of law, various elements of the United Nations have embraced the transitional justice imperative,<sup>37</sup> leading to some concerns about the need for increased harmonization of the various agencies involved. Among the key multilateral developments is the articulation in 2005 by the U.N. General Assembly of a set of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>38</sup> In 2011, the U.N. Human Rights Council added a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence to its suite of Special Procedures.<sup>39</sup> The inaugural Special Rapporteur, Pablo de Greiff, issued a series of detailed reports devoted to providing conceptual clarity around each of the four components of his mandate.<sup>40</sup> The Security Council regularly calls upon states to implement a comprehensive transitional justice program<sup>41</sup> and to comply with their obligations to end impunity for serious violations of international law in order to prevent future violations and contribute to a sustainable peace.<sup>42</sup> In February 2020, it hosted a dedicated, and extended, debate on transitional justice under its peacebuilding agenda item.<sup>43</sup>

In terms of the United Nations' long-term agenda, actors devoted to implementing Sustainable Development Goal (SDG) #16 on Peace, Justice, and Strong Institutions as part of the 2030 Agenda Commitment to Peaceful, Just, and Inclusive Societies are focused on exploring the kind of justice people seek, the theoretical and empirical case for increasing access to justice, and what strategies and tools will work to achieve unfettered access.<sup>44</sup> Within the SDG framework, the International Center for Transitional Justice (ICTJ) is leading a Working Group on Transitional Justice as part of an International Task Force on Justice is examining approaches to increasing access to justice specifically in post-conflict and post-repression contexts, exploring the way in which the legacies of such violations hinder progress toward peace and development, and addressing the contribution of transitional justice to the rule of law, inclusive institutions, the prevention of violent conflict, and economic equality and exclusion.

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<sup>37</sup> See, e.g., *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, U.N. Doc. S/2004/616 (Aug. 23, 2004); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634 (Oct. 12, 2011) (taking stock of the progress made in implementing the recommendations from the 2004 report).

<sup>38</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). See also Comm'n on Hum. Rts., Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

<sup>39</sup> Hum. Rts. Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, U.N. Doc. A/HRC/RES/18/7 (Oct. 12, 2011).

<sup>40</sup> See, e.g., Hum. Rts. Council, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Twenty-fourth session, U.N. Doc. A/HRC/24/42 (Aug. 28, 2013) (discussing the right to truth and challenges faced by truth commissions); Human Rights Council, Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Thirtieth Session, U.N. Doc. A/HRC/30/42 (Sept. 7, 2015) (discussing a framework for designing state guarantees of non-recurrence) [hereinafter *Report on Non-Recurrence*].

<sup>41</sup> See, e.g., S.C. Res. 2062, ¶ 10, U.N. Doc. S/RES/2062 (July 26, 2012) (encouraging Côte d'Ivoire to adopt "concrete measures to promote justice and reconciliation at all levels and on all sides" and to adopt "a broad-based and comprehensive" program of transitional justice).

<sup>42</sup> Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/1 (Jan. 19, 2012).

<sup>43</sup> U.N. SCOR, 75th sess., 8723rd mtg., U.N. Doc. S/PV.8723 (Feb. 13, 2020).

<sup>44</sup> David Tolbert, *The Role of Transitional Justice in Countries Emerging from Conflict*, IMPAKTER (May 18, 2018).

Beyond the United Nations, the international donor community is increasingly coordinated when it comes to programing and funding transitional justice priorities,<sup>45</sup> although it has not yet adopted the kind of synchronization seen in sector-wide approaches (SWAp) in the public health and international development realms. The World Bank has also expressed support for the proposition that transitional justice can create an enabling environment to promote development and security given the recognition that repeated cycles of violence seriously undermine the development agenda. According to the World Bank, a strengthening of “legitimate institutions and governance” to provide justice is “crucial to break cycles of violence.”<sup>46</sup>

The United States has gradually enhanced its transitional justice portfolio in terms of available policy tools, in-house expertise, and its ability to provide technical and financial assistance.<sup>47</sup> In 2017, for example, the U.S. Congress passed the Syrian War Crimes Accountability Act of 2017 with strong bipartisan and near-unanimous support.<sup>48</sup> The Act, which is embedded within the annual must-pass National Defense Authorization Act (NDAA), mandated the Department of State to conduct a study on the feasibility and desirability of potential transitional justice mechanisms for Syria; to brief Congress on the commission of atrocity crimes in Syria and the United States’ responses thereto; and to support entities pursuing transitional justice for Syria, including criminal investigations by civil society entities and in third party states.<sup>49</sup> This work is to be undertaken by, *inter alia*, the Office of Global Criminal Justice in the State Department.<sup>50</sup> The legislation expresses a distinct preference for criminal accountability among the range of transitional justice measures, including a potential hybrid tribunal.

A number of legal and political advancements have contributed to this “internationalization” of transitional justice. First, legalism plays a progressively important role in the field, with international law providing both a normative framework but also increasingly firm obligations governing exercises of transitional justice. In particular, many societies have undertaken binding legal obligations by virtue of their ratification of a range of human rights and international criminal law treaties that contain express and implicit duties to prosecute breaches, provide due process and judicial protection to victims, reject blanket amnesties, respect and ensure the right to truth, and repair harm.<sup>51</sup> During periods of transition, transitional justice offers a concrete set of policy options to advance these entitlements on behalf of rights holders. An additional consequence of these positive law obligations is that certain transitional justice choices have been rendered justiciable, and may be invalidated through exercises of judicial review before

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<sup>45</sup> See, e.g., U.N. Development Programme, *Complementarity and Transitional Justice: Synthesis of Key Emerging Issues for Development* (Nov. 16, 2012) (discussing the use of basket funds for transitional justice programming in Burundi, Guatemala, and Colombia).

<sup>46</sup> WORLD BANK, *WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY AND DEVELOPMENT*, at 2 (2011).

<sup>47</sup> Dep’t of State, Office of Global Criminal Justice, *Transitional Justice Policy Paper Series*, <https://www.state.gov/key-topics-office-of-global-criminal-justice/#papers>.

<sup>48</sup> Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. pmb. (2017).

<sup>49</sup> See John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub L. No. 115-232, § 1232, 132 Stat. 1636 (2018), codified at 22 U.S.C. § 8791 note. The Trump Administration was apparently late in submitting these reports. Zachary D. Kaufman, *Legislating Atrocity Prevention*, 57 HARV. J. LEGIS. 163, 204 (2020).

<sup>50</sup> See Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. (forthcoming 2020) (discussing Congressional efforts to deploy process controls to dictate agency structure, operations, and decision-making).

<sup>51</sup> See, e.g., Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5-7, Dec. 10, 1984, 1465 U.N.T.S. 85.

domestic<sup>52</sup> or supranational courts.<sup>53</sup> For example, El Salvador's Constitutional Court ruled that the amnesty law that had been put in place at the end of the civil war was unconstitutional and in violation of international law because it infringed victims' rights to judicial protection and reparations.<sup>54</sup> Among the human rights bodies, the Inter-American Court has been at the vanguard in this regard.<sup>55</sup> In connection with systemic violence against women in Ciudad Juarez, the Inter-American Court confirmed that states have a duty to provide justice to victims. When it comes to reparations and guarantees of non-repetition, it held:

Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.<sup>56</sup>

Given these precedents, confronting a legacy of past abuse is no longer something that can be fully negotiated away. To be sure, this turn to legalism is not always cheered, in part because it constrains creativity and compromise.<sup>57</sup> In response to these concerns, advocates are increasingly calling for more interdisciplinary approaches.<sup>58</sup>

Second, and relatedly, the increased acceptance of the exercise of extraterritorial jurisdiction, including the principle of universal jurisdiction, means that transitional justice choices do not remain within the exclusive competence of the territorial state. Efforts to promote accountability abroad, for example under principles of universal jurisdiction, can inspire a transitional state to revisit prior transitional justice decisions, leading to greater accountability over time.<sup>59</sup> Chile offers a prime example. Known colloquially as the "Pinochet Effect," a movement to bring the former dictator to justice in courts in Europe reawakened domestic constituencies and inspired the country to initiate its own criminal trials of dirty war perpetrators.<sup>60</sup> Similarly, in Liberia, criminal, civil, and immigration trials in foreign courts—galvanized in part by transnational victims' groups—have begun to foster a more robust debate internally about the need

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<sup>52</sup> Naomi Roht-Arriaza, *El Salvador's Constitutional Court Invalidates Amnesty Law*, DUE PROCESS OF LAW FOUNDATION (July 22, 2016).

<sup>53</sup> See, e.g., *Sidabras & Džiautas v. Lithuania*, App. Nos. 55480/00 & 59330/00, Eur. Ct. H.R., 42 Eur. H.R. Rep. 104 (July 27, 2004) (invalidating Lithuanian lustration laws).

<sup>54</sup> *Sala de lo Constitucional de la Corte Suprema de Justicia, Inconstitucionalidad*, 44-2013/145-2013, San Salvador, July 13, 2016.

<sup>55</sup> See Jorge Contesse, *Contestations and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROB. 123, 135-37 (2016) (discussing IACHR's amnesty jurisprudence).

<sup>56</sup> *Gonzalez et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Nov. 16, 2009).

<sup>57</sup> INSTITUTE FOR INTEGRATED TRANSITIONS, RETHINKING PEACE AND JUSTICE (2019), <https://www.ifit-transitions.org/resources/publications/major-publications-briefings/rethinking-peace-and-justice>.

<sup>58</sup> Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34(4) J. L. & SOCIETY 411 (2007).

<sup>59</sup> See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

<sup>60</sup> NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005).

to address the brutal violence perpetuated during the country's extended civil wars and re-enlivened prospects for the establishment of a hybrid tribunal.<sup>61</sup>

Third, even in highly repressive states, courageous and sophisticated civil society organizations now form part of a global epistemic community devoted to fostering human rights and accountability in the wake of abuses. These groups—with support and funding from their multinational counterparts—can make credible demands on transitioning states to translate ideals into action. They can also serve as conduits to bring new ideas and external expertise into domestic processes. At the dawn of the field, transitioning states were left to improvise, with little guidance, coordination, or outside support. Today, national actors can benefit from the lessons learned from other societies that have lived through similar experiences. These groups are densely networked and so can share strategies and legal and institutional templates. There is now a growing recognition that the challenges faced by transitioning societies are not necessarily unique or without precedent, and history offers various models that can provide inspiration for local adaptation.

A fourth factor influencing the internationalization of transitional justice processes is that those transitional states that genuinely want to promote peace and stability may find value in welcoming, or at least accepting, international involvement in their transitional justice processes. At base, such contributions bring expertise and resources to transitional justice exercises. Such engagement can also signal legitimacy and provide assurances to vulnerable communities or groups associated with the perpetrators that they will be heard and will not be subjected to a vengeful exercise of victor's justice. The inclusion of international actors in transitional justice institutions can also help to insulate transitional justice actors from domestic political interference and keep a process on track. At the same time, too much international engagement risks undermining local agency, generating backlash, and creating legitimacy deficits. When it comes to Syria, one experienced practitioner has warned: “[t]he biggest mistake for the international community in the short term would be to impose or be seen as imposing a model that does not have the backing of a legitimate, nationally owned process.”<sup>62</sup>

### ***Looking Both Backwards and Forwards***

The concept of transitional justice originally emerged as a retrospective exercise aimed at helping war-torn societies address a history of violence or repression through truth-telling, accountability, and multiple forms of reparation and rehabilitation. At the same time, inherent to the field is the prospective goal of instantiating peace and preventing a return to the policies or practices of the past through processes of (de)legitimation, reform, and empowerment.<sup>63</sup> Among other articulations, the U.N. Human Rights Council has noted that when designing transitional justice strategies, the specific context of each situation must be taken into account with a view to preventing “the recurrence of crises and future violations of human rights.”<sup>64</sup> While some transitional justice mechanisms—such as guarantees of non-recurrence—are expressly devoted to

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<sup>61</sup> See Civitas Maxima, *Quest for Justice Campaign Liberia* (2018); Rodney D. Sieh & Henry Karmo, *Liberia: Despite President Weah's Ambivalence, War Crimes Court Almost a Done Deal*, FRONT PAGE AFRICA (Oct 3, 2019).

<sup>62</sup> Seils, *supra* note 7, at 4.

<sup>63</sup> Valérie Arnould, *Transitional Justice and Democracy in Uganda: Between Impetus and Instrumentalisation*, 9 J. E. AFR. STUD. 354, 354 (2015).

<sup>64</sup> Hum. Rts. Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, pmbi, U.N. Doc. A/HRC/27/L.4 (Sept. 19, 2014).

prevention, all include a preventative component. So, prosecutions and vetting aim to punish and incapacitate perpetrators but also to create a system of specific and general deterrence, counteract the corrosive effect of impunity, remove those responsible for breaches from positions of power and authority, and neutralize potential spoilers.<sup>65</sup> In addition to their punitive effects, it is hypothesized that these more retributive mechanisms build peace by diffusing and socializing norms,<sup>66</sup> dispelling notions of collective guilt by individuating responsibility for atrocities,<sup>67</sup> and satiating impulses toward private vengeance by providing acknowledgement that rights were violated and offering a formal process of accountability.<sup>68</sup>

When it comes to more restorative mechanisms, truth-telling exercises—such as truth and reconciliation commissions—compile the details of past crimes and offer victims a chance to bear witness. They also identify prior pathways to violence that might re-emerge, prevent revisionist histories or a general amnesia from taking root, document the causes and consequences of violence, signal an official determination to avoid the recurrence of violations, and offer concrete and aspirational proposals for reform. Their preventative impact often hinges on the willingness of the state to heed these recommendations, whether binding or not, and whether the truth commission mobilizes civil society actors in the service of peace.<sup>69</sup> Reparations seek to repair survivors while imposing tangible costs on the commission of violence and repression (especially if paid directly by perpetrators). They also respond to the legitimate grievances of victims and their communities that might fester if left unaddressed. Memorialization provides a way to honor victims and survivors. Efforts at institutional reform are expressly forward-looking. Reforms can dismantle mechanisms of repression and violence, place checks on powerful state actors, restore faith in governmental systems, and build a more inclusive and fair system for the future.<sup>70</sup>

The importance of prevention finds expression in the Transitional Justice Special Rapporteur's title, which includes the concept of guarantees of non-recurrence—perhaps the least tangible but most forward-looking element of his mandate. These offers must be more than mere rhetorical devices or empty promises; rather, they should be actionable “objects[s] of policymaking” that will benefit all individuals within the state's jurisdiction, not merely the discrete victims of a previous era.<sup>71</sup> The Special Rapporteur's multidimensional framework suggests three main spheres of intervention. First, official state institutions are encouraged to ratify relevant treaties; undertake justice and security sector reforms; amend security legislation and constitutional provisions; repeal or remove discriminatory regulatory provisions; incorporate a bill of rights; train government personnel and human rights defenders; establish monitoring bodies and independent ombudspersons; strengthen judicial independence to insulate judges from interference

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<sup>65</sup> Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22(2) INT'L SEC. 5, 5 (1997) (noting that a potent threat to post-conflict societies “comes from spoilers—leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it.”).

<sup>66</sup> Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939-63 (2010).

<sup>67</sup> James Meernik, Angela Nichols & Kimi L. King, *The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War*, 11 INT'L STUD. PERSP. 309, 312 (2010).

<sup>68</sup> Hugo Van der Merwe, *Delivering Justice During Transition: Research Challenges*, in ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 115, 122 (Hugo Van Der Merwe et al. eds., 2009).

<sup>69</sup> Omur Bakiner, *Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society*, 8 INT'L J. TRANSITIONAL JUST. 6 (2013) (comparing the direct political impact of commissions through the implementation of recommendations and indirect political impact through civil society mobilization).

<sup>70</sup> Bassiouni, *supra* note 13.

<sup>71</sup> Report on Non-Recurrence, *supra* note 40, ¶ 22.

and corruption; place the military and security forces under civilian control; disarm and disband armed groups; and ensure all citizens enjoy a legal identity and security of person.<sup>72</sup> Next, the preventative capacity of civil society actors (including NGOs, trade unions, and religious organizations) should be enhanced, including through the reversal of “closing space” phenomena,<sup>73</sup> the promotion of the rights to speech and assembly, and the creation of educational and training opportunities.<sup>74</sup> Finally, the populace should be engaged and inspired to exercise empathy towards victims within the educational, artistic, and cultural spheres; archives should be opened so people can know the truth of what happened; and victims should be provided with trauma counseling and psychosocial support.<sup>75</sup>

### **The Value of Transitional Justice**

The international community’s motivation for encouraging transitional justice processes in Syria and elsewhere is partially inspired by a resolute belief in the deontological value of such exercises. At the same time, this international involvement also reflects a growing recognition, premised on emerging empirical research discussed below, that promoting a broad range of accountability and transitional justice measures leads to better outcomes (from the perspective of long-term stability and democracy) than if issues of accountability and reconciliation are left unaddressed. Indeed, it has been demonstrated time and again that the failure to address past conflict, and its underlying grievances, can perpetuate cycles of violence with destabilizing effects at the domestic, regional, and international levels.<sup>76</sup>

### ***The Empirical Challenges of “Proving” the Impact of Transitional Justice Interventions***

The entire human rights field is increasingly being subjected to empirical methodologies in an effort to more accurately measure compliance;<sup>77</sup> assess human rights law’s impact on other desirable outcomes, such as peace, economic growth, the establishment of the rule of law, and the spread of democratic values; and prove—or refute—long-standing claims of efficacy and causation.<sup>78</sup> Scholars caution, however, that “the very strengths of quantification—simplification and abstraction in applying a single measurable definition across different contexts—are its Achilles heel,”<sup>79</sup> because an obsession with empirical proof may miss important nuances, overly simplify complex processes, or fail to reflect cultural values and sensitivities. Although metrics

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<sup>72</sup> *Id.* ¶¶ 1-76.

<sup>73</sup> See THOMAS CAROTHERS & SASKIA BRECHENMACHER, *CLOSING SPACE: DEMOCRACY & HUMAN RIGHTS UNDER FIRE* (2014) (recounting efforts by governments to erect legal, fiscal, and logistical barriers to the ability of human rights organizations to operate transnationally and to work with external actors).

<sup>74</sup> Report on Non-Recurrence, *supra* note 40, ¶¶ 79-91.

<sup>75</sup> *Id.* ¶¶ 92-102.

<sup>76</sup> U.N. Secretary-General, *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, U.N. Doc. A/61/636-S/2006/980 (Dec. 14, 2006).

<sup>77</sup> AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 *BERKELEY J. INT’L L.* 253-315 (2009).

<sup>78</sup> OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. Doc. HRI/MC/2008/3 (2008).

<sup>79</sup> Malcolm Langford & Sakiko Fukuda-Parr, *The Turn to Metrics*, 30 *NORDIC J. HUM. RTS.* 222, 232 (2012).

are seductive, they can only do so much when it comes to complex social phenomena and complicated causal pathways.<sup>80</sup> In short, not everything that counts can be counted.<sup>81</sup>

For many years the transitional justice field produced a robust but frequently contested theoretical literature undergirded by strong normative convictions but untested by rigorous social science research.<sup>82</sup> Debate over the utility of trials and amnesties in periods of transition appeared frequently in the dueling fields of international law and international relations, with much literature in the former discipline bemoaning the overweening impact of politics on law and much literature in the latter insisting that peace should always, and politics will always, be prioritized over justice. So-called “rationalists” contend that prosecutions will exacerbate conflict and sharpen grievances<sup>83</sup> whereas “norms theorists” insist that trials can contribute to deterrence and that justice is an essential component of peace and reconciliation.<sup>84</sup> For every theory of how transitional justice mechanisms contribute to peace and justice, however, there are opposing speculations that they actually raise tensions, derail peace negotiations, and create martyrs, or that other factors are at play when conflicts subside and formerly warring groups revert to peaceful coexistence.<sup>85</sup> During the first wave of scholarship, the debate had ossified and become almost ritualistic.

Transitional justice scholars have recently, however, begun to apply empirical and statistical methods to the transitional justice field to test these orthodoxies. This methodological evolution has been facilitated by the fact that a number of transitions around the globe have been underway for enough time to support longitudinal research on the sequencing and impact of transitional justice interventions.<sup>86</sup> Indeed, in Latin America, some states are still tweaking their policies decades after their formal transition.<sup>87</sup> In this regard, the modern research contradicts earlier claims that trials had to happen in the immediate transition period or they would not happen at all.<sup>88</sup> Furthermore, international and domestic human rights prosecutions have increased dramatically since the mid-1990s, heralding a veritable “revolution in accountability”<sup>89</sup> and

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<sup>80</sup> See generally TODD LANDMAN & EDZIA CARVALHO, *MEASURING HUMAN RIGHTS* (2010) (discussing empirical methodologies).

<sup>81</sup> This quote has been attributed to Albert Einstein, but probably should be credited to sociologist William Bruce Cameron. See WILLIAM BRUCE CAMERON, *INFORMAL SOCIOLOGY: A CASUAL INTRODUCTION TO SOCIOLOGICAL THINKING* 13 (1963).

<sup>82</sup> Oskar N.T. Thoms et al, *State-level Effects of Transitional Justice: What Do We Know?*, 4 INT’L J. TRANSITIONAL JUST. 1, 27-28 (2010).

<sup>83</sup> See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SEC. 5, 5 (2004) (warning that pushing for prosecutions pays “insufficient attention to political realities”).

<sup>84</sup> See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95(1) AM. J. INT’L L. 7 (2001).

<sup>85</sup> See Geoff Dancy & Eric Wiebelhaus-Brahm, *Justice and the Peace: A Time-Sensitive Empirical Evaluation* 4 (Mar. 1, 2011) (presented at the Ann. Meeting of the Int’l Studies Ass’n) (collecting arguments that “the stabilizing effect of transitional justice is a result of wishful thinking, principled logics of appropriateness, or legal romanticism.”) [hereinafter *Dancy & Wiebelhaus-Brahm, Empirical Evaluation*].

<sup>86</sup> Sikkink & Walling, *supra* note 30, at 428 (focusing on Latin American since these countries were “early innovators of human rights trials as well as truth commissions. ... Since more time has passed, we can more fully assess the effect of these transitional justice mechanisms on future human rights practices, democratic consolidation, and conflict than in any other region.”).

<sup>87</sup> See also *id.* at 433.

<sup>88</sup> See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 228 (1991) (“In new democratic regimes, justice comes quickly or it does not come at all.”).

<sup>89</sup> See CHANDRA LEKHA SRIRAM, *GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY* (2005).

providing a larger pool of case studies.<sup>90</sup> Although there are competing conceptions of how to measure the value of any intervention, this new research aspires to evaluate both the performance of various transitional justice mechanisms (in terms of their ability to meet established benchmarks) as well as their impact on the societies in question (in terms of determining the effects and causal power of an intervention).

To be sure, it is relatively easy to measure more immediate and concrete outcomes of transitional justice processes, such as: How many cases were filed or testimonies recorded? Were trials conducted fairly and impartially? Were reparations provided? Did violence or tensions resume? How many victims were able to participate in the process and did they report they were satisfied with the process? However, assessing the long-term impact of a transitional justice program, judging its “success” in instantiating democracy or peace, and measuring whether all its varied goals have been achieved pose acute challenges.<sup>91</sup> Transitional justice processes are multidimensional and cross-sectional. Articulated goals—truth, justice, and reconciliation—are by their nature amorphous and tricky to measure. Proving deterrence in particular is an inherently fraught exercise, even in well-established domestic criminal justice systems, and requires the conceptualization of counterfactuals that cannot be tested.<sup>92</sup> In any case, processes of deterrence may operate differently in atrocity situations.<sup>93</sup> This is particularly so when it comes to those who order offenses, leaders who are susceptible to prosecution under principles of command responsibility, and the rank-and-file.<sup>94</sup>

Furthermore, the architects of transitional justice interventions often aspire to catalyze more ambitious processes of social change and to alter the society’s trajectory of political development. These macro goals involve complex, unpredictable, and nonlinear processes that are embedded within larger social and political systems that are themselves beset with confounding variables. The full impact of various interventions may take years, or even decades, to play out, and firm conclusions on causality remain elusive.<sup>95</sup> Furthermore, there is the perennial problem of endogeneity and simultaneity: the emergence of certain transitional justice mechanisms, such as reparations or even prosecutions, can be a *consequence* rather than a *cause* of the consolidation of peace and democracy. Even if a positive correlation emerges between a transitional justice response, such as criminal trials, and conflict termination or the instantiation of peace, other factors

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<sup>90</sup> See Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions for Human Rights Violations*, 9 ANN. REV. L. & SOC. SCI. 269 (2013); Sikkink & Walling, *supra* note 30, at 430-31 (graphing prosecutions over time from 1979).

<sup>91</sup> Kirsten Ainley et al., *Transitional Justice in Sierra Leone: Theory, History and Evaluation*, in EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 1, 6 (2015).

<sup>92</sup> See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. LAW & CRIMINOLOGY 765 (2010).

<sup>93</sup> Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 1 INT’L J. TRANSITIONAL JUSTICE 434, 439-40 (2013) (discussing whether the proverbial “rational actor” exists in atrocity situations and if atrocities can be understood as part of a rational strategy under certain conditions); Macartan Humphreys & Jeremy Weinstein, *Handling and Mismatching Civilians during Civil War*, 100(3) AM. POL. SCI. REV. 429 (2010) (arguing that internal dynamics rather than other factors dictate a group’s propensity to abuse civilians in armed conflicts).

<sup>94</sup> Cronin-Furman, *supra* note 93, at 447, 453 (arguing that commanders with an adequately high risk of prosecution are most likely to be deterred by the prospects of an international prosecution).

<sup>95</sup> Colleen Duggan, *Editorial Note, Transitional Justice on Trial—Evaluating its Impact*, 4 INT’L J. TRANSITIONAL JUST. 315, 321 (2010).



could be increasing the likelihood of all these phenomena.<sup>96</sup> Because demonstrated correlations remain rather weak, other variables—such as the length, nature, and severity of the conflict or post-conflict regime and polity characteristics—may be more important to peace duration than particular post-conflict transitional justice decisions.<sup>97</sup> Finally, principled evaluations are difficult because transitional justice interventions are almost always the result of fraught political compromises and concessions, and yet they are often measured against unattainable ideals.<sup>98</sup>

There are additional challenges posed by cross-national research in light of the wildly different contexts in which transitional justice mechanisms have been utilized. Given this variation, the field more readily lends itself to ethnographic and thick description approaches or small-N regional analyses.<sup>99</sup> That said, some scholars have begun to undertake large-N studies premised on data drawn from the dozens of countries that have undergone political transitions since the 1970s and 1980s.<sup>100</sup> Aiding this approach is the relatively recent emergence of several comprehensive datasets on conflict dynamics, amnesty laws, and the global deployment of transitional justice mechanisms. These data enable the testing of assumptions and hypotheses around transitional justice on a large number of transitional states. For example, the Transitional Justice Database Project includes over 900 instances when 120 states implemented one or more transitional justice mechanisms (trials, truth commissions, amnesties, reparations, and lustrations) since 1970.<sup>101</sup> Through empirical research on societies that have experienced several decades of change since their transition away from authoritarianism and war, scholars have only just begun to confirm, or refute, some of the claims articulated in the theoretical literature.

A few additional notes of caution before diving into the literature. First, there is an ever-present risk of bias in this work given that “scholarship, advocacy, and practice” often reside under one roof, creating a potential “feedback loop” that masks adverse outcomes and excludes critical perspectives.<sup>102</sup> In this regard, scholars recommend the adoption of “methodological eclecticism” and Bayesian thinking to avoid the overreliance on any single approach.<sup>103</sup> In addition, not all scholars are relying upon precisely the same universe of case studies, definitions of various mechanisms, or dependent variables.<sup>104</sup> This heterogeneity may account for some of the diverging

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<sup>96</sup> Tove Grete Lie et al., *Post-Conflict Justice and Sustainable Peace* (World Bank, Policy Research Working Paper No. 4191, 2007), at 9.

<sup>97</sup> *Id.* at 16-17. See also Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 8-10 (discussing the difficulties of controlling for alternative explanations); *id.* at 28 (concluding that “strong autocracies and strong democracies are at lower risk of conflict resumption.”).

<sup>98</sup> Duggan, *supra* note 95, at 321; Sikkink, *supra* note 59, at 25 (“The very magnetism of the ideals that gave impetus to the [justice] cascade also sets it up for failure, when measured against those ideals. Justice ... is one of those powerful concepts that in practice always falls short of our ideals.”).

<sup>99</sup> David Backer, *Cross-National Comparative Analysis*, in *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 23-72 (Hugo Van Der Merwe et al. eds., 2009).

<sup>100</sup> Elin Skaar et al., *Analytical Framework*, in *TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY* 25, 26 (2016).

<sup>101</sup> See Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in the World, 1970-2007: Insights from a New Dataset*, 47(6) *J. PEACE RES.* 803 (2010). Geoff Dancy and colleagues have created a truth commission database as well. See Geoff Dancy, Hunjoon Kim & Eric Wiebelhaus-Brahm, *The Turn to Truth: Trends in Truth Commission Experimentation*, 9(1) *J. HUM. RTS.* 45 (2010).

<sup>102</sup> Duggan, *supra* note 95, at 317.

<sup>103</sup> Hugo van der Merwe, Victoria Baxter & Audrey R. Chapman, *Introduction*, in *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 1, 9 (Hugo Van Der Merwe et al. eds., 2009).

<sup>104</sup> For example, when it comes to criminal accountability, some studies track post-conflict trials while others focus on judicial proceedings mid-conflict; some count the entire process of prosecution whereas others count only guilty

conclusions in the literature.<sup>105</sup> Furthermore, given the highly contextual nature of post-conflict or post-repression societies, policymakers should be cautious about using aggregate findings when focused on impressionistic conclusions drawn from a single case. Indeed, the literature reveals that individual case studies and cross-national studies often yield contradictory findings. As a result of all these concerns, the empirical transitional justice literature remains somewhat tentative and modest when it comes to causal claims.<sup>106</sup>

### ***What the Research Shows***

Notwithstanding these difficulties of empirical proof, some trends are emerging that should inform policy prescriptions and funding priorities within the international community and transitioning states such as Syria. Most importantly: multiple studies have demonstrated that impunity is a reliable predictor of future violence. Indeed, a history of prior unaddressed atrocity crimes and habituation to impunity appear as structural risk factors in all atrocities prevention checklists and early warning systems.<sup>107</sup> The majority of studies show that societies that host at least some post-conflict human rights trials enjoy more durable periods of peace than countries that choose impunity, even if prosecutions are coupled with other transitional justice interventions, such as a truth commission.<sup>108</sup> For example, Lie et al. rely on the largescale Civil War and Transitional Justice database produced by Binningsbø et al.<sup>109</sup> and the Uppsala-PRIO armed conflict database to measure the impact of transitional justice interventions (including transitional justice abstentions such as amnesties and exile) on conflict and peace duration. They conclude that the nature of conflict termination (with military victories leading to more durable peace than negotiated settlements) is the most important determinate of peace duration,<sup>110</sup> but the various transitional justice mechanisms standing alone and in combination are also significant. Of all the potential interventions studied, trials (even if limited, one-sided, and unfair) are most correlated with peace duration, particularly in democracies.<sup>111</sup> Payne et al. agree that the type of conflict (secessionist versus civil wars) and the type of conflict cessation (a military victory versus a negotiated conclusion) are highly relevant to the instantiation of peace, with the latter two variables

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verdicts; some look at all trial proceedings others focus on “human rights trials,” variously defined. *See* Sikkink, *supra* note 59, at 136-37 (discussing different coding methodologies).

<sup>105</sup> *See* Geoff Dancy & Eric Wiebelhaus-Brahm, *The Impact of Criminal Prosecutions During Intrastate Conflict*, 55(1) J. PEACE RES. 47, 48 (2018) (discussing study design variation) [hereinafter *Dancy & Wiebelhaus-Brahm, Intrastate Conflict*].

<sup>106</sup> *See* Oskar N.T. Thoms, James Ron, and Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, Centre for International Policy Studies Working Paper, at 4, 12 (Apr. 2008) (noting that few studies at the time articulated strong conclusions about the effects of transitional justice across multiple cases).

<sup>107</sup> Lawrence Woocher, *Developing a Strategy, Methods and Tools for Genocide Early Warning*, prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide (Sept. 2006); Barbara Harff, *Assessing Risks of Genocide and Politicide*, in *PEACE AND CONFLICT* (Monty G. Marshall & Ted Robert Gurr eds., 2005).

<sup>108</sup> *See, e.g.,* Sikkink, *supra* note 59, at 148-56 (examining the correlation between trials in Latin American and the instantiation of democracy, peace, human rights, and the rule of law); Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63(1) INT’L STUD. Q. 99 (2019). *But see* Meernik et al., *supra* note 67, at 321 (finding that neither international tribunals nor human rights trials appear to exercise a significant impact on peace or human rights in post-conflict states, but may offer other salutary benefits).

<sup>109</sup> *See* Helga Malmin Binningsbø, et al., *Armed Conflict and Post-Conflict Justice, 1946-2006: A Dataset*, 49 J. PEACE RESEARCH 731 (2012).

<sup>110</sup> Lie et al., *supra* note 96 at 9, 14.

<sup>111</sup> Lie et al., *supra* note 96, at 14, 16.

making it more likely that conflict will reoccur.<sup>112</sup> Other studies find that negotiated settlements that result in power-sharing arrangements are more durable.<sup>113</sup> These negotiated settlements tend to produce more fulsome transitional justice responses (although amnesties are most likely to follow government victories).<sup>114</sup>

Sikkink & Walling similarly surveyed 17 Latin American countries that have hosted trials as part of a transitional justice response and found human rights improvements in 14 of them many years later. They determined that countries with more cumulative prosecutions proved to be less repressive according to the Political Terror Scale (PTS) than countries that did not hold trials and countries that held fewer trials.<sup>115</sup> Countries with both a truth commission and trials fared the best. They hypothesize that these results can be traced both to the material punishment meted out by courts and to normative pressures exerted by trials, which tend to be highly salient in post-conflict periods. In no case did trials exacerbate or extend conflict in any of the countries studied.<sup>116</sup> This result challenges outmoded theoretical literature that trials extend conflicts by discouraging bargaining between embattled parties or impeding peace processes.<sup>117</sup> Skeptics nonetheless counter that trials—particularly before international bodies—tend to monopolize international attention and resources, undermining more restorative transitional justice responses.<sup>118</sup> A more nuanced (and paradoxical) view is that trials, including those at an international court such as the ICC, might both prolong conflicts—by eliminating the option of exile—and also deter atrocities by signaling to leaders that safe exile is not an option.<sup>119</sup>

The results of research by Dancy & Wiebelhaus-Brahm similarly attests to the value of post-conflict trials. They demonstrate that for every trial year in a transitional state, the risk of conflict recurrence decreases by about 10%.<sup>120</sup> This suggests that “populations become increasingly accustomed to trials as they continue rather than becoming increasingly restive.”<sup>121</sup> They have also compiled a large-N cross-national dataset that includes instances of criminal trials (in domestic, foreign, or international courts involving conflict-related charges) of both non-state actors and state agents to test whether criminal prosecutions of armed combatants convened in the midst of violent interstate conflict help to bring about the end of fighting. They conclude that (1) trials of rebels are associated with a higher probability of conflict termination (on the theory that trials compel the opposition to discontinue fighting); (2) trials of state agents are weakly associated with conflict persistence (on the theory that such trials signal a lack of resolve on the part of the

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<sup>112</sup> Leigh Payne et al., *Conflict Prevention and Guarantees of Non-Recurrence* 17 (World Bank, Working Paper, May 1, 2017).

<sup>113</sup> See, e.g., Caroline Hartzell & Matthew Hoddie, *Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management*, 47 AM. J. POL. SCI. 318 (Apr. 2003).

<sup>114</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 22.

<sup>115</sup> Sikkink & Walling, *supra* note 30, at 437.

<sup>116</sup> *Id.* at 440.

<sup>117</sup> See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

<sup>118</sup> Sarah Nouwen & Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT’L CRIM. JUST. 157-76 (2014).

<sup>119</sup> Daniel Krmaric, *The ICC’s Pursuit of International Justice Creates Difficult Tradeoffs Between Ending Ongoing Conflicts and Deterring Future Atrocities*, ICC FORUM, <http://iccforum.com/performance> (last visited June 19, 2018); Daniel Krmaric, *Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice*, 62(2) AM. J. POL. SCI. 486 (2018) (tracing patterns of exile and noting that culpable leaders are less likely to seek exile than in the past).

<sup>120</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28.

<sup>121</sup> *Id.* at 30.

government, which emboldens the rebels); and (3) international trials are weakly associated with conflict termination (on the theory that the international community tends to focus on intractable conflicts and judicial interventions may serve as a “shock” to frozen conflict conditions).<sup>122</sup> In no cases do trials prolong conflict.<sup>123</sup> Subsequent abuses also decrease with the capture, trial, and incarceration of rebel group leaders,<sup>124</sup> which offers “a legitimate form of leadership decapitation.”<sup>125</sup> Dancy & Wiebelhaus-Brahm conclude that “retributive modes of justice are more effective for resolving conflict, whereas truth-telling and legal immunity are more likely to exacerbate tensions” over time.<sup>126</sup>

In the same vein, Payne et al. find that the trials of low- to mid-level perpetrators are statistically-correlated with conflict nonrecurrence.<sup>127</sup> The rate of recurrence actually decreases by approximately 70% when such trials are held.<sup>128</sup> Conversely, trials of high-ranking actors is associated with the recurrence of conflict,<sup>129</sup> perhaps because such trials are seen as an attack on the group such individuals represent, which exacerbates conflict.<sup>130</sup> There is no statistically-significant relationship between the establishment of national human rights institutions (such as ombuds offices) or non-prosecutorial transitional justice mechanisms (truth commissions and amnesties) and the resumption of conflict (although the authors do not examine the impact of reparations, vetting, or corporate complicity for lack of comprehensive data).<sup>131</sup> As such, this study concludes that negotiating parties have some flexibility in initiating a range of non-penal transitional justice processes without jeopardizing the prospects for peace.<sup>132</sup> Similarly, even studies that did not find that trials enhanced human rights practices or the instantiation of peace concluded that trials did not exert negative effects either.<sup>133</sup>

In subsequent research, Dancy et al. conclude that trials provide some deterrent effect: societies that undertake trials manifest fewer violations of physical integrity than societies that do

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<sup>122</sup> Dancy & Wiebelhaus-Brahm, *Intrastate Conflict*, *supra* note 105, at 48, 52-53. Indeed, the existence of “security trials” (trials against rebels by the state) produces the same change in probability of conflict termination as the presence of a U.N. peacekeeping operation (14%). *Id.* at 56.

<sup>123</sup> *Id.* at 56, 59-60.

<sup>124</sup> Michael Broache, *The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group* (Sept. 1, 2014) (showing that violence diminished upon the surrender of the head of M23), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2434703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703); Kirssa Cline Ryckman, *Lasting Peace or Temporary Calm? Rebel Group Decapitation and Civil War Outcomes*, CONFLICT MANAGEMENT AND PEACE SCIENCE (2017); Michael Tiernay, *Killing Kony: Leadership Change and Civil War Termination*, 59(2) J. CONFLICT RESOLUTION 175 (2013); Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18(4) SECURITY STUDIES (Dec. 2009).

<sup>125</sup> Dancy & Wiebelhaus-Brahm, *Intrastate Conflict*, *supra* note 105, at 51.

<sup>126</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28.

<sup>127</sup> Payne, *supra* note 112, at 17. A similar effect is seen with the promulgation of new constitutions, particularly when produced during participatory processes. The inclusion of human rights protections within these constitutions does not impact the rate of conflict recurrence; however, these provisions may accomplish other goals. *Id.* at 17-18.

<sup>128</sup> Payne, *supra* note 112, at 19.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 23. See also Chris Mahoney, *International Criminal Justice Case Selection Independence: An ICJ Barometer*, FICHL Policy Brief Series No. 58, at 1 (2016) (“a criminal process that disproportionately targets one party or its leadership comparative to another group deepens conflict drivers such as ethno-regional, political, or other societal schisms.”).

<sup>131</sup> Payne, *supra* note 112, at 19-20, 22.

<sup>132</sup> *Id.* at 20.

<sup>133</sup> Meernik et al., *supra* note 67, at 327.

not.<sup>134</sup> At the same time, they note that amnesties can enhance improvements in civil and political rights, “which support open democratic competition.”<sup>135</sup> They measure these human rights outcomes using the CIRI Human Rights Database, which offers an assessment of the protection of “physical integrity rights,” which encompasses acts of extrajudicial killing, torture, disappearances, and arbitrary detention, as well as the panoply of civil and political rights. They hypothesize that conflicting policies can co-exist agonistically—generating positive aspects in an environment marked by some political conflict.<sup>136</sup>

Sometimes events in one country have an impact on the transitional justice landscape in another. Escribà-Folch & Wright look at the effect of trials on neighboring dictatorships. They show that “personalist dictatorships” are less likely to democratize when their *neighbors* prosecute human rights abusers.<sup>137</sup> This does not hold true in other dictatorships, however, where they find little evidence to suggest that neighbors’ prosecutions deter democratic transitions. They hypothesize that the ability of elites to protect their interests post-transition is a strong predictor of whether trials in neighboring countries will be perceived as threatening.<sup>138</sup> Most of the studies canvassed above look at criminal trials rather than civil suits, which also offer an opportunity for victim empowerment, particularly when criminal proceedings are foreclosed for some reason, such as a *de jure* amnesty or a *de facto* lack of political will.

In today’s transitions, trials are often accompanied by other transitional justice interventions. Lie et al. did not record increases in peace duration where the “whole package” of transitional justice mechanisms are employed.<sup>139</sup> By contrast, Olsen et al. have coined the concept of a “justice balance” and conclude that truth commissions are more likely to achieve their goals when accompanied by amnesties or criminal trials.<sup>140</sup> Their theory is that truth commissions promote “a balance between stability and accountability,” provide a middle ground between appeasement and justice, and enhance the human rights-promoting qualities of other interventions.<sup>141</sup> Amnesties in particular can help to calm those who might be prosecuted and thus enable other mechanisms to function. In fact, their research challenges conventional wisdom because it suggests that truth commissions deployed in isolation actually have a negative impact on human rights in the aggregate as measured by two major human rights indices: the CIRI Database and the Political Terror Scale.<sup>142</sup>

Perhaps paradoxically, the combination of transitional justice mechanisms that is most associated with improvements in indicators of democracy and human rights compliance was trials

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<sup>134</sup> Dancy et al., *supra* note 101, at 9-10.

<sup>135</sup> *Id.* at 10.

<sup>136</sup> *Id.*

<sup>137</sup> Abel Escribà-Folch & Joseph Wright, *Human Rights Prosecutions and Autocratic Survival*, 69(2) INT’L ORG. 343 (2015).

<sup>138</sup> *Id.* at 347.

<sup>139</sup> Lie et al., *supra* note 96, at 14.

<sup>140</sup> Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 INT’L J. TRANSITIONAL JUST. 457, 469 (2010). *See also* Seils, *supra* note 7, at 5 (“all of these measures, taken together, offer more than the sum of their parts”).

<sup>141</sup> Tricia D. Olson et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32(4) HUM. RTS. Q. 980 (2010).

<sup>142</sup> *Id.* at 462-3; *see also* ERIC WIEBELHAUS-BRAHM, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY (2010) (citing preliminary findings that the establishment of a truth commission has only a marginal effect on subsequent democratic practice and may actually be associated with increases in human rights violations).

plus amnesties or trials, amnesties, and truth commissions in tandem.<sup>143</sup> Societies that implement some combination of these options are more likely to show improvements in human rights than societies that implement none of them.<sup>144</sup> Consistent with Olsen et al.'s conclusions, Dancy & Wiebelhaus-Brahm have also found that truth commissions standing alone are associated with conflict resumption, especially if they operate for extended periods of time.<sup>145</sup> The theory is that truth commissions offer lower levels of human rights protection, may generate resentment among those who yearn for more robust responses, and embolden spoilers.<sup>146</sup> In a separate study, however, Brahm tracked the implementation of truth commission recommendations and determined that while truth commissions can discredit unaccountable institutions, set a reform agenda, and channel international pressure, they do not necessarily have an impact—positive or negative—on processes of democratization.<sup>147</sup> The effect of non-retributive mechanisms (truth commissions and reparations) on peace duration is stronger in democracies than in the general sample; scholars hypothesize that this is due to a greater focus on the victim in such contexts.<sup>148</sup>

Although such statistical correlations may counsel against the establishment of a truth commission, others are quick to note that even if they do not necessarily promote, or are not correlated with, conflict non-recurrence, truth commissions may contribute to the “quality of peace”<sup>149</sup> and enhance other worthy goals, such as fulfilling victims’ right to truth, enhancing survivors’ dignity through staging testimonial processes, producing official historical narratives, and spurring reforms.<sup>150</sup> For example, Rodolfo Mattarollo—who was part of the U.N. Mission in Sierra Leone (UNAMSIL)—has observed that:

In countries where they have had the greatest impact, truth commission reports, and especially their conclusions and recommendations, have acted as a kind of foundation stone, signalling a society’s decision to turn over a new page in its history. In fact, an important characteristic of truth commissions ... has been their clear desire to break with the past.<sup>151</sup>

It should be noted that the studies mentioned above take a binary approach to coding the existence of a truth commission (or other intervention)—either the mechanism was utilized or it was not. They do not, for example, disaggregate truth commissions by particular attributes, institutional strengths, or perceptions of legitimacy.<sup>152</sup> The value of truth commissions may hinge on whether the truth commission’s recommendations are implemented, which is also not recorded in these studies.<sup>153</sup> Botha took a different approach by coding truth commissions according to their strengths and weaknesses with reference to their resources, thoroughness of investigations,

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<sup>143</sup> Olsen et al., *supra* note 140, at 464. *See also* TRICIA D. OLSEN, LEIGH A. PAYNE, AND ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* 159 (2010).

<sup>144</sup> Olsen et al., *supra* note 135, 463.

<sup>145</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28 (finding that for every year a truth commission operates, the survival time for peace decreases by 10%).

<sup>146</sup> *Id.* at 31.

<sup>147</sup> Thoms, *supra* note 100, at 41 (citing Eric Brahm, *Truth and Consequences: The Impact of Truth Commissions in Transitional Societies* (Ph.D. Diss., University of Colorado at Boulder (2006))).

<sup>148</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 18.

<sup>149</sup> *See* Johan Galtung, *Peace, Positive and Negative*, *ENCYCLOPEDIA OF PEACE PSYCH.* (Daniel J. Christie ed. 2011).

<sup>150</sup> Payne, *supra* note 112, at 22; Olsen et al., *supra* note 140, at 475.

<sup>151</sup> Association for the Prevention of Torture, *Truth Commissions: Can they Prevent Further Violations?*, at 31.

<sup>152</sup> Olsen et al., *supra* note 140, at 466-67.

<sup>153</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 33.

perceived credibility, etc.<sup>154</sup> She found that strong truth commissions are associated with sustained decreases in the reporting of government repression and public protests, although she acknowledges that both factors (the strength of the truth commission and the reduction in protests) could be caused by a third variable, such as the quality of the political bargain reached between adversaries.<sup>155</sup>

Putting their legality to the side, amnesty laws feature prominently in many early transitional justice efforts because of their presumed potential to lure parties to the bargaining table; remove the threat of prosecution; encourage defections; and enable power-sharing arrangements to be put in place.<sup>156</sup> These assumptions have been challenged by empirical research that concludes that amnesties appear to reduce peace duration, especially in democracies.<sup>157</sup> One study, for example, shows that for every additional amnesty that a country has enacted, the risk of conflict recurrence actually *increases* by 11%.<sup>158</sup> Reiter has found that amnesties granted in the context of internal armed conflicts have no demonstrable impact on sustaining peace or security, although they do entice combatants to demobilize and can help initiate negotiations and secure agreements.<sup>159</sup> Reiter reveals that the timing of amnesties matters: those put in place post-conflict as part of a carefully negotiated peace agreement are better correlated with a sustained peace than self-amnesties or amnesties extended by a government during a conflict, which are often perceived as unreliable political gestures.<sup>160</sup> Indeed, Assad has implemented several amnesty decrees over the years in an effort to entice back individuals who had refused compulsory military service and induce rebels to hand in their weapons and surrender.<sup>161</sup> These did not necessarily have the desired effect, in part due to the hostility and distrust felt towards him within the opposition.

Research also reveals a distinction between amnesty and exile with the former having a “strong positive effect on peace failure in post-conflict democratic societies, while exile still appears to prolong peace.”<sup>162</sup> Amnesties enacted by non-democratic governments appear to be less credible and may send a signal of weakness.<sup>163</sup> All that said, these studies have generally coded amnesties dichotomously and have not made distinctions between amnesties for political prisoners, rebels laying down arms, perpetrators of grave international crimes, or leaders versus the rank-and-file. Indeed, there is a high degree of heterogeneity around amnesty laws when it comes to their scope, their democratic legitimacy, and their application.<sup>164</sup> Taken together, these modern

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<sup>154</sup> BELINDA MEGAN BOTHA, TRUTH COMMISSIONS AND THEIR CONSEQUENCES FOR THE LEGITIMACY of Nascent Democracies 102 (Ph.D. dissertation, Univ. of Houston, 1998).

<sup>155</sup> *Id.* at 149-153.

<sup>156</sup> Indeed, several studies have concluded that amnesties are the most common transitional justice response. Andrew G. Reiter, *Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict*, 47 *ISR. L. REV.* 133, 134 n.6, 137-38 (2014).

<sup>157</sup> Lie et al., *supra* note 96, at 16.

<sup>158</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 27-8.

<sup>159</sup> Reiter, *supra* note 150, at 146.

<sup>160</sup> *Id.* at 146-47.

<sup>161</sup> See, e.g., Legislative Decree No. 15, 23 (Arabic); *Syria: Amnesty for Rebels Extended*, GLOBAL LEGAL MONITOR (Oct. 31, 2016).

<sup>162</sup> Lie et al., *supra* note 96, at 15.

<sup>163</sup> Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 32.

<sup>164</sup> See Ronald Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, VA. J. INT'L L. 173 (2002).

studies contradict earlier untested hypotheses suggesting that trials would do little to deter violence but that amnesties promote peace.<sup>165</sup>

Many transitional justice interventions tend to privilege victims' civil and political rights to the exclusion of economic and social rights, even though breaches of these entitlements feature prominently in victims' identification of the sources of tension pre-conflict.<sup>166</sup> Reparations—whether individual or collective, material or symbolic—respond to these concerns, and are often demanded by, and promised to, victims during a transitional period. The final report of the truth and reconciliation commission of Sierra Leone perceptively noted that:

Truth-telling without reparations could be perceived by the victims as an incomplete process in which they revealed their pain and suffering without any mechanism in place to deal with the consequences of that pain or to substantially alter the material circumstances of their lives. In that regard, the Commission concurs with the view expressed with the South African Truth and Reconciliation commission that without adequate reparation and rehabilitation measures, there can be no healing or reconciliation.<sup>167</sup>

Studies of survivors in post-conflict Bosnia-Herzegovina and Croatia reported valuing social reconstruction—aiming for a society characterized by a high degree of tolerance, peaceful co-existence, and a collective identity that transcends communal differences—as much as formal justice mechanisms.<sup>168</sup> The architects of truth commissions devoted to Kenya, East Timor, and Tunisia have attempted to incorporate these economic and social concerns into their mandates.<sup>169</sup>

Despite their importance to victims, the actual implementation of reparations programs has generated deep dissatisfaction. For example, the South African Truth and Reconciliation Commission (TRC) has been criticized for over-promising and under-delivering on reparations, resulting to litigation by victims' groups to enforce promises that the state would tackle entrenched inequality post-apartheid.<sup>170</sup> In other scenarios, victims perceive asymmetries with demobilization, disarmament, and reintegration (DDR) programs, which tend to receive international funding and disproportionately benefit ex-combatants.<sup>171</sup> In Sierra Leone, for example, DDR programs allowed ex-combatants to establish monopolies in certain trades to the detriment of their victims.<sup>172</sup> Although the international community has disbursed vast expenditures on DDR programs over the years, it has been reluctant to fund reparations programs directly, particularly when they involve simple wealth transfers. That said, some funding has been provided under a peacebuilding or

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<sup>165</sup> Snyder & Vinjamuri, *supra* note 83, at 6 (arguing that “[a]mnesties, in contrast, have been highly effective in curbing abuses”).

<sup>166</sup> Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009); Sandoval, *supra* note 16, at 167.

<sup>167</sup> WITNESS TO TRUTH: THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE, Volume II, ¶ 41 (Nov. 2004).

<sup>168</sup> Mirkos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in MY ENEMY, MY NEIGHBOR: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 183 (Eric Stover & Harvey Weinstein eds., 2004).

<sup>169</sup> Sandoval, *supra* note 16, at 174.

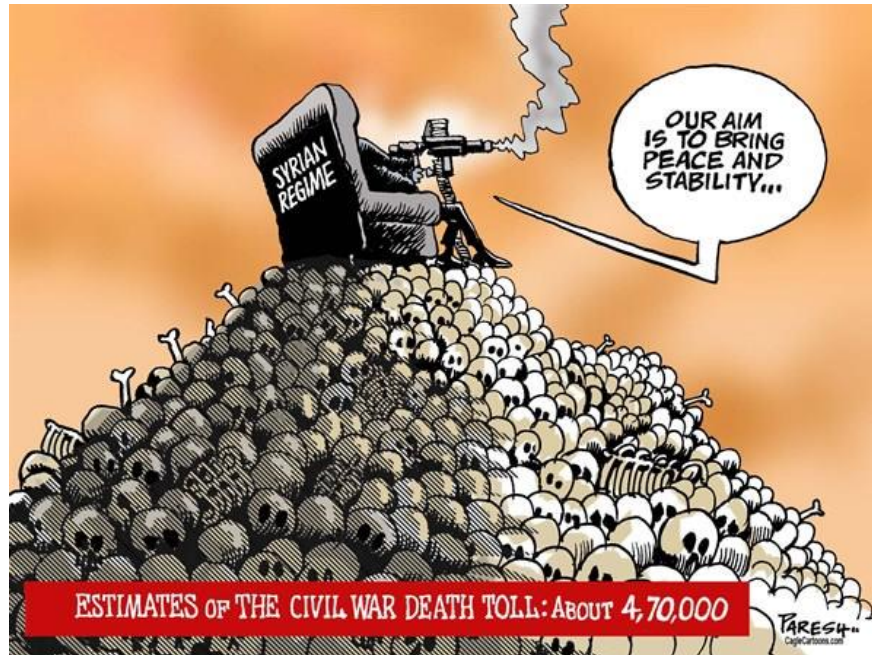
<sup>170</sup> Narnia Bohler-Muller, *Reparations for Apartheid-Era Human Rights Abuses: The Ongoing Struggle of Khulumani Support Group*, 1 SPECULUM JURIS 1 (2013).

<sup>171</sup> See DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS (Anna Cutter Patel et al. eds., 2009).

<sup>172</sup> See Kirsten Ainley, *Evaluating the Success of Transitional Justice in Sierra Leone and Beyond*, in EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 241 (2015).



development framework. In Sierra Leone, for example, the U.N. Peacebuilding Fund funded the Sierra Leone reparations program recommended by the country's TRC.<sup>173</sup> This latter approach, however, has raised concerns because it does not address the specific harms experienced by victims and often involves the provision of social services that governments should be providing to its citizenry as a matter of course.



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The research has only just begun to explore which transitional justice policy interventions—reparations, social acknowledgement, political empowerment, punishment, or apologies—facilitate or inhibit the elusive processes of achieving forgiveness, reconciliation, and peaceful coexistence in post-conflict contexts.<sup>174</sup> Indeed, many victims will report that reconciliation or forgiveness may be undesirable or even impossible,<sup>175</sup> especially when there is no consensus around the events of the past and no admission of responsibility or repentance on the part of perpetrators.<sup>176</sup> Policy interventions aimed at promoting forgiveness are controversial because they may be counter-productive if foisted on victims, who alone possess the ability to forgive those who have harmed them. If unaccompanied by processes of institutional reform aimed at rectifying underlying power relationships or inequalities, programs aimed at fostering forgiveness can result in little more than a compromised political accommodation or *modus vivendi*

<sup>173</sup> INTERNATIONAL ORGANIZATION FOR MIGRATION, SUPPORT TO THE IMPLEMENTATION OF THE SIERRA LEONE REPARATIONS PROGRAMME. IOM provided programmatic and fiduciary oversight to the scheme, which included cash grants, vocational training, emergency medical assistance, and symbolic measures. *Id.* at 1.

<sup>174</sup> Roman David & Susan Y. P. Choi, *Forgiveness and Transitional Justice in the Czech Republic*, 50(3) J. CONFLICT RESOLUTION 339, 341 (2006).

<sup>175</sup> Laurel E. Fletcher & Harvey M. Weinstein, *Transitional Justice and the "Plight" of Victimhood*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE (Cheryl Lawther et al. eds, 2017); Lesley McEvoy, et al., *Reconciliation as a "Dirty Word": Conflict, Community Relations and Education in Northern Ireland*, 60(1) INT'L AFF. 81 (2006).

<sup>176</sup> *But see* Jeremy Watkins, *Unilateral Forgiveness and the Task of Reconciliation*, 21(1) RES PUBLICA 19 (2015) (arguing that forgiveness can contribute to civic reconciliation even in the absence of a shared account of the past).

that further entrenches power hierarchies or marginalizes victims, particularly those who refuse to go along with a program of forced reconciliation.<sup>177</sup> They may also foster recidivism.<sup>178</sup>

Forgiveness can be defined as the abandonment of feelings of vengeance and offers the potential to “renew civic relationships between victims and perpetrators” and prevent conflicts from escalating or recurring.<sup>179</sup> David & Choi posit that fostering genuine forgiveness requires multiple approaches: empowering victims individually, socially and politically (through restitution, compensation, psychosocial rehabilitation, and institutional reform); downgrading perpetrators through punitive measures and apologies; and restoring the status balance between the two groups.<sup>180</sup> To test these hypotheses, David & Choi surveyed former political prisoners in the Czech Republic on a range of transitional justice questions devoted to forgiveness. They found that apologies, measures of social and individual empowerment, punishment, and political enfranchisement had the strongest effect on promoting forgiveness; these impacts were blunted where respondents had experienced prolonged imprisonment or torture.<sup>181</sup> The theory is that victims who continue to suffer the economic and health consequences of mistreatment find it harder to forgive and put aside prior disagreements; on the flip side, social empowerment facilitates forgiveness. Likewise, their data suggest that the punishment of perpetrators and apologies facilitate forgiveness, because they signify a recognition of wrongdoing and a willingness to address it. All that said, the frequency of church attendance turned out to be the strongest predictor of forgiveness among their particular pool of respondents.<sup>182</sup>

In conclusion, a number of lessons can be learned from this research as well as “successful” transitional justice case studies. First is the importance of implementing a broad-based transitional justice program that includes elements of accountability, truth-telling, reparations, memorialization, and forward-looking reforms. These mechanisms can be layered or sequenced, depending on the political circumstances and the availability of resources. Second, and relatedly, it has proven helpful to enact an omnibus transitional justice law to create the legal and political framework for transitional justice mechanisms to operate and to ensure governmental buy-in. Third, although it is important for any transitional justice program to enjoy domestic legitimacy, incorporating international elements in the process helps to insulate transitional justice actors from political interference and keep a process on track. Fourth, all successful transitions contemplate some form of criminal accountability, even if it is only exemplary cases that ultimately move forward. Fifth, a strong victims’ organization or community can consolidate and advance victims’ preferences while offering a counterweight to sources of resistance. And sixth, transitional justice programs that generate unrealistic or unmet expectations, particularly around reparations, are unstable.

### **Pre-Transition Transitional Justice Lines of Effort in Syria**

Turning to the Syrian context, the international community invested in a number of pre-transition transitional justice lines of effort, both unilaterally and multilaterally. Although individual states and norm entrepreneurs put forth proposals addressed to promoting criminal accountability within and beyond the ICC, these never achieved adequate momentum to generate

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<sup>177</sup> David & Choi, *supra* note 174, at 340-41.

<sup>178</sup> Watkins, *supra* note 170, at 27.

<sup>179</sup> David & Choi, *supra* note 174, 340.

<sup>180</sup> *Id.* at 342.

<sup>181</sup> *Id.* at 358.

<sup>182</sup> *Id.* at 363.

tangible progress, as discussed in previous chapters. This chapter focuses on the restorative end of the transitional justice spectrum, efforts that met the same fate.

For many years, the United Nations and individual states laid emphasis on the documentation of abuses “on all sides,” including by leveraging tools available through the U.N. Human Rights Council and then the U.N. General Assembly. Beyond this documentation work, states and non-governmental organizations (NGOs) also surveyed and trained Syrian actors to prepare them for undertaking a program of transitional justice if a transition were ever to begin. The international community took steps to foster other pre-transition transitional justice interventions, including the establishment of programs dedicated to the psycho-social rehabilitation of survivors, the consolidation of victims’ groups, and laying the groundwork for truth-telling exercises. Other proto-accountability exercises included naming and shaming the regime and individual perpetrators, although this was not pursued to the full extent possible in Syria. This individuation of responsibility could undergird in criminal trials as well as a lustration regime if one were ever undertaken (although with Assad likely remaining in power, the opportunities for this sort of vetting will be limited).

The remainder of this chapter highlights some of these interventions. It remains unclear whether this international engagement will have a lasting impact within Syria once it starts the arduous process of rebuilding itself post-conflict. To be sure, much depends on how the conflict gets resolved on the ground and whether the international community will condition reconstruction assistance on taking steps towards justice—an outcome that remains unsettled at the time this book goes to press.

### *Training, Outreach & Research*

The imperative of Syrian ownership in determining transitional justice paths and priorities emerged as a frequent refrain in international discussions about the crisis. Indeed, this language became boilerplate in multilateral resolutions.<sup>183</sup> Actors within the international community did not, however, have a clear understanding of Syrians’ varied preferences, needs, and capacity to undertake a fulsome process that would advance the complete range of transitional justice objectives, including criminal accountability and the vetting of potential perpetrators, the restitution and rehabilitation of victims, and institutional/legal reform. In particular, the potential for a transitional government to hold fair trials was unknown and largely unknowable, given a lack of understanding about the Syrian legal framework, which had historically been eclipsed by an Emergency Law in place since the Ba’athist coup of 1963 until it was rescinded in 2011 by Decree 161. Indeed, the international community had very little faith in the state of the Syrian judicial system given the relative unavailability of legislation and jurisprudence in English, the authoritarian nature of the judicial system under the Assad regime, and historical due process deficits.<sup>184</sup>

Identifying, convening, surveying, and training Syrian actors—ordinary Syrians as well as technocrats, incipient governance officials, representatives from historically marginalized groups, and potential future policymakers from legal, opposition, and activist backgrounds—emerged as a

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<sup>183</sup> See, e.g., G.A. Res. 66/253, ¶ 7, U.N. Doc. A/RES/66/253 (Feb. 21, 2012) (calling for “an inclusive Syrian led political process, conducted in an environment free from violence, fear, intimidation and extremism and aimed at effectively addressing legitimate aspirations and concerns of the people of the Syrian Arab Republic.”).

<sup>184</sup> See Human Rights Watch, *Syria, Events of 2004*, WORLD REPORT 2005 (cataloging a long record of “grossly unfair trials” in Syria).

pre-transition activity undertaken to varying degrees by the international community to prepare for an eventual transition. In the spirit of empowering Syrian ownership of transitional justice processes, the international community convened or funded various international conferences dedicated to exploring transitional justice themes. To provide the necessary technical expertise, donor states regularly worked through civil society organizations (so-called “implementing partners”) with a mandate for promoting peace and justice. The European Commission, the United Kingdom Foreign and Commonwealth Office (FCO), the Italian Ministry of Foreign Affairs, and the Open Society Foundation, for example, have funded transitional justice work in Syria by No Peace Without Justice (NPWJ). This outsourcing enables donors to catalyze the work in a way that is more cost effective, and that enjoys greater local legitimacy, than deploying government personnel directly in country. These conferences aimed to encourage Syrian legal experts and local leaders to begin to conceptualize an integrated transitional justice strategy and anticipate future legal reforms and institution-building exercises that would be imperative, or advisable, in any transition period.<sup>185</sup> Individuals were encouraged to evaluate existing transitional justice mechanisms and archetypes with an eye towards their adaptation to the Syrian context and the development of bespoke alternative models. Organizers of these events often invited civil society and governmental actors from other transitional and post-transition states—such as Guatemala, Cambodia, and Bosnia-Herzegovina<sup>186</sup>—in order to create opportunities for these experts to share their history of transitional justice with their Syrian counterparts. In 2005, for example, the International Center for Transitional Justice (ICTJ) helped develop a Documentation Affinity Group of human rights documentation centers from around the world to discuss ways to address shared transitional justice challenges.

Coming from a repressive prosecutorial culture, surveyed Syrians often defaulted to criminal accountability until introduced to the full suite of transitional justice tools. As such, many of these gatherings undertook a holistic approach to transitional justice and reconciliation by advocating for transitional justice processes beyond criminal prosecutions. Multilateral trainings explored ways to address the root causes of the conflict; the reform of institutions; the vetting of individuals undeserving of holding positions of power and importance in a new democratic order; processes of individual and collective restitution, including the return of property and looted assets; and memorializations. When it comes to lustration, the De-Ba’athification of Iraq emerged as a potent object lesson of how a process of vetting can be manipulated for political purposes and deprive a transitional state of bureaucratic expertise.<sup>187</sup> Because many donor states are wary of being perceived as promoting impunity, inadequate attention is often paid in such convenings to thinking about ways to craft a principled, conditional, and “legitimate” amnesty law that does not necessarily entrench blanket impunity.<sup>188</sup> This unwillingness to think creatively about amnesties

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<sup>185</sup> The Carter Center, for example, identified a number of constitutional and legislative reforms that would be desirable to bring Syrian law into compliance with international norms. See THE CARTER CENTER, SYRIA’S TRANSITION: GOVERNANCE AND CONSTITUTIONAL OPTIONS UNDER U.N. SECURITY COUNCIL RESOLUTION 2254 (June 2016).

<sup>186</sup> See Women’s International League for Peace & Freedom, *Women Organising for Change in Syria and Bosnia* (2014).

<sup>187</sup> Miranda Sissons & Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice (Mar. 4, 2013).

<sup>188</sup> See Louise Malinder, *Can Amnesties and International Justice Be Reconciled?*, 1 INT’L J. TRANSITIONAL JUST. 208 (2007) (arguing that international courts should recognize amnesties enjoying some democratic approval to promote peace and reconciliation if accompanied by mechanisms to fulfil victims’ rights); Slye, *supra* note 164 (deriving principles to evaluate the legitimacy of amnesty laws).

is unfortunate given that there will inevitably be impulses to provide amnesty as an inducement to bring leaders to the negotiating table.<sup>189</sup> There are a number of ways that amnesty laws can be designed so as to contribute to, or complement, accountability mechanisms.<sup>190</sup>

Two important entities emerged in this space. The first is the Syrian Expert House, an initiative implemented by the Center for Political and Strategic Studies (SCPSS) under the leadership of Radwan Ziadeh, a longtime human rights leader and member of the Syrian opposition in exile who was appointed by the interim opposition government to head the Syrian Commission on Transitional Justice.<sup>191</sup> In consultation with the U.S. State Department and funded largely by Canada, SCPSS and the Syria Expert House hosted a conference in 2012 that brought together key Syrian opposition figures to create a Syria Transition Roadmap. This outcome document recommended a whole panoply of post-transition reforms addressed to political structures, the constitution, and the economy as well as sophisticated proposals dedicated to transitional justice. Institutionally, the Roadmap advocated the immediate creation of an Association for the Defense of the Victims of the Syrian Revolution and a National Preparatory Committee for Transitional Justice. It envisioned the eventual convening of a National Commission for Transitional Justice to manage all transitional justice activities post-transition.<sup>192</sup>

The second organization that emerged to pursue this work is The Day After Project (TDA). Designed to engage in transition planning with funding from the U.S.-Middle East Partnership Initiative (MEPI), TDA was first convened by the U.S. Institute of Peace and the German Institute for International and Security Affairs in 2012.<sup>193</sup> The imperative of transitional justice formed one pillar of its work, which envisioned the implementation of a range of retributive and more restorative measures over a notional two-year timeframe post-transition. A Special Criminal Court within the Syrian judiciary to prosecute senior regime officials formed a key component of its transitional justice blueprint. The report also advocated conditional amnesties for lower-level figures and targeted lustrations. In its guidelines, the report called for the inclusion of foreign expertise, “when needed, with full respect of [sic] Syrian sovereignty.”<sup>194</sup> Although the organizers convened Syrians as part of this process and eventually spun off an independent organization, TDA was criticized as being too Western, which helped galvanize the SCPSS effort.<sup>195</sup>

The international community also convened sessions focused more intently on advancing fair, credible, and even-handed criminal trials to respond to the pervasive wartime criminality. These included trainings devoted to a number of practical and technical topics, such as best practices for undertaking rigorous human rights and criminal law investigations; collecting and archiving potential evidence to preserve the chain of custody; analyzing documentation to prove violations of human rights and international humanitarian law; and building the chain of command. This work mainly engaged networks of Syrian lawyers and judges that exist throughout Syria and in neighboring countries with expertise on the Syrian judiciary, penal law framework, evidentiary rules, and criminal procedure. Individuals were drawn from revolutionary courts in liberated areas and alternate bar associations, such as the Free Syrian Lawyers Aggregation, the Free Syrian

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<sup>189</sup> See generally Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009).

<sup>190</sup> See Transitional Justice Institute—University of Ulster, *The Belfast Guidelines on Amnesty and Accountability*.

<sup>191</sup> See Suzanne Nossel, *The Gross Misconduct of Radwan Ziadeh’s Asylum Denial*, FOREIGN POLICY, July 25, 2017.

<sup>192</sup> SCPSS & Syria Expert House, *Syria Transition Roadmap* 141-155 (2013).

<sup>193</sup> USIP, The Day After Project, <https://www.usip.org/publications/day-after-project>.

<sup>194</sup> The Day After, *Transitional Justice*, <http://tda-sy.org/en/>.

<sup>195</sup> See USIP, *Evaluation of the United States Institute of Peace Support to the Day After Project* (July 2004).

Lawyers Association (FSLA), and the Council of the Free Syrian Judges—organizations composed mainly of judges and lawyers who had defected or were operating in liberated areas. They formed an International Legal Assistance Consortium funded by the Swedish International Development Agency (SIDA). The U.S.-founded and -funded Documentation Center of Cambodia (DC-Cam), which preceded the United Nations’ establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), offers an interesting model in this regard. For several years, DC-Cam hosted training sessions of jurists, police, journalists, law students, and other government personnel. The curriculum was focused on international criminal law, human rights law, and trial practice, with an emphasis on building the expertise necessary to stage an accounting for crimes committed during the Khmer Rouge era. Many of DC-Cam’s former participants are now staffing the organs ECCC, including chambers, the prosecutors’ office, the victims’ unit, the defense, and the registry.

Bringing indigenous legal expertise to bear on a future transitional justice program enabled the candid evaluation of the state of the Syrian judicial system pre-revolution and the identification of areas in which legal reform may be advisable. Such an exercise may enhance future prosecutions of both ordinary and conflict-related crimes. In many transitional states, there may be a need to draft discrete pieces of legislation to facilitate a robust transitional justice program. This would include laws that incorporate international or other relevant categories of crimes (such as financial crimes) and forms of responsibility into the penal code; enable the appointment of international personnel within the various components of the judicial branch as staff or dedicated experts; revise certain defenses or evidentiary rules; and amend the civil code or administrative law to allow for the payment of reparations or restitution.<sup>196</sup> It was envisaged that participants in these pre-transition gatherings would undertake drafting exercises to prepare notional decree laws (or at least the building blocks of such legislation), and even shadow indictments. Such gatherings of legal experts can also occasion a discussion about the demands of international human rights norms devoted to due process protections and the administration of the death penalty. Some of this work was undertaken in the Syrian context, but it is unclear if the right actors were engaged or if any outputs will actually be influential if there are ever openings for legislative reform.

### ***Gleaning Attitudes Towards Transitional Justice***

In addition to these training opportunities, states and civil society organizations also commissioned social scientists to glean micro-level data on Syrian attitudes toward justice and accountability.<sup>197</sup> Although human rights work has traditionally been premised on qualitative case-based research, human rights advocates are becoming increasingly adept at using quantitative methods, including population-based surveys and statistical modeling.<sup>198</sup> The Berkeley Human Rights Center and other academics have undertaken a number of such population-based surveys in the past to gather empirical data on citizens’ expectations and hopes around transitional

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<sup>196</sup> See Global Study, *supra* note 36, ¶ 64 (discussing the utility of administrative programs to respond to multiple cases expeditiously); SYRIA JUSTICE & ACCOUNTABILITY CENTRE, RETURN IS A DREAM: OPTIONS FOR POST-CONFLICT RESTITUTION OF PROPERTY IN SYRIA (Sept. 2018), <https://syriaaccountability.org/library/return-is-a-dream-options-for-post-conflict-property-restitution-in-syria/>.

<sup>197</sup> David Backer & Anupam Kulkarni, *Humanizing Transitional Justice: Reflections on the Role of Survey Research in Studying Violent Conflict and its Aftermath*, 1(4) TRANSITIONAL JUST. REV. 197 (2016) (discussing trend towards survey research in transitioning states).

<sup>198</sup> See generally Roman David, *What We Know About Transitional Justice: Survey and Experimental Evidence*, 38 POL. PSYCHOL. (Feb. 2017).

justice.<sup>199</sup> Many of these surveys have been administered after-the-fact to gauge a population's satisfaction with a transitional justice process already undertaken; others have been produced pre-transition or prior to a key accountability exercise.<sup>200</sup> These population-based studies can be especially useful in the pre-implementation stage, as they help scholars, practitioners, and policymakers identify baseline attitudes before a transition and then track changing perceptions at different points across a society's overall transitional justice trajectory.<sup>201</sup>

In 2013, the Syria Justice & Accountability Center (SJAC) commissioned a qualitative survey of Syrians, including regime supporters and opponents, although it only undertook 46 interviews.<sup>202</sup> The report found that people were deeply apprehensive about rising sectarianism and the likelihood that the country could ever heal. They had high expectations for justice and fostering coexistence among Syria's various ethnic groups, but weak knowledge about other transitional justice options, such as truth commissions.<sup>203</sup> Respondents were not attracted to the idea of a hybrid court, preferring instead trials in Syrian courts and before Syrian judges even while they expressed concern that the courts had been compromised by politics and corruption. International involvement was equated with "meddling."<sup>204</sup>

Participants did not view peace and justice as antagonistic or mutually exclusive: they expressed support for a negotiated settlement, even as they uniformly called for legal accountability for the commission of international crimes. Indeed, participants saw "institutionalized accountability" as an alternative to vigilantism and expressed deep concern about the potential for a "culture of revenge" to set in.<sup>205</sup> The prospect of the populace choosing to "forgive and forget" was not foreseen among those surveyed.<sup>206</sup> Compensation was appealing for strictly economic losses, although it was not seen as a viable substitute for those who had lost loved ones; participants insisted that only true legal accountability would deliver redress in these circumstances. People also supported the idea of civic education, to inform their compatriots about what transitional justice had to offer.<sup>207</sup>

The Day After Project conducted a larger survey in 2014 of attitudes towards transitional justice, reconciliation, and human rights involving over a thousand participants in mostly opposition-controlled areas.<sup>208</sup> Even when made aware of the range of transitional justice options, Syrians were often at odds about which mechanisms were worth prioritizing. A large majority of respondents, regardless of ethnic background, valued justice in the form of fair trials, the avoidance

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<sup>199</sup> See, e.g., *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* (Dec. 2007); Patrick Vinck & Phuong Pham, *Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo*, Harvard Humanitarian Initiative (July 2014).

<sup>200</sup> See generally Jonathan Hall et al., *Exposure to Violence and Attitudes Towards Transitional Justice*, 39(2) POL. PSYCHOL. 345 (Apr. 2018) (arguing that a community's attitudes towards transitional justice are related to the nature of the violence experienced as well as the social interdependence between victims and perpetrators).

<sup>201</sup> See Neil Kritz, *Policy Implications of Empirical Research on Transitional Justice*, in *ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH* 13 (Hugo Van Der Merwe et al. eds., 2009).

<sup>202</sup> Craig Charney & Christine Quirk, "He Who Did Wrong Should be Accountable": *Syrian Perspectives on Transitional Justice* (Jan. 2014).

<sup>203</sup> *Id.* at 47.

<sup>204</sup> *Id.* at 44.

<sup>205</sup> *Id.* at 2, 36.

<sup>206</sup> *Id.* at 38.

<sup>207</sup> *Id.* at 70.

<sup>208</sup> The Day After, *Pilot Survey on Transitional Justice* (Dec. 2014).

of impunity, and a rejection of any type of amnesty.<sup>209</sup> In terms of mechanisms to deliver justice, they generally rejected “traditional courts,” although many expressed a preference for national courts above hybrid or international ones.<sup>210</sup> They also deemed apologies to be inadequate, and different groups ranked reform and restitution differently, although both were deemed “very important.”<sup>211</sup> There was some interest in including events prior to March 2011 in any prosecutorial program<sup>212</sup> and strong support for a truth commission or national dialogue in the form of “listening sessions.”<sup>213</sup> Many participants expressed a need to reform or disband certain agencies and organizations, including the security forces, Air Force Intelligence, and the Ba’ath Party.<sup>214</sup>

Outside of Syria, the Center for Statistics and Research surveyed Syrian refugees and migrants in Germany on various transitional justice approaches.<sup>215</sup> An overwhelming 72% indicated that they preferred ensuring the “accountability of criminals” over compensation for victims, and 88% rejected a policy of national reconciliation.<sup>216</sup> Almost no one saw a role for Assad in a post-war era.<sup>217</sup> The results of all these inquiries remain available if Syrian policymakers are ever in a position to pursue a transitional justice program. Their utility is hampered, however, by the fact that they focused on individuals who were in opposition areas or had fled the country, so will not accurately reflect the preferences of regime supporters.

### ***Promoting Psychosocial Rehabilitation***

Armed conflicts and crimes against humanity produce profound and multi-faceted consequences within the implicated societies. In addition to physical injury and death, individual victims, their families, and their communities may all experience multiple and debilitating forms of emotional suffering. As de Greiff has written:

the pain and suffering endured in the violation itself is merely the beginning of sequelae that frequently include a deep sense of uncertainty and a debilitating and in some cases incapacitating sense of fear. The reason lies in the fact that serious human rights violations shatter normative expectations fundamental to our sense of agency in the world.<sup>218</sup>

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<sup>209</sup> *Id.* at 13, 24-25.

<sup>210</sup> *Id.* at 15. Not surprisingly, perhaps, Kurdish respondents and women preferred international mechanisms. *Id.* at 16-18.

<sup>211</sup> *Id.* at 14-15.

<sup>212</sup> *Id.* at 21

<sup>213</sup> *Id.* at 26.

<sup>214</sup> *Id.* at 23.

<sup>215</sup> The Center for Civil Society and Democracy, under the leadership of Rajaa Al-Talli, also led two different surveys in 2012-13 of Syrians inside Syria and had broad scope of participation. See Syrian Center for Statistics and Research, *Return to Syria?* (Apr. 11, 2018) (compiling results of study on why individuals fled Syria, their plans for returning, and their attitudes about transitional justice and the resolution of the conflict).

<sup>216</sup> *Id.* at 9.

<sup>217</sup> *Id.* at 11-12.

<sup>218</sup> Pablo de Greiff, *Transitional Justice, Security, and Development*, World Development Report 2011, Background Paper 8 (Oct. 29, 2010).



The consequent harm can rise to the level of diagnosable mental health illnesses, from post-traumatic stress disorder (PTSD) to anxiety and depression.<sup>219</sup> Co-morbidity—the simultaneous presence of two disease states in an individual—is common within victim populations.<sup>220</sup> Sequential traumatization—the accumulation of traumatic events—occurs when individuals are subjected to the myriad of stressors that often accompany conflict, including the loss of loved ones and social networks; displacement, expulsion, and exile; poverty and economic instability; and the disintegration of a generation of life plans.<sup>221</sup> Enforced disappearances have proven to be particularly damaging psychologically as family members vacillate between hope and despair. These ambiguous losses generate greater anxiety and traumatic grief than confirmed losses.<sup>222</sup> These forms of psychological harm are, in turn, associated with a broad spectrum of inter-related social problems (such as substance abuse and domestic violence) if not appropriately addressed.<sup>223</sup> Research indicates that trauma can be intergenerational as well in that the children of traumatized parents show heightened psychopathologies.<sup>224</sup> The impact of trauma on human psychology shows remarkable consistency across cultures.<sup>225</sup> Given the acute needs of victims, the World Health Organization has urged the international community to provide support to repair the psychological damage of war, conflict, and natural disasters.<sup>226</sup>

Often overlooked is the fact that participating in human rights abuses can also exert a negative psychological impact on perpetrators. The concept of moral injury describes the adverse impact on soldiers and others of being personally involved in an experience that violates core values and principles.<sup>227</sup> Moral injury involves a cluster of symptoms that are similar to PTSD but also reflect a spiritual component linked to the sanctity of life.<sup>228</sup> Fewer transitional justice programs have endeavored to address this moral injury, although some do include opportunities for perpetrators to “pay their dues” in order to be re-absorbed into society. In Timor-Leste, for example, perpetrators of less serious crimes were able to enter into agreements (which were filed in court) to undertake community service as part of community reconciliation procedures.<sup>229</sup>

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<sup>219</sup> See generally CAMBODIA’S HIDDEN SCARS: TRAUMA PSYCHOLOGY AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Beth Van Schaack & Daryn Reicherter eds., 2d ed. 2016) (describing long-term impact of violence during the Khmer Rouge era).

<sup>220</sup> See Creamer, M., Burgess, P., & McFarlane, A. C. (2001), *Post-traumatic Stress Disorder: Findings from the Australian National Survey of Mental Health and Well-being*, 31(7) PSYCHOL. MED. 1237 (finding that major depression, dysthymia (chronic but less severe depression), bipolar disorder, generalized anxiety disorder, panic disorder, agoraphobia, social phobia, and obsessive-compulsive disorder have all been linked to PTSD).

<sup>221</sup> See HANS KEILSON, SEQUENTIAL TRAUMATIZATION IN CHILDREN (1992).

<sup>222</sup> Steve Powell et al., *Missing or Killed: The Differential Effect on Mental Health in Women in Bosnia and Herzegovina of the Confirmed or Unconfirmed Loss of their Husbands*, 15 EUROP. PSYCH. 185 (2010); Carina Heeke, *When Hope and Grief Intersect: Rates and Risks of Prolonged Grief Disorder Among Bereaved Individuals and Relatives of Disappeared Persons in Colombia*, 173 J. AFFECTIVE DISORDERS 59 (2015).

<sup>223</sup> Yael Danieli, *Assessing Trauma Across Cultures from a Multigenerational Perspective*, in CROSS-CULTURAL ASSESSMENT OF PSYCHOLOGICAL TRAUMA AND PTSD 65 (John P. Wilson & Catherine So-kum Tang eds., 2007).

<sup>224</sup> See Mallory E. Bowers & Rachel Yehuda, *Intergenerational Transmission of Stress in Humans*, 41(1) NEUROPSYCHOPHARMACOLOGY 232 (2016).

<sup>225</sup> See Daryn Reicherter & Alexandra Aylward, *The Impact of War and Genocide on Psychiatry and Social Psychology*, in HIDDEN SCARS, *supra* note 219, at 14 (recounting comparative research in post-conflict states); Inger Agger, *Healing the Mind: Healing after Mass Atrocity in Cambodia*, 52 TRANSCULTURAL PSYCHIATRY 543 (2015).

<sup>226</sup> WHO, *Resolution on Health Action in Crises and Disasters*, Res. A58/6 (Apr. 15, 2005).

<sup>227</sup> See WAR AND MORAL INJURY: A READER (Robert Emmet Meagher & Douglas A. Pryer eds., 2018).

<sup>228</sup> Michael D. Matthews, *Moral Injury: Toxic Leadership, Maleficent Organizations, and Psychological Distress*, PSYCHOL. TODAY (Mar. 10, 2018).

<sup>229</sup> Geoffrey Gunn & Reyko Huang, *Reconciliation as State-building in East Timor*, 11 LUSOTOPIE 19, 32 (2004).

Although it will be impossible to reach all individuals in need while a conflict is ongoing, it is feasible to begin to provide some victims of human rights abuses with appropriate psychological and psychiatric interventions in the pre-transition phase. This assistance can be provided within refugee camps, diaspora populations, and civilian safe havens (if they exist) and also remotely with victims who remain in-country through the use of new communications platforms, such as Facetime and Skype. The international community can help identify, fund, and disseminate culturally-appropriate resources to provide psychosocial support services and treatment in addition to responding to other humanitarian needs of refugees and internally-displaced citizens who have had their lives destroyed. Indeed, the emergent field of “trauma first aid,” originally developed by the National Center for Post-Traumatic Stress Disorder (NC-PTSD), is premised on the idea that immediate psychological interventions following a traumatic event can help to forestall the development of future psychological distress and disorder while also fostering resilience and adaptive functioning.<sup>230</sup> At the same time, a single session debriefing in the immediate aftermath of a traumatic event may actually increase the risk of PTSD and depression.<sup>231</sup> Such efforts can be undertaken first and foremost through a collective and community-based approach, building on parochial networks, indigenous leaders, victims’ organizations, and families. Local NGOs and civil society groups can be trained in how to recognize who is suffering from extreme distress and is in need of further professional psychiatric and psychological treatment. Eventually, this work can be consolidated post-transition in collaboration with the National Ministry of Health, if one exists and is operational.

In Syria, almost half a million individuals have died<sup>232</sup> and over half the population (more than 10 million people) is internally or externally displaced.<sup>233</sup> Countless more have been physically maimed and psychologically traumatized. Thousands of people live in besieged areas.<sup>234</sup> Surveys of Syrian refugees reveal high levels of psychological distress.<sup>235</sup> It will be critical to address this harm in a comprehensive and culturally-appropriate way once the fighting has subsided.<sup>236</sup> For now, the international community has provided some mental health services in refugee camps and other areas where the displaced have congregated. The human rights bureau in the U.S. State Department hosted a donor conference to fund the Syria Survivors of Torture Initiative with the Syria Justice & Accountability Centre.<sup>237</sup> The frontline countries in the refugee crisis, however, are overtaxed on a number of fronts and cannot meet the acute demand, particularly given the unique needs of children and victims of sexual violence (both male and female) and the high degree of stigma associated with mental illness.<sup>238</sup> Lawyers have used humanitarian parole proceedings to bring traumatized individuals to countries where they can

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<sup>230</sup> See Jonathan I. Bisson & Catrin Lewis, *Systematic Review of Psychological First Aid* (July 31, 2009).

<sup>231</sup> Suzanne C. Rose et al., *Psychological Debriefing for Preventing Post Traumatic Stress Disorder (PTSD)*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS (Apr. 22, 2002).

<sup>232</sup> The Syrian Center for Policy Research put the number at 470,000 at the beginning of 2016.

<sup>233</sup> UN High Commissioner for Refugees, *Syria Emergency*, <http://www.unhcr.org/en-us/syria-emergency.html>.

<sup>234</sup> HUMAN RIGHTS WATCH, *WORLD REPORT: SYRIA* (2018).

<sup>235</sup> Khaldoun I. Marwa, *Psychological Sequels of Syrian Conflict*, 19(2) J. PSYCHIATRY 355 (2016).

<sup>236</sup> See Sahr MuhhammedAlly, *Assisting Syrian War Victims*, HUFFPOST (OCT. 16, 2013) (arguing for the creation of a Victims Assistance Program for Syria that would encompass psycho-social and medical services in addition to financial assistance).

<sup>237</sup> U.S. State Department, Press Release, *Donor Conference for the Syria Justice and Accountability Center and the Syria Survivors of Torture Initiative* (Oct. 6, 2016).

<sup>238</sup> Cherisse Davis & Amy Wanninger, International Medical Corps, *Mental Health and Psychosocial Support Considerations for Syrian Refugees in Turkey: Sources of Distress, Coping Mechanisms, and Access to Support* 11-12 (Jan. 2017).

receive the treatment they need, but this is a time-consuming process that is difficult to scale. Moreover, the emphasis on PTSD and addressing immediate reactions to the trauma of war and displacement means that work on longer-term rehabilitation and recovery may be neglected.<sup>239</sup>

Although treatment is essential, it must be accepted that some human rights victims may never be fully healed in a clinical sense—surviving atrocity may be an experience to be endured, not a trauma to be cured.<sup>240</sup> That said, the concept of post-traumatic growth (PTG)—which manifests itself in “an increased appreciation of life in general, more meaningful interpersonal relationships, an increased sense of personal strength, changed priorities, and a richer existential and spiritual life”—offers cause for hope.<sup>241</sup>

### ***Fostering Solidarity Among Victims***

In the pre-transition phase, the international community can also help to catalyze the formation of victims’ associations as sources of support and solidarity.<sup>242</sup> Although many human rights documentation organizations regularly engage with victims, they do not necessarily represent the interests, or respond to the innumerable needs, of all those affected by the conflict. Broadly representative victims organizations can augment victims’ political power and improve victims’ ability to advocate on their own behalf with the international community around a whole range of issues, including humanitarian assistance needs, peace negotiations, transitional justice, and restitution and reparations—all in keeping with the “nothing about us without us” theory of human rights advocacy.<sup>243</sup> Membership organizations can also mobilize natural leaders and provide partners for human rights organizations operating on a global scale, such as Human Rights Watch or Amnesty International. When it comes to designing a future transitional justice program, victims’ organizations offer a forum for victims to develop consensus positions on key decisions, articulate and advance their transitional justice interests and preferences with a more powerful and unified voice, and undertake more effective diplomatic engagement with the international community and the media to ensure that victims’ perspectives are a part of any multilateral conversations about political transitions and transitional justice. In the event of a consolidated transition, such organizations can play a role in advocating for victim-centered reforms to address the core grievances that motivated the uprising in the first place as well as in keeping a process moving forward.

The development of such an inclusive association also offers opportunities for empowering victims by connecting them to others with common experiences so they can share their stories of harm as well as strategies for survival and rehabilitation. They also create vectors to crowd-source information and facilitate mass communication among victims using traditional and social media. Associations can record and preserve victims’ testimony for posterity, including for future justice, restitution/rehabilitation, and truth-telling efforts. All this work can build solidarity among

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<sup>239</sup> Hussam Jefee-Bahloul et al. *Mental Health in the Syrian Crisis: Beyond Immediate Relief*, 386(10003) THE LANCET 1531 (2015).

<sup>240</sup> Lawrence L. Langer, *The Alarmed Vision: Social Suffering and Holocaust Atrocity*, 125 DAEDALUS 47, 58 (1006).

<sup>241</sup> See Richard G. Tedeschi & Lawrence G. Calhoun, *Posttraumatic Growth: Conceptual Foundations and Empirical Evidence*, 15(1) PSYCH. INQUIRY 1, 1 (2004) (defining PTG as “the experience of positive change that occurs as a result of the struggle with highly challenging life crises.”).

<sup>242</sup> See Global Study, *supra* note 36, ¶ 27 (expressing the potential for transitional justice processes to help “victims occupy a space in the public sphere”).

<sup>243</sup> See generally JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT USE: DISABILITY OPPRESSION AND EMPOWERMENT (2000).

victims—across genders, ethnic and religious groups, and regions—in a way that has the potential to lay the groundwork for future reconciliation and relational transformation. If a number of disparate local organizations already exist, catalyzing a more broad-based coalition can also serve as a mechanism for connecting existing organizations and offering them an elevated platform for their work. If such local groups do not exist, a larger membership organization can foster neighborhood support groups and more community-level associations. Such organizations can also provide an immediate and long-term outlet for psycho-social and medical rehabilitation as needed as well as the dissemination of reparations, if available.

An example of what a highly effective victims' organization can achieve can be seen in Chad. The Chadian Association for the Promotion and Defense of Human Rights and the Association for Victims of Crimes of the Hissène Habré Regime represented many victims of arbitrary detention and torture under the administration of ex-Chadian President Hissène Habré.<sup>244</sup> As soon as Habré was deposed, these groups formed a transnational coalition with Human Rights Watch and others and began collecting evidence of Habré's crimes, engaging policymakers and diplomats, and exerting domestic and international pressure to build political will for his prosecution.<sup>245</sup> For 25 years, they pursued legal redress on behalf of the thousands of Habré's victims in what has been described as "one of the world's most patient and tenacious campaigns for justice."<sup>246</sup> This involved creative advocacy and litigation in domestic courts (in Chad, Senegal, and Belgium); a regional court (the Economic Community of West African States Court of Justice);<sup>247</sup> a treaty body (the U.N. Committee Against Torture); and an international court (the International Court of Justice).<sup>248</sup> When Habré was finally brought to trial, it was before the Extraordinary African Chambers, a bespoke hybrid institution established in Senegal by the African Union with support from other donor states.<sup>249</sup> As one commentator put it, this was an striking case of "victims' justice."<sup>250</sup>

The U.S. Holocaust Memorial Museum's Ferencz International Justice Initiative (FIJI) is working to replicate the Chadian model with victims from a number of contemporary conflicts. FIJI is convening Justice Advisory Groups to connect experts with local justice actors to enable them to build, and sustain, the political will around transitional justice initiatives. In Syria, the international community has helped to build civil society organizations focused on victims, but no overarching victims organization dedicated to Syria has emerged. This is understandable given the many millions of victims, whose individual experiences have varied widely.

### ***Truth Telling***

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<sup>244</sup> Marie Gibert, *Trial in Senegal of former Chadian President is a Victory for Civil Society*, THE CONVERSATION (July 20, 2015).

<sup>245</sup> See Reed Brody, *Victims Bring a Dictator to Justice*, BREAD FOR THE WORLD 19 (June 2017).

<sup>246</sup> Geoffrey York, *Former Dictator of Chad Arrested on Allegations of 40,000 Murders*, GLOBE & MAIL (June 30, 2013).

<sup>247</sup> Hissène Habré v. République du Sénégal, ECW/CCJ/JUD/06/10, Judgment, Court of Justice of the Economic Community of West African States, ¶¶ 58-61 (Nov. 18, 2010).

<sup>248</sup> Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, I.C.J. 430 (Jul. 20).

<sup>249</sup> See generally Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*, 11(5) J. INT'L CRIM. JUSTICE 1139 (2013) (detailing history).

<sup>250</sup> Peter Fabricus, *Now to Make this Extraordinary Court, Ordinary*, INSTITUTE FOR SECURITY STUDIES (Feb. 11, 2016).

Many transitional justice programs involve a truth-telling component in the form of a truth commission (sometimes also denominated a truth and reconciliation commission), commission of inquiry, missing persons commissions, or related body.<sup>251</sup> These institutions serve multiple goals, including the compilation of a definitive account of the conflict or repression, which might limit future deniability; “sense-making” in terms of understanding the structural dimensions, patterns, and practices of violence and telling the story of what happened; victim-tracing and giving survivors a forum in which to bear witness; and offering proposals for reform to ensure non-repetition.<sup>252</sup> Given that transitional states are beset by diverging narratives of what happened and who was at fault, a truth commission staffed by experts and public figures of unimpeachable character can serve as a bulwark—though not necessarily an impenetrable one—against the emergence of revisionist histories of violence. Truth commissions vary considerably when it comes to mandate, procedures, their ability to subpoena participation or refer matters for potential investigation and prosecution, and output.<sup>253</sup> A few truth commissions have identified perpetrators by name, a practice that remains controversial.<sup>254</sup> Many have generated blueprints for reform and reparation (although implementation has been mixed). They also respond to an emerging “right to truth” enjoyed by victims.<sup>255</sup> Several human rights institutions have recognized such a right, including the Inter-American Court of Human Rights<sup>256</sup> and the European Court of Human Rights.<sup>257</sup> It also appears in the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>258</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight that the right to an effective remedy includes “access to the factual information concerning the violations.”<sup>259</sup>

In the past, truth commissions have always been established post-transition, often as a substitute for, or precursor to, criminal accountability. And, most truth commissions have operated with official approval from the state, which carries a measure of legitimacy but also a recognition

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<sup>251</sup> See OHCHR, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE, HR/PUB/14/7 (2015).

<sup>252</sup> Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79 (1995).

<sup>253</sup> See generally PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011) (providing a comparative analysis of multiple truth commissions). The U.S. Institute of Peace has compiled a digital library of truth commission reports and other data.

<sup>254</sup> For a discussion of due process standards application to truth commissions, see MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006).

<sup>255</sup> See Human Rights Council Resolution 2005/66, Right to the Truth, ¶ 1 (Apr. 20, 2005) (recognizing “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”); Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT’L L. 526 (2015).

<sup>256</sup> Inter-Am. C.H.R., Annual Report 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev.1 (Sept. 26, 1986), p. 193.

<sup>257</sup> *El-Masri v. The Former Yugoslav Republic of Macedonia*, Appl. No. 39630/09, Judgment, ¶ 191 (Dec. 13, 2012).

<sup>258</sup> International Convention on for the Protection of All Persons from Enforced Disappearance art. 24(2), G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006) (“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”).

<sup>259</sup> African Union, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(b)(3) (2003).

that harms were done in the name of the sovereign.<sup>260</sup> Theoretically, however, a truth commission could begin to function pre-transition and extraterritorially with an eye towards continuing to work in country once conditions allow. Such a commission could focus on tracking missing persons or evaluating the legality of individual detentions.<sup>261</sup> The challenge would be to ensure that its members are broadly representative and perceived as legitimate envoys, so the commission could credibly contribute to post-conflict reconciliation processes without being perceived as a tool to condemn only one side or a civil society effort without formal sanction.<sup>262</sup>

When it comes to Syria, the U.S. State Department's Bureau of Conflict and Stabilization Operations (CSO) funded a three-day workshop in Gaziantep, Turkey in 2013 with civil society activists who envisioned standing up a truth commission in their hometowns. Although both the Syria Transition Roadmap<sup>263</sup> and The Day After Project<sup>264</sup> contemplated that Syria might one day convene a truth commission following the war, no concrete steps have been taken in this regard separate and apart from the many NGO and multilateral documentation efforts underway. Given the degree of documentation in existence, any future commission might focus its attention on issues of reconciliation and repair, assuming a future Syrian administration is a credible partner when it comes to these imperatives. If the national political climate remains intensively polarized, however, a government truth commission is likely to ratify the outcome of the conflict without generating a genuine national dialogue or contributing to national reconciliation.

### **Post-Transition**

The situation in Syria demonstrates that—to a point—there are a range of initiatives that members of the international community can undertake—multilaterally and individually—to prepare for, or even potentially to hasten, an eventual transition. Although many worthy proposals were not pursued, these various lines of effort have laid some groundwork for the instantiation of a transitional justice program in Syria's post-transition period. In the immediate transition phase, and assuming Assad remains in power in some capacity, it is likely that violence will be ongoing and the government in place may lack legitimacy or nationwide control. There may be limited possibilities for the international community to engage on transitional justice issues with emergent governmental structures, given the longstanding hostility towards Assad and the lack of effective levers with his regime. This will necessitate a focus on civil society and local actors at first. It is hoped that these interlocutors will have the knowledge and expertise to begin a public dialogue

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<sup>260</sup> See Freeman, *supra* note 253, at 18 (defining truth commission as a creature of the state). Some truth commissions have, however, been established in the nongovernmental sector, such as Paraguay's *Projecto Nunca Mas*, which was sponsored by the Committee of Churches. See TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Volume 1) 258 (Neil Kritz ed., 2004) (discussing nongovernmental truth-telling projects).

<sup>261</sup> See Haxie Meyers-Belkin, *After the IS group in Syria: Helping Families Trace Loved Ones who have Disappeared*, FRANCE24, May 16, 2019 (discussing effort to get anti-ISIL coalition to focus on missing persons and mass graves).

<sup>262</sup> Starting with the Russell Tribunal in 1967, which considered war crimes alleged to have been committed during the Vietnam War, a number of "people's tribunals" with no formal authority have been established over the years, usually in the face of extreme impunity. Richard Falk, *People's Tribunals, and the Roots of Civil Society Justice*, OPENSECURITY (May 12, 2015).

<sup>263</sup> Syria Transition Roadmap, *supra* note 192, at 144. The Roadmap actually envisaged the creation of several commissions of inquiry to focus on the commission of different international crimes (e.g., extrajudicial killings and torture cases). *Id.*

<sup>264</sup> The Day After Project recommended a discrete commission to address pre-war oppression as well. See *supra* note 193.

about a range of accountability and transitional justice options. In this process, political actors will need to take the time to build a credible and consultative process while also managing expectations. These consultative deliberations may exert a short-term effect of deterring violence—and especially acts of retribution—and a medium-term objective of conceptualizing and implementing systematic justice processes, including truth-telling and memorialization, at the national and community levels. Psycho-social rehabilitative work—to include services to victims of torture as well as support for refugees and the internally displaced—should be initiated as soon as possible. Likewise, the international community can deploy forensic assistance to preserve and exhume mass graves in what will likely be a chaotic postwar environment.

Because Assad is emerging triumphant, any form of domestic criminal accountability for all sides is likely a bridge too far; indeed, the risk is that Assad will implement his own form of victor’s justice. That said, if Assad is at all committed to the ideal of reconciliation—which remains speculative at best—he might be persuaded to convene a truth commission to provide a forum in which to air the grievances that inspired the revolution back in 2011; generate a national understanding of the patterns of violence; investigate the fate of the disappeared; and offer opportunities for confession, bearing witness, and forgiveness. Memorials to the victims might also be erected. These gestures can operate as a confidence-building measure and signal to refugees and others that he is committed to working to restore Syria’s ethnic and religious mosaic. Such an institution could go a long way towards responding to the Geneva Communiqué’s call for a National Dialogue and “a comprehensive package for transitional justice, including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness”<sup>265</sup>—measures implicitly mandated by Security Council Resolution 2254, which endorsed the Communiqué and set forth a roadmap for a political transition.<sup>266</sup> However, Assad’s current retributive approach to returning Syrian refugees—the majority of whom were associated with the opposition in some way—suggests that he is not likely to undertake any sort of sincere process, even if bribed to do so with reconstruction funding and other inducements.<sup>267</sup> Absent assurances of his genuineness, such efforts will backfire. Were Assad to stage a one-sided charade aimed at reinforcing his narrative of the war, it would do further damage to the prospects for peace.

If prosecutions are ever undertaken in Syria, the international community should help establish standards and guidelines so that relevant authorities will be prepared to review the files of the network of detention centers with an eye towards immediately releasing political detainees, rebels who did nothing more than fight, protesters, and other individuals unfairly arrested by the Assad regime. It may also be possible to help to shape an appropriate amnesty strategy in keeping with international humanitarian law for members of the Free Syrian Army and other rebels,<sup>268</sup> with a view toward creating incentives for combatants who are not associated with abuses to disarm and return to civilian life.<sup>269</sup> For example, as part of its historical peace deal, Colombia passed an

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<sup>265</sup> See Final Communiqué of the Action Group for Syria, U.N. Doc A/66/865-S/2012/522, annex (July 6, 2012).

<sup>266</sup> S.C. Res., ¶ 1, U.N. Doc. S/RES/2254 (Dec. 18, 2015).

<sup>267</sup> Louisa Loveluck, *Assad Urged Syrian Refugees to Come Home. Many are being Welcomed with Arrest and Interrogation*, WASH. POST, June 2, 2019.

<sup>268</sup> Protocol II to the Geneva Conventions calls upon states to “endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” at the end of hostilities. Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), June 8, 1977, 1125 U.N.T.S. 609.

<sup>269</sup> *Colombia Approves Amnesty Deal for Thousands of FARC Rebels*, THE GUARDIAN, Dec. 28, 2016.

amnesty law aimed at encouraging the demobilization of members of the Revolutionary Armed Forces of Colombia (FARC). It does not apply to serious crimes, such as murder or sexual violence, and contains truth-telling and reparative elements. At the same time, the international community will need to stand ready to recommend against granting amnesty for those who have committed international crimes,<sup>270</sup> and the idea of any amnesty for residual ISIL fighters will not be well received. To the extent that a partial amnesty or conditional amnesty is being considered, the international community can work with the committee responsible for this task to identify clear criteria for allocating amnesties or pardons and craft appropriate conditionalities, such as community service, truth-telling, guarantees of non-repetition, or apology. In addition, international experts can convey lessons learned and provide technical assistance on developing processes for vetting members of the transitional and new regional governmental bodies, emerging police forces and militias, and the rump security sector.

In order to address the root cause of the conflict, it will be necessary to focus on the reform of institutions at a minimum, although peacebuilding and conflict transformation—*vice* resolution—are multifaceted processes.<sup>271</sup> The international community should thus support long-term policies and programs that address systemic inequity and injustice over and above the outcomes achieved by traditional truth commission or prosecutorial methods aimed at addressing war-time violence in the immediate period. Influential states and donors should also be prepared to provide support to appropriate Syrian civil society and media organizations to manage the expectations of the public in terms of what various transitional justice mechanisms can achieve, including the limitations of formal judicial redress and reparations.<sup>272</sup> Proceeding without addressing these expectations could undermine the credibility of the new justice system and create dissatisfaction, which may lead to discontent and even more violence.

Finally, if Assad remains in power, as is now expected, all of this work may have been for naught, unless he can be convinced of the need to undertake a genuine process of reckoning with the past in order to instantiate a more peaceful and inclusive future. This seems unlikely at the moment. And so, as other transitional states have revealed, transitional justice in Syria may become an inter-generational enterprise. It will thus fall to the Syrian youth to determine whether the field has anything to offer as they build their own future.

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<sup>270</sup> See OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009), available at [https://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf).

<sup>271</sup> See JOHN PAUL LEDERACH, *THE LITTLE BOOK OF CONFLICT TRANSFORMATION: CLEAR ARTICULATION OF THE GUIDING PRINCIPLES BY A PIONEER IN THE FIELD* (2003) (making a distinction between conflict resolution and conflict transformation). See also *Conflict Transformation: Three Lenses in One Frame*, 14 NEW ROUTES (2009).

<sup>272</sup> See Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251 (2009) (arguing that “media coverage of transitional justice processes, and the dialogue that ensues, can promote or hinder national reconciliation in post-conflict settings.”).