



# WORLD DEVELOPMENT REPORT 2011

BACKGROUND PAPER

## TRANSITIONAL JUSTICE, SECURITY, AND DEVELOPMENT

SECURITY AND JUSTICE THEMATIC PAPER

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*The findings, interpretations, and conclusions expressed in this paper are entirely those of the author. They do not necessarily represent the views of the ICTJ, the World Development Report 2011 team, the World Bank and its affiliated organizations, or those of the Executive Directors of the World Bank or the governments they represent.*

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## Introduction

At the highest level of generality, ‘transitional justice’ refers to measures that are implemented in order to redress the legacies of massive serious crimes under international law.<sup>2</sup> Despite abiding disagreements about the outside boundaries of the concept of transitional justice, consensus has been achieved about a set of core elements that a transitional justice policy minimally must include. These elements include prosecutions, truth-telling measures, reparations for victims, and some initiatives tending towards institutional reform, particularly the vetting of security sector personnel. Other elements frequently said to be parts of transitional justice include memorialization efforts as well as local justice initiatives. As in all attempts to translate concepts into practice, there are also plenty of debates about the best way to implement these measures.

This annex can only provide a brief overview of transitional justice measures (§ I), and summarize an argument that clarifies the aims that these measures arguably are designed to seek (§ II). This is important, in turn, in order to clarify the contributions that transitional justice can make to security and development, particularly in the context of fragility. Contrary to misconceptions, particularly on the part of non-experts, transitional justice is neither past-oriented, nor of concern to victims alone; rather, to the extent that it achieves any of its goals, it does so in virtue of its potential to affirm general but basic norms—therein its potential contributions to both security and development. The argument thus is also meant to counter the perception that transitional justice measures hamper development and reconstruction, or that transitional justice is not urgent in the aftermath of the cessation of conflict (§ III). The next section clarifies the ‘mechanisms’ through which transitional justice can be thought to make their contributions to development, emphasizing their norm affirming function, and their (related) potential to disarticulate and articulate networks (§IV). Finally, I close by showing the relevance of the foregoing analysis to the WDR and offer four cautionary notes about the approach it adopts (§V).

### I.

Despite differences about boundaries and modalities of application, consensus about the minimum core elements of a transitional justice policy is reflected, for example, in the UN General Secretary’s Report of 2004, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.”<sup>3</sup> This report defines transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-

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<sup>2</sup> One could say in the past that transitional justice measures were applied largely in cases where gross violations of human rights had taken place. The increasingly frequent application of the practice in post conflict settings requires an expanded reference; ‘Serious crimes under international law’ includes both gross violations of international human rights law and serious violations of international humanitarian law. In terms of crimes this basically refers to genocide, extrajudicial, summary or arbitrary executions; enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention, deportation or forcible transfer of populations, slavery and slave trade, and systematic racial discrimination fall into the category of gross violations of human rights. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.

<sup>3</sup> S/2004/616, August 23, 2004.

scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>4</sup> The report enumerates the main components of a transitional justice policy mentioning explicitly criminal justice, truth-telling, reparations, and vetting,<sup>5</sup> and, furthermore, stipulates that, far from being isolated pieces, these “mechanisms” (*sic*) should be thought of as parts of a whole: “[w]here transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.”<sup>6</sup>

More important than any terminological consensus is agreement on the grounds of this practice. Legally, transitional justice arguably responds to violations of foundational elements of the international legal architecture, among others, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the International Covenant on Civil and Political Rights; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment; the International Convention for the Protection of All persons from Enforced Disappearance; the Geneva Conventions of 1949; the 1977 Protocol Additional (No.I) to the Geneva Conventions of 12 August 1949; and the Protocol Additional (No.II) to mention only a few treaty-based sources. Several UN documents reflect the specific ways in which transitional justice measures constitute an effort to give substance to internationally binding obligations to secure the rights to justice, truth, and reparations.<sup>7</sup>

The fact that transitional justice measures rest upon binding obligations does not mean that there is no latitude concerning how to satisfy those obligations, concretely. Thus, to illustrate, the obligation to investigate, prosecute, and bring to justice perpetrators of certain violations –the principle “that the most serious crimes of concern to the international community as a whole must not go unpunished” in the words of the preamble of the Rome Statute of the International Criminal Court— leaves open many important questions including the precise scope of those liable to prosecutions (those “most responsible”) or, what constitutes an adequate punishment for those found guilty of the relevant crimes in a particular jurisdiction. Similarly, the obligation to provide reparations to victims does not settle, on its own, crucial questions in the design and implementation of reparations programs, including what type of benefits to distribute or of what magnitude. There is, indeed, quite a bit of discretion concerning most aspects of the design and implementation of these measures, allowing for sensitivity to important contextual considerations. This conceptual and practical space, however, should not become an excuse for non-compliance.

Before proceeding in the substantive part of this annex to the articulation of the links between transitional justice, security, and development, a few words about the particular elements of a transitional justice policy and illustrations about their mode of implementation may be useful.

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<sup>4</sup> Ibid., p. 4.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. p. 9.

<sup>7</sup> In addition to the SG report mentioned above, see, e.g., Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/ Add.1); Diane Orentlicher, Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, E/CN.4/2004/88, February 27, 2004; Report of the Independent Expert to Update the Set of Principles to Combat Impunity, E/CN.4/2005/102, February 18, 2005 and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of the International Humanitarian Law. (A/RES/60/147).

a. Criminal prosecutions. Although the obligation to prosecute and punish gross violations of human rights or international humanitarian law is not new, it is only in the last two decades that serious and systematic efforts have been made to comply with this obligation. In part because of this relatively short experience, but mostly because of the paucity of prosecutions in transitional settings, what I find noteworthy about discussions concerning prosecution is the lack of relation between the resistance a policy of prosecutions still generates in some quarters and the (very low) likelihood that most of those responsible for abuses will actually be legally charged. No country where atrocities have taken place has come even close to prosecuting each and every perpetrator, let alone punished them in proportion to the harm they caused –not even those “most responsible.” Indeed, for various reasons including scarcity of resources, capacity, and will, only a tiny fraction of those that bear responsibility for perpetrating outrageous acts are ever even investigated.<sup>8</sup>

In order to respond to this and other challenges that accompany prosecutorial efforts, during the last twenty years various initiatives have been launched and are starting to bear fruit. While prosecutions in domestic courts are still in principle favored over international courts considering their lower costs, and higher impact, participation, and ownership, precisely due to reasons related to the fragility of institutions in post conflict and post authoritarian settings as well as the frailty of most transitional processes, alternatives to domestic prosecutions have been pursued with some degree of success. In 1993 and 1994 the UN Security Council established two ad-hoc international tribunals to try cases stemming from the conflicts in the former Yugoslavia and Rwanda, respectively.<sup>9</sup> Hybrid tribunals, thought to combine some of the advantages of domestic prosecutions (proximity, legacy, possibility of participation, etc.) and to mitigate some of the disadvantages of international tribunals (distance, costs, etc.)<sup>10</sup> were established in, among others, Sierra Leone,<sup>11</sup> in Cambodia,<sup>12</sup> and, more recently, in Lebanon.<sup>13</sup> Similarly, prosecutions of human rights violations have taken place under the principle of ‘universal jurisdiction’ for crimes committed abroad in courts in Belgium, Germany, and Spain, amongst others.<sup>14</sup> Finally, of course, the International Criminal Court, long in the making, now has four cases concerning the DRC, CAR, Uganda, and Sudan. Beyond the cases it may try, there are other ways in which the ICC may have –and is already having—an impact on the ground,

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<sup>8</sup> Argentina and Chile have made great strides in the prosecution of human rights abusers, in a development that both reflects and catalyzes the recent international determination not to leave at least the worst abuses in total impunity. For these cases see, e.g., Naomi-Roht Arriaza, “Prosecuting Heads of State in Latin America,” in *Prosecuting Heads of State*, Ellen Lutz and Caitlin Reiger, eds. (New York: Cambridge University Press, 2009), and ICTJ Briefing, “Criminal Prosecutions for Human Rights Violations in Argentina,” (November 2009) available at: [http://www.ictj.org/static/Publications/briefing\\_Argentina\\_prosecutions.pdf](http://www.ictj.org/static/Publications/briefing_Argentina_prosecutions.pdf)

<sup>9</sup> S.C. Res. 827 May 29, 1993, U.N. Doc. S/RES/827 (1993), establishing the ICTY, and S.C. Res. 995, November 8 1994. U.N. Doc. S/RES/995 (1994), establishing the ICTR.

<sup>10</sup> See OHCHR, “Maximizing the Legacy of Hybrid Courts” [Part of The Office of the High Commissioner for Human Rights’ *Rule of Law Tools for Post-Conflict States*, to which I will refer hereafter by ‘OHCHR’ followed by the specific topic]. Available at: [www.ohchr.org/Documents/Publications/HybridCourts.pdf](http://www.ohchr.org/Documents/Publications/HybridCourts.pdf)

<sup>11</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002.

<sup>12</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, June 6, 2003.

<sup>13</sup> S.C. RES 1757, May 30, 2007, U.N. Doc. S/RES/1757 (2007).

<sup>14</sup> See e.g., Ellen Lutz, “Prosecutions of Heads of State in Europe,” in *Prosecuting Heads of State*.

including the changes that are brought about by implementing legislation at the local level and by trainings of the judiciary and the security forces so as to prevent them from falling foul of ICC requirements. Indeed, it is starting to become apparent that the greatest contribution that the ICC can make against impunity will derive not through its direct assertion of jurisdiction, heavily limited by Art. 17 of the Rome Statute, which sets forth the ‘complementarity regime’ under which the court operates –that is, that the Court will try cases only when national courts are “unable or unwilling” to do so (among other jurisdictional limitations).<sup>15</sup>

**b. Truth-Commissions.** Over the last three decades, almost 30 countries have established officially sanctioned, temporary, non-judicial investigative bodies to investigate a period in which massive abuses took place.<sup>16</sup> The motivations for establishing such commissions are varied and so are their mandates and modalities of operation, but generally speaking, they are created at least in part in order to enhance accountability in contexts in which given the difficulties in carrying out equally massive prosecutions, an ‘impunity gap’ results. Truth commissions are also meant to provide an institutional response to the now widely recognized right to truth, and, particularly since the introduction of public audiences as one of their characteristic features, commissions provide an official stage where victims, who have been traditionally marginalized, (re)enter the public sphere.

The learning curve concerning the operation of truth commissions in a globalized world has been, not surprisingly, quite steep, mitigating thereby the fact that this is an area in which there are fewer international law standards than regarding criminal prosecutions.<sup>17</sup> There are nevertheless deep variations across commissions in different countries. They vary not just in terms of their structure, size, and capacity, but also in terms of the mandate that they receive (for example, the period and type of violations they are supposed to investigate), their powers (including, crucially, whether they receive search and subpoena powers or not), their relationship with other justice measures including prosecutions,<sup>18</sup> and the scope and nature of their recommendations (some range broadly, over huge areas of institutional reform, some concentrate more narrowly on victim-related issues, some recommendations are supposed to be binding, some are not).

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<sup>15</sup> Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9, Art. 17.

<sup>16</sup> See, e.g., Priscilla Hayner, *Unspeakable Truths* 2<sup>nd</sup>. Edition (New York: Routledge, 2010), and OHCHR, Rule of Law Tools for Post-Conflict States: Truth Commissions (Geneva: UHCHR, 2006), HR/PUB/06/1. Available at: [www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf)

<sup>17</sup> For the standards that truth commissions ought to observe see Mark Freeman, *Truth Commissions and Procedural Fairness* (New York: Cambridge University Press, 2006) and OHCHR Truth Commissions. For documentation concerning truth commissions, including establishing decrees and reports, see the USIP’s Truth Commissions Digital Collection at <http://www.usip.org/library/truth.html>

<sup>18</sup> It is nothing more than a misperception that all truth commissions have been created as substitutes for criminal justice and that they are closely related to amnesties. Most truth commissions in the world have actually recommended the judicialization of cases, and their relationship with amnesties has been either non-existent or more complicated than it is thought. Even in the much touted South African model of ‘truth in exchange for amnesty’ the amnesty to which those that provided testimony could apply was (a) conditional both on the crimes committed having been ‘political’ and on full disclosure –on pains of prosecution— and (b) granted or denied by a sub-committee of the commission which was independent from the one receiving the testimony. Indeed, most of those who provided testimony to the TRC had their applications for amnesty turned down—although the history of subsequent prosecutions has been dismal.

Interestingly, despite both the theoretical debates about the relativity of truth and the fact that commissions usually operate in politically charged contexts and pronounce themselves over deeply contentious issues, the veracity or reliability of truth commission reports has rarely been disputed. Indeed, if anything, the more frequent charge, namely, that particular reports did not ‘go far enough’ (either in depth or in breadth), provides some support to their methodological and substantive reliability; it amounts to the claim that if only the same methods and approach could have been applied to a broader period of time, or more in depth to given topics, results would have been better. In any case, despite the mixed record of compliance on the part of governments with truth commission recommendations, both the process (now almost invariably participatory and increasingly public) of building up a record of the abuses as well as the record itself –focusing as it normally does, on more ‘structural’ dimensions of violence than the inevitably perpetrator-oriented criminal justice process—has become an important moment in almost all of the transitions in the last two to three decades.

c. Reparations programs. Reparations have come to occupy a special place in transitional processes at least in part because they are the transitional justice measure which arguably has the largest potential of making a difference in the life of victims. Most of the recent transitional countries have adopted administrative, non-judicial programs to distribute a variety of benefits –both material and symbolic, and both individual and collective—to victims as parts of their transitional justice policies.<sup>19</sup>

Here again, there are significant variations amongst different countries. Some of the most significant variables include the following:<sup>20</sup> (a) programs differ in their degree of *comprehensiveness*, that is, in the list of violations that trigger access to benefits. There is no reparations program that has provided benefits for all the different types of violations that take place during periods of conflict or of authoritarianism. Choices are inevitable and most programs have concentrated on a fairly narrow set of violations of largely civil and political rights, those that threaten physical integrity and a narrow set of liberties. In effect, programs concentrate heavily on extrajudicial executions, disappearance, illegal detention, torture, and, increasingly, on forms of sexual violence. (b) Programs differ in their degree of *complexity*, that is, in the kinds of benefits they distribute. The trend is towards programs of greater complexity, that is, in favor of programs that in addition to monetary compensation provide other kinds of benefits, such as access to medical services, educational and housing support, as well as symbolic benefits such as official apologies and the renaming of buildings and public spaces. (c) Different programs adopt different distribution modalities for their compensatory benefits, and some of them involve the apportioning of those benefits amongst different family members. All other things being equal experience suggests that distributing monetary benefits in terms of a pension system rather than in single lump sums is beneficial. There is some evidence that apportioning has beneficial consequences for women and children.<sup>21</sup> (d) Programs also vary significantly in their degree of *munificence* that is, in the magnitude, the quantum, of benefits they offer. As it turns out, there is no direct correlation between the degree of socio-economic development of a country and the munificence of its reparations program, or between

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<sup>19</sup> See, e.g., *The Handbook of Reparations*, Pablo de Greiff, ed. (New York: Oxford University Press, 2006).

<sup>20</sup> For a detailed elaboration of these and other design variables in reparations programs see Pablo de Greiff “Repairing the Past,” in the *Handbook* and OHCHR, Rule of Law Tools for Post-Conflict States: Reparations Programmes (Geneva: UHCHR, 2008), UN Publ. no. HR/Pub/08/1. Available at: [www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf](http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf)

<sup>21</sup> See, e.g., *The Gender of Reparations*, Ruth Rubio-Marín, ed. (New York: Oxford University Press, 2009).

munificence and degree of satisfaction with the program. Beyond a certain threshold other variables, such as participation and, particularly, linkages with other justice measures, seem to be more significant.<sup>22</sup>

d. Vetting. The agenda of transitional justice overlaps with the broad agenda of ‘institutional reform.’ However, largely because transitional justice is concerned with addressing human rights violations and the institutions that are most often involved in such abuses are the security forces and the judiciary, transitional justice is concerned in particular with vetting these institutions. Various measures that can be loosely grouped under the label of ‘vetting’ have long been a part of common practice in post-conflict and post-authoritarian transitional situations. The idea of ridding institutions of abusers and collaborators in the aftermath of conflict or authoritarianism, as is well known, has a long (but not necessarily distinguished) history.<sup>23</sup> I will follow recent efforts to distinguish vetting measures from massive, summary dismissals or purges, and will use the term ‘vetting’ to refer to processes for assessing the integrity of individuals to determine their suitability for continued or prospective public employment, where integrity refers to “an employee’s adherence to international standards of human rights and professional conduct, including a person’s financial propriety.”<sup>24</sup>

Just as in the case of the other transitional justice measures, there has been a great deal of variation between different programs.<sup>25</sup> At the broadest level an important distinction can be drawn between review and (re)appointment processes, corresponding to two different approaches to transitional institutional reform: the first kind of process, review, screens members of existing institutions that will be gradually reformed, in part through personnel changes. In (re)appointment processes, the screening of individual records takes place after an institution is disbanded and a renewed one is being established, so that former employees apply for their old positions—along with a potentially new pool of applicants.<sup>26</sup>

Beyond this very general distinction, the following are some of the crucial design variables in vetting programs:<sup>27</sup> (a) vetting programs differ in terms of their *targets*. No transitional society has reformed or vetted all institutions at the same time, and in fact, rarely even a single institution at all hierarchical levels. Choices have to be made both about the institutions where vetting will be applied and the positions within those institutions which will be subject to screening. (b) Programs differ also in terms of the *screening criteria*; what kind of abuses, precisely, is the system designed to root out? (c) Not all programs are the same in terms of the *sanctions* they impose; even firings can take place in many different ways (starting with a relatively mild one involving giving people the opportunity to resign without disclosing their participation in behavior considered abusive). Vetting sanctions can involve different degrees of publicity and also prospective limitations in seeking employment in various sectors in the future.

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<sup>22</sup> See Alexander Segovia “Financing Reparations Programs,” in the *Handbook*, and OHCHR Reparations Programmes.

<sup>23</sup> See, e.g., papers in Part II of *Retribution and Reparation in the Transition to Democracy*, Jon Elster, ed. (Cambridge: Cambridge University Press, 2006).

<sup>24</sup> OHCHR Rule of Law Tools for Post-Conflict States: Vetting (Geneva: OHCHR, 2006), p. 4. UN Publ. no. HR/PUB/06/5. Available at: [www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf)

<sup>25</sup> See the essays in *Justice as Prevention. Vetting Public Employees in Transitional Societies*, Alexander Mayer-Rieckh and Pablo de Greiff, eds. (New York: Social Sciences Research Council, 2007).

<sup>26</sup> Mayer-Rieckh “On Preventing Abuse: Vetting and Other Transitional Reforms,” in *Justice as Prevention*.

<sup>27</sup> See Roger Duthie’s useful introduction to *Justice as Prevention*.

## II

What role can these justice related measures play in the promotion of security and development in contexts of fragility? Before beginning to address that question by offering the sketch of a normative (and explanatory) conception of transitional justice that centers on determining the proper goals that can be attributed to a comprehensive transitional justice policy and on the specification of the ‘social mechanisms’<sup>28</sup> through which the measures can be thought to contribute to the attainment of these goals—two steps which are as crucial as usually missed in the assessment of policy interventions—it is important to dispel two misimpressions about transitional justice.<sup>29</sup>

The first is that transitional justice interventions are concerned merely with ‘the past.’ This is manifested in many ways, including the unargued association of an interest in transitional justice with retributivism. Since retributivism is a philosophically non-consequentialist position, that lack of concern with (future) consequences is often transferred to transitional justice as a whole (ignoring the fact that transitional justice cannot be reduced to its criminal justice dimension, even if there are some that defend that measure on retributivist grounds). More generally, this misconception is expressed in the view that the main aim of transitional justice is to ‘give closure’ to a problematic past.<sup>30</sup> The remainder of this section will offer grounds for questioning this claim.

The second misperception consists of the claim that transitional justice addresses issues of concern to victims alone. To see how profound this misunderstanding is, it is good to keep in mind what the effects of massive human rights violations usually are.

The “phenomenology of victimhood” is dense and complex, but it overwhelmingly gravitates toward the conclusion that 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. The expectations that get broken whenever human rights are violated are not just whimsical ones; they are based on general norms—that is, they are expectations whose satisfaction we reasonably feel *entitled* to. These norm-based expectations are the manifestation of the basic structure, the ground or framework, of our agency. They are expectations about, for example, what constitutes legitimate treatment of others and at the hands of others, about situations in which it is “normal” to expect the assistance of others, about the state being the guarantor, rather than the violator, of fundamental rights, and so on. The very basic, fundamental nature of these expectations explains the pervasive fear that their defeat generates: victims experience a deep sense of normative disorientation (How could *this* have happened? If this happened, then *anything* can happen), of solitude (How could *anyone* do

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<sup>28</sup> On the notion of “social mechanisms,” see, e.g., *Social Mechanisms*, Peter Hedström and Richard Swedberg, eds. (New York: Cambridge University Press, 1998).

<sup>29</sup> Misperceptions to which the rhetoric of transitional justice both in practice and in the literature, has, concededly, fueled.

<sup>30</sup> E.g., the claim is repeated in the otherwise very useful paper by Chiara Giorgetti on “International Norms and Standards,” one of the background papers for the WDR Report. (Draft 1/19/2010), p. 25.



this to me, and, crucially, how come *no one* prevented it?), and of resentment (This should have *never* happened, I was entitled to better treatment).<sup>31</sup>

In the context of the WDR, it is even more important to note that it is not just (“direct”) victims who are affected by violations; human rights violations have huge ‘spill over effects.’ Ultimately, this is not only a function of bonds of concern or even of relations of dependence, but also a function of the nature of the norms that are shattered when human rights are violated—namely, the general norms that give rise to the expectations that undergird basic agency and social competence. In contexts of massive human rights abuses, nonvictims often have the sense that after what happened to the victims, *no one* can be safe, no one can really know what to expect. The end result is a generalized weakening of agency, not just the agency of victims. It is not uncommon for victims of massive abuse to lead substantially more reclusive lives than they led before the violations, to withdraw from public spaces, to disengage from social networks, and particularly to refrain from making claims to authorities and formal institutions. This is also true for nonvictims.<sup>32</sup>

Having addressed misimpressions about what transitional justice is about, let me turn to the model. Given that all sorts of goals can be attributed to a given policy intervention (and certainly the range of goals attributed to transitional justice has been broad) in order to assess interventions, clarity about the goals that can be reasonably attributed to them, *and* a reasonable account that explains the ‘social mechanisms’ that *could* lead from the implementation of the policy to its expected outcome, are essential.<sup>33</sup>

Elsewhere, I have articulated in great detail a normative model of transitional justice.<sup>34</sup> As all normative models this one is meant to clarify the relationship between its constituent parts, clarify its relationship with other concepts and practices, and finally, maximize the action guiding potential of transitional justice by clarifying the manifold implications of commitments that we in fact undertake, and by showing that understanding not just *what* we are committed to (for example legally), but *why* we are so committed can make a difference in our choices.

Briefly, the main idea is that the various parts of a comprehensive transitional justice policy are tied together by the fact that the different measures can be thought to promote certain goals. The ultimate goal of transitional justice is, of course, to promote justice.<sup>35</sup> The

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<sup>31</sup> See my “Articulating the Links between Transitional Justice and Development: Justice and Social Integration,” in *Transitional Justice and Development: Making Connections*, Pablo de Greiff and Roger Duthie, eds. (New York: Social Sciences Research Council, 2009).

<sup>32</sup> The ‘spill over’ effects of the effects of human rights violations from victims to others can be magnified when the violence has an identity dimension, for then all the members of broad categories of people feel particularly threatened. See, e.g., *Identities in Transition*, Paige Arthur, ed. (New York, Cambridge University Press, forthcoming). But there is evidence of these effects across a variety of cases, including those, such as Argentina, in which the human rights violations were not an instance of ‘ethnic violence.’

<sup>33</sup> Notice the modality; ‘could.’ Nothing guarantees that the implementation of complex policies will produce a given set of outcomes. Nevertheless, an understanding of the mechanisms, which includes or generates an account of the ‘functional adequacy’ of the policy relative to its end, is essential. This helps avoid misfocused evaluations such as that in Tove Grete Lie, et.al., “Post-Conflict Justice and Sustainable Peace” World Bank Policy Research Working Paper 4191, April 2007.

<sup>34</sup> See de Greiff, “Theorizing Transitional Justice,” in *Transitional Justice*, Melissa Williams, Rosemary Nagy, and Jon Elster eds. NOMOS, vol. L (New York: New York University Press, forthcoming), which the argument in this section tracks closely. Full references to the relevant literature appear in that paper.

<sup>35</sup> For example in the sense of contributing to “giving everyone his or her due,” or to strengthening the link between effort and success, or whatever one’s general understanding of justice might be.

problem is that this statement is too abstract to be of real help. Arguably, however, and in a reconstructive spirit, transitional justice measures can be seen as measures that promote recognition, civic trust (as mediate ends), and the democratic rule of law (as a final end).<sup>36</sup>

This is a systematic conception, precisely, because it does not attribute aims to measures that, as desirable as they might be, may nevertheless be only randomly related to the former. What makes it reasonable to claim that recognition, trust, and the democratic rule of law are goals of transitional justice measures is not only that these ends relate conceptually to one another but, more important, that they are closely related with justice, and of course, as will be shown below, that a reasonable account can be given of the functional adequacy of the measures to attain these goals. The close relationship between recognition, trust, and the democratic rule of law on the one hand, and justice, on the other, is shown by the fact that they can be understood as dimensions or as both preconditions and consequences of the effort to give concrete expression *through law-based systems* to the necessarily more abstract notion of justice: a system of justice (a legal one, at least), meaning a system of effective, actionable, and legitimate *rights*, is unimaginable without minimal levels of recognition, trust, and political participation. At the same time, systems of justice of this sort also stimulate and strengthen recognition, trust, and political participation. The goals, then, are closely tied to justice.<sup>37</sup>

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<sup>36</sup> In the assessment of policy it is not only important to clarify the relationship between the goals the policies are designed to attain and the mechanisms that make them functionally adequate for the attainment of these goals, but also, at a more refined level, to establish distinctions between different types of goals. To begin with, the distinction between immediate, mediate, and final goals of a policy is important. The immediate goal of a particular measure is one that in theory can be brought about by that intervention on its own; 'mediate' and 'final,' therefore, refer to degrees of separation from this position. The mediate aims of a measure are aims that it is reasonable to think the measure's implementation may further, but which it is just as reasonable to think the intervention of a number of different measures will also be required; so, for example, reparations may contribute to making victims feel recognized but almost certainly cannot satisfy victims' claims for recognition on their own. 'Final ends' in the way I am using the term here are ends whose attainment is causally even more distant, and therefore whose realization really depends upon the contribution of an even larger number of factors, whose role, relatively speaking, increases in importance. So there are actually two, not just one, axes along which I am classifying aims: not only the number of intervening factors, but their relative importance in bringing about the desired results. While it is not unthinkable that transitional justice measures, if designed and implemented in what I have called an "externally coherent" fashion—that is, in a manner that is aware of the many ways in which they interrelate both positively and negatively and tries to maximize the synergies—could make a contribution to the trust that citizens have in their institutions, it is obvious that strengthening democracy will require the intervention of a larger number of factors, and that in this mixture, the significance of transitional justice measures may end up being relatively speaking low, compared to, for example, broader constitutional reforms and economic restructuring programs.

<sup>37</sup> For a fuller development of these links, see, e.g., de Greiff, "Truth-Telling and the Rule of Law," in Tristan Anne Borer, ed., *Telling the Truths, Truth Telling and Peacebuilding in Post-Conflict Societies* (Notre Dame: University of Notre Dame Press, 2006). The fact that the argument spins around the relationship between instruments that promote certain goals (recognition, civic trust, and the strengthening of the democratic rule of law), goals which in turn are related to the establishment of *formal* systems of justice, says something about whether 'complementarity' in a sense akin to that in which the Rome Statute defines the relationship between the ICC and national jurisdictions applies to the relationship between local, informal mechanisms and the familiar transitional justice mechanisms mentioned, e.g., in the SG's 2004 report (cf. fn. 2 above); as stated before, the list of familiar elements of a transitional justice policy is obviously non-exhaustive and in fact, it usually includes the implementation of traditional, local measures. However, to the extent that justice, under conditions of modernity, includes the institutionalization of formal systems of rights, the burden of establishing the relationship

*Civic Trust.* For reasons of space, I will concentrate here on issues relating to trust and the rule of law, simply stating that the different transitional justice measures can be thought to provide recognition to victims not only as victims but as right bearers, that is, as citizens. The argument concerning the trust-inducing potential of transitional justice measure must start with what again can only be a stipulation, namely that trust should not be reduced to mere empirical predictability: that reliability is not the same as trustworthiness can be seen in our reluctance to say that we *trust* someone about whose behavior we feel a great deal of certainty but only because we both monitor and control it (e.g., through enforcing the terms of a contract), or because we take defensive or preemptive action. Trust, far from resembling a sort of ‘mechanical reliability,’ involves an expectation of a shared *normative* commitment. I trust someone when I have reasons to expect a certain pattern of behavior from her, and those reasons include not just her consistent past behavior, but also, crucially, the expectation that among her reasons for action is the commitment to the norms and values we share.

Trusting an institution, the case that is particularly relevant for us, amounts to assuming that its constitutive rules, values, and norms are shared by its members or participants and are regarded by them as binding.

How do transitional justice measures promote this sense of civic trust? Prosecutions can be thought to promote civic trust by reaffirming the relevance of the norms that perpetrators violated, norms that precisely turn natural persons into rights-bearers. Judicial institutions, particularly in contexts in which they have traditionally been essentially instruments of power, show their trustworthiness if they can establish that no one is above the law. An institutionalized effort to confront the past through truth-telling exercises might be seen by those who were formerly on the receiving end of violence as a good faith effort to come clean, to understand long-term patterns of socialization, and, in this sense, to initiate a new political project around norms and values that this time around are truly shared. Reparations can foster civic trust by demonstrating the seriousness with which institutions now take the violation of their rights, a seriousness that is manifested, to put it bluntly, by the fact that “money talks”—and so do symbolic reparations measures—that even under conditions of scarcity and competition for resources, the state responds to the obligation to fund programs that benefit those who were formerly not only marginalized but abused. Finally, vetting can induce trust, and not just by “re-peopling” institutions with new faces, but by thereby demonstrating a commitment to systemic norms governing employee hiring and retention, disciplinary oversight, prevention of cronyism, and so on.

*Democratic Rule of Law.* The general point is that the various transitional justice measures contribute to strengthening the rule of law as follows: criminal trials that offer sound procedural guarantees and that do not exempt from the reach of justice those who wield power illustrate nicely the generality of law; truth-telling exercises that contribute to understanding the many ways in which legal systems failed to protect the rights of citizens provide the basis on which, *a contrario*, legal systems can behave in the future; reparations programs that try to redress the violation of rights serve to exemplify, even if it is *ex post facto*, the commitment to the notion that legal norms matter; and, finally, institutional reform measures, even those that

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between traditional justice measures and formal systems of justice falls on the shoulders of those that defend this understanding of ‘complementarity.’ On the lack of functional alternatives to formal system of rights under contemporary conditions see Jürgen Habermas, “Legitimation through Human Rights,” in Pablo de Greiff and Ciaran Cronin, eds., *Global Politics and Transnational Justice* (Cambridge MA: MIT Press, 2002).

screen out those who abused their positions, help to make rule of law systems operative, prospectively at least.

This commitment to the rule of law is not exhausted by a commitment to a formalist understanding of the notion, for such an understanding is compatible with many forms of arbitrariness, as long as these are regularly and predictably patterned. If the notion of the rule of law is to have any critical purchase, it has to take seriously the idea that legitimacy does not depend just on formal characteristics of the law, but also on characteristics of the very process of *making* laws and on the substance of the laws thus produced.

A rule is recognized as a legal *norm* not only in virtue of attending to facts pertaining to the rules themselves (for example, the fact that the rule has formal properties such that it has the capacity to guide behavior), but in virtue of the fact that those subject to it, after taking a normative, evaluative attitude, endow the rule with the authority to “norm” (*normen*) their behavior. Under conditions of modernity, this authority is a function of what I call “the dynamics of inclusion and ownership” behind lawmaking; the authority of law depends, ultimately, upon its legitimacy, something that a law gains precisely in virtue of the fact that we can consider it to be *our* rule (ownership), one that we give to ourselves—via recognized procedures—where the “ourselves” keeps growing (inclusion).

Just as in the attribution to transitional justice of the goals of providing recognition and promoting civic trust, I want to emphasize that in claiming that transitional justice has as one of its ‘final goals’ the promotion of the democratic rule of law, the argument is not merely that this is a desirable goal, but that it is closely connected with justice. A substantive conception of the rule of law, one that among other things guarantees participation is both a precondition and a consequence of justice; the possibilities of achieving justice overall and of attaining its full effects usually depend on the possibility of establishing practices of participation in processes of law-making.

Before closing, I want to highlight the special role of norms in this account. The effects of massive human rights violations and of leaving their legacies unaddressed, articulated in the opening part of this section in terms of norm breakdown, is now matched by an account of transitional justice according to which transitional justice measures seek the reestablishment of the force of fundamental norms.

### III

Now, so how does this help to clarify the relationship between transitional justice, security, and development? Clarity calls for acknowledging (partially) two points that could be made by a critic, i.e., by those who claim that measures to redress the past at the very least are not urgent under some circumstances, including those of fragility of on-going conflict, or of the immediate aftermath of conflict. As the critic points out, after all, the application of transitional justice measures does seem to presuppose certain developmental and security conditions, and it is on guaranteeing these that efforts should concentrate: trials require operative courts; reparations programs require, among other things, resources to distribute; even the mildest form of institutional reform, vetting, requires institutions strong enough to withstand having personnel removed. Trials and truth-telling exercises are significantly harder to organize where conflict is raging on and where security conditions are such that witnesses and court or truth commission officials cannot exercise their functions. Reparations in the midst of conflict—as Colombia is belatedly learning—are not only difficult to plan, for the horizon of victims keeps growing, but is

not even clear that this is what would best serve victims, compared with truly effective humanitarian programs.

Second, from the account above, including the model, it is clear that transitional justice measures were functionally designed in order to shore up systems of rights, rather than, primarily, to transform the socio-economic conditions of a country or to secure the silencing of guns.

These two considerations are true, and yet, the problem is that they rest on quite impoverished conceptions of development and security, and of the conditions that lead to them. True, weak institutions or raging conflict makes trials, truth telling, reparations, and vetting difficult. But first, the objection seem to neglect the fact that prosecutions, truth-telling, reparations, and vetting themselves rest on long and arduous processes, beginning with documentation and evidence gathering, processes without which the measures cannot be implemented, but that indeed can be started and *should* be started as the violations take place. Second, concerning some of the processes, there are alternatives that by-pass some of the difficulties generated by institutional weakness and conflict such as holding trials abroad.<sup>38</sup> ,.

Most importantly, however, except for notions of development that reduce it to sheer economic growth (perhaps) and of security which reduce it to the thinnest version of 'negative peace' (in the sense of the baldest form of physical security –again, perhaps) even slightly more robust understandings of security and development would see the value of measures that seek to reestablish or establish for the first time legally mediated systems of rights and that try to achieve this aim, fundamentally, in virtue of their norm-affirming potential.

So, before tackling the relevance of justice to security, let us deal with its relevance to development.<sup>39</sup> I will borrow three *topoi* from the development literature to start making the case. The first is the recent development literature, some of it produced by the World Bank or with its support, that shows the ways in which deep inequalities lead to a downward adjustment of expectations on the part of the poor, making them less effective participants in economic activities.<sup>40</sup> The second topic I will appeal to is the literature on social capital, replete with analysis of how mistrust adversely affects development, not the least through increases in transaction costs and diminutions in investments.<sup>41</sup> Finally, I will also borrow from the notion of human development understood in terms of capabilities or the enhancement of choice, which also seeks to explain the ways in which poverty and marginalization, by diminishing capabilities, undermine development.

In a nutshell, the argument is that the same accounts used to explain the negative effects of poverty and marginalization explain why unaddressed human rights violations would have a negative impact on development, and why, *a contrario*, providing recognition, promoting trust, and strengthening a robust and inclusive rule of law, is important. The outlines of the accounts will be as follows: unaddressed human rights violations, like poverty, leads to 'adverse forms of recognition' which in turn weaken the 'capacity to aspire.'<sup>42</sup> Or, they lead to a

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<sup>38</sup> The ICTY started operating before the conflict in the former Yugoslavia was resolved, and the ICC has not waited for conflict to be over in some of the situations in which it is active.

<sup>39</sup> The arguments sketched in this section are worked out in detail in my "Articulating the Links between Transitional Justice and Development: Justice and Social Integration." Here, for reasons of space I can do nothing more than outline them.

<sup>40</sup> See, e.g., WDR, *Equity and Development* (Washington, D.C.; World Bank, 2006), esp. chs. 1 and 2.

<sup>41</sup> See, e.g., Deepa Narayan, "Bonds and Bridges: Social Capital and Poverty," Poverty Group, World Bank (n.d.)

<sup>42</sup> See, WDR, *Equity and Development*, ch. 1.

weakening of trust (the erosion of social capital), which increases transaction costs, diminishes investments, and in the end, are akin to a reduction in market size. Finally, one can also say that unaddressed human rights violations undermine the capacities that are fundamental to exercising choice at the core of the concept of human development. Keeping in mind the spillover effects of massive human rights violations, the fact that the weakening of basic norms affects not just victims but all of those who are supposed to mediate their interactions by means of these norms, makes these accounts more compelling

Indeed, one can use a version of Sen's account of the manifold relationship between freedom and development, to argue for the developmental relevance of a type of justice that works through the affirmation of basic norms; the argument would be that the institutionalization of these norms through legally based systems of rights is instrumentally useful to development, that such systems are partly constitutive of development (that is, that achieving development *means*, in part, institutionalizing such rights), and that they are necessary in order to give concrete content, in specific circumstances, to the notion of development (that is, that as constructivists argue, the notion of development needs to be specified by means of public deliberations that call for the institutionalization of basic norms that guarantee certain fundamental rights).<sup>43</sup>

Once the complexity of the relationship between justice and development is clarified, it is easier to make a parallel case regarding the relationship between security and justice; justice (again understood in terms of recognition, civic trust, and a substantive conception of the rule of law) can then be seen to be instrumental to security; security forces will have a hard time fulfilling their mission (even if this is narrowly conceived) with former abusers in their midst, both for 'internal' and for 'external' reasons; internally, networks of human rights violators are likely to act as 'spoilers' of reform and of the provision of legitimate services. Externally, given that in the absence of totalitarian surveillance security forces depend upon a minimal sense of trust on the part of the population so that at least they are willing to report crimes that they witness or suffer, unreformed security forces are likely to be ineffective. Vetting, then, can be argued to serve not just the interests of justice, but of security as well.<sup>44</sup> Of other justice-related measures the same could be said: providing reparations for victims, for instance, may facilitate the reintegration of ex-combatants, for in the end, successful reintegration depends upon not just a change on the part of those who used to bear arms, but on the willingness of receiving communities to accept them.<sup>45</sup> The abiding sense of grievance that stems from the mostly true observation that while ex-combatants are often served by complex programs victims and receiving communities receive nothing, does not foster such willingness.<sup>46</sup>

Similarly, a case can be made about a constitutive relationship between justice and security. Here the fact that transitions never wipe the slate clean, that there is no such thing as perfect closure, and therefore never a completely 'new order,' and that this is true not just for

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<sup>43</sup> See, e.g., Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001), chs. 1, 3, and 6.

<sup>44</sup> See de Greiff "Vetting and Transitional Justice," and Mayer-Rieckh "On Preventing Abuse" in *Justice and Prevention*; Roger Duthie and Mayer-Rieckh, "Enhancing Justice and Development through Justice-Sensitive Security Sector Reform," in *Transitional Justice and Development*, as well as Jean-Marie Guehenno's contribution to the WDR.

<sup>45</sup> Recent surveys conducted for the WDR show the reluctance of many members of receiving communities to accept ex-combatants back in their fold. Older surveys in Sierra Leone had already shown the same tendency, and to track the participation in abuses of different armed groups.

<sup>46</sup> See *Disarming the Past. Transitional Justice and Ex-combatants*, Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf, eds. (New York: Social Sciences Research Council, 2009).

victims but for everyone who was subject to the fear that is characteristic of societies in which massive abuses took place, namely the fear that everything is possible, should make the connection particularly compelling. In the absence of measures that give force to basic norms (including the norms that ground the obligations to redress past abuses) people have no reason to feel secure, no matter what other changes may occur. To be secure means, in part, to live in contexts in which norms of justice are routinely applied.<sup>47</sup>

Finally, if the preceding are reasonable presumptions, defining what security requires in concrete and often rapidly changing circumstances assumes that people are willing to participate in discussions, and particularly to *raise claims* on behalf of their perceived security needs. And again, as argued before, this presupposes, precisely, the sort of normatively based systems of rights which call for justice measures when abuses have taken place.

The relationship between justice and security is complex, indeed.

#### IV

Before concluding I would like to elaborate the more ‘explanatory’ dimension of the argument above. Explaining how interventions in the field of justice work is as important as it is seldomly attempted. This dearth of explanatory accounts has the perverse effect of feeding into the tendency to dismiss interventions in justice as, at least, not urgent, for, especially under conditions of scarcity, it is difficult to justify investments that cannot be easily understood.<sup>48</sup> Now, since this tendency is not unprovoked, but stems from a confusion between justification and explanation which leads some of those interested in justice issues to think that a normative, justice-based justification for policy –the idea that we do certain things ‘because it is right’— creates an exemption from the need to work out, precisely, *how* a particular policy is supposed to work, how it achieves its particular (justice-based) ends, setting some boundaries around justificatory issues on the one hand, and explanatory questions on the other, might have the benefit of restoring the incentive to take explanatory issues in justice work more seriously.<sup>49</sup> The starting idea, then, is that even if there is a conception of justice that provides the ultimate justification for interventions in this area (and thus that it is this conception rather than other beneficial consequences that justifies the interventions), it is important to *explain* how the interventions can be thought to realize, bring about, or promote *that* conception of justice. Beyond this, however, concentrating on the explanatory account will help us draw some links between this approach to the relationship between justice, security, and development, and that taken in the WDR.

Again, here I will only be able to sketch the relevant explanatory account. I will frame it in terms of the vocabulary of ‘social mechanisms.’ Although there is no consensus on a single definition of this term, the motivating idea is to bring social sciences beyond mere correlational analyses and to invite them to think (again) about what lies between a particular intervention

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<sup>47</sup> The notion of human security, of course integrates the protection of human rights (including, presumably, the familiar mechanisms of redress when those rights are violated). See, e.g., UNDP, *Human Development Report 1994: Human Security*.

<sup>48</sup> Having said that, it is not that other areas of policy intervention, including development and security themselves, are better understood. For a skeptical account of development interventions, see, e.g., William Easterly, *The Elusive Quest for Growth. Economists’ Adventures and Misadventures in the Tropics* (Cambridge, MA: MIT Press, 2002).

<sup>49</sup> This does not mean that justification and explanation can be separated from one another “all the way down.”

and its alleged effects, to ‘peer into the black box’ that always lies between the inputs and outputs of interventions in the social world.<sup>51</sup> Of course, it is not that this piece of sociological terminology does not pose dangers of its own, not the least that it might suggest inclinations in favor of linear, monocausal explanations. But that risk I have already averted by distinguishing between immediate, mediate, and final ends, a distinction that, recall, spins around not so much the temporal location of the ends, but degrees of causal (in)sufficiency of the measures intended to bring these ends about, and therefore, it involves disavowing the adequacy of linear, monocausal accounts. Having pointed out this risk, it seems to me that there is something salutary in the idea that explanation ultimately proceeds on the basis of clarifying the relevant causal links; it invites modesty of two kinds: first, it highlights how poor our understanding of many things we think we know really is (and I emphasize, justice interventions in this respect are *not* worse off than other policy interventions, including those in the economy), without inducing a sense of paralysis. Furthermore, by affirming the requirement that if we want to attribute to a particular intervention the power to bring about certain consequences we need to articulate an account of the way in which the intervention could do so, the idea of social mechanism imposes discipline on our attribution of effects and promotes a type of fairness in our assessments of particular initiatives. Articulating the mechanism calls for considerations about ‘functional adequacy,’ and this helps clarify that there are effects that we cannot plausibly attribute to a given type of intervention. It also, at the same time, reveals the inappropriateness of faulting interventions for failing to bring about effects they were not functionally designed to produce.

So, leaving introductory remarks aside and returning to the task at hand, in section II I offered explanations about how different transitional justice measures work, trying to spell out how they can be thought to bring about certain ends, or more precisely, how their contribution to bringing about certain ends might be thought about, causally. In this final section I will take one last abstractive turn and try to identify the relevant mechanisms, not just the particular causal chains, as I did before. There are two main (and related) mechanisms by which transitional justice measures achieve their mediate and final ends of providing recognition, promoting civic trust, and strengthening the democratic rule of law; the two principal mechanisms are *norm-affirmation* and the *articulation and disarticulation of networks*.<sup>52</sup>

Since the account I offered in section II already highlights the crucial role that norm affirmation plays in my understanding of transitional justice, here I will only recapitulate the core point: transitional justice measures can provide recognition to victims as citizens, promote civic trust, and strengthen the democratic rule of law, precisely because they are measures that in different ways affirm the force and relevance of some of the norms that are constitutive of each of these goals, which in turn are both conditions and consequences of formal systems of justice.<sup>53</sup> So, to summarize, there are norms that are essential to the recognition of victims not

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<sup>51</sup> See, e.g., Mario Bunge, “Mechanism and Explanation,” *Philosophy of the Social Sciences* 27 (1997): 410-465.

<sup>52</sup> I am using ‘networks’ here to refer to both formal and informal, official and unofficial ‘groups,’ organizations or enterprises (and thus in a sense that is akin to the organizational dimensions of the established ‘practices’ to which Douglass North refers to with the term ‘Institutions.’ See, e.g., Douglass North, “Institutions,” *The Journal of Economic Perspectives*, 5, 1. (Winter, 1991): 97-112; and Alasdair MacIntyre, *After Virtue* (South Bend: University of Notre Dame Press, 1981) for the notion of ‘practices.’

<sup>53</sup> See my “Theorizing Transitional Justice” for a detailed account of the overall strategy. Of course, the argument shows the relevance of norms at the conceptual level. How the norms are institutionalized,



merely as victims, but as citizens, as rights-bearers; similarly, trust is not the same thing as mere empirical predictability, but is based on the conviction that the other acts, at least in part, on the basis of norms; and finally, there is no plausible understanding of the rule of law that does not affirm the importance of certain norms. The satisfaction of the basic norms that are critical to recognition, civic trust, and the democratic rule of law is both a precondition of, and catalyzed by, formal systems of justice. Thus, the argument is that transitional justice measures work, to the extent they do, through the affirmation of these norms. This is the way in which they contribute to the achievement of justice.

In the little space I have left I will concentrate on the second mechanism, having to do with the effects of these justice measures on what we may broadly construe as ‘social networks.’ There are actually two different dimensions to this potential and each of them is worth exploring. One can say that transitional justice measures have both *articulating* and *disarticulating* capacity. The first one has been observed as a side effect of transitional justice measures on civil society. There is sufficient international experience with transitional justice measures now to assert confidently that one of the virtually inevitable consequences of even putting one of these measures for discussion in the public agenda in a country –let alone implementing one such program—is the formation of a plethora of civil society organizations. Transitional justice catalyzes civil society organization. This is as true of reparations measures as it is of truth commissions, and as true in South Africa as it is in Morocco and Peru.<sup>54</sup> This is no mere unintended albeit frequent correlate of transitional justice measures; my point here is that it is an important explanatory mechanism: transitional justice measures work, to the extent they do (that is, they help to provide recognition, to promote civic trust, and to strengthen the rule of law), in virtue of their success in catalyzing the (re)articulation of networks also.

I will return presently to the way in which this articulating capacity of transitional justice measures *explains* anything. To approach the point, and to broaden the scope of the claim beyond civil society, it will be easier to see the negative case first: transitional justice measures also have a *disarticulating* potential. This is, indeed, a better explanation than deterrence of how both prosecutions and vetting, to begin with, contribute to the achievement of justice (more concretely, how they can be thought to contribute to providing recognition to victims as rights-holders, fostering trust, and promoting the rule of law). If deterrence has always been a dubious explanation of the effects of criminal punishment, even of the most severe forms of punishment, and even in the more established jurisdictions, vetting and criminal prosecutions in transitional contexts are even less likely to be adequately explained in terms of deterrence, given that the likelihood of being subjected to either is in most cases too small; in transitional situations there are always general questions about whether the new regime will be able to hold

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both in the sense of the institutional manifestation they receive, and of how effective particular manifestations turn out to be in concrete contexts is a separate and largely empirical question.

<sup>54</sup> For the way in which this worked out in Peru, for example, see Lisa Magarrell and Julie Guillerot, *Reparaciones en la Transición Peruana: Memorias de un Proceso Inacabado* (Lima: APRODEH, ICTJ, OXFAM, 2006), esp. chap. 6. In virtually every country in which a transitional justice measure is proposed, civil society organizations and even coalitions of NGOs follow shortly thereafter.

on to power,<sup>55</sup> and there will always be more specific doubts concerning the reach of prosecutorial initiatives and of vetting measures.<sup>56</sup>

So, how do these measures work? Most immediately, through the disarticulation of criminal networks. Notice that here the argument is not limited to civil society, for indeed, vetting is most often applied as a method to screen public institutions, and prosecutions frequently target government officials. But the main point is that one effective way of accounting for how these measures, which are acknowledgedly weak in their reach (especially based on numbers, both of targets vis-à-vis perpetrators, and of sanctions vis-à-vis the crimes they committed), work, that is, why they can still be thought of as part of a *justice* policy, is that they disable the structures that make system crimes possible in the first place. In a sense, this is a preventive, rather than a deterrent argument. In fact, one of the advantages of this account is that it allows one to explain both vetting and prosecutions without relying on their deterrence effects; . rather than focusing on the possible reactions of individuals to particular measures, this argument operates at a different, more structural level. It takes vetting and prosecutions to be functionally akin to an anti-mafia measure. Thus, their purpose is not primarily to send signals to *individuals* (i.e., that they will lose their jobs, social standing, or, indeed, basic liberties, if they engage in certain behavior, as powerful as these signals might be for some), but to disable *structures* within which individuals (who, by the way, may have refrained from criminal activity were it not for those structures) in fact carried out criminal acts. This is a more defensible position than the deterrent one, fundamentally because it need not commit itself to controversial assumptions about the behavior of individuals given certain incentives. The most controversial assumption the preventive argument can simply eschew has to do with a claim about recidivist tendencies, namely that those who have committed certain offenses are more likely than others to commit them in the future. This is a questionable assumption in its own terms (for, among other reasons, it abstracts from peculiar social conditions which enable criminal activity, conditions in the absence of which many individuals may have refrained from participating in crime, and which are also, precisely, the typical conditions in conflict situations), but it also conflicts with a commitment to ‘meliorism’ –the idea that autonomous individuals have the power to improve themselves.<sup>57</sup> The workings of vetting and prosecutions, then, are partially explained on the grounds that they may prevent the recurrence of violations, not necessarily because the sanctions they mete are sufficient to deter individuals, but because they dismantle networks of criminal activity, even if they do not reach each and every participant in activities that violate the rights of others.<sup>58</sup>

Now let us return to the question of the way in which the *articulating* power of transitional justice measures explains why they can achieve their characteristic aims. It is worth beginning with the reminder that part of the point of exercising certain types of terror is, precisely, to impede the free operation of civil society and the public sphere; one of the uses of

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<sup>55</sup> And the increased use of transitional justice measures in postconflict (and conflict) as opposed to postauthoritarian situations only compounds this problem.

<sup>56</sup> As we know from the criminology literature, the probability of being punished is a more important deterrent factor than the type of punishment. I elaborate these arguments (and offer references to the relevant literature) in “Vetting and Transitional Justice.”

<sup>57</sup> For a succinct account of meliorism as a liberal commitment, see John Gray, *Liberalism* (Minneapolis: University of Minnesota Press, 1995).

<sup>58</sup> Truth commissions may be said to have a weak preventive power in an analogous sense: there are some activities that can only be performed in the shadows (even if their effects are meant to be very visible). By shining a light on the operations of certain criminal enterprises, they can be said to exercise a weak dismantling force.

terror is to isolate people and therefore to prevent the coalescence of effective opposition.<sup>59</sup> So, by contrast, one can say that catalyzing the organization of groups is empowering, at least in part in virtue of the ‘power of aggregation.’ In the face of *organized* violence, it of course makes a difference whether one has to respond to it *alone* or as part of a group.

But this is just the beginning. The issue of course is not simply one of numbers, but importantly, also, of the characteristic activities to which networks of the sort that are relevant for this discussion devote themselves; these have as their core *claims-raising*, that is, not pleading, but asserting recognition of status, entitlements, *rights*. This is of course the fundamental reason why regimes that commit themselves to autonomy—what North, Wallis and Weingast call ‘open access orders’—commit themselves to respecting, ‘liberal’ associational norms, not to speak about the constraints on the distribution and exercise of powers through formal laws that regulate, among other things, processes of institutional change.<sup>60</sup>

Before closing this inevitably brief discussion about social mechanisms, one last remark: it should be clear that the two mechanisms I have proposed—norm affirmation and the articulation and disarticulation of networks—are not equally fundamental. Indeed, the former is foundational, as can be seen by the fact that norms are essential if the latter is to serve justice interests; after all, it is not just that disarticulating organizations can be done fairly or unfairly, but that given the weaknesses of the transitional justice measures that can arguably disarticulate groups that have been remarked upon (low numbers of people vetted and prosecuted, weak deterrent effects, an obvious gap between insight and transformation in the case of truth-telling exercises), a good part of the power these measures have they acquire through their signaling capacity; measures that affect only those ‘most responsible’ are significant not because they ‘repeople’ entire institutions, but mainly, because they signal commitment to basic norms in whatever staffing decisions (dismissals, retentions, promotions) the institutions subjected to them do get to make. Similarly, with respect to the articulation of networks, it must be acknowledged that this is an ambiguous phenomenon, that groups can be formed for all sorts of reasons and purposes. Even short of criminal enterprises, NGOs, for example, can be formed in defense of all sorts of causes, some of which do not necessarily serve the ends of justice,<sup>61</sup> and there is no such thing as a sustainable regime that can respect just any kind of associational activities. Once again, there is a normative foundation that sets (broad) parameters of the sorts of groups that are admissible (mafias, for instance, are not), the sorts of claims that can legitimately be pressed by them (the extermination of other groups is typically outlawed), the means that these networks can use in pursuit of their ends (even if the ends are legal, so for instance, monopolies are curbed), just to mention a few of the salient constraints imposed by norms.

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<sup>59</sup> As Arendt put it, “[t]otalitarian government, like all tyrannies, certainly could not exist without destroying the public realm of life, that is, without destroying, by isolating men, their political capacities...” Hannah Arendt, *The Origins of Totalitarianism*, 2nd ed. (New York: Meridian Books, 1958), 475.

<sup>60</sup> Douglass North, John J. Wallis, and Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Understanding Recorded Human History* (New York: Cambridge University Press, 2008).

<sup>61</sup> And of course, even those that serve just causes can do so ineptly and in ways that weaken, rather than strengthen justice institutions. But I cannot take up this topic here.

## V

In the closing section of this annex I would merely like to highlight the relevance of the foregoing argument for the WDR. At the highest level of generality, the strong (although complex) links between justice, security, and development that the annex attempts to illuminate, provide support for the thematic choice, and more importantly, for the framework adopted by the WDR, for these links make clear that continuing to isolate work on these areas, as if they had nothing to do with one another, is not just conceptually, but practically misguided, as reality should have made plain. This of course has implications both for national as well as for international actors, as the recommendations of the Report suggest. Rather than recapitulate these recommendations, I will illustrate the significance of justice concerns by means of one example and then sound four (related) cautionary notes about the position taken in the WDR.

If the argument offered in this annex is correct, the balance between justice and security investments on the part of the international community is likely to need some redress. An illustration of current practices that would need to be changed is the following: in discussions about DDR programs it is common to hear the mantra that programs need to be created that include as beneficiaries *all* ex-combatants. No similar intention is expressed, even for rhetorical purposes, concerning the creation of reparations or even assistance programs for the victims of conflict. The realities of aid flows and of local expenditures reflect this asymmetry regarding 'security' and 'justice' concerns: of the 22 countries with ongoing DDR programs in a recent global study, programs involving 1.25 million beneficiaries and the expenditure of more than 2 billion dollars,<sup>63</sup> only a few have discussed the possibility of establishing reparations programs, but none of these countries has implemented one.<sup>64</sup> Examples of this lack of balance between investments in security and investments in justice, as if they had nothing to do with one another, can be multiplied across the entire range of transitional justice measures.<sup>65</sup>

By the standards of current discourse about conflict, the WDR is significant in many ways, two of which I would like to highlight here: first, it rests upon significant empirical work that demonstrates tight correlations between human rights violations and the recurrence of conflict. Second, it offers compelling arguments about the significance of norms for addressing conflict and development needs. It does so in different ways which include the references to the importance of confidence for the resolution of conflict and for setting fragile societies on sustainable developmental paths; similarly, the Report does not entirely shy away from mentioning the significance of rights, the rule of law, and legitimacy for the same purposes.

Having said this, however, there are four areas where the significance of normative concerns, and indeed, where binding norms should be emphasized even more than the WDR does. The first concerns the general issue of democracy. The way in which the Report uses the notion of the rule of law should have led it, as it has led others, to be forthcoming about the fact that a purely formal conception of the rule of law –one that can be reduced to 'regularity'—is insufficient for its own purposes. That a document produced by the World Bank is reticent about the connections between the rule of law and more substantive conceptions that refer not merely to the formal features of law but to participatory modes of law-making may be

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<sup>63</sup> Escola de Cultura de Pau (ECP), "Analysis of the Disarmament, Demobilisation and Reintegration Programs Existing in the World During 2006" (Barcelona, March 2007).

<sup>64</sup> On the relationship between DDR and Transitional Justice, see *Disarming the Past*, and the module on DDR and Transitional Justice now a part of the UN's IDDRS (6.20).

<sup>65</sup> See the paper by Jake Sherman on Criminal Justice for this project.

unsurprising given the Bank's mandate, but of course this does not make the position correct. I do not face similar constraints, so I take the opportunity to make the point without further elaboration.<sup>67</sup>

Virtually identical remarks can be made about the WDR's use of the notions of confidence (trust) and legitimacy. Here the danger is that these conceptions are underdefined in the report, and that therefore they elide the very thick connections they have not just with abstract norms, but with *binding* human rights obligations. As I argued before, trust (which figures prominently, for example, in the model of inclusive social compacts that the Report adopts) cannot be reduced to reliably satisfying expectations. 'Expectations' *simpliciter* cannot be taken to be dispositive of anything; as was pointed out before, there is plenty of social scientific work on adaptive preferences which suggests that people commonly adjust expectations on the basis of experience and judgments of feasibility. The 'endogeneity' of expectations means, then, that the satisfaction of expectations pure and simple cannot be taken as a criterion of success, even less in the context of fragility, in which people may have adapted their preferences downward, never having received anything positive from state institutions. The general point, of course, is that the expectations that matter are 'normative expectations,' that is, expectations based on norms which we presume are shared, and which set the limits of behavior, thus offering protection against harm. While some of these are not codified anywhere, a good number of the fundamental ones having to do with what it is reasonable to expect from *state institutions* have indeed become, precisely, the subject of internationally binding agreements. This needs to be highlighted in the Report.

A similar point can be made about the notion of 'trust;' trust understood in the sense of mere empirical predictability will do nothing to advance the agenda that supposedly underlies the WDR: the behavior of authoritarian states vis-à-vis opposition is quite predictable, and so is that of corrupt officials vis-à-vis virtually anything that requires their authorization. And yet, of course, we would not take either as expressing a defensible paradigm of trustworthy institutions, no matter how predictable their responses might be. In reality, as argued above, we say we trust people not simply when we can predict their behavior, but when we wager that certain norms figure in their reasons for acting as they do. In the case of 'civic trust,' trust in institutions, we trust them when we think that they are run by people that take certain shared norms as binding. Again, without norms, *de facto* predictability will (inappropriately) become a standard of success. Some of the relevant minimal norms are precisely the international binding agreements concerning human rights. There is no way of thinking about the relationship between security and justice in terms that will not lead to the 'securitization' of the discussion without reintroducing a normative dimension to the notion of trust.

The same holds for 'legitimacy.' As Jürgen Habermas put the point, "a legal norm has validity whenever the state guarantees two things *at once*: on the one hand, the state ensures average compliance, compelled by sanctions, if necessary; on the other hand, it guarantees the institutional preconditions for the legitimate genesis of the norm itself, so that it is always at least possible to comply out of respect for the law."<sup>68</sup> Unless the report wants to end up on the side of the first condition only, (securing average compliance), it needs to pay more attention to the institutional preconditions of legitimacy which are inseparable from the sorts of considerations having to do with justice and rights that have been the focus of this annex.

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<sup>67</sup> For a fuller defense of the democratic rule of law, however, see my "Theorizing Transitional Justice."

<sup>68</sup> Jürgen Habermas, *Between Facts and Norms*, William Rehg, trans. (Cambridge, MA: MIT Press, 1996), 448 (my emphasis).

The final cautionary note has to do with the ways in which prudential arguments about the limits of institutional reform may be received. There is something salutary in the WDR's frank avowal of the time it takes to reform institutions; despite protestations, international assistance still works with unrealistic time-frames. National stakeholders also expect quick fixes in a way that predictably will lead to disappointment. And yet, unless extra care is taken, these justified warnings, and the sensible distinction between short-term versus medium- and long-term reforms to which they lead, will be seen as a defense of a well-known position according to which the latter distinction coincides with the distinction between security and development on the one hand and justice on the other.<sup>69</sup> As it turns out, the success of policies in each of these domains depends upon the satisfaction of expectations that are always already normatively shaped. Not surprisingly, even under extreme circumstances people have sophisticated expectations about security and justice. Thus, for example, surveys, even under the harsh conditions of conflict, while confirming the predictable preference that people have for the cessation of conflict, at the same time reveal that they are willing to postpone, but not forgo accountability and justice for perpetrators of human rights abuses.<sup>70</sup> The security v. justice debate is one that cannot be resolved by making a choice one way or the other. Victims of both insecurity and injustice know it. It would be good for policy makers and the international community to reach, at the very least, that level of insight. Their practice does not give evidence that they consistently do.<sup>71</sup>

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<sup>69</sup> In fact, this is not merely a danger of reception; the original concept note of the WDR started making this assumption. This has fortunately changed since then.

<sup>70</sup> See, e.g., ICTJ, , Human Rights Center, UC Berkeley, and Payson Center for International Development, Tulane University, "When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda" (December 2007) available at: <http://www.ictj.org/images/content/8/8/884.pdf>

<sup>71</sup> The concern that introducing justice considerations in programs that have traditionally been a part of the peacemaking or security spheres may be overblown: first, amnesties never guaranteed that even their beneficiaries would abide by the agreements leading to those amnesties, as both Foday Sankoh and Charles Taylor amply demonstrate. Furthermore, it is not even clear that criminal prosecutions, the transitional justice measure that may be thought to be most incompatible with peace and security tools, in fact hamper these processes: arguably, the SCSL's indictment of Charles Taylor hastened his demise from power and enhanced peace and security in the area by removing a 'spoiler' as it were. The Dayton Peace Agreement was negotiated after Radovan Kardzic and Ratko Mladic had already been indicted by the ICTY. The Colombian Peace and Justice Law, for all its flaws, is one that no longer rests on the assumption that demobilization will occur only at the price of total impunity. Ex-combatants in Sierra Leone expressed interest in the work of the SCSL, at least in part in order to differentiate themselves from perpetrators of human rights abuse. Receiving communities in different parts of the world complain about their sense of renewed grievance at the fact that while ex-combatants receive benefits through DDR programs, they rarely receive any attention at all *and* their concern about being expected to accept people who may have committed atrocities (suggesting that reintegration would be eased if the communities knew that the returning ex-combatants do not include the worst perpetrators). For these and related issues see Eric Witte, "Beyond Peace vs. Justice': Understanding the Relationship Between DDR Programs and the Prosecution of International Crimes," in *Disarming the Past*; and Alexander Mayer-Rieckh and Roger Duthie, "Enhancing Justice and Development through Justice-Sensitive Security Sector Reform."

