

# THE TRUTH ABOUT TRUTH COMMISSIONS: WHY THEY DO NOT FUNCTION OPTIMALLY IN POST-CONFLICT SOCIETIES

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*Almost forty years after the first truth commission convened and more than sixty-seven others have been employed, there is little clarity on how they contribute to their stated objectives and in which transitional contexts they succeed or fail. This Article uses data gathered from my field research in Ghana, Sierra Leone, and Liberia to develop a theoretical framework for understanding in which contexts truth commissions may be the most effective. Using insights from the legal transplant literature and applying it to the diffusion of truth commissions, this Article finds that truth commissions face greater challenges carrying out their mandates in post-conflict as opposed to post-authoritarian societies. In post-conflict societies, weak institutions to support a truth-telling process combined with large numbers of victims and perpetrators will tend to overwhelm truth commissions. These factors, along with the lack of moral consensus surrounding mass violence, interact to make truth commissions function less optimally in post-conflict contexts. This Article finds that despite their widespread use in post-conflict and fragile states, truth commissions may have more utility in post-authoritarian or even non-transitional states. In sum, this Article argues that the kind of transition should determine the kind of transitional-justice interventions employed.*

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## TABLE OF CONTENTS

INTRODUCTION .....	2265
I. THE IMPORTANCE OF CONTEXT.....	2272
A. <i>Ghana's Transition from Authoritarian Rule and Establishment of a Truth Commission</i> .....	2274
B. <i>Liberia's and Sierra Leone's Civil Wars and Transitional Justice Institutions</i> .....	2276
1. Civil War and Establishment of the Truth Commission in Liberia.....	2277
2. Civil War and Establishment of the Truth Commission and Court in Sierra Leone.....	2279
C. <i>The Limits of Transplants</i> .....	2285
II. INSTITUTIONAL WEAKNESS AND THE LIMITED IMPACT OF TRUTH COMMISSIONS .....	2292
A. <i>Weak Security Institutions</i> .....	2295
B. <i>Weak Political Institutions</i> .....	2298
III. LACK OF MORAL CONSENSUS SURROUNDING VIOLENCE LIMITS THE IMPACT OF TRUTH COMMISSIONS.....	2303
A. <i>Lack of Moral Consensus as an Impediment to Truth-Telling</i> .....	2305
B. <i>Lower Moral Consensus as an Impediment to Establishing an Accurate Historical Record</i> .....	2311
IV. SIZE MATTERS.....	2315
A. <i>Numerous Victims and Perpetrators Create Challenges for Acknowledgment</i> .....	2317
B. <i>Large Victim and Perpetrator Classes Create Obstacles for Promoting Healing</i> .....	2321
C. <i>Size of Victim and Perpetrator Classes Complicates Efforts to Provide Redress</i> .....	2325
V. IMPLICATIONS.....	2331
A. <i>Theoretical and Policy Implications for Transitional Justice</i> .....	2332
B. <i>Theoretical and Policy Implications for Legal Transplants</i> .....	2335
C. <i>International and Foreign Policy Implications</i> .....	2338
METHODOLOGICAL APPENDIX.....	2340

## INTRODUCTION

From the trials at Nuremberg to the South African Truth and Reconciliation Commission,<sup>1</sup> societies have reckoned with issues of truth and punishment following a period of massive human rights violations. Resort to the regular judicial system is often impossible due to the complete breakdown of the rule of law, the existence of a weakened judiciary, as well as procedural and operational limitations. Transitions are characterized by widespread criminality and norm breaking, which complicates efforts to resort to the criminal justice system. Transitional justice<sup>2</sup> mechanisms are usually set up to address a period of mass violence, increasingly through truth commissions. A truth commission is an officially sanctioned non-judicial body organized for a limited time. They are usually set up at a time of transition for the specific purpose of examining serious human rights violations.<sup>3</sup> They aim to achieve restorative-justice goals by combining elements of public truth seeking, victim-offender confrontation, public apology, and historical accounting.<sup>4</sup> Some have even advocated that there is an emerging legal justification for pursuing truth commissions following mass atrocity based on the “right to truth.”<sup>5</sup> The many

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<sup>1</sup> See generally Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (the SATRC Act).

<sup>2</sup> I employ Naomi Roht-Arriaza’s definition of transitional justice: “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.” Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). Although a number of scholars take issue with the concept of “transitional justice,” this Article utilizes this term because other terms used to describe the pursuit of justice during transition are also contested. See, e.g., Pablo de Greiff, *Theorizing Transitional Justice*, in TRANSITIONAL JUSTICE 31 (Melissa S. Williams, et al. eds., 2012) (discussing the concept of justice in times of transition).

<sup>3</sup> See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 14 (2002).

<sup>4</sup> See Elizabeth Haumann, *Striking a Balance Between Justice and Peace: Restorative Justice in States of Transition*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: EXPLORING THE RELATIONSHIP 142, 150 (Linda Gröning & Jørn Jacobsen eds., 2012). For further discussion, see generally John Braithwaite, *Narrative and “Compulsory Compassion”*, 31 LAW & SOC. INQUIRY 425 (2006) and Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 79–83 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>5</sup> See HAYNER, *supra* note 3, at 31; see also Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Organization of African Unity, African (Banjul) Charter on Human and Peoples’ Rights, art. 9, adopted June 27, 1981, OAU Doc. CAB/LEG/6713 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, available at <https://www.umn.edu/humanrts/instree/z1afchar.htm>; Organization of American States, American Convention on Human Rights, art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm); Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 261 (1997).

objectives of truth commissions often include promoting truth-telling and reconciliation, psychological healing for victims, establishing an accurate historical record, recommending reparations for victims, ensuring minimal accountability, restoring dignity to victims, making recommendations for institutional reform, as well as preventing violence and repetition of abuses.<sup>6</sup> In recent years, many societies have adopted a South African-style truth commission,<sup>7</sup> including Kenya,<sup>8</sup> South Korea,<sup>9</sup> the Democratic Republic of Congo,<sup>10</sup> Ecuador,<sup>11</sup> the Solomon Islands,<sup>12</sup> and Honduras.<sup>13</sup> A number of countries, such as

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<sup>6</sup> See HAYNER, *supra* note 3, at 15–16.

<sup>7</sup> South African-style truth commissions emphasize not only traditional truth recovery functions, but also facilitating healing and reconciliation. For further discussion, see *infra* Part I.C.

<sup>8</sup> The government established the Truth Justice and Reconciliation Commission in November of 2008 to investigate and recommend appropriate action on human rights abuses committed by authoritarian regimes between December 12, 1963 and February 28, 2008 following the period of post-electoral communal violence. See TRUTH JUSTICE & RECONCILIATION COMM'N, KENYA, REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION, at vi (2013), available at [http://www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_1.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_1.pdf).

<sup>9</sup> The Truth and Reconciliation Commission for the Republic of Korea was established in May of 2005. The Commission investigated incidents regarding human rights abuses, violence, and massacres occurring since Japanese rule up to the nation's various authoritarian regimes. See AHN BYUNG-OOK, TRUTH & RECONCILIATION COMM'N, REPUBLIC OF KOREA, TRUTH AND RECONCILIATION: ACTIVITIES OF THE PAST THREE YEARS 5, 8 (Sung-Soo Kim et al. trans., 2009), available at <http://www.jinsil.go.kr/English/index.asp> (click on "TRC Report").

<sup>10</sup> The transitional government in the Democratic Republic of Congo established the Truth and Reconciliation Commission (*Commission Verité et Réconciliation*) in 2003, which was one of the transitional institutions provided for in the Comprehensive Peace Agreement. See *Truth Commission: Democratic Republic of Congo*, U.S. INST. PEACE, <http://www.usip.org/publications/truth-commission-democratic-republic-of-congo> (last visited June 28, 2014).

<sup>11</sup> Ecuador established the Truth Commission to Impede Impunity (*Comisión de la Verdad para impedir la impunidad*) in May of 2007 to investigate, clarify, and "impede impunity" with respect to human rights abuses perpetrated between 1984 and 1988 and other periods of authoritarian rule. See *Truth Commission: Ecuador 07*, U.S. INST. PEACE, <http://www.usip.org/publications/truth-commission-ecuador-07> (last visited June 28, 2014).

<sup>12</sup> The government established the Truth and Reconciliation Commission in 2008 after the civil war to examine the nature, antecedents, root causes, responsibility for, and the extent of the impact on human rights violations or abuses that occurred between January 1, 1998 and July 23, 2003. See Truth and Reconciliation Commission Act 5 of 2008 § 5 (Solom. Is.), available at <http://www.parliament.gov.sb/files/committees/bills&legislationcommittee/2008/bills/TruthReconCommBill2008.pdf>.

<sup>13</sup> The government established the Truth and Reconciliation Commission (*Comisión de la Verdad y la Reconciliación*) in 2010 to provide a report on the events leading up to and following the June 28, 2009 coup, during which military troops in Honduras ousted then President Manuel Zelaya after a power struggle over plans to change the Constitution. See *Truth Commission: Honduras 2010*, U.S. INST. PEACE, <http://www.usip.org/publications/truth-commission-honduras-2010> (last visited June 28, 2014). The accord signed by the government and the coup regime called for a truth commission. See *Diálogo Guaymuras Acuerdo Tegucigalpa/San José: para la reconciliación nacional y el fortalecimiento de la democracia en Honduras* [Accord for National Reconciliation and the Strengthening of Democracy in Honduras], Oct. 30, 2009, available at <http://www.narconews.com/Issue61/article3910.html>.

Libya<sup>14</sup> and South Sudan,<sup>15</sup> are also considering adopting truth commissions. Even non-transitional countries like the United States have used truth commissions, notably in North Carolina<sup>16</sup> and Illinois.<sup>17</sup> Yet, almost twenty years after the iconic truth commission in South Africa, there is little clarity on where truth commissions function optimally. There is also insufficient clarity on what role truth commissions can or should play in “non-transitional” societies.

While there has been a growth in scholarly attention paid to truth commissions<sup>18</sup> and trials following mass atrocity,<sup>19</sup> much of the

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<sup>14</sup> See Adam Nossiter, *On Road to Reconciliation, Libya Meets Trail of Anguish*, N.Y. TIMES, Nov. 4, 2011, at A4.

<sup>15</sup> See Charlton Doki, *Time for Truth and Reconciliation in South Sudan*, RADIO NETH. WORLDWIDE (June 5, 2013, 4:00 AM), <http://www.rnw.nl/africa/article/time-truth-and-reconciliation-south-sudan>.

<sup>16</sup> The Greensboro Truth and Reconciliation Commission was established to investigate the events of November 3, 1979, during which a number of demonstrators for racial and economic justice were killed and wounded in what is known as the “Greensboro Massacre.” See GREENSBORO TRUTH & RECONCILIATION COMM’N, GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT: EXECUTIVE SUMMARY 2–3 (2006), *available at* [http://www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf). For more information, see GREENSBORO TRUTH & RECONCILIATION COMMISSION, <http://www.greensborotrc.org> (last visited June 28, 2014).

<sup>17</sup> The Illinois Torture Inquiry and Relief Commission was established in 2010 to investigate widespread allegations of police torture from prisoners, who alleged they had been convicted based on forced confessions. See *Mission and Procedures Statement*, STATE OF ILL. TORTURE INQUIRY & RELIEF COMMISSION, <http://www2.illinois.gov/itrc/Pages/default.aspx> (last visited June 28, 2014).

<sup>18</sup> See, e.g., ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS (2012); MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006); JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? (2004) [hereinafter GIBSON, OVERCOMING APARTHEID]; TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 4; ERIC WIEBELHAUS-BRAHM, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY (2010); Tristan Anne Borer, *Truth Telling as a Peace-Building Activity: A Theoretical Overview*, in TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST CONFLICT SOCIETIES 1 (Tristan Anne Borer ed., 2006); Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1 (2001); Lansana Gberie, *Truth and Justice on Trial in Liberia*, 107 AFR. AFF. 455 (2008) [hereinafter *Truth and Justice on Trial in Liberia*]; James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123 (2009) [hereinafter Gibson, *Legitimacy Theory and Truth Commissions*]; Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 INT’L J. TRANSITIONAL JUST. 457 (2010).

<sup>19</sup> See, e.g., LARA J. NETTELFIELD, COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL’S IMPACT IN A POSTWAR STATE (2010); TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010); CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION (2004); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); Patrice C. McMahon & Jennifer L. Miller, *From Adjudication to Aftermath: Assessing the ICTY’s Goals Beyond Prosecution*, 13 HUM. RTS. REV. 421 (2012); James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271 (2005); Kathryn Sikkink & Carrie Booth Walling,

literature does not sufficiently account for the variation in truth commissions' performance in various societies. Rather than assuming the benefits of these transitional justice mechanisms irrespective of the nature of the transitions, as much of the literature does,<sup>20</sup> I use a more analytical approach toward truth commissions and identify key variables that begin to help us understand how these factors influence the effectiveness of truth commissions. The larger size of the victim and perpetrator class, the lesser degree of moral consensus surrounding violence, and the weakness of institutions in post-conflict societies interact to limit the utility of truth commissions compared to post-authoritarian contexts. Conversely, in post-authoritarian societies that are marked by stronger institutions to support a truth-telling process, relatively small victim or perpetrator classes, and higher levels of moral consensus surrounding mass violence, truth commissions are likely to function more optimally in meeting stated objectives. This finding has profound implications for the types of interventions customarily made in post-conflict and post-authoritarian societies.

Countries that have undergone conflict generally experience extreme violence, social disruption, human suffering, and economic destruction, while authoritarian rule is characterized by the concentration of power in a small group of politicians who maintain control through the exclusion of political challengers and political repression. In post-authoritarian contexts, the state generally perpetrates abuses against citizens. However, in post-conflict contexts, while the state may be implicated in abuses—mass violence also envelopes individuals, with neighbor turning against neighbor, engulfing whole communities. The interventions needed following transitions from periods of repressive rule or conflicts are quite different. Posner and Vermuele have argued elsewhere “that the kind of transition affects the kind of transitional justice that will occur.”<sup>21</sup> This Article argues that the kind of transition *should* determine the kind of

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*The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427 (2007); Tove Grete Lie et al., *Post Conflict Justice and Sustainable Peace* (World Bank Policy Research, Working Paper No. 4191, 2007), available at <http://go.worldbank.org/0LQ66BH110>.

<sup>20</sup> See, e.g., Par Engstrom, *Transitional Justice and Ongoing Conflict*, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS 41, 48 (Chandra Lekha Sriram et al. eds., 2013) (noting empirical studies that question the impact of transitional justice); Oskar N.T. Thomas et al., *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* 45 (Apr. 2008) (unpublished manuscript), available at [http://aix1.uottawa.ca/~rparis/CIPS\\_Transitional\\_Justice\\_April2008.pdf](http://aix1.uottawa.ca/~rparis/CIPS_Transitional_Justice_April2008.pdf) (discussing the need for the transitional justice field to move away from “faith-based” discussions about the impact of transitional justice mechanisms to “fact-based discussions” (internal quotation marks omitted)).

<sup>21</sup> Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 770 (2004) (“Where the elites lead the transition, transitional justice is limited. Where the elite and the opposition enter a bargain, transitional justice is moderate. Where the opposition or a foreign nation leads the transition, transitional justice is significant.”).

transitional justice institution utilized. For example, the need for “truth” takes on much more significance in a post-authoritarian context where “deception is so central to the abuses,”<sup>22</sup> while in post-conflict contexts where abuses are not “hidden” and were committed openly, “truth” in and of itself takes on much less significance.<sup>23</sup> Yet, the same institution is usually employed in drastically different circumstances.

I draw on original fieldwork that I conducted in Ghana, Sierra Leone, and Liberia to make a series of different observations.<sup>24</sup> I selected these countries for this cross-national study because they are located in the same sub-region and have somewhat similar historical and cultural backgrounds as well as socio-economic development levels. They represent a mix of transitions with Ghana emerging from a series of authoritarian regimes, while Sierra Leone and Liberia transitioned from devastating conflicts. The transitional justice experiences of the countries examined in this Article, particularly Ghana and Liberia, are also not as well documented as other cases from Africa or Latin America.<sup>25</sup>

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<sup>22</sup> HAYNER, *supra* note 3, at 27 (citing Aryeh Neier).

<sup>23</sup> Some have argued that in these circumstances, acknowledgement takes on added significance. *See, e.g.*, ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND 162 (2007). However, acknowledgment without more in conditions of abject poverty is inadequate for reasons discussed more fully below. *See* discussion *infra* Part IV.A.

<sup>24</sup> I conducted a series of interviews in Ghana, Sierra Leone, and Liberia between November 2008 and January 2009, interviewing over 100 victims of human rights violations, community, religious, and nongovernmental organizations that assist victim groups, as well as relevant actors from truth commissions, courts, governments, and U.N. agencies. A fuller discussion of my methodological choices is included in the Methodological Appendix, which also includes a sample of questions and common responses and a brief discussion of the surveys and indicators on which this Article relies. *See infra* Methodological Appendix.

<sup>25</sup> *See, e.g.*, David Backer, *Cross National Comparative Analysis*, in ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 23, 58 (Hugo van der Merwe et al. eds., 2009) (discussing the bias in the selection of transitional justice cases studied, which may be unrepresentative of the potential for these processes); *see also* Thomas et al., *supra* note 20, at 27 (discussing the over reliance of those in the transitional justice world on a “biased sample”). While I refer to the South African experience, a thorough discussion of South Africa’s truth-telling process is beyond the scope of this Article and has been amply covered elsewhere. *See generally* COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION (Deborah Posel & Graeme Simpson eds., 2002); GIBSON, OVERCOMING APARTHEID, *supra* note 18; LYN S. GRAYBILL, TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL? (2002); ANDREA LOLLINI, CONSTITUTIONALISM AND TRANSITIONAL JUSTICE IN SOUTH AFRICA 95–125 (2011); JEREMY SARKIN, CARROTS AND STICKS: THE TRC AND THE SOUTH AFRICAN AMNESTY PROCESS (2004); THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE AND IMPUNITY (Charles Villa-Vicencio & Erik Doxtader eds., 2003); TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? (Audrey R. Chapman & Hugo van der Merwe eds., 2008); Ronald C. Slye, *Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, *supra* note 4, at 170; Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE 745 (M. Cherif Bassiouni ed., 2002).

This Article builds on findings from an earlier article, which focused on the ability of truth commissions and trials to contribute to restorative, retributive, expressive, and utilitarian goals.<sup>26</sup> In my recent Article *Beyond Truth & Punishment*, I argued that scholars and practitioners have misplaced confidence in the ability of truth commissions and trials to contribute toward restorative, retributive, expressive, and utilitarian goals.<sup>27</sup> I concluded that the number of goals of truth commissions should be limited to increase their effectiveness, and that transitional institutions should focus on their comparative advantage.<sup>28</sup> In *Beyond Truth & Punishment*, I was mainly concerned with the sociological legitimacy<sup>29</sup> of transitional institutions. As such, I privileged the perceptions of the relevant society in evaluating each mechanism by drawing on data from qualitative interviews as well as survey data (as opposed to other metrics for measuring effectiveness).<sup>30</sup> Perceptions of the effectiveness of transitional institutions are especially important in determining legitimacy.<sup>31</sup> It is important to examine the way people most impacted by mass violence perceive transitional justice processes meant to provide redress to them.<sup>32</sup> The literature has given insufficient attention to these perceptions.

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<sup>26</sup> Matiangai V.S. Sirleaf, *Beyond Truth & Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223 (2014) [hereinafter Sirleaf, *Beyond Truth & Punishment*].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 284–85.

<sup>29</sup> See, e.g., MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 325 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947) (describing the bases for sociological legitimacy).

<sup>30</sup> For example, this Article could have relied on indicators of human rights such as the Political Terror Score or the CIRI Physical Integrity Index, which rely on the annual reports of Amnesty International and the U.S. State Department. See Thomas et al., *supra* note 20, at 43. However, both of these sources have their own biases. I also eschew the use of such indicators for purposes of assessing the truth commissions' impact due to the inherent difficulty in attempting to "represent complex social phenomena" such as respect for human rights, reconciliation, or truth with a numerical scale. *Id.* For further discussion, see *infra* Methodological Appendix.

<sup>31</sup> See, e.g., Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 407 n.2 (2012) ("Numerous studies by psychologists and sociologists have concluded that legitimacy is important to political and legal institutions because individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when the institutions are perceived as legitimate."). For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 227–29.

<sup>32</sup> See, e.g., Backer, *supra* note 25, at 66 (discussing the ways in which "preoccupation with institutional design and system-level effects" have obscured questions regarding how transitional justice processes affect real people); see also Ford, *supra* note 31, at 407 n.1 (noting that "[t]he international community's perception of" the legitimacy of transitional justice mechanisms matter as well, "particularly for issues like funding"). The international community's perceived legitimacy of the transitional justice mechanisms utilized is not the primary focus of this Article. Neither is this Article concerned with the moral or legal legitimacy of the transitional justice mechanisms employed. Cf. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400,



This Article explores a unique and under-researched area and adds to our understanding of when transplanted institutions work. I use insights from the legal-transplant literature to analyze truth commissions, and my analysis yields contributions for both the transitional-justice literature and the legal-transplant literature. Admittedly, much more research is needed to determine how the factors analyzed in this Article interact in other post-conflict and post-authoritarian societies. Notwithstanding these limitations, my analysis produces a number of important theoretical and policy implications. First, the truth about truth commissions is that their success depends on the nature of the transitions. My key-variable approach helps to illuminate the contexts in which truth commissions may be the most effective. Paradoxically, it seems that despite their widespread use in post-conflict and fragile states, truth commissions may have more utility in post-authoritarian or even non-transitional states. Moreover, my key-variable approach helps to identify important social and institutional factors in both the origin and transplant country<sup>33</sup> that elucidate how much innovation may be required for transplanted institutions to be effective. Yet, the conundrum of transplants is that countries with the least amount of capacity<sup>34</sup> may be the least likely to adapt transplanted institutions to local conditions, but these are the very countries that need to innovate the most. Further, the analysis in this Article complicates critiques of the legal transplant literature as synonymous with Western imperialism and colonialism by illustrating the difficulties posed even where transplants are ostensibly South-to-South. My analysis indicates that much more experimentation needs to be done in order to formulate effective and contextually appropriate responses to mass violence. In particular, the use of more decentralized and informal institutions that promote objectives of truth-telling and reconciliation may be more impactful at assisting with the United Nation's (U.N.'s) and other international actors' post-conflict rebuilding efforts. Additionally, the foreign policy implications for the United States and its interventions in post-conflict and failed states are that longer-term efforts aimed at building institutions and moral consensus around violence may be better placed than limited and quick interventions. The increasing use and popularity of the truth commission model means that the findings of this Article will be instructive.

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1436–38 (2009) (noting the possible tension between sociological legitimacy and moral or legal legitimacy).

<sup>33</sup> See Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 171 (2003) (“[T]he social, economic and institutional context often differs remarkably between origin and transplant country . . .”).

<sup>34</sup> See *infra* note 41 (defining capacity).

This Article is organized as follows: Part I distinguishes post-conflict and post-authoritarian contexts, summarizes the nature of the transitions and the establishment of transitional justice mechanisms in Ghana, Sierra Leone, and Liberia, as well as discusses the limits of transplants. Part II analyzes how the relative weakness of state institutions in post-conflict as opposed to post-authoritarian countries limits the effectiveness of truth commissions in post-conflict contexts. Part III focuses on how the lack of moral consensus surrounding mass violence in post-conflict societies versus the higher levels of moral consensus in post-authoritarian societies enables the “truth” emanating from commissions to fit comfortably in post-authoritarian societies. Part IV examines how the larger classes of victims and perpetrators in post-conflict contexts overwhelm truth commissions and frustrate their ability to carry out their mandates relative to truth commissions in post-authoritarian contexts. Part V discusses the main theoretical and policy implications of this Article.

#### I. THE IMPORTANCE OF CONTEXT

The “states of disrepair” in a post-authoritarian society versus a post-conflict society are drastically different. An “ideal type” of post-conflict society might exhibit the following characteristics:

[E]conomically the infrastructure has been destroyed; the currency has been undermined; commerce is at a standstill; agriculture has been devastated; unemployment is high, which means there are no jobs for former soldiers; and there is no basis for exports. The country’s society has been undercut by the mutual dislike between warring groups, which is not any weaker than before the war; the wide distribution of weapons within the population; the people’s habit of non-obedience to government and authority generally; the undermining of traditional sources of authority; the need to demobilize and disarm at least two armies quickly; and the prevalence of young soldiers with no skills other than killing. The old political process has been discredited . . . , there is no single legitimate government, there is a low tolerance for legitimate oppositions, there is often little democratic tradition, and the police and judicial systems are seen (usually correctly) as part of the problem . . . because they have no legitimacy for much of the population.<sup>35</sup>

In contrast, in a post-authoritarian society, an “[i]llegitimate but functional” system exists in which “[c]ertain core legal institutions

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<sup>35</sup> Roy Licklider, *Obstacles to Peace Settlements*, in ELGAR HANDBOOK OF CIVIL WAR AND FRAGILE STATES 284, 284–85 (Graham K. Brown & Arnim Langer eds., 2012).

continue to . . . function” and “minimal principles of legality are not transgressed.”<sup>36</sup> A post-authoritarian society can also be characterized by a “corrupt and dysfunctional” system, wherein some features of the rule of law remain, and the “judiciary and legal system exists in name,” but the judiciary generally lacks impartiality and independence, and institutions generally lack public trust.<sup>37</sup> Both characterizations would apply to post-apartheid South Africa, as well as Ghana after military rule. However, while the “state[] of disrepair” in a post-conflict context may resemble some characteristics of a post-authoritarian society, in massively destructive conflicts, the state is generally “[d]evastated and non-functional,” “[t]he rule of law [completely] disintegrates,” and “the entire formal legal apparatus of a society collapses.”<sup>38</sup> Liberia and Sierra Leone are paradigmatic cases of this dysfunction.

Notably, I do not intend for the distinction between post-conflict and post-authoritarian countries to cover the entire universe of societies. There are of course non-transitional or consolidated democracies that would not be conceptualized as “post” anything because their transition from conflict or authoritarianism occurred many years ago. Thus, there is a temporal element of a recent history of conflict or authoritarianism. Additionally, there are countries that do not neatly fit into any one category: Colombia, for example, has been experiencing a low-intensity armed conflict for almost seventy years, but has utilized transitional-justice mechanisms.<sup>39</sup> South Africa’s transition from apartheid also defies easy categorization as the repressive white-only apartheid government certainly had attributes of authoritarianism. However, the struggle against white-only rule in South Africa also involved massive violence from non-state actors both against the apartheid regime and amongst competing black political parties, which, combined, resulted in approximately 40,000 deaths.<sup>40</sup> Countries that combine elements of authoritarianism and conflict fall along the spectrum of post-conflict and post-authoritarian societies. Those with comparatively stronger institutions are placed closer to authoritarian regimes than countries that have experienced massively destructive conflicts. I conceptualize this spectrum as one of capacity, with post-conflict countries generally falling lower on that spectrum and post-

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<sup>36</sup> See RAMA MANI, *BEYOND RETRIBUTION* 73 (2002) (italics omitted).

<sup>37</sup> *Id.* at 73–74.

<sup>38</sup> *Id.* at 73, 75.

<sup>39</sup> See CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT*, 203–22 (2012) (discussing the long-running conflict and the use of a truth commission, amnesty, and reparations in Colombia); see also SUE MAHAN, *RESTORING JUSTICE IN COLOMBIA: CONCILIATION IN EQUITY* 5, 13–24 (2012) (discussing the violence in Colombia dating back to 1940 and generally discussing the use of restorative justice practices in Colombia).

<sup>40</sup> See WIEBELHAUS-BRAHM, *supra* note 18, at 36.

authoritarian countries falling higher on that spectrum.<sup>41</sup> Indeed, where weak institutions exist to support a truth-telling process, numerous victims and perpetrators overwhelm the capacity of truth commissions and low levels of moral consensus surrounding mass violence are present. Even if the societies are properly designated as “non-transitional,” we would anticipate that these factors would have the same predictive power in gauging the utility of truth commissions. Thus, the labels of post-conflict or post-authoritarian are best understood as useful generalizations or frameworks to clarify several critical variables.

This Part provides an overview of the historical context in which abuses took place in Ghana, Sierra Leone, and Liberia, and briefly discusses the nature of the transitions: post-authoritarian in Ghana and post-conflict in Sierra Leone and Liberia. This Part also provides background on the relative number of alleged perpetrators and victims and the relative strength of institutions post-transition in Ghana, Liberia, and Sierra Leone, which is critical to understanding the varied impact of the truth commissions in all three countries and the hybrid court in Sierra Leone. This Part concludes with a discussion of the limits of transplanting truth commissions.

A. *Ghana’s Transition from Authoritarian Rule and Establishment of a Truth Commission*

After the 1966 overthrow of Ghana’s charismatic independence leader, Kwame Nkrumah, a series of military coups destabilized the country.<sup>42</sup> Various military governments ruled for a total of twenty-one years, with one remaining in power for over a decade.<sup>43</sup> The First Republican government and the four military juntas: the National Liberation Council (1966–1969), the National Redemption Council and Supreme Military Council (1972–1979), the Armed Forces Revolutionary Council (AFRC) (1979), and the Provisional National Defense Council (PNDC) (1981–1992), committed gross violations of human rights.<sup>44</sup> To many Ghanaians, the record of human rights violations perpetrated by the AFRC/PNDC, led by Flight-Lieutenant

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<sup>41</sup> See Syed Mansoob Murshed, *Conflict and the Social Contract*, in ELGAR HANDBOOK OF CIVIL WAR AND FRAGILE STATES, *supra* note 35, at 59, 60 (discussing how “state capacity (its ability to both police citizens and provide public goods) is greater in established autocratic or democratic societies, rather than in societies undergoing transition”).

<sup>42</sup> See 1 NAT’L RECONCILIATION COMM’N, REPORT OF THE NATIONAL RECONCILIATION COMMISSION 43–76 (2004) [hereinafter 1 NRC REPORT].

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

Jerry Rawlings, was unparalleled in the country's history.<sup>45</sup> The range of human rights violations that occurred during periods of authoritarian rule in Ghana included "killings, abductions, disappearances, torture, sexual abuse, detentions, ill-treatment, seizure of properties, . . . [and] interference with the right to work . . ."<sup>46</sup> The NRC estimates that, out of the violations reported to it, 8686 victims suffered abuses over the periods of repressive rule in Ghana.<sup>47</sup> This figure provides a rough approximation of the level of victimization in Ghana. There are no reliable estimates of the total number of alleged perpetrators implicated in abuses during the periods of unconstitutional rule in Ghana.<sup>48</sup> For our purposes, it suffices to say that these numbers were lower than the perpetrator classes in the civil wars in Sierra Leone and Liberia.

Ghana's transition from authoritarian rule<sup>49</sup> occurred due to a combination of internal and external factors that influenced the Rawlings regime to move towards democratic rule. Before leaving office, Rawlings's authoritarian regime inserted indemnity clauses into the Constitution, prohibiting any court from questioning or granting remedies or relief regarding any executive, legislative, or judicial actions of past military governments.<sup>50</sup> Ghanaians held a national referendum accepting the 1992 Constitution under Rawlings and the National Democratic Congress (NDC).<sup>51</sup> The Constitution bars parliament from

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<sup>45</sup> See CDD-GHANA, PUBLIC OPINION ON NATIONAL RECONCILIATION IN GHANA: SURVEY EVIDENCE 12 (2001) [hereinafter CDD-GHANA, PUBLIC OPINION SURVEY] (discussing nationwide survey with sample size of 1000 respondents in which 68% of respondents perceived the AFRC to have the worst human rights record and 56% perceived the PNDC as such). For example, the regime arrested three former heads of state, tried them before "kangaroo courts" for corruption, and promptly executed them. The regime also arrested, tortured, and executed other influential military officers and civilians, including a number of senior judges who had questioned the government. Some suffered detention for long periods. Fearing for their lives, many fled into exile. Abuses did not only target the powerful; soldiers stripped market women naked and beat them publicly merely for selling matches above government prices. See generally 1 NRC REPORT, *supra* note 42.

<sup>46</sup> 1 NRC REPORT, *supra* note 42, at 10.

<sup>47</sup> *Id.* at 164.

<sup>48</sup> It has been difficult to come across any source with aggregate numbers. While governmental documents, U.N. reports, NGO reports, books, and news analyses contain some figures, none of them cite total figures of those perpetrating abuses over the various authoritarian regimes in Ghana. For example, the National Reconciliation Commission estimates that out of the violations reported to it, the military perpetrated 53%, the police forces perpetrated 17%, unknown actors perpetrated 12%, and the prison service perpetrated 9%. 1 NRC REPORT, *supra* note 42, at 160.

<sup>49</sup> For more on Ghana's transition from authoritarian rule, see generally ASIRIFI DANQUAH, HISTORY OF GHANA: PREZ. NKRUMAH TO PREZ. KUFUOR (2007); GHANA: THE POLITICAL ECONOMY OF RECOVERY (Donald Rothchild ed., 1991); GHANA: TRANSITION TO DEMOCRACY (Kwame A. Ninsin ed., 1998); AKWASI P. OSEI, GHANA: RECURRENCE AND CHANGE IN A POST-INDEPENDENCE AFRICAN STATE (1999); YOURY PETCHENKINE, GHANA: IN SEARCH OF STABILITY, 1957-1992 (1993); KEVIN SHILLINGTON, GHANA AND THE RAWLINGS FACTOR (1992).

<sup>50</sup> See CONSTITUTION OF THE REPUBLIC OF GHANA 1992, 1st sched., §§ 34-35.

<sup>51</sup> See 1 NRC REPORT, *supra* note 42, at 184.

amending the indemnity provisions.<sup>52</sup> In 2000, Ghanaians voted the New Patriotic Party (NPP) led by John A. Kufour into power.<sup>53</sup> The indemnity provisions limited the choices available to the NPP government,<sup>54</sup> which would later establish a truth commission. The then-opposition party (NDC) did not support the use of a truth commission in Ghana because it was concerned that the commission's investigations would target its members, but public support for the commission was strong.<sup>55</sup> In January of 2002, the Ghanaian Parliament passed the National Reconciliation Commission Act into law<sup>56</sup> in a vote boycotted by the NDC.

B. *Liberia's and Sierra Leone's Civil Wars and Transitional Justice Institutions*

The conflicts in Liberia and Sierra Leone were interrelated tragedies of immense proportions, resulting in approximately 50,000 deaths in Sierra Leone<sup>57</sup> and over 250,000 deaths in Liberia,<sup>58</sup> and creating millions of refugees and internally displaced people.<sup>59</sup> Both countries' situations quickly deteriorated as rival warlords competed for political power and economic resources, which destroyed each country's flailing infrastructure and left each country without electricity, sewage systems, or running water. The war in Sierra Leone is internationally known for mass amputations and forcible recruitment of children.<sup>60</sup> Other violations included forced cannibalism, sexual slavery, assault, torture, rape, as well as looting and property destruction.<sup>61</sup> Similar

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<sup>52</sup> See CONSTITUTION OF THE REPUBLIC OF GHANA 1992, 1st sched., § 37.

<sup>53</sup> See 1 NRC REPORT, *supra* note 42, at 1; see also DANQUAH, *supra* note 49, at 243.

<sup>54</sup> See, e.g., OSEI, *supra* note 49, at 113 (discussing how the indemnity clause limited accountability options).

<sup>55</sup> See CDD-GHANA, PUBLIC OPINION SURVEY, *supra* note 45, at 15 fig.2 (88.7% of those surveyed supported the government's decision to establish the NRC).

<sup>56</sup> See The National Reconciliation Commission Act, 2002 (Ghana), available at <http://www.ghanareview.com/reconact.html> (the NRC Act).

<sup>57</sup> See John Bellows & Edward Miguel, *War and Institutions: New Evidence from Sierra Leone*, 96 AM. ECON. REV. 394, 394 (2006).

<sup>58</sup> Ezekiel Pajibo, *Civil Society and Transitional Justice in Liberia: A Practitioner's Reflection from the Field*, 1 INT'L J. TRANSITIONAL JUST. 287, 288 (2007).

<sup>59</sup> See *id.* (noting that one million people were displaced in Liberia); Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 74 (2003) (noting that the war in Sierra Leone "caused the displacement of more than a million" civilians).

<sup>60</sup> See Amanda Bryant Banat, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939, 941 (2002).

<sup>61</sup> See 3A TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 470 (2004), available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume3A.pdf>.

human rights violations were committed in the civil war in Liberia.<sup>62</sup> While there are clearly many other indicators of “victimization” besides loss of life, the differences in the death toll in Liberia and Sierra Leone is a stark indicator of the relative sizes of the victim class in each country, with roughly five-times as many victims in Liberia. The Disarmament, Demobilization, and Reintegration (DDR) programs supported by the international community in Sierra Leone provided approximately \$150, skills training, and starter kits to 73,000 ex-combatants.<sup>63</sup> In Liberia, the programs disarmed 101,496 ex-combatants and provided approximately 90,000 of them with \$300 as well as some skills training.<sup>64</sup> These figures provide a rough estimate of the number of alleged perpetrators in Sierra Leone and Liberia following their conflicts. While a thorough discussion of the wars in Liberia and Sierra Leone<sup>65</sup> are beyond the scope of this Article, I provide a brief synopsis below.

### 1. Civil War and Establishment of the Truth Commission in Liberia

The civil war began in Liberia in December 1989 when a band of rebels known as the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, invaded Liberia from Côte d’Ivoire.<sup>66</sup> The NPFL aimed to overthrow the brutal and corrupt regime of President Samuel Doe, who gained power through a coup in 1980 that overthrew President William Tolbert, Jr. and ended over 100 years of settler hegemonic rule by the minority Americo-Liberians.<sup>67</sup> The Economic Community of West African States brokered a cease-fire in Liberia in 1990, which the cease-fire monitoring group, the Economic Community of West African

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<sup>62</sup> See TRUTH & RECONCILIATION COMM’N OF LIBERIA, CONSOLIDATED FINAL REPORT 262 (2009) [hereinafter TRC-L FINAL REPORT], available at [http://trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf).

<sup>63</sup> See Chandra Lekha Sriram, *Victim-Centered Justice and DDR in Sierra Leone*, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS, *supra* note 20, at 159, 166–67.

<sup>64</sup> Rosalind Raddatz, *Tempering Great Expectations: Peacebuilding and Transitional Justice in Liberia*, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS, *supra* note 20, at 179.

<sup>65</sup> For more details on the conflict in Liberia, see generally STEPHEN ELLIS, THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR (1999); MARY H. MORAN, LIBERIA: THE VIOLENCE OF DEMOCRACY (2006); COLIN M. WAUGH, CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA’S LONE STAR STATE (2011). For more details on the conflict in Sierra Leone, see generally BETWEEN DEMOCRACY AND TERROR: THE SIERRA LEONE CIVIL WAR (Ibrahim Abdullah ed., 2004); LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE (2005); DAVID KEEN, CONFLICT AND COLLUSION IN SIERRA LEONE (2005); Alfred B Zack-Williams, *Sierra Leone: The Political Economy of Civil War, 1991–98*, 20 THIRD WORLD Q. 143 (1999).

<sup>66</sup> See ELLIS, *supra* note 65, at 75–76.

<sup>67</sup> See *id.* at 50, 54–56, 66–74.

States Military Observer Group (ECOMOG), implemented.<sup>68</sup> President Joseph Momoh's regime in Sierra Leone played a prominent role in the establishment of ECOMOG.<sup>69</sup> Taylor wanted to weaken ECOMOG, which he believed to be blocking his attempts to take control of the capital of Liberia.<sup>70</sup> He vowed that Sierra Leone would soon "taste the bitterness of war."<sup>71</sup>

Between 1990 and 1997, various factions competed for political control of Liberia, signing and reneging on thirteen peace agreements.<sup>72</sup> Taylor won a dubious election in 1997, as many Liberians were afraid of the consequences of his "returning to the bush" and continuing to warmonger.<sup>73</sup> Neighboring countries supported dissidents within their borders to unseat Taylor due to his support of armed groups within their territories.<sup>74</sup> Fighting continued intermittently in Liberia, led by Liberians United for Reconciliation and Democracy and its splinter group, the Movement for Democracy and Elections in Liberia.<sup>75</sup> The intensity heightened during 2002 and 2003, which forced Taylor to declare a state of emergency and come to the negotiating table.<sup>76</sup> In 2003, Nigeria brokered a deal granting Taylor asylum in return for his resignation.<sup>77</sup> Shortly thereafter, the interim government in Liberia and rebel groups signed the Comprehensive Peace Agreement, which set the terms for new negotiations for remedying past violence.<sup>78</sup> Although the peace agreement did not provide for blanket amnesty,<sup>79</sup> many factions in Liberia held a misconception that the peace agreement included one.<sup>80</sup>

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<sup>68</sup> See WAUGH, *supra* note 65, at 141, 144–46.

<sup>69</sup> See *id.* at 209–10.

<sup>70</sup> See *id.* at 147–48; see also KEEN, *supra* note 65, at 37.

<sup>71</sup> See ELLIS, *supra* note 65, at 93 (internal quotation marks omitted).

<sup>72</sup> See generally WAUGH, *supra* note 65, at 123–201.

<sup>73</sup> A popular campaign slogan expressed this: "He killed my ma, He killed my pa, I'm going to vote for him." Douglas Farah, *Standing By as a Brutal Warlord Plots His Return*, WASH. POST, Oct. 2, 2005, at B3 (internal quotation marks omitted); see also WAUGH, *supra* note 65, at 234.

<sup>74</sup> See WAUGH, *supra* note 65, at 264–68.

<sup>75</sup> See LANSANA GBERIE, *DIAMONDS WITHOUT MAPS: LIBERIA, THE UN, SANCTIONS AND THE KIMBERLEY PROCESS 5* (2004).

<sup>76</sup> See WAUGH, *supra* note 65, at 265–73.

<sup>77</sup> See PRISCILLA HAYNER, *NEGOTIATING PEACE IN LIBERIA: PRESERVING THE POSSIBILITY OF JUSTICE* 18 (2007), available at [http://www.hdcentre.org/uploads/tx\\_news/89NegotiatingpeaceinLiberia-PreservingthepossibilityforJustice.pdf](http://www.hdcentre.org/uploads/tx_news/89NegotiatingpeaceinLiberia-PreservingthepossibilityforJustice.pdf).

<sup>78</sup> See HAYNER, *supra* note 77, at 5, 6.

<sup>79</sup> Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, art. XXXIV, Aug. 18, 2003 [hereinafter *Liberian Peace Agreement*], available at [http://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/liberia\\_08182003.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf).

<sup>80</sup> See HAYNER, *supra* note 77, at 18; see also Jonny Steinberg, *Briefing: Liberia's Experiment with Transitional Justice*, 109 AFR. AFF. 135, 138 (2009).



Instead, it called for a Truth and Reconciliation Commission (TRC-L), to “address issues of impunity,” “provide . . . an opportunity for both the victims and perpetrators of human rights violations to share their experiences,” and “deal with the root causes of the [war].”<sup>81</sup> The National Transitional Legislative Assembly of Liberia approved the TRC-L Act on June 10, 2005.<sup>82</sup> The TRC-L Act contains an ambiguous amnesty clause.<sup>83</sup> The truth commission in Liberia also had more explicit punitive powers than the other commissions, which included ensuring political accountability and recommending prosecutions.<sup>84</sup>

## 2. Civil War and Establishment of the Truth Commission and Court in Sierra Leone

Sierra Leone’s conflict began in 1991, when Former Army Corporal Foday Sankoh’s Revolutionary United Front (RUF) made a series of armed incursions from Liberia with the assistance of Taylor’s NPFL.<sup>85</sup> The incursions contributed to the breakdown of state authority in Sierra Leone and further destabilized Momoh’s corrupt and dysfunctional regime.<sup>86</sup> In March 1996, wartime elections brought Ahmed Tejan Kabbah to power in Sierra Leone.<sup>87</sup> However, disgruntled soldiers led by Major Johnny Paul Koroma, leader of the Armed Forces Revolutionary Council (AFRC) and affiliated with the RUF, overthrew Kabbah in May 1997.<sup>88</sup> Internal resistance and the intervention of Nigerian troops enabled Kabbah to return to power in March 1998.<sup>89</sup> Sierra Leone’s conflict was a battle between the RUF and successive civilian and military governments, in alliance with the government-aligned Civil Defense Force (CDF).<sup>90</sup> After several unsuccessful peace accords, the government and the RUF signed the Lomé Peace Agreement in July 1999.<sup>91</sup>

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<sup>81</sup> Liberian Peace Agreement, *supra* note 79, art. XIII.

<sup>82</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005), available at <http://www.refworld.org/docid/473c6b3d2.html>.

<sup>83</sup> See *id.* art. VII, § 26(g); see also *infra* text accompanying notes 258–64.

<sup>84</sup> *Id.* art. VII, § 26(d), (j). The TRC-L was empowered to “ensur[e] accountability, political or otherwise, for any such violation” it determined responsibility for, as well as to “make[] recommendations” for “prosecutions in particular cases[,] as [it] deems appropriate.” *Id.* For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 239–40.

<sup>85</sup> See WAUGH, *supra* note 65, at 209.

<sup>86</sup> See KEEN, *supra* note 65, at 32–35.

<sup>87</sup> See WAUGH, *supra* note 65, 214–15.

<sup>88</sup> *Id.* at 218–19.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 335.

<sup>91</sup> See *id.* at 220–22.

The peace agreement granted blanket amnesty to all fighters.<sup>92</sup> It purported to install Foday Sankoh, leader of the RUF, as Vice President.<sup>93</sup> The common belief was that the RUF would not sign the agreement if there were any prospect of trials.<sup>94</sup> The Special Representative of the U.N. Secretary General appended a disclaimer stating “that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”<sup>95</sup> This disclaimer foreshadowed that the amnesty provision would prove to be meaningless. The peace agreement made provision for creating a commission “to address impunity, break the cycle of violence . . . facilitate genuine healing and reconciliation,” as well as “recommend measures to be taken for the rehabilitation of victims of human rights violations.”<sup>96</sup> Sierra Leone’s Parliament passed The Truth and Reconciliation Commission (TRC-SL) Act on February 2000.<sup>97</sup>

A few months after the legislature passed the TRC-SL Act, the RUF fighters took 500 U.N. peacekeepers hostage and killed civilians who were protesting.<sup>98</sup> The Sierra Leonean president requested that the U.N. Secretary General create a court to try the RUF.<sup>99</sup> The U.N. created the Special Court for Sierra Leone (SCSL) “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”<sup>100</sup> The SCSL is a hybrid tribunal that incorporates both international and Sierra Leonean law.<sup>101</sup> Notably, the SCSL sat where the war crimes occurred in order for its proceedings

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<sup>92</sup> *Id.* at 222.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* (discussing the international community’s desire for “peace at any price”).

<sup>95</sup> 3B TRUTH & RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 364 (2004) [hereinafter 3B TRC-SL REPORT], available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf>.

<sup>96</sup> Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. XXVI, July 7, 1999, available at <http://www.sierra-leone.org/lomeaccord.html>.

<sup>97</sup> Truth and Reconciliation Commission Act of 2000 (Sierra Leone), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>.

<sup>98</sup> *See* 3B TRC-SL REPORT, *supra* note 95, at 366.

<sup>99</sup> *See id.* (citing Letter from Alhaji Dr. Ahmad Tejan Kabbah, President of Sierra Leone, to Kofi Annan, Secretary General of the United Nations (June 12, 2000)).

<sup>100</sup> *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, available at <http://www.refworld.org/docid/3fbdda8e4.html>.

<sup>101</sup> *See* Mark E. Wojcik et al., *International Legal Developments in Review: 2004 Disputes*, 39 INT’L LAW. 279, 289 (2005). The U.N. did not establish the SCSL under Security Council Chapter VII powers, and therefore, the SCSL also lacks the ability to compel other states to cooperate. *See id.* at 291. In this respect, the SCSL differs from both the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, which the U.N. created under Chapter VII of the U.N. Charter. *Id.*

to be more impactful.<sup>102</sup> The international community did not create a similar tribunal in Ghana or in Liberia. No domestic prosecutions have occurred to address wartime atrocities in Liberia or human rights violations committed during Ghana's authoritarian regimes. On January 18, 2002, Kabbah declared the conflict over in Sierra Leone and lifted the four-year state of emergency ahead of general elections in May 2002, which he won.<sup>103</sup>

Notably, Sierra Leone had two transitional institutions—the TRC-SL and the SCSL. They were to fulfill complementary roles, with the SCSL “prosecut[ing] those who bore the greatest responsibility” for atrocities and the commission making recommendations for institutional reform and providing a complete record of the conflict.<sup>104</sup> The TRC-SL's Report released in 2004 concluded that many who might have wished “to participate in the truth-telling process” stayed away for fear that their information may be turned over to the SCSL and that “[t]he Commission's ability to create a forum of exchange between victims and perpetrators was . . . retarded by the presence of the [SCSL].”<sup>105</sup> During my interviews with court personnel in 2008, they also observed that coexistence hindered their work, particularly because the SCSL could not question individuals about information disclosed to the TRC-SL and was prohibited from accessing its archives.<sup>106</sup> Despite the initial negative assessments of the two transitional institutions in Sierra Leone, this Article demonstrates how the concurrent operation of the two mechanisms ultimately increased perceptions of both institutions' abilities to accomplish their goals. More recent survey results have found that a majority of Sierra Leoneans perceive the two institutions to have mutually reinforcing goals.<sup>107</sup> Further, the

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<sup>102</sup> See *id.* See generally Statute of the Special Court for Sierra Leone, Jan. 16, 2002, available at [www.sierra-leone.org/specialcourtstatute.html](http://www.sierra-leone.org/specialcourtstatute.html) (setting forth powers, jurisdiction, and composition of the SCSL); S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (requesting Secretary-General to negotiate agreement establishing the SCSL).

<sup>103</sup> See WAUGH, *supra* note 65, at 224–25.

<sup>104</sup> See 3B TRC-SL REPORT, *supra* note 95, at 129, 370.

<sup>105</sup> *Id.* at 378.

<sup>106</sup> Interviews with former staff of the Truth and Reconciliation Commission in Sierra Leone (TRC-SL), staff of the Special Court for Sierra Leone (SCSL), Commissioners of the Human Rights Commission for Sierra Leone (HRC-SL), civil society leaders, professors, lawyers, and civil servants, in Freetown, Sierra Leone (Nov. 3–13, 2008) [hereinafter Interviews from Sierra Leone]. See *infra* Methodological Appendix for a discussion of the nineteen interviews conducted. Although 74% of interviewees viewed coexistence as a mistake, I conducted the majority of the interviews in Sierra Leone with urban elites and as such did not capture the views of those in rural areas and non-elites. See *id.*

<sup>107</sup> See L. ALLISON A. SMITH & SARA MELI, SPECIAL COURT FOR SIERRA LEONE, MAKING JUSTICE COUNT: ASSESSING THE IMPACT AND LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE IN SIERRA LEONE AND LIBERIA 45 Annex 18 (2012) [hereinafter SCSL SURVEY], available at <http://www.npwj.org/node/5599> (showing that 54% of Sierra Leoneans surveyed reported that the goals of SCSL and the TRC-SL were complementary or the same, while 37% indicated that they were not). An earlier survey conducted by the SCSL in 2007 was criticized for its

experience of Liberia—where one transitional institution operated alone in similar circumstances, but with results that are more dismal—is also particularly instructive.<sup>108</sup>

This Article identifies key social and institutional conditions in post-conflict countries that interact to limit the utility of transplanted truth commissions. During my field research, I observed that interviewees in post-conflict countries were generally more pessimistic about the ability of their truth commissions to achieve stated objectives.<sup>109</sup> This Article will demonstrate that in Ghana, which had relatively well-functioning institutions after the transition from authoritarian rule, comparatively small victim and perpetrator “classes,” and a comparatively higher degree of moral consensus about abuses committed by military regimes, Ghanaians perceived the truth commission to contribute toward many of its stated objectives. However, in Liberia, which had significantly weaker or non-existent institutions following the civil war, a comparatively much larger victim “class,” a more threatening number of alleged perpetrators, and a lack of moral consensus about the violence committed during the civil war, Liberians did not perceive the truth commission as advancing many of its stated objectives. Yet, in Sierra Leone (which had some of the same defining factors as Liberia), the combination of truth and punishment mechanisms, although not without its problems, led to more favorable assessments of both the commission’s and the court’s contributions toward their goals. In Sierra Leone, the court helped fill important institutional gaps that existed after the conflict in ways that the truth commission operating alone in Liberia was unable to emulate.

A comparative summary of the transitional justice mechanisms used in each country and the key factors examined in this Article is included in Table 1. The estimates of low, medium, and high are relative and are not based on any absolute scale.

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methodology and impartiality. See Ford, *supra* note 31, at 443 n.189 (discussing criticisms of a 2007 SCSL-commissioned survey). The methodology of the court-commissioned 2012 survey has modest improvements, but the impartiality concerns persist. Accordingly, this Article discounts the SCSL survey and relies more heavily on other surveys conducted in Sierra Leone. For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 239 & n.75).

<sup>108</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 240, 247–48.

<sup>109</sup> See *infra* Methodological Appendix.

Table 1<sup>a</sup>

COUNTRY (NATURE OF TRANSITION)	TRANSITIONAL JUSTICE MECHANISMS UTILIZED	NUMBER OF VICTIMS <sup>b</sup>	NUMBER OF ALLEGED PERPETRATORS <sup>c</sup>	STATE WEAKNESS <sup>d</sup>	MORAL CONSENSUS <sup>e</sup>
South Africa (post-apartheid)	<ul style="list-style-type: none"> <li>• Truth Commission</li> <li>• Amnesty (conditional)</li> <li>• Reparations</li> <li>• Limited trials</li> </ul>	Low	Low	"State to Watch" <sup>f</sup>	High
Ghana (post-authoritarian)	<ul style="list-style-type: none"> <li>• Truth Commission</li> <li>• Amnesty (blanket)</li> <li>• Reparations</li> </ul>	Low	Low <sup>g</sup>	"State to Watch"	Medium
Sierra Leone (post-conflict)	<ul style="list-style-type: none"> <li>• Truth Commission</li> <li>• Amnesty (partial)</li> <li>• Hybrid Court</li> <li>• Reparations</li> </ul>	Medium	Medium	"Critically Weak" <sup>h</sup>	Low
Liberia (post-conflict)	<ul style="list-style-type: none"> <li>• Truth Commission</li> <li>• Amnesty (de facto and conditional)</li> <li>• Lustration<sup>i</sup></li> </ul>	High	High	"Critically Weak"	Low

<sup>a</sup> I based the approximation of victims and perpetrators on the percentage of the population during the operation of the commissions. For South Africa, Ghana, and Sierra Leone I relied on the U.N. Population Division data for 2000, and for Liberia, I relied on the data for 2005. See POPULATION DIV., U.N. DEP'T OF ECON. & SOCIAL AFFAIRS, WORLD POPULATION PROSPECTS: THE 2012 REVISION 169, 171 (2013), available at [http://esa.un.org/wpp/Documentation/pdf/WPP2012\\_Volume-I\\_Comprehensive-Tables.pdf](http://esa.un.org/wpp/Documentation/pdf/WPP2012_Volume-I_Comprehensive-Tables.pdf) (noting that Ghana's population was approximately nineteen million, Sierra Leone's approximately four million, Liberia's approximately three million, and South Africa's approximately forty-five million). For Ghana, I used the approximately nine thousand victims identified by the NRC, see NRC REPORT, *supra* note 42, at 164, and the estimated nineteen million in the population during the commission's operations to determine that roughly 0.04% of the population was victimized. This approximation only reflects those who engaged with the commission and likely underestimates the number of those victimized. Due to the paucity of data of human rights violations committed in Ghana during various authoritarian regimes, the figures collected by the NRC are the most reliable aggregate data available. These figures are, however, also over-inclusive, as they include all forms of violations reported to the commission, whereas I limited the other countries' estimates of victimization to loss of life. There are numerous limitations associated with using loss of life as a proxy for indicating the level of victimization in a given society. Loss of life is a crude measure, as it is grossly under-inclusive of the range of violations endured during periods of mass violence. However, the finality of death makes it one of the most severe forms of human rights violations. Furthermore, loss of life is often accompanied by other gross human rights violations, and data on the number of deaths is usually recorded during periods of mass violence. These factors make loss of life a more reliable and useful indicator of victimization than other proxies. Accordingly, I use loss of life as an indicator of victimization for all the countries in this study except for Ghana. For South Africa, I used the estimated forty thousand people that were killed in mass violence, see WIEBELHAUS-BRAHM, *supra* note 18, at 36, and the estimated forty-five million in the population during the commission's operation to determine that 0.08% of the population was victimized. Actual estimates of the number of perpetrators in South Africa are hard to come by. Cf. MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS 266 (2001) ("In the white population in Apartheid South Africa, there were few perpetrators but many beneficiaries."). I use the roughly seven thousand amnesty applicants as a stand-in for those who self-identified as perpetrators. See

TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 25, at 11. Using this figure is inadequate because it does not capture those who perpetrated abuses but did not request amnesty from the truth commission. *See id.* at 250–52 (noting lack of amnesty applications from members of the security forces and former political leaders). However, it does allow us to get an incredibly rough estimate of the 0.01% of the population that self-identified as perpetrators. For Sierra Leone, I used the approximately fifty thousand people that died in the Sierra Leonean civil war, *see Bellows & Miguel, supra* note 57, and the estimated four million in the population during the commission’s operation to determine that roughly 1.2% of the population was victimized. I used the seventy-three thousand ex-combatants that disarmed during the DDR process in Sierra Leone to determine a rough estimate of 1.8% percent of the population that self-identified as perpetrators. For Liberia, I used the approximately 250,000 people that died in the Liberian civil war, *see Pajibo, supra* note 58, and the estimated three million population size at the time of the commission’s operation to determine that roughly 8% of the population was victimized. I used the 101,496 ex-combatants that disarmed during the DDR process in Liberia to determine that 3.3% of the population self-identified as perpetrators. Using the DDR figures is over-inclusive—capturing those who did not perpetrate abuses but who wanted to receive monetary and other benefits from the programs. *See Raddatz, supra* note 64, at 180 (discussing the program in Liberia). The figures are also under-inclusive because they depend on the robustness of the DDR process, which excluded many women and girls who did not have weapons to submit. For further discussion, *see id.* at 179–81 and Sriram, *supra* note 63, at 166–68 (discussing the DDR program in Sierra Leone). The above limitations in the estimates of the number of victims and perpetrators are unavoidable. They nonetheless provide us with some indicia of the comparative size of the victim and perpetrator classes. They also correspond with data from the truth commissions. *See discussion infra* notes 329–332 and accompanying text.

<sup>b</sup> *See discussion supra* note 47 and accompanying text; *discussion infra* notes 329–332 and accompanying text.

<sup>c</sup> *See discussion supra* notes 48, 63–64 and accompanying text.

<sup>d</sup> The state-weakness categorizations are based on the Index of State Weakness in the Developing World. *See* SUSAN E. RICE & STEWART PATRICK, BROOKINGS INST., INDEX OF STATE WEAKNESS IN THE DEVELOPING WORLD 3, 10, 39, 41 (2008) [hereinafter INDEX OF STATE WEAKNESS], available at [http://www.brookings.edu/~media/research/files/reports/2008/2/weak%20states%20index/02\\_weak\\_states\\_index.pdf](http://www.brookings.edu/~media/research/files/reports/2008/2/weak%20states%20index/02_weak_states_index.pdf) (“[W]eak states [are] countries that lack the essential capacity and/or will to fulfill four sets of critical government responsibilities: fostering an environment conducive to sustainable and equitable economic growth; establishing and maintaining legitimate, transparent, and accountable political institutions; securing their populations from violent conflict and controlling their territory; and meeting the basic human needs of their population.”). For further discussion of my reliance on the indicators in the Index of State Weakness, *see infra* Methodological Appendix.

<sup>e</sup> Moral consensus has been defined as shared moral values about “how [people] ought to act.” Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 725, 733 (2000). For our purposes, it is best to conceptualize moral consensus surrounding mass violence as the level of agreement on the nature and “justness” of violence. Moral consensus about mass violence includes the level of agreement over historical responsibility—which party bears responsibility for violence, who were the victims, and who were the perpetrators. I discuss the moral consensus surrounding mass violence in the societies examined in this Article based on information from my field research and survey data from various sources. For further discussion on the inherent difficulties of measuring moral consensus, *see infra* Part V; *infra* Methodological Appendix.

<sup>f</sup> “[S]tates to watch” are defined as those states that perform “particularly poorly . . . in at least one of the four core areas of state function” or poorly in at “least two core areas,” “but their aggregate scores” tend to fall within the top two tiers. INDEX OF STATE WEAKNESS, *supra* note d, at 20.

<sup>g</sup> There are no reliable estimates of the total number of perpetrators in Ghana. *See* NRC REPORT, *supra* note 45, at 160.

<sup>h</sup> “[C]ritically weak states” are defined as those states “least capable of fulfilling most, if not

all, of the four critical functions of government.” INDEX OF STATE WEAKNESS, *supra* note d, at 10.

<sup>i</sup> Lustration describes a process of removing or preventing alleged perpetrators from maintaining or acquiring positions of authority, usually in key branches of government and the security sector. See HAYNER, *supra* note 3, at 9 (discussing the process of lustration in Eastern Europe and Latin America). Lustration is a less punitive form of punishment than incarceration and was widely used in post-communist Europe. See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 365–85 (1999) (discussing the use of lustration in Czechoslovakia); Roger Duthie, *Introduction to JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES* 17–19 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (defining, among others, vetting, lustration, and purges). For further discussion on the lustration process in Liberia, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26 (manuscript at 36–38).

### C. The Limits of Transplants

Alan Watson, the scholar who coined the term “legal transplants,” defined it as “the moving of a rule or a system of law from one country to another, or from one people to another.”<sup>110</sup> Watson noted that transplanting is a practice that has been around since the earliest recorded history.<sup>111</sup> The literature on legal transplants is vast, touching on nearly every topic—from political and legal reform<sup>112</sup> to economic growth.<sup>113</sup> The fascination with legal transplants is simple: “If the law can be transplanted, policymaking by governing powers and international institutions can achieve objectives that require legal reform through [the use of] legal transplants.”<sup>114</sup> Daniel Berkowitz and others have argued that in order for legal transplants to be effective, “a

<sup>110</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (1974).

<sup>111</sup> See Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 80–81 (1976).

<sup>112</sup> See, e.g., Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 605–07 (2010); Erin Graham et al., *The Diffusion of Policy Diffusion Research*, 43 BRITISH J. POL. SCI. 673, 673 (2012) (noting that between 1958 and 2008 over eight hundred articles have been published in the field of political science alone on policy diffusion); Penelope (Pip) Nicholson, *Comparative Law and Legal Transplants Between Socialist States: An Historical Perspective*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* 143 (Tim Lindsey ed., 2007); Tanja A. Börzel & Thomas Risse, *The Transformative Power of Europe: The European Union and the Diffusion of Ideas* 7–8 (KFG, Working Paper No. 1, 2009), available at [http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working\\_paper/WP\\_01\\_Juni\\_Boerzel\\_Risse.pdf](http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_01_Juni_Boerzel_Risse.pdf); see also Wade Jacoby, *Inspiration, Coalition and Substitution: External Influences on Postcommunist Transformations*, 58 WORLD POL. 623 (2006) (reviewing books considering the role that the United States and Western Europe has played in encouraging post-communist institutional change).

<sup>113</sup> See, e.g., John Flood, *The Vultures Fly East: The Creation and Globalisation of the Distressed Debt Market*, in *ADAPTING LEGAL CULTURES* 257, 257–62 (David Nelken & Johannes Feest eds., 2001); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1115 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1131–32 (1997); Tony Prosser, *Marketisation, Public Service and Universal Service*, in *ADAPTING LEGAL CULTURES*, *supra*, at 223, 235.

<sup>114</sup> Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQ. L. 723, 727 (2009).

demand for law must exist so that the law on the books will actually be used in practice” and that the transplant must also be adapted “to local conditions.”<sup>115</sup> Where this does not occur, a “transplant effect” happens wherein less effective legal institutions persist when compared to the origin country.<sup>116</sup> However, some scholars, like Pierre Legrand, have challenged the very idea of legal transplants, arguing that law as a social construct, by necessity, cannot remain the same once it is removed from its context (“historical, epistemological, or cultural baggage”).<sup>117</sup> A more nuanced understanding of legal transplants contends that “transplants always involve a degree of cultural adaptation” because transplants “represent instances of mediated action” and cannot merely reproduce the original.<sup>118</sup>

While much of the legal-transplant literature is preoccupied with the study of legal transplants from the West to other areas of the world,<sup>119</sup> the insights from the legal-transplant literature apply to the transplanting of truth commissions as well. The institutional emulation of truth commissions is not surprising to scholars writing in the fields of comparative and international law because “[w]hen faced with an institutional problem, lawyers typically look around the world for examples of how other legal systems have dealt with [similar] issue[s].”<sup>120</sup> The legal-transplant literature helps to explain why common-law countries like Sierra Leone, Ghana, and Liberia would seek to mimic the truth commission in South Africa.<sup>121</sup> Additionally, South Africa, Ghana, and Sierra Leone are all former British colonies and current members of the Commonwealth.<sup>122</sup> As Watson explains, it

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<sup>115</sup> Berkowitz, Pistor & Richard, *supra* note 33, at 167–68.

<sup>116</sup> *Id.* at 168; accord Karen J. Alter, Laurence R. Helfer & Osvaldo Saldías, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629, 634–35 (2012).

<sup>117</sup> See Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 114 (1997).

<sup>118</sup> Graziadei, *supra* note 114, at 723, 728, 737.

<sup>119</sup> See, e.g., WATSON, *supra* note 110, at 71–74; Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135 (2012) [hereinafter Alter, *Global Spread*]; Graziadei, *supra* note 114, at 728, 737–38; Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din”*, in ADAPTING LEGAL CULTURES, *supra* note 113, at 119; Jacoby, *supra* note 112; Luke Nottage, *The Still-Birth and Re-birth of Product Liability in Japan*, in ADAPTING LEGAL CULTURES, *supra* note 113, at 147, 147–48.

<sup>120</sup> Alter, *Global Spread*, *supra* note 119, at 138.

<sup>121</sup> The policy diffusion literature also helps to explain this phenomenon because where leading countries serve as “exemplars” policymakers in other countries often play “follow the leader” even “in the absence of evidence of the efficacy of those policies.” Beth A. Simmons et al., *Introduction: The Diffusion of Liberalization*, in THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY 7 (Beth Simmons et al. eds., 2008); see also KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES, 4, 14–15 (2013) (discussing why the policy choices of rich, large, and proximate countries are emulated regardless of consequences).

<sup>122</sup> Their common colonial background may help to explain, in part, why the Liberian



is easier for transplants to be successful where they can “graft onto existing legal norms and practices.”<sup>123</sup>

While a number of truth commissions preceded the commission in South Africa, “[n]o truth commission has received the global attention and near universal acclaim of South Africa’s Truth and Reconciliation Commission.”<sup>124</sup> Thus, despite the different historical contexts of the transitions in each country—Ghana emerging from an authoritarian regime and Sierra Leone and Liberia emerging from massively destructive civil wars—all three countries adopted South African-style truth commissions. In Ghana, some expressed concern that a truth commission was inappropriate because abuses were isolated incidents occurring under various regimes,<sup>125</sup> as opposed to systematic violations occurring over a prolonged period. In Sierra Leone and Liberia, there occurred widespread and divisive conflicts that pitted different groups against each other with abuses committed openly, which led some to question the utility of a truth commission because its revelatory function would be limited.<sup>126</sup> Juxtaposed “to the secret, cloak-and-dagger nature of political violence in South Africa” and Ghana, mass violence in Liberia and Sierra Leone “did not happen under cover of darkness, with hardly a witness in sight, and with every effort to destroy the evidence.”<sup>127</sup> Additionally, the transitional institutions were established at significantly different intervals after their transitions, with Ghana’s commission established some ten years after its transition from authoritarian rule, Liberia’s only two years after the end of its civil war, and Sierra Leone’s transitional institutions established a mere seven months after the peace agreement was signed. Further, U.N. peacekeeping missions were operating in both Sierra Leone and Liberia during the period of the commissions’ operations.

The limits of truth commissions become particularly apparent when these institutions are transplanted from post-authoritarian contexts and expected to function similarly in post-conflict contexts. Although the South African truth commission has reached iconic status, it is far from clear that the limited success achieved by that

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commission underperformed when compared to the other commissions. Yet, the key-variable approach developed in this Article puts forward a much more convincing account. See discussion *infra* Parts II, III, IV.

<sup>123</sup> Alter, Helfer & Saldías, *supra* note 116, at 634 (citing Watson, *supra* note 111).

<sup>124</sup> WIEBELHAUS-BRAHM, *supra* note 18, at 35.

<sup>125</sup> See Meredith Wain, *Ghana’s National Reconciliation Commission*, PEACE MAGAZINE, Apr.–June 2003, at 18, available at <http://peacemagazine.org/archive/v19n2p18.htm>.

<sup>126</sup> Interviews with human rights victims, staff, and Commissioners of the Truth and Reconciliation Commission for Liberia (TRC-L), civil society leaders, professors, lawyers, civil servants, and U.N. personnel, in Monrovia, Liberia and Lofa, Nimba, Bong, and Grand Gedeh counties, Liberia (Dec. 8–22, 2008; January 5–8, 2009) [hereinafter Interviews from Liberia]; Interviews from Sierra Leone, *supra* note 106.

<sup>127</sup> Cf. MAMDANI, *supra* note a (tbl.1), at 267 (contrasting South Africa with Rwanda).

commission<sup>128</sup> can be emulated elsewhere, particularly in societies that have experienced the kinds of massively destructive conflicts with which this Article is most concerned. Indeed, it is far from evident that the experiences with truth commissions in post-authoritarian countries, such as Argentina, Chile, and South Africa, would look anything like those of post-conflict countries.<sup>129</sup>

A comparative summary of the objectives and functions of each truth commission is included in Table 2 below for ease of reference:

Table 2

		TRUTH COMMISSIONS			
		South Africa Truth and Reconciliation Commission (SATRC) Established in 1995	Sierra Leone Truth and Reconciliation Commission (TRC-SL) Established in 2000	Ghana National Reconciliation Commission (NRC) Established in 2002	Liberia Truth and Reconciliation Commission (TRC-L) Established in 2005
OBJECTIVES & FUNCTIONS	Promote Truth-Telling	SATRC Act, <i>supra</i> note 1, § 3(1)	Sierra Leonean Peace Agreement, <i>supra</i> note 96, art. XXVI, § 1	NRC Act, <i>supra</i> note 56, § 13(a)	Liberian Peace Agreement, <i>supra</i> note 79, art. XIII, § 1
	Promote Reconciliation	SATRC Act, <i>supra</i> note 1, § 3(1)	TRC-SL Act, <i>supra</i> note 97, § 6(1)	NRC Act, <i>supra</i> note 56, § 20(2)(g)	TRC-L Act, <i>supra</i> note 82, art. IV, § 4(b)
	Grant Amnesty to Persons Who Make Full Disclosures	SATRC Act, <i>supra</i> note 1, § 3(1)(b), 4(c)			TRC-L Act, <i>supra</i> note 82, art. VII, § 26(g)
	Promote Psychological Healing for Victims		TRC-SL Act, <i>supra</i> note 97, § 6(1)	NRC Act, <i>supra</i> note 56, § 20(2)(g)	TRC-L Act, <i>supra</i> note 82, art. IV, § 4(b)

<sup>128</sup> See, e.g., Margaret (Peggy) Maisel, *Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future*, 20 CARDOZO J. INT'L & COMP. L. 143, 155–56 (2011) (discussing how the commission was biased against women when it only looked at violations that occurred “in the course of political conflicts,” only examined individuals’ experiences and not communities’, and disregarded the harm women faced “from sexism and gender inequality” (internal quotation marks omitted)); Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 DIACRITICS 33, 33–34 (2002) (discussing the following limitations of the SATRC’s work: the “reduc[ti]on of] apartheid from a relationship between the state and entire communities to one between the state and individuals;” the failure “to highlight the . . . nature of apartheid as a form of power that governed natives differently from non-natives;” and the “exten[sion of] impunity to most perpetrators of apartheid”); Zanaida Miller, *Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice*, 2 INT’L J. TRANSITIONAL JUST. 266, 290 (2008) (arguing that structural violence in South Africa may persist despite the commission’s intervention); see also WIEBELHAUS-BRAHM, *supra* note 18, at 35 (“South Africans are more ambivalent about the TRC.”).

<sup>129</sup> Thomas et al., *supra* note 20, at 17, 27.

<b>Establish an Accurate Historical Record of Human Rights Violations</b>	SATRC Act, <i>supra</i> note 1, § 3(1)(a)	TRC-SL Act, <i>supra</i> note 97, § 6(1)	NRC Act, <i>supra</i> note 56, § 20(2)(b)	TRC-L Act, <i>supra</i> note 82, art. VII, § 26(i)
<b>Recommend Reparations for Victims</b>	SATRC Act, <i>supra</i> note 1, § 3(1)(c)	TRC-SL Act, <i>supra</i> note 97, § 7(6)	NRC Act, <i>supra</i> note 56, § 20(2)(h)	TRC-L Act, <i>supra</i> note 82, art. VII, § 26(j)(i)
<b>Ensure Minimal Accountability and Address Impunity</b>	SATRC Act, <i>supra</i> note 1, § 4(a)(v)	TRC-SL Act, <i>supra</i> note 97, § 6(1)		TRC-L Act, <i>supra</i> note 82, art. IV, § 4(b)
<b>Restore Dignity to Victims</b>	SATRC Act, <i>supra</i> note 1, § 3(1)(c), 4(f)(i)	TRC-SL Act, <i>supra</i> note 97, § 6(2)(b)	NRC Act, <i>supra</i> note 56, § 20(2)(d)	TRC-L Act, <i>supra</i> note 82, art. VII, § 26(f)
<b>Make Recommendations for Institutional Reform</b>	SATRC Act, <i>supra</i> note 1, § 3(1)(d), 4(h)	TRC-SL Act, <i>supra</i> note 97, § 15(2)	NRC Act, <i>supra</i> note 56, § 20(2)(f)	TRC-L Act, <i>supra</i> note 82, art. VII, § 26(j)(ii)
<b>Prevent Violence and Repetition of Abuses</b>	SATRC Act, <i>supra</i> note 1, §§ 3(1)(d), 4(h)	TRC-SL Act, <i>supra</i> note 97, § 6(1)	NRC Act, <i>supra</i> note 56, § 20(2)(e)	TRC-L Act, <i>supra</i> note 82, art. IV, § 4

In addition to mimicking a number of functions and objectives of the SATRC, the West African commissions also adopted key design features of the South African model:<sup>130</sup>

- (1) Gathering information and taking statements from individuals;<sup>131</sup>
- (2) Holding public hearings and conducting investigations;<sup>132</sup> and
- (3) Compiling a public report of findings and recommendations.<sup>133</sup>

It is also worth noting the overwhelming and unrealistic number of goals attached to each institution.<sup>134</sup>

<sup>130</sup> Notably, however, they did not copy certain design features, such as the SATRC's three subcommittees: "the Committee on Human Rights Violations," "the Committee on Amnesty," and "the Committee on Reparation and Rehabilitation." See Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(3)(a)–(c) (S. Afr.).

<sup>131</sup> *Id.* § 4(b); see The National Reconciliation Commission Act, 2002 § 9(3) (Ghana), available at <http://www.ghanareview.com/reconact.html>; An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. VII, § 26(e), available at <http://www.refworld.org/docid/473c6b3d2.html>; Truth and Reconciliation Commission Act of 2000 § 7(1)(c) (Sierra Leone), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>.

<sup>132</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 28–30, 33 (S. Afr.); see The National Reconciliation Commission Act, 2002 §§ 10, 1 (Ghana); An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. VII, § 26(p); Truth and Reconciliation Commission Act of 2000 § 7(1)(a)–(b) (Sierra Leone).

<sup>133</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 3(1)(d), 4(e) (S. Afr.); see The National Reconciliation Commission Act, 2002 § 20 (Ghana); An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. X, §§43–44; Truth and Reconciliation Commission Act of 2000 §§ 15–16 (Sierra Leone).

<sup>134</sup> See *supra* Table 2. For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 259–88.

The legal-transplant literature informs us that changes in transplanted institutions indicate adjustments for domestic conditions.<sup>135</sup> Thus, blind copying weakens the effectiveness of the transplanted institution.<sup>136</sup> The analysis below indicates that copying may work better where there is more similarity between the origin and transplant country. Accordingly, we would anticipate that the truth commissions that hewed the most closely to the South African model, in very different contexts would fare the worst. The truth commissions in Ghana and Sierra Leone exhibited the most variation from the objectives and functions of the South African commission. A major innovation in Sierra Leone was the use of a hybrid court alongside the truth commission. Additionally, only the Ghanaian commission's constitutive act attempted any limitation of its goals. The truth commission that mimicked the South African model the most closely was Liberia's commission, which was the only commission empowered to grant amnesty,<sup>137</sup> in drastically different circumstances than South Africa and without strong legal institutions to support the process. While the SATRC did not provide for it to "promote healing,"<sup>138</sup> the drafters of the SATRC likely assumed the commission's contribution to this objective, as reconciliation and healing are concepts that (though distinct) are often used synonymously.<sup>139</sup>

The almost identical objectives of the West African commissions as well as their similar design features are no mere coincidence. Many of the actors involved in designing the South African truth commission were instrumental in diffusing the model and supporting the creation of the truth commissions in West Africa and elsewhere.<sup>140</sup> Some of the commissioners even went on study trips to learn about South Africa's experience and to find out about best practices.<sup>141</sup> The international

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<sup>135</sup> See e.g., Berkowitz, Pistor & Richard, *supra* note 33, at 179.

<sup>136</sup> *Id.* at 171.

<sup>137</sup> See An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. VII, § 26(g), available at <http://www.refworld.org/docid/473c6b3d2.html>. For further discussion, see *infra* text accompanying notes 258–64.

<sup>138</sup> See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.).

<sup>139</sup> See *id.* § 3 (providing that the commission shall promote "reconciliation"); see also Phil Clark, *Establishing a Conceptual Framework: Six Key Transitional Justice Themes*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND 191, 195 (Phil Clark & Zachary D. Kaufman eds., 2009).

<sup>140</sup> Victoria Baxter, *Critical Challenges for the Development of the Transitional Justice Research Field*, in ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE, *supra* note 25, at 326 (noting that "there is a recognized pool of people who have worked on the South African Truth and Reconciliation Commission" and that "[t]hese individuals tend to be mobile and work in other transitional justice contexts and have therefore become influential in the development of transitional justice policy in a variety of countries"); see also WIEBELHAUS-BRAHM, *supra* note 18, at 35 ("Many in the international human rights community are inured to the potential of truth commission based almost entirely on the South African model.").

<sup>141</sup> Interviews from Liberia, *supra* note 126. See *infra* Methodological Appendix for a fuller discussion of the eighty-seven interviews conducted.

community and donors were also very influential in the diffusion of the South African model.<sup>142</sup> Yet, this is not merely a case of another transplant from the West to non-Western countries (this time simply via South Africa). Instead, as Desmond Tutu reflected in his book, the SATRC was infused with principles of “*ubuntu*,” meaning that “[m]y humanity is caught up, is inextricably bound up, in yours.”<sup>143</sup> The principles of *ubuntu* emphasize reciprocity, inclusivity, forgiveness, and reconciliation.<sup>144</sup> Chapman and van der Merwe have noted that the expansion of the goals of truth commissions from primarily “truth recovery” to encompassing many other objectives, including “promot[ing] forgiveness and reconciliation” “is primarily due to the influence of the South African model.”<sup>145</sup> There had previously been commissions on the disappeared in Argentina, Uganda, and Sri Lanka; truth and justice commissions in Haiti and Ecuador; and now, increasingly, truth and reconciliation commissions since the commission in South Africa. In particular, a number of post-conflict countries have sought to copy and paste many of the features of the South African Commission.<sup>146</sup>

Parts II, III, and IV will explore some of the ways the commissions in West Africa mimicked the South African model, particularly highlighting difficulties faced in promoting truth-telling, healing, establishing an accurate historical record, and providing redress and acknowledgment for victims. This Article illuminates the challenges posed for truth commissions in post-conflict countries due to the interaction of key factors—the relative weakness of institutions, the lower levels of moral consensus surrounding mass violence, and the larger number of victims and perpetrators. While I discuss these key variables separately below for ease of explanation, it should be recalled

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<sup>142</sup> Thomas et al., *supra* note 20, at 16–17 (“International human rights groups and U.N. agencies are encouraging this templatization.”). For a more in depth discussion of international policy diffusion, see Simmons *supra* note 121, at 34–35.

<sup>143</sup> See DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 31 (1999) (internal quotation marks omitted); see also GIBSON, *OVERCOMING APARTHEID*, *supra* note 18, at 263.

<sup>144</sup> See Tim Murithi, *Towards African Models of Transitional Justice*, in *WHERE LAW MEETS REALITY: FORGING AFRICAN TRANSITIONAL JUSTICE* 203–04 (Moses Chrispus Okello et al. eds., 2012).

<sup>145</sup> See Audrey R. Chapman & Hugo van der Merwe, *Introduction to TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?*, *supra* note 25, at 4.

<sup>146</sup> For example, the truth commission in the Solomon Islands was established with the assistance of Desmond Tutu, the former chair of the SATRC. *Desmond Tutu Launches Commission to Restore Peace in Solomon Islands*, UNITED NATIONS DEV. PROGRAMME (Apr. 28, 2009), <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2009/04/28/archbishop-tutu-opens-solomon-islands-truth-and-reconciliation-commission>; see also Doki, *supra* note 15 (discussing the South Sudanese government’s plans to launch a truth and reconciliation process based on the South African model); Nossiter, *supra* note 14 (discussing how the government in Libya was considering a truth commission to draw on the South African experience).

that they interact in numerous ways. Further, I discuss the key variables in order of significance, with institutional strength having the most impact on a truth commission's abilities and the number of victims and perpetrators in a given society having the least.

## II. INSTITUTIONAL WEAKNESS AND THE LIMITED IMPACT OF TRUTH COMMISSIONS

Post-conflict states have significant social problems, which “require comprehensive reforms in their political, economic, social, and security sectors.”<sup>147</sup> Resolving these problems “require[s] a strong state, [which] at a minimum [is] able to provide security for its citizens, make decisions in a politically acceptable way, . . . create organizations that will implement these decisions,” and generate revenue to “pay for the whole process.”<sup>148</sup> In the aftermath of the conflicts in Liberia and Sierra Leone, many vital state institutions were non-existent or significantly weakened. For example, the Index of State Weakness in the Developing World (“Index”), which ranks all 141 developing countries according to their performance in four key areas—economics, politics, security, and social welfare—ranked Liberia ninth, Sierra Leone thirteenth, and Ghana eighty-fourth (with a lower ranking representing a weaker state).<sup>149</sup> As a point of comparison, the Index ranked South Africa 110th out of 141 developing countries and categorized it as a “state to watch.”<sup>150</sup> This provides a rough approximation of the level of state capacity during the periods the commissions were operating in each country, with the Index categorizing Liberia and Sierra Leone as “critically weak states” and Ghana as a “state to watch.”<sup>151</sup> Following their respective transitions, the

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<sup>147</sup> Licklider, *supra* note 35, at 294 (quoting Krishna Kumar, *The Nature and Focus of International Assistance for Rebuilding War-Torn Societies*, in *REBUILDING SOCIETIES AFTER CIVIL WAR* 1, 3 (Krishna Kumar ed., 1997)) (internal quotation marks omitted).

<sup>148</sup> *Id.*

<sup>149</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 3, 39, 41. The scale also looked at twenty “subindicators,” which included widely recognized indicators in each area. *See id.* at 3, 30–36. The data sources used coincide with the periods of operation of the transitional justice mechanisms in Ghana, Sierra Leone, Liberia, and South Africa.

<sup>150</sup> *See id.* at 10, 13, 41. The Index of State Weakness was only recently created, and the oldest version of the Index is from 2008, which weighs data from 1991 to 2007 when compiling scores. *See id.* at 30–37. The earliest available data for South Africa is in the “Failed States Index,” which also ranks it 110th. *See The Failed States Index 2006*, FUND FOR PEACE <http://ffp.statesindex.org/rankings-2006-sortable> (last visited June 29, 2014). “The Failed States Index . . . is perhaps the best-known rankings of countries according to their relative weakness.” INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 7. I rely on the Index of State Weakness as opposed to the Failed States Index because the latter underestimates the role of “inadequate health care and education” in contributing to state weakness, “relies extensively on selected” media coverage, and “lacks full transparency.” *Id.* at 7.

<sup>151</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 10, 39, 41 (“[C]ritically weak states” are defined as those states “least capable of fulfilling most, if not all, of the four critical

economies in all three countries were also relatively weak, with Ghana having a relatively stronger economy than Sierra Leone, and Liberia with the weakest economy.<sup>152</sup> Additionally, Ghana performed significantly higher than Liberia and Sierra Leone in terms of the provision of social welfare to its citizens, with Sierra Leone faring the worst.<sup>153</sup> The Index considered five factors: “child mortality,”<sup>154</sup> “primary school completion,”<sup>155</sup> the “prevalence of undernourishment,”<sup>156</sup> “access to improved water sources [and] improved sanitation facilities,”<sup>157</sup> and “life expectancy.”<sup>158</sup> This provides some sense of the level of comparative social and economic deprivation in Ghana, Sierra Leone, and Liberia. A number of interviewees during my field research also commented on the socio-economic difficulties faced. For example, one interviewee in Liberia stated, “every woman in village was raped, or gang raped, but we don’t even have a pump for safe drinking water, the ones placed here do not even work.”<sup>159</sup> Another Liberian interviewee lamented, “The country is hard, what will we eat? The price of rice is high. There are no roads for commerce, no transportation. People are catching hell.”<sup>160</sup> Another interviewee stated

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functions of government,” while “states to watch” “perform better overall than those in the bottom two quintiles,” but “score . . . poorly in at least one of the four core areas of state function” (internal quotation marks omitted).

<sup>152</sup> *Id.* at 39, 41. For instance, the composite score in the economic sphere on the Index was 3.39 for Liberia, 5.04 for Sierra Leone, and 5.92 for Ghana on a scale of one to ten (with a lower score representing a worse score). *Id.* at 39, 41. The Index relied on five economic indicators: “growth of gross domestic product,” *id.* at 34 (relying on *World Development Indicators 2007*, WORLD BANK, with data coverage from 2002–2006), “gross national income,” *id.* at 33 (relying on *World Development Indicators 2007*, *supra*, with data coverage from 2006), “inflation,” *id.* at 34 (relying on *World Economic Outlook Database*, INT’L MONETARY FUND (Sept. 2006), [www.imf.org/external/pubs/ft/weo/2006/02/data/index.aspx](http://www.imf.org/external/pubs/ft/weo/2006/02/data/index.aspx), with data from 2003–2007), “income inequality,” *id.* (relying on the *World Development Indicators 2007*, *supra*, with data from 2006), and “regulatory quality,” *id.* (relying on Daniel Kaufmann et al., *Governance Matters VI: Governance Indicators for 1996–2006* (World Bank Policy Research, Working Paper No. 4280, 2007), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979), with data from 2006).

<sup>153</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 39, 41. The Index gave a composite score of 0.76 to Sierra Leone, 1.25 to Liberia, and 5.48 to Ghana on a scale of one to ten, according to their performance in the provision of social welfare. *Id.*

<sup>154</sup> *Id.* at 35 (relying on UNICEF, THE STATE OF THE WORLD’S CHILDREN 2007 (2006), available at [http://www.unicef.org/publications/files/The\\_State\\_of\\_the\\_Worlds\\_Children\\_2007\\_e.pdf](http://www.unicef.org/publications/files/The_State_of_the_Worlds_Children_2007_e.pdf), with data coverage from 2005).

<sup>155</sup> *Id.* (relying on the *World Development Indicators 2007*, *supra* note 152, with data coverage from 2000 and 2005).

<sup>156</sup> *Id.* (relying on *Statistics*, FOOD & AGRIC. ORG. UNITED NATIONS, with data coverage from 2004).

<sup>157</sup> *Id.* (relying on the *World Development Indicators 2007*, *supra* note 152, with data coverage included from 2004).

<sup>158</sup> *Id.* at 31 (relying on the *World Development Indicators 2007*, *supra* note 152, with data coverage included from 2005).

<sup>159</sup> Interviews from Liberia, *supra* note 126.

<sup>160</sup> *Id.*

that after the war “when people returned, our houses were burned down, we need help to put our lives back together, zinc to build our homes.”<sup>161</sup> These statements provide us with additional context for how drastically different the circumstances were for the commissions operating in post-conflict countries.

Given the realities of operating a truth commission in a post-conflict context with significantly weakened or non-existent institutions concomitant with general deprivation, the difficulties Liberia and Sierra Leone faced are not surprising. Field research revealed that both the TRC-SL and the TRC-L effectively lost portions of their preparatory period and the first couple of months of their mandates due to administrative and management difficulties within their Secretariats.<sup>162</sup> Additionally, interviewees stressed how inadequate funding plagued all of the commissions,<sup>163</sup> but that this was particularly problematic for the commissions in Sierra Leone and Liberia, given the large number of victims and alleged perpetrators their commissions had to engage. The experience of Liberia and Sierra Leone is likely typical of other post-conflict contexts, where state capacity is low following mass violence, and funding for truth-telling processes is limited. Field research exhibited how, comparatively, the international community better financed and supported the SCSL. Accordingly, the SCSL did not face as many administrative and management difficulties as the truth commissions.<sup>164</sup> Parts II.A and II.B focus on examples of how fragile institutions following the conflicts in Liberia and Sierra Leone limited the impact of truth commissions in these countries and how the combination of truth and punishment mechanisms helped to fill important institutional gaps in Sierra Leone.

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<sup>161</sup> *Id.*

<sup>162</sup> In Liberia, the commission lost all of its preparatory period and six months of its operational mandate due to similar challenges. The TRC-L functioned for almost a year without an Executive Secretariat. In January 2007, the International Contact Group for Liberia intervened, enumerating ways in which the TRC-L had not performed optimally and creating a TRC Working Group to monitor its activities. Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>163</sup> The NRC struggled to attract international funding for its initial \$5 million budget and was forced to operate within the \$1.5 million budget provided by the Ghanaian government. See SARA TOLLEFSON & KIM STANTON, CDD-GHANA, INTERIM REPORT ON THE NRC 5 (2003) (unpublished manuscript) (on file with author). The TRC-SL also faced a considerable shortfall of its initial \$10 million budget and had to operate on a \$4.1 million budget. See 1 TRUTH & RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 103–05 (2004) [hereinafter 1 TRC-SL REPORT], available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf>. Comparatively, the Liberian government provided tremendous financial support, donating approximately \$4.2 million of the almost \$8 million budget of the TRC-L. See TRC-L FINAL REPORT, *supra* note 62, at 38–40. In contrast, the SATRC had an estimated budget of \$33 million and a staff of 400 at its peak. See Hugo van der Merwe & Audrey R. Chapman, *Did the TRC Deliver?*, in TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?, *supra* note 25, at 247.

<sup>164</sup> Interviews from Sierra Leone, *supra* note 106.



A. *Weak Security Institutions*

Post-conflict states face enormous challenges establishing security for its citizens, but this is arguably the most fundamental objective for the new state, as victims need assurances to resume their lives.<sup>165</sup> “[A] police force has to be created,” and they in turn “need[] a set of laws to enforce,” which requires “a judicial system with judges and lawyers” as well as a functioning prison system, all of which, following a conflict, needs to “be built from the ground up.”<sup>166</sup> The fragility of security institutions<sup>167</sup> following the conflicts in Liberia and Sierra Leone limited the impact of their commissions. For example, the Index gave Sierra Leone a composite score of 5.43, Liberia 6.01, and Ghana 8.44 on a scale of one to ten according to their performance in security (with a lower score representing a worse score).<sup>168</sup> The Index relied on five security indicators: “conflict intensity,”<sup>169</sup> “political stability and absence of violence,”<sup>170</sup> “incidence of coups,”<sup>171</sup> “gross human rights abuses,”<sup>172</sup> and “territory affected by [the] conflict.”<sup>173</sup> These figures provide some sense of the comparative level of insecurity in the three countries.

Because of the heightened levels of insecurity in Sierra Leone and Liberia, both commissions had significantly fewer people participate in their public hearings despite the relatively large size of the victim and perpetrator classes. While the commission in Sierra Leone heard 350 people,<sup>174</sup> and the commission in Liberia heard approximately 800 people,<sup>175</sup> the commission in Ghana ultimately heard 1866 people<sup>176</sup> in public hearings. In Sierra Leone, obtaining witnesses for the TRC-SL was difficult because many people had returned to their communities,

<sup>165</sup> Licklider, *supra* note 35, at 294–95.

<sup>166</sup> *Id.* at 295.

<sup>167</sup> Security institutions are those institutions that have primary responsibility for maintaining security, such as the military and the police.

<sup>168</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 39, 41.

<sup>169</sup> *Id.* at 31 (relying on Monty G. Marshall, *Major Episodes of Political Violence 1946–2007*, CENTER SYSTEMIC PEACE, <http://www.systemicpeace.org/warlist.htm> (last updated Mar. 27, 2014), with data coverage from 1993–2007).

<sup>170</sup> *Id.* (relying on Kaufmann et al., *supra* note 152, with data coverage from 2006).

<sup>171</sup> *Id.* at 31–32 (relying on the ARCHIGOS, A DATABASE ON LEADERS (Version 2.8, 2007), with data coverage from 1992–2006).

<sup>172</sup> *Id.* at 32 (relying on Mark Gibney et al., POLITICAL TERROR SCALE, <http://www.politicalterroryscale.org> (last updated Dec. 1, 2013), with data coverage from 2002–2006).

<sup>173</sup> *Id.* at 33 (relying on *Political Instability Task Force*, CTR. GLOBAL POL’Y, <http://globalpolicy.gmu.edu/political-instability-task-force-home> (last updated June 20, 2012), with data coverage from 1991–2005).

<sup>174</sup> See CTR. FOR CONFLICT RESOLUTION, PEACE VERSUS JUSTICE? TRUTH AND RECONCILIATION COMMISSIONS AND WAR CRIMES TRIBUNALS IN AFRICA 24 (Yazeed Fakier ed., 2007).

<sup>175</sup> TRC-L FINAL REPORT, *supra* note 62, at 189.

<sup>176</sup> 1 NRC REPORT, *supra* note 42, at 91.

others no longer wished to testify, and some feared repercussions if they testified.<sup>177</sup> Field research revealed that the commission in Liberia similarly struggled with public hearings, in a context where many known perpetrators roamed freely.<sup>178</sup> Interviewees noted that the witness protection scheme put in place by the TRC-L had limited impact in encouraging involvement.<sup>179</sup> Women interviewees in post-conflict countries especially feared stigma and retaliation if they testified publicly.<sup>180</sup> Paradoxically, fewer people engaged in the public hearings in Sierra Leone and Liberia than did in Ghana<sup>181</sup> because security institutions, which might have provided victim and witness protection, were significantly weakened or non-existent.

Liberia had only one transitional-justice mechanism, which was solely responsible for fulfilling a host of justice-promoting objectives, in a context with very large numbers of perpetrators. A majority of interviewees in Liberia remarked that their truth commission had not helped to consolidate peace and stability.<sup>182</sup> In Sierra Leone, however, the court helped to fill important institutional gaps and buttressed the efforts of the TRC-SL. For example, 81% of those surveyed by the SCSL felt that the court had contributed to the restoration and maintenance of peace.<sup>183</sup> Additionally, 43% of respondents in Liberia and 39% of respondents in Sierra Leone thought that the closing of the SCSL would affect peace in their country and the region because “[i]t [would] no longer serve as a deterrent”<sup>184</sup> or that closing the court would “bring back fear.”<sup>185</sup> In particular, interviewees in Sierra Leone and Liberia routinely singled out Charles Taylor’s trial before the SCSL<sup>186</sup> for its

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<sup>177</sup> See 1 TRC-SL REPORT, *supra* note 163, at 99.

<sup>178</sup> Interviews from Liberia, *supra* note 126.

<sup>179</sup> *Id.*; see also AMNESTY INT’L, LIBERIA: TOWARDS THE FINAL PHASE OF THE TRUTH AND RECONCILIATION COMMISSION 22–23 (2008); TRC-L FINAL REPORT, *supra* note 62, at 62 (noting that “witness protection was applied on an individual case by cases basis due inadequate resources and the limited time” of the TRC-L’s mandate).

<sup>180</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106; see also TRC-L FINAL REPORT, *supra* note 62, at 200 (noting that only 32% of those who participated in the public hearings were women).

<sup>181</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 244.

<sup>182</sup> Interviews from Liberia, *supra* note 126.

<sup>183</sup> SCSL SURVEY, *supra* note 107, at 30. The SCSL is also recognized for contributing to peace-building in Sierra Leone and Liberia. Many respondents in Sierra Leone (72%) and Liberia (68%) thought that the SCSL had contributed to the development of other peace-building mechanisms in their respective countries. *Id.* at 51 Annex 36. Notably, 32.06% of respondents in Liberia thought that the SCSL did not have an impact because there was no “Special Court in Liberia.” *Id.* at 30.

<sup>184</sup> *Id.* at 43 Annex 13. Overall, 37.25% of respondents indicated this. *Id.*

<sup>185</sup> *Id.* Overall, 23.52% of respondents indicated this. *Id.*

<sup>186</sup> A thorough analysis of the more-than-2000-page trial judgment, see Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. INT’L CRIM. JUST. 835, 836 (2013), is beyond the scope of this Article. See generally *id.*; Kenneth S. Gallant, *Charles Taylor, Arms Dealers, and Reparations* (UALR-William H. Bowen Sch. of Law, Research Paper No. 12-08, 2012), available at <http://ssrn.com/abstract=2079768>.

contribution to deterrence. My field research demonstrated that a number concluded that his trial helped to contribute to regional stability and put other leaders on notice that “there is accountability for fomenting war in neighboring countries.”<sup>187</sup> While it is difficult to draw any larger conclusions about the impact of the court on deterrence in and beyond the sub-region,<sup>188</sup> it seems clear that the SCSL’s perceived contribution to preventing violence and the non-repetition of abuses bolstered both processes. It also appears that the court helped to fill perceived security gaps.

Overall, Sierra Leone’s experience indicates that in post-conflict countries, where security institutions (where they exist) are relatively weak, the combination of a hybrid court and a commission can help to fill key institutional gaps and increase perceptions of effectiveness for both institutions. In particular, perceptions of security are important as prosecutions can potentially create a greater sense of security that truth commissions can then benefit from. In Sierra Leone, the hybrid court had much more capacity and resources than the commission. If both institutions were equally under-resourced, the beneficial relationship between court and commission would likely not be replicated. Liberia’s experience is also instructive because it indicates that where the commission and fragile state-security institutions provide insufficient witness and victim protection following a conflict, the truth commission’s efforts to fulfil its mandate will be frustrated. The experience of Liberia and Sierra Leone is likely typical of other post-conflict contexts, where there are numerous perpetrators who threaten or intimidate victims to discourage them from participating fully in the process. The commission in Ghana operated in a more secure environment, and accordingly had more people come forward in public hearings. Part II.B discusses how weak political institutions following the conflicts limited the impact of the truth commissions.

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<sup>187</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>188</sup> Taylor’s trial suffers from the same challenges posed by deterrence theory at the domestic level. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 63–71 (2002). For example, “it is difficult to prove that threats of legal sanctions, rather than other motivations, . . . prevent[] people from offending.” *Id.* at 65. Additionally, deterrence theory “only works in relation to some crimes and some offenders,” *id.*, who are rational actors, but in the context of mass atrocities, it is unclear that we are dealing with rational actors making these calculations, *id.* at 66. Further, in the real, world punishment is never swift, certain, or severe and is often determined by a host of factors, which limit the ability for deterrence to play a role. *Id.* at 64–65.

### B. *Weak Political Institutions*

The weakness of the political institutions<sup>189</sup> in Liberia and Sierra Leone limited the impact of the commissions. For example, the Index gave a composite score of 3.87 to Sierra Leone, 3.91 to Liberia, and 7.02 to Ghana on a scale of one to ten, according to their performance in the political sphere (with a lower score representing a worse score).<sup>190</sup> The Index used political indicators that measured five factors: “government effectiveness,”<sup>191</sup> the “rule of law,”<sup>192</sup> “control of corruption,”<sup>193</sup> “voice [and] accountability,”<sup>194</sup> and “freedom.”<sup>195</sup> This provides a rough comparator of the variance in political institutions in each country.

Field research revealed that political institutions too weak to carry out reforms and the lack of political will have been the main challenges for the implementation of all the commissions’ recommendations.<sup>196</sup> In Ghana, interviewees stated that the work of the NRC has seemingly fallen off the political radar.<sup>197</sup> During my field research, some interviewees remarked that the NRC “has not met expectations,” with a few commenting, “people have forgotten about it.”<sup>198</sup> Given the

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<sup>189</sup> Political institutions are those institutions that are primarily in charge of governing, such as the legislative and executive branches.

<sup>190</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 39, 41.

<sup>191</sup> *Id.* at 30 (relying on Kaufmann et al., *supra* note 152, with data from 2006).

<sup>192</sup> *Id.* (relying on Kaufmann et al., *supra* note 152, with data from 2006).

<sup>193</sup> *Id.* (relying on Kaufmann et al., *supra* note 152, with data from 2006).

<sup>194</sup> *Id.* (relying on Kaufmann et al., *supra* note 152, with data from 2006).

<sup>195</sup> *Id.* at 31 (relying on *Freedom in the World 2007*, FREEDOM HOUSE (Jan. 17, 2007), <http://www.freedomhouse.org/template.cfm?page=70&release=457>, with data from 2007).

<sup>196</sup> In Ghana, the NRC’s key recommendations involved reparations payments and restoring seized assets as well as recommendations for institutional reform, particularly regarding the security sector, the judiciary, and other institutions. See 3 NAT’L RECONCILIATION COMM’N, REPORT OF THE NATIONAL RECONCILIATION COMMISSION 1–50 (2004). In Sierra Leone, the commission’s main recommendations concerned addressing corruption, creating a new Bill of Rights, strengthening the legislature and the judiciary, security sector reform, decentralizing governance, delivering basic services, increasing participation for youth and women in decision-making, and establishing a reparations program. See 2 TRUTH & RECONCILIATION COMM’N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 123–25 (2004) [hereinafter 2 TRC-SL REPORT], available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>. In Liberia, the commission’s main recommendations pertained to criminal prosecutions and lustrations. See TRC-L Final Report, *supra* note 62, at 347–61, 369–76. The TRC-L also recommended the creation of a national *palava* hut (local mechanism for reconciliation), the establishment of a reparations program, greater human rights protection, and amnesty for children. *Id.* at 363–67, 377–94, 402–03. For further discussion of the commissions’ recommendations, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 274–75.

<sup>197</sup> Interviews with former staff and Commissioners of the National Reconciliation Commission (NRC), civil society leaders, human rights victims, professors, lawyers, and judges, in Accra, Ghana (Nov. 18–29, 2008) [hereinafter Interviews from Ghana] (a number of interviewees mentioned that there was insufficient awareness about the NRC). See *infra* Methodological Appendix for discussion of the twelve interviews conducted.

<sup>198</sup> Interviews from Ghana, *supra* note 197.

politicization of the NRC in Ghana, interviewees feared that later governments might summarily dismiss the NRC's recommendations as a creature of the opposition party, which was previously in power.<sup>199</sup> Far more interviewees expressed concern about the lack of political will in Sierra Leone than did in Ghana.<sup>200</sup> In Sierra Leone, Kabbah's government did not demonstrate sufficient political will or leadership concerning implementation of the commission's recommendations. Some interviewees noted that the government's apathetic attitude toward the commission might have resulted from the criticisms leveled against it.<sup>201</sup> Despite initial representations,<sup>202</sup> the new Sierra Leonean government, led by President Ernest Bai Koroma, also demonstrated insufficient political will. Similarly, in Liberia, the commission's report has united much of the political class in opposition against it,<sup>203</sup> because it recommended prosecution and debarment from public office for much of the political elite.<sup>204</sup> Indeed, there does not appear to be any implementation strategy in place other than avoidance of the report's recommendations.<sup>205</sup> In all three countries, alleged perpetrators or parties affiliated with alleged perpetrators, either are currently in power or continue to have political influence. In the post-conflict countries, various actors have generally been able to obstruct or slow the pace of institutional reforms recommended by the commissions.<sup>206</sup> The

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<sup>199</sup> In Ghana, the truth commission's investigations mainly targeted members of the current ruling party (the NDC). *Id.*

<sup>200</sup> *Id.*; Interviews from Sierra Leone, *supra* note 106.

<sup>201</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>202</sup> See HUMAN RIGHTS COMM'N FOR SIERRA LEONE, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS & UNITED NATIONS INTEGRATED OFFICE IN SIERRA LEONE, REPORT ON THE CONSULTATIVE CONFERENCE ON THE STATUS OF IMPLEMENTATION OF THE TRUTH AND RECONCILIATION COMMISSION RECOMMENDATIONS 24 (2007) [hereinafter STATUS OF IMPLEMENTATION OF TRC-SL] (referring to a statement from the president that he would fully implement the TRC-SL's recommendations).

<sup>203</sup> Steinberg, *supra* note 80, at 143.

<sup>204</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 261–62.

<sup>205</sup> See *Joint Resolution Suspending Action on TRC Report Signed into Law*, EXECUTIVE MANSION (Sept. 17, 2009), [http://www.emansion.gov.lr/2press.php?news\\_id=1327](http://www.emansion.gov.lr/2press.php?news_id=1327). The Liberian government has indicated that it is reviewing the legal implications of implementing the TRC-L's recommendations. See *Ellen Presents TRC Recommendations Performance Report to Legislature*, NEW DAWN LIBERIA (Mar. 18, 2010, 12:15), [http://www.thenewdawnliberia.com/index.php?option=com\\_content&view=article&id=398:ellen-presents-trc-recommendations-performance-report-to-legislature&catid=25:politics&Itemid=59](http://www.thenewdawnliberia.com/index.php?option=com_content&view=article&id=398:ellen-presents-trc-recommendations-performance-report-to-legislature&catid=25:politics&Itemid=59). The slow pace of the review and consultations has raised questions about the government's willingness to implement the recommendations at all.

<sup>206</sup> The post-conflict governments delayed the establishment of the follow-up bodies to the commissions. In both Sierra Leone and Liberia, the truth commissions' acts provided for the establishment of a formal body whose mandate focused on follow-up activities. See Truth and Reconciliation Commission Act of 2000 § 18 (Sierra Leone), *available at* <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>; An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. X, § 46, *available at* <http://www.refworld.org/docid/473c6b3d2.html>. The government of Sierra Leone did not create a follow up committee to facilitate the implementation of the commission's

institutional independence and rigor necessary to carrying out reforms without directives from the governmental leaders is also lacking. In the post-conflict countries, this has been more pronounced because these institutions have less capacity to respond effectively and independently.<sup>207</sup> The above factors combined with the lack of awareness about the commissions more generally have also limited the impact of the truth commissions.

“[G]overnmental accountability to citizens” is another indicator of the strength of political institutions.<sup>208</sup> Yet, the political institutions in all three countries have not been called to account for their lack of action in implementing the commissions’ recommendations because public awareness about the commissions and their reports, particularly in the post-conflict countries, is lacking.<sup>209</sup> For example, a survey conducted in Liberia by the Human Rights Center at University of California, Berkeley revealed that while 73% reported awareness of the commission’s existence, over 90% stated they had “no (45%) or little (46%) knowledge of the TRC[-L],” with 32% of respondents “incapable

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recommendations as stipulated in the TRC-SL Act. Interviews from Sierra Leone, *supra* note 106. The follow-up committee was to consist of representatives from the “Moral Guarantors” of Sierra Leone’s “Lome Peace Agreement.” Truth and Reconciliation Commission Act of 2000 § 18(1) (Sierra Leone). The Sierra Leonean government considers the Human Rights Commission for Sierra Leone (HRC-SL) to be the de facto follow-up committee. Interviews from Sierra Leone, *supra* note 106. This is problematic because “the government has not put in place measures to adequately resource the work of the Commission” for this task. STATUS OF IMPLEMENTATION OF TRC-SL, *supra* note 202, at 20. There is also the danger that the HRC-SL will become overwhelmed in meeting its other priorities and not be able to prioritize TRC-SL follow-up. Interviews from Sierra Leone, *supra* note 106. In Liberia, the government delayed establishing the follow-up body due to amendments to the TRC-L Act, as well as the legislature’s rejection of the executive’s nominees. See PAUL JAMES-ALLEN ET AL., BEYOND THE TRUTH AND RECONCILIATION COMMISSION: TRANSITIONAL JUSTICE OPTIONS IN LIBERIA 12 (2010) [hereinafter BEYOND THE TRC-L]. Apparently, some legislators rejected the nominees to prevent any follow-up work on the TRC-L’s recommendations. *Id.* at 12 n.45. The government finally established the follow-up body in October 2010. Interviews from Liberia, *supra* note 126. It has faced a number of operational and financial troubles, which inhibited its ability to serve as an effective follow-up mechanism. *Id.* In Ghana, the commission’s act did not provide for a formal follow-up mechanism.

<sup>207</sup> See INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 8.

<sup>208</sup> *Id.*

<sup>209</sup> Sixty-eight percent of the 102 victims interviewed by CDD-Ghana indicated that they were aware of the Commission’s existence before it started its hearings. CDD-GHANA, OPINIONS OF VICTIMS OF PAST HUMAN RIGHTS ABUSE IN GHANA AFTER THE NATIONAL RECONCILIATION COMMISSION’S PUBLIC HEARINGS 9 (2006) [hereinafter CDD-GHANA, VICTIMS SURVEY], available at <http://cddghana.org/publications/Other-Publications>. Due to the purposive sampling used in selecting respondents and the limited sample size, I only rely on the findings from the survey as indicative of opinions of victims, but I do not generalize these findings. Thus, it is not clear how many Ghanaians in general understood the commission’s role or were aware of the NRC and its report. Interviews from Ghana, *supra* note 197. Additionally, many Liberian interviewees from my field research in rural areas were confused about the role of the TRC-L. Interviews from Liberia, *supra* note 126.

of recalling any” of the commission’s recommendations.<sup>210</sup> Similarly, 89% of Sierra Leoneans surveyed by the BBC were aware of the TRC-SL, yet only 23% were aware of the content of the TRC-SL’s report and its recommendations.<sup>211</sup> This has made implementation of the commissions’ institutional reforms recommendations haphazard because many officials in Sierra Leone lack adequate knowledge of the TRC-SL’s findings and recommendations.<sup>212</sup> Some officials were not aware that, if they implemented a number of planned activities, it would fulfill one or more recommendations.<sup>213</sup> A number of interviewees in Sierra Leone also pointed out the lackluster response of the international community in supporting the implementation of the commission’s recommendations and ensuring that the government of Sierra Leone acts.<sup>214</sup> Many more interviewees in Sierra Leone expressed frustration with the government’s failure to act than did in Ghana.<sup>215</sup>

Lack of awareness about the commissions’ reports has also meant a lack of adequate pressure to follow-up on the work of the commissions from civil society and victim groups. For example, in Ghana, staff from a prominent NGO remarked that “the reform needs are so many that it has been difficult to sustain focus on implementing recommendations, and efforts to get funding both internationally and domestically for post-NRC follow-up have gone nowhere.”<sup>216</sup> In Sierra Leone, there are a few civil society groups advocating for TRC-SL-related follow-up.<sup>217</sup> In Liberia, there is a coalition of civil society organizations that have been vocal in advocating for the implementation of the commission’s recommendations, but to no avail.<sup>218</sup> Inadequate follow-up to the commissions’ recommendations may mean that the commissions’ reports are left gathering dust on the shelves. While follow-up has been lacking in all three countries, the import of this is likely more

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<sup>210</sup> See PATRICK VINCK ET AL., TALKING PEACE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SECURITY, DISPUTE RESOLUTION, AND POST-CONFLICT RECONSTRUCTION IN LIBERIA 69–71 (2011) [hereinafter HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY], available at <http://www.escholarship.org/uc/item/59p3f3mn>. Additionally, a survey conducted in 2012 indicated that 90% of those surveyed in Liberia had heard of the TRC-L. SCSL SURVEY, *supra* note 107, at 44 Annex 16.

<sup>211</sup> INT’L CTR. FOR TRANSITIONAL JUSTICE, BBC WORLD SERV. TRUST, BUILDING A BETTER TOMORROW: A SURVEY OF KNOWLEDGE AND ATTITUDES TOWARD TRANSITIONAL JUSTICE IN SIERRA LEONE 25–26 (2008) [hereinafter BBC, SIERRA LEONE SURVEY].

<sup>212</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>213</sup> See STATUS OF IMPLEMENTATION OF TRC-SL, *supra* note 202, at 6. This information was corroborated in the interviews I conducted in Sierra Leone. Interviews from Sierra Leone, *supra* note 106.

<sup>214</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>215</sup> Compare Interviews from Ghana, *supra* note 197, with Interviews from Sierra Leone, *supra* note 106.

<sup>216</sup> Interviews from Ghana, *supra* note 197.

<sup>217</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>218</sup> See, e.g., *Liberia Warned—Implement TRC’s Report and Recommendation Now to Ensure Peace*, ALLAFRICA.COM (Nov. 14, 2012), <http://allafrica.com/stories/201211150667.html>.

pronounced in post-conflict countries recovering from massively destructive civil wars, where reform or rebuilding needs are more pressing. It is unlikely that an “empty truth” (that is, a truth commission not followed by reform of abusive institutions) will forge the basis for rehabilitation, another important objective of the commissions.<sup>219</sup>

In sum, this Part has shown how the limits of transplanting truth commissions become evident when these institutions are “copied and pasted” from post-authoritarian contexts with relatively well-functioning institutions and expected to function similarly in post-conflict contexts with significantly weaker or even non-existent institutions. Given the realities of operating a truth commission in a post-conflict context, we have seen how the Sierra Leonean and Liberian commissions struggled to fulfil their mandates due to weak security and political institutions. Yet, the Sierra Leonean commission outperformed the Liberian commission,<sup>220</sup> even though they both operated in similar post-conflict societies. In Sierra Leone, since one transitional-justice mechanism was not solely responsible for carrying out complementary objectives and responsibility was somewhat diffused between the commission and the court, each mechanism bolstered the other’s ability.<sup>221</sup> In contrast, Ghana’s commission functioned in a state with relatively strong key institutions in the security and political sectors, which influenced the commission’s relative success. In Ghana, the stronger security environment had a greater impact on the truth commission’s operations than on the strength of its political institutions because political will was generally lacking across all countries studied. As a point of comparison, South Africa ranked similarly to Ghana in the political and security spheres in the Index of State Weakness.<sup>222</sup> The Liberian truth commission hewed the most closely to the South African model and, predictably, fared the worst of all three countries, in part because it did not have strong institutions to support its truth-telling process. Utilizing the same mechanism in drastically different circumstances and expecting similar results is unwise. Part III discusses how the lower levels of moral consensus surrounding violence in post-conflict countries can thwart the effectiveness of truth commissions.

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<sup>219</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 281–85.

<sup>220</sup> *See id.* at 258.

<sup>221</sup> *See id.* at 239–41.

<sup>222</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 41. Ghana scored 8.44 according to its performance in security on a scale of one to ten, and South Africa scored 7.72. *Id.* Additionally, Ghana scored 7.02 on a scale of one to ten according to its performance in the political sphere, and South Africa scored 8.07. *Id.*



### III. LACK OF MORAL CONSENSUS SURROUNDING VIOLENCE LIMITS THE IMPACT OF TRUTH COMMISSIONS

Moral consensus has been defined as shared moral values about “how [people] ought to act.”<sup>223</sup> In other contexts, consensus is measured by examining “how close . . . opinions or preferences are.”<sup>224</sup> Yet such measurements are rarely done following a conflict or the demise of an authoritarian regime. They would be incredibly difficult to undertake and the reliability of any exact figures would be inherently suspect. Following a conflict, the shared morality once held around issues such as murder or theft is generally unsettled.<sup>225</sup> For our purposes, it is best to conceptualize moral consensus surrounding mass violence as the level of agreement or shared understanding of the nature and “justness” of violence, for example: Was it a civil war or was it genocide? Moral consensus about mass violence includes the level of agreement over historical responsibility: Which party bears responsibility for violence? Who was victimized? And who were the perpetrators?<sup>226</sup> The significant numbers of those who have taken up arms combined with the incredible number of people victimized in massively destructive conflicts almost ensures that there will be much more moral dissensus about the nature of violence in post-conflict societies. However, in post-authoritarian societies, where the “truth” about abuses is generally not well known (because deception is central to the nature of the violations), and the numbers involved in the abuses are fewer, moral consensus about the nature of violence is generally easier to form.

The varying levels of moral consensus surrounding mass violence in post-conflict and post-authoritarian societies are crucial because truth commissions are thought to provide a degree of moral sanction,<sup>227</sup> which occurs through the stigmatization that alleged perpetrators face when they are confronted by their victims and shunned by the rest of society. Expressive theories of punishment generally provide that a sanction is required to reverse the false message sent by the offender’s actions about the value of the victim relative to the offender.<sup>228</sup>

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<sup>223</sup> Tyler & Darley, *supra* note e (tbl.1), at 725, 733.

<sup>224</sup> E.g., F. Chiclana et al., *A Statistical Comparative Study of Different Similarity Measures of Consensus in Group Decision Making*, 221 J. INFO. SCI. 110, 110 (2013).

<sup>225</sup> See EMILE DURKHEIM, *ON THE DIVISION OF LABOR IN SOCIETY* 108 (George Simpson Trans., Macmillan 1933) (1893) (discussing how crimes violate a society’s moral code and weaken those norms).

<sup>226</sup> See RONEN STEINKE, *THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVES FROM NUREMBERG TO THE HAGUE* 11 (2012).

<sup>227</sup> See HAYNER, *supra* note 3, at 29.

<sup>228</sup> See, e.g., R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 47–48 (1996); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 11–13 (Wesley Cragg ed., 1992); see also Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998).

Expressive theorists view punishment as a form of moral communication used to express condemnation, revalidate a victim's worth, and strengthen social solidarity.<sup>229</sup>

Scholars and practitioners (to varying degrees) conceive of both trials and truth commissions as expressing the wrongfulness of past atrocities, communicating society's condemnation of the conduct at issue, and creating social cohesion. Prosecutions can assist in producing moral consensus by incarcerating offenders, but they could also foster "feelings of bitterness," "create scapegoats," or "create a perception that the trial represents victor's justice."<sup>230</sup> Truth commissions, on the other hand, predominantly rely on shaming as a moral sanction.<sup>231</sup> However, shame is most effective when "the moral code is both pervasive and emphatic in its repudiation of the wrongs done."<sup>232</sup> Where a moral consensus about the nature of violence is deeply fractured, which is typical of post-conflict countries, shaming is not likely to be an effective form of punishment.<sup>233</sup> Notably, moral dissensus is also likely to decrease over time when fewer partisans form part of the political community. For example, in the immediate aftermath of the United States civil war, there was much disagreement (at least among the ruling class) about the reasons for engaging in the war. Yet, today, there is much more consensus about the nature of violence. While there is unlikely to be total agreement about mass violence in any society, we can anticipate comparatively less moral consensus surrounding mass violence in a post-conflict context and more moral consensus about violence in a post-authoritarian context.

The experiences of Liberia, Ghana, and Sierra Leone confirm this. For our purposes, it suffices to compare moral consensus in Ghana following authoritarian rule to moral consensus in Sierra Leone and Liberia following their conflicts. I discuss the moral consensus surrounding mass violence in the societies examined in this Article based on information from my field research and survey data from various sources. In particular, I focus on how competing understandings of mass violence affected the truth commissions' ability to carry out

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<sup>229</sup> See, e.g., DURKHEIM, *supra* note 225; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 576 (Samantha Besson & John Tasioulas eds., 2010); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 42-45, 69-71 (2007).

<sup>230</sup> Aukerman, *supra* note 188, at 76.

<sup>231</sup> See Posner & Vermeule, *supra* note 21, at 767 (discussing how one of the main purposes of truth commissions is to expose perpetrators and collaborators "to public outrage").

<sup>232</sup> DALY & SARKIN, *supra* note 23, at 144.

<sup>233</sup> See TRC-L FINAL REPORT, *supra* note 62, at 63 (noting that exchanges between alleged perpetrators and victims were "limited and did not occur frequently").

some of their central objectives: promoting truth-telling and establishing an accurate historical record. This Part illustrates how the varying levels of moral consensus in post-conflict countries limited the truth commissions' ability to promote the truth and establish an accurate historical record, and how the combination of court and commission buttressed those efforts in Sierra Leone.

A. *Lack of Moral Consensus as an Impediment to Truth-Telling*

"Truth" in a transitional context can be understood as "people's understandings of what occurred during periods of mass violence."<sup>234</sup> Where the society in which truth is promoted shares a common moral consensus about the events investigated by the commission, promoting truth-telling will fit "comfortably within that pre-existing narrative."<sup>235</sup> Accordingly, the commissions in post-conflict societies should fare much worse in their efforts to promote truth-telling. The experiences of Liberia, Sierra Leone, and Ghana confirm this.

During the public hearings, most of the commissions used their compulsory powers sparingly and relied mainly on moral suasion to get alleged perpetrators to appear before them.<sup>236</sup> Due to the higher degree of moral consensus about mass violence in post-authoritarian societies, truth commissions in such countries will be able to rely on moral suasion more effectively. For example, in Ghana, the NRC published names of alleged perpetrators with a warning that, if they failed to respond, they risked the commission making findings of liability against them.<sup>237</sup> The NRC's "naming and shaming" of alleged perpetrators led to approximately eighty of them coming forward to rebut allegations.<sup>238</sup> Significantly, 60% of the victims surveyed by CDD-Ghana reported that they "believed the NRC obtained truthful confessions from abusers."<sup>239</sup> Ghana's experience indicates that in post-authoritarian societies, truth commissions may be better placed to promote truth-telling due to the comparatively easier task of marshalling moral sanction. The indemnity provision in Ghana's Constitution likely also influenced alleged perpetrators to be more forthcoming when they appeared before the commission. Ghana's experience is in some ways akin to that of South

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<sup>234</sup> Clark, *supra* note 139, at 203; *see also* DALY & SARKIN, *supra* note 23, at 147–48 (discussing the impossibility of ever recounting the "truth" accurately and the need for truth-telling in "multiple dimensions").

<sup>235</sup> DALY & SARKIN, *supra* note 23, at 145.

<sup>236</sup> *See* Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 268–70.

<sup>237</sup> Interviews from Ghana, *supra* note 197.

<sup>238</sup> *See* NAHLA VALJI, INT'L CTR. FOR TRANSITIONAL JUSTICE, GHANA'S NATIONAL RECONCILIATION COMMISSION: A COMPARATIVE ASSESSMENT 13 (2006).

<sup>239</sup> CDD-GHANA, VICTIMS SURVEY, *supra* note 209, at 22 (internal quotation marks omitted).

Africa, where the commission was able to use the prospect of amnesty to get alleged perpetrators to participate more in the truth-telling process. However, even if alleged perpetrators participate in greater numbers in authoritarian contexts, this does not mean that they will necessarily be more contrite.<sup>240</sup>

Even so, Liberia's experience indicates that truth commissions will be much less effective in post-conflict contexts. The TRC-L also relied on its powers of "moral suasion" and encouraged voluntary compliance.<sup>241</sup> It published a list of individuals whom it urged to respond to allegations levied against them by victims of the civil war.<sup>242</sup> Yet, only thirty-three alleged perpetrators ultimately appeared before the TRC-L in response to this "naming and shaming."<sup>243</sup> This is so, despite the larger number of perpetrators in Liberia when compared to Ghana.

In Liberia, many alleged perpetrators had a common understanding about mass violence. The DDR process, which gave benefits to ex-combatants, may also have bolstered a culture of "perpetratorhood" by seemingly sanctioning actions taken during the conflict.<sup>244</sup> When alleged perpetrators appeared before the commission, their understandings of mass violence were on full display. One interviewee noted, "Liberians were promised 'truth,' but the nation is obligated to listen to lies."<sup>245</sup> For example, during his testimony, a former rebel leader who was responsible for the indiscriminate shelling of Monrovia asked the commission to create a monument in his honor for his efforts to "liberate" Liberians.<sup>246</sup> The audience reacted violently, and the United Nations Peacekeeping Mission in Liberia had to ensure calm.<sup>247</sup> In contrast, in Ghana many more interviewees noted that the

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<sup>240</sup> See, e.g., VALJI, *supra* note 238, at 13.

<sup>241</sup> TRC Public Bulletin No. 07 Policy Paper on Warrants and Compulsory Processes the TRC Will Sparingly Employ the Use of Subpeona, Warrants and Other Compulsory Processes as a Matter of Last Resort, TRUTH & RECONCILIATION COMMISSION LIBERIA (Mar. 31, 2008), [http://trcofliberia.org/press\\_releases/161](http://trcofliberia.org/press_releases/161).

<sup>242</sup> See *List of Perpetrators or Alleged Perpetrators Needed by the TRC to Respond to Various Violations of Human Rights and International Humanitarian Law*, TRUTH & RECONCILIATION COMMISSION LIBERIA (Nov. 30, 2008), [http://trcofliberia.org/press\\_releases/63](http://trcofliberia.org/press_releases/63); see also James Kpargoi, Jr., *TRC Publishes List of Alleged Perpetrators and Persons of Interest*, LIBERIAN J. (Nov. 30, 2008), <http://theliberianjournal.com/index.php?st=news&sbst=details&rid=685>.

<sup>243</sup> See TRC-L FINAL REPORT, *supra* note 62, at 202. "All [the] heads of [the] former warring factions appeared [before the commission] except [for] former president Charles Taylor . . . ." *Id.* at 190; see also Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>244</sup> For further discussion, see *infra* Part IV.C.

<sup>245</sup> Interviews from Liberia, *supra* note 126.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

hearings helped to “reduce tensions beneath the surface” and “lay the foundations for peace.”<sup>248</sup>

Further, in Liberia many of those who appeared before the commission did not show remorse. Unlike South Africa and Sierra Leone, a credible threat of prosecutions did not exist in Liberia, which undoubtedly influenced the actions of alleged perpetrators before the truth commission. When they appeared, they vindicated their actions and engaged in political posturing and grandstanding.<sup>249</sup> One interviewee noted, “it started as enjoyable theater, but now it is just despicable.”<sup>250</sup> The Chair’s response was:

[The] TRC[-L] is not about impeaching, disgracing, or exposing a witness more than they have already done. It is not a place to compel a witness to admit to wrong . . . . The TRC has created a forum for people to speak their minds and made to be accountable for what they have done . . . . An appearance before the TRC is an opportunity for self-redemption . . . . People have lived with their perceptions for years.<sup>251</sup>

The failure to interrogate alleged perpetrators and the “neutral” approach adopted by the commission may have served to legitimate the views of revisionists or apologists. Since the TRC-L had determined not to create a forum for victims to confront their perpetrators,<sup>252</sup> alleged perpetrators did not have to endure the “shame” of facing their victims. However, truth commissions in many ways depend on the morality play in which victims confront alleged perpetrators. Truth commissions need the “victim” and “perpetrator” to play their assigned roles, yet this is incredibly difficult to do in post-conflict contexts where moral dissensus on the nature of violence is so high. Thus, in Liberia alleged perpetrators were able to “isolate themselves . . . within their . . . closed communities” and avoid stigmatization.<sup>253</sup> A number of alleged perpetrators even demonstrated disregard for the TRC-L commissioners, at times insulting them by referring to them as “little boy[s]” or “*pekin*.”<sup>254</sup>

The conduct of alleged perpetrators at the hearings in Liberia led to heightened calls for retribution. One Liberian interviewee observed that

Alleged perpetrators came to tell stories [before the TRC-L] and the[se] guys are deliberately lying and are using the TRC[-L] as a place to praise themselves. They show no regret, [they] just boast

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<sup>248</sup> Interviews from Ghana, *supra* note 197.

<sup>249</sup> Steinberg, *supra* note 80, at 140.

<sup>250</sup> Interviews from Liberia, *supra* note 126.

<sup>251</sup> *Id.*

<sup>252</sup> See TRC-L FINAL REPORT, *supra* note 62, at 63.

<sup>253</sup> DALY & SARKIN, *supra* note 23, at 144 (internal quotation marks omitted).

<sup>254</sup> Steinberg, *supra* note 80, at 140 (emphasis added) (internal quotation marks omitted).

about [their] roles and acts committed, acting as if it is good. The town and country is ablaze and wanting prosecution[s].<sup>255</sup>

A number of interviewees during my field research echoed this sentiment; although they had previously supported the TRC-L, the behaviour of alleged perpetrators during the public hearings led them to prefer a more punitive approach.<sup>256</sup> Others also called for adopting a more explicitly retributive approach, arguing that “there can be no reconciliation without justice.”<sup>257</sup> Liberia’s experience may indicate that in post-conflict countries where moral consensus on the nature of abuses is contested or legitimated as “necessary,” moral sanction will be much more difficult to form, and shame will be viewed as an insufficient punishment. In these contexts, it is unlikely that the social opprobrium faced by alleged perpetrators will be enough; the inability of truth commissions to provide much more will leave a huge gap between expectations and reality.

In Liberia, the inadequacy of the moral consensus surrounding mass violence is compounded by the fact that “almost everybody who prosecuted the war has done so well [materially] from the peace . . . .”<sup>258</sup> The perception is that alleged perpetrators have not faced any cost, social, political, moral, or otherwise. In its final report, the TRC-L named thirty-eight individuals whom it found to be responsible for committing “gross human rights violations” and recommended that these individuals not be prosecuted because they “cooperated with the TRC process, admitted to the crimes committed . . . and expressed remorse . . . .”<sup>259</sup> The TRC-L Act expressly prohibits the grant of amnesty for such crimes.<sup>260</sup> The list of those granted amnesty includes notorious individuals like Joshua Blahyi, or “General Butt Naked,”<sup>261</sup>

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<sup>255</sup> Interviews from Liberia, *supra* note 126.

<sup>256</sup> *Id.*

<sup>257</sup> *Catholic Church Wants War Crimes Tribunal After TRC . . . As Lutheran Massacre Commemoration Begins*, TRUTH & RECONCILIATION COMMISSION LIBERIA (July 16, 2008), [http://trcofliberia.org/press\\_releases/132](http://trcofliberia.org/press_releases/132). In 2006, a group called the Forum for the Establishment of a War Crimes Court in Liberia collected signatures, filed a petition to the National Legislature, and attempted to submit it to then U.N. Secretary General Kofi Annan. *Liberia: Youth Petition for War Crimes court*, IRIN (Apr. 11, 2006), <http://www.irinnews.org/report/58721/liberia-youths-petition-for-war-crimes-court>; Interviews from Liberia, *supra* note 126. The Forum is one of the main groups publicly advocating for prosecutions, particularly of President Sirleaf, Liberia’s current president, and authorities have continually harassed and arrested its leaders. Interviews from Liberia, *supra* note 126. Popular opinion variously holds that Taylor’s cronies seeking revenge, or supporters of the main opposition party, sponsor the group in order to undermine the current government. *Id.*

<sup>258</sup> Steinberg, *supra* note 80, at 140.

<sup>259</sup> TRC-L FINAL REPORT, *supra* note 62, at 353.

<sup>260</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. VII, § 26(g), available at <http://www.refworld.org/docid/473c6b3d2.html>.

<sup>261</sup> See Steinberg, *supra* note 80, at 142 (internal quotation marks omitted). Blahyi once led the “Butt Naked Brigade” of child soldiers for one of the warring factions who reportedly believed that their nudity protected them from bullets. *Truth and Justice on Trial in Liberia*,

who stated before the commission that he was responsible for the killing of 20,000 people.<sup>262</sup> In Liberia, there was never a formal truth-for-amnesty process as there was in South Africa, where individuals applied for amnesty and disclosed the “truth” to their victims and the rest of society publicly. In contrast, there has been no such transparency around the amnesty process in Liberia—with no public hearings concerning amnesty applications, any record of whether the commission received such applications under its stated amnesty policy,<sup>263</sup> or opportunity for victims and others to weigh in on the appropriateness of granting amnesty. The lack of procedural fairness in Liberia’s process as well as the limited voice of victims in the amnesty process also distinguishes the TRC-L’s granting of amnesty from the SATRC’s. Moreover, the final report does not specify how the commission reached its determinations of sufficient “truth” and “remorse” to make such recommendations. Unsurprisingly, perceptions about the ability of the Liberian commission to promote the truth are significantly lower when compared to the other commissions.<sup>264</sup>

Comparatively, there has been much less contestation about the ability of the truth commission in Sierra Leone to promote the truth.<sup>265</sup> For example, the BBC Sierra Leone Survey found that 69% of respondents thought the TRC-SL had contributed to the “truth,”<sup>266</sup> despite the polarized nature of post-conflict Sierra Leone.<sup>267</sup> The

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*supra* note 18, at 459. He has since established a local church in Liberia and published a book regarding his transformation.

<sup>262</sup> Steinberg, *supra* note 80, at 142.

<sup>263</sup> See, e.g., TRC Public Bulletin No. 06 Policy Paper on Application for Amnesty May Be Done in Writing Within a Limited Period Specified by the TRC, TRUTH & RECONCILIATION COMMISSION LIBERIA (Mar. 31, 2008), [http://trcofliberia.org/press\\_releases/162](http://trcofliberia.org/press_releases/162).

<sup>264</sup> See, e.g., HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY, *supra* note 210, at 70 (“[D]espite the work of the TRC[-L], just 44% [of respondents] believed that the truth about the civil war is known.”). For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 247–48.

<sup>265</sup> Interviews from Sierra Leone, *supra* note 106. Some interviewees noted, “[p]eople went before the commission telling lies.” *Id.*

<sup>266</sup> BBC, SIERRA LEONE SURVEY, *supra* note 211, at 32 (results were limited to those respondents who scored “excellent” or “good” on awareness of the TRC-SL). *But see* Amadu Sesay, *Does One Size Fit All?: The Sierra Leone Truth and Reconciliation Commission Revisited* 7–8, 39 (Nordiska Afrikainstitutet, Discussion Paper No. 36, 2007) [hereinafter Sesay, *Freetown Survey*], available at <http://nai.diva-portal.org/smash/get/diva2:240853/FULLTEXT01.pdf> (finding that 46.1% of respondents believed that the truth was told during the TRC-SL’s proceedings in a semi-structured survey that was supplemented by focus group discussions and was limited to residents of Freetown, Sierra Leone). One possible explanation for the variance is the distinction between the TRC-SL’s contributing to the “truth” and various actors telling the “truth” during the TRC-SL’s proceedings. In addition, the sample size was much smaller than the nationally representative sample used by the BBC in Sierra Leone.

<sup>267</sup> See SCSL SURVEY, *supra* note 107, at 22. The SCSL SURVEY indicates that, when Sierra Leonean and Liberian respondents were queried about “how the truth can be established,” the most common responses were “[i]nquiry by a judicial system” (49.58%), as opposed to “[l]et[ting] people talk freely” (35.02%) or through a “truth commission” (27.17%). *Id.*

existence of the SCSL may also have limited the space for alleged perpetrators to contest the narrative surrounding mass violence; whereas in Liberia, there was no such check. Additionally, the commission in Sierra Leone did not have to rely mainly on moral suasion and moral sanction to encourage compliance. One institution was able to serve as a carrot and the other the stick—with the existence of the court emboldening the truth commission. For example, when several key role players did not appear, the TRC-SL issued subpoenas against five serving ministers and leaders of government institutions.<sup>268</sup> Yet, few alleged perpetrators ultimately testified before the commission in Sierra Leone because they feared that the SCSL would use the evidence against them.<sup>269</sup> Some interviewees believed there was a tunnel between the two institutions where an appearance before the truth commission might literally result in an appearance before the court.<sup>270</sup> Despite the SCSL discouraging some perpetrators for participating in the truth-telling process, because both mechanisms were attempting to deal with issues of impunity, the concurrent operation of the two mechanisms increased the perception that justice was being done.<sup>271</sup> Most of the other commissions did not operate in a context where the incentives of alleged perpetrators were shaped by the threat of prosecution. In South Africa, prosecutorial justice and the truth commission also reinforced each other because “[f]ew would have applied for amnesty if not faced with the threat of prosecution.”<sup>272</sup> In South Africa, the few trials of apartheid-era leaders encouraged a number of perpetrators to apply for amnesty. Even still, members of the three major political parties in South Africa were reluctant “to cooperate fully with the [SA]TRC’s truth recovery efforts.”<sup>273</sup> Where multiple transitional justice mechanisms are engaged in truth-seeking, it is more likely that both institutions’ perceived ability to promote the truth will be higher. The converse is evidenced in Liberia where the truth commission operated without a court or credible threat of prosecution and relied mainly on moral suasion and sanction. In post-conflict contexts, the ability of truth commissions to rely on these moral forms of encouraging compliance will be limited because of the lower levels of moral consensus surrounding violence. Part III.B discusses how lower

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<sup>268</sup> See 1 TRC-SL REPORT, *supra* note 163, at 97.

<sup>269</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>270</sup> *Id.*

<sup>271</sup> For example, a majority (57%) of respondents surveyed by the BBC believed that the TRC-SL had contributed to “justice.” BBC, SIERRA LEONE SURVEY, *supra* note 211, at 34 (results were limited to those respondents who scored “excellent” or “good” on awareness of the TRC-SL). For more details, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 269–70.

<sup>272</sup> Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209 (2000).

<sup>273</sup> van der Merwe & Chapman, *supra* note 163, at 241, 246. Accordingly, “most survivors doubted that the TRC had succeeded in establishing ‘the truth.’” *Id.* at 248.



levels of moral consensus surrounding mass violence can also limit the impact of truth commissions' efforts to establish an accurate historical record in post-conflict societies.

B. *Lower Moral Consensus as an Impediment to Establishing an Accurate Historical Record*

While the "truth" is always subject to interpretation and manipulation, in the context of previously warring parties, the difficulty of finding consensus is particularly acute.<sup>274</sup> The experiences of Ghana, Sierra Leone, and Liberia indicate that moral consensus around mass violence is unlikely to be uniform in post-conflict or post-authoritarian societies, but that in post-conflict societies the divergence will be much more pronounced. For example, in Ghana, after the NRC submitted its report to the President, it was leaked to the media prior to the 2004 elections.<sup>275</sup> The NDC perceived this as a partisan attempt to influence the outcome, and some NDC members denounced the report as being an "NPP-version of history."<sup>276</sup> In Liberia, the TRC-L released its final report on June 30, 2009,<sup>277</sup> with one commissioner dissenting<sup>278</sup> and another publicly distancing himself from it.<sup>279</sup> In some ways, the failure of the TRC-L to rally around its report was predictable given the pre-existing divisions in the Commission.<sup>280</sup> Following the release of the TRC-L's report, some of the leaders of warring factions held a press

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<sup>274</sup> See DALY & SARKIN, *supra* note 23, at 140–41.

<sup>275</sup> Interviews from Ghana, *supra* note 197.

<sup>276</sup> *Id.*

<sup>277</sup> The commissioners disagreed on the necessity of producing a report by the deadline set by the International Contact Group for Liberia. *Id.* The TRC-L submitted its "Preliminary Findings and Determinations" to the National Legislature on December 19, 2008. See REPUBLIC OF LIBERIA TRUTH & RECONCILIATION COMM'N, PRELIMINARY FINDINGS AND DETERMINATIONS 81 (2008), available at [http://trcofliberia.org/resources/reports/final/volume-one\\_layout-1.pdf](http://trcofliberia.org/resources/reports/final/volume-one_layout-1.pdf). The Vice Chair, joined by three other commissioners, subsequently denied knowledge of the report in writing and urged that it be withdrawn. Interviews from Liberia, *supra* note 126. The defecting commissioners argued that the Chair (supported by three other commissioners) did not have the authority to submit what was essentially a report in draft form to the Legislature and the President. *Id.*

<sup>278</sup> See DISSENTING/REPORT OF COUNCILOR PEARL BROWN BULL COMMISSIONER, TO THE FINAL REPORT VOLUME 1, CONSOLIDATED REPORT VOLUME II OF THE TRUTH AND RECONCILIATION COMMISSION OF LIBERIA (2009) (unpublished manuscript) (on file with author).

<sup>279</sup> The commissioner who distanced himself was Sheikh Kafumba Konneh, who had not participated in the drafting of the report. See TRC-L FINAL REPORT, *supra* note 62, at 325 (noting that Commissioner Konneh gave "the impression that he had nothing to do with the entire work of the Commission over the last three years").

<sup>280</sup> For further discussion of the internal divisions within the commission, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 257–58. Incredibly, in the final report of the TRC-L, it apologized for its various shortcomings and sought to reassure the public "that the report [was] objective and comprehensive." See TRC-L FINAL REPORT, *supra* note 62, at 267–68.

conference. They intimated that implementing the report (which recommended prosecution and debarment from public office for a number of those who convened the press conference) would lead to further instability in Liberia.<sup>281</sup> Reportedly, two commissioners from the TRC-L had to go into hiding after receiving death threats.<sup>282</sup> While there were strong reactions to the commissions' reports in both Ghana and Liberia, the response was much more pronounced in Liberia, and with potentially more dangerous consequences. Additionally, in Liberia, the commission itself was unable to reach consensus on what constituted an accurate historical record, one of its key mandates.<sup>283</sup>

To be clear, all of the commissions' reports resulted in important disclosures and helped to establish a more accurate historical record.<sup>284</sup> For example, if not for the intervention of the commission in Ghana, many would not know the magnitude of violations, since they were generally concealed from the public. In Sierra Leone and Liberia, in contrast, human rights violations were committed openly, and there was much less emphasis on recovering hidden truths.<sup>285</sup> The affected societies were well aware of the scale of abuses committed during the wars and had lived through them. Following the end of the conflicts however, there were multiple competing truths. In Sierra Leone, the commission helped to dispel the myth that only the RUF committed gross atrocities and exposed the extent of the violations carried out by the CDF and government forces. The TRC-SL also helped to guard against revisionists' accounts. In Liberia, the commission also dispelled some myths about massacres<sup>286</sup> and documented a number of mass graves.<sup>287</sup> The variation among the countries' experiences is largely explained by the different contexts. In Sierra Leone, the perceived contributions to establishing the truth of both the SCSL and the TRC-SL were mutually reinforcing.<sup>288</sup> Since both mechanisms were attempting to establish various levels of "truth"—judicial (the SCSL) and historical

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<sup>281</sup> BEYOND THE TRC-L, *supra* note 206, at 10.

<sup>282</sup> Steinberg, *supra* note 80, at 135.

<sup>283</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 247–48.

<sup>284</sup> *Id.* at 248–49.

<sup>285</sup> Interviews from Liberia, *supra* note 126; *see also* George Wachira & Prisca Kamungi, NPI-Africa, Truth and Reconciliation Commissions and Transitional Justice in Africa: Lessons and Implications for Kenya (Background Paper) 11 (Apr. 2008) (unpublished manuscript) (on file with author) (so noting regarding Sierra Leone).

<sup>286</sup> *See, e.g., Truth and Justice on Trial in Liberia*, *supra* note 18, at 460–61.

<sup>287</sup> *See* TRC-L FINAL REPORT, *supra* note 62, at 244–54. The TRC-L collected voluminous material from the United States and other governments documenting human rights violations during the Liberian conflict, and the final report catalogues some of these human rights violations. *See id.* at 216–43.

<sup>288</sup> The BBC's survey revealed that 56% of respondents believe that the TRC-SL has provided "an accurate account of what happened during the conflict in Sierra Leone." BBC, SIERRA LEONE SURVEY, *supra* note 211, at 35. For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 254.

(the TRC-SL)—and because responsibility was diffused between the institutions, the combination of court and commission were more effective at establishing stated objectives.<sup>289</sup> While, at times, the court and commission in Sierra Leone acted at cross-purposes,<sup>290</sup> the combination of the two mechanisms was more effective than the commission operating alone in Liberia.<sup>291</sup> In Ghana, the truth commission was able to reveal the nature and scale of abuses committed under authoritarian regimes as was the case in South Africa, which meant, “previously hidden and silenced issues could now be debated, contextualized to some degree and dissected.”<sup>292</sup> Additionally, in Ghana, the commission operated in a post-authoritarian context, with fewer alleged perpetrators to threaten its authoritative version of history.

Recent survey results in Ghana, Sierra Leone, and Liberia provide some indication of how mass violence is currently understood. In Liberia, 83% of those surveyed by the Afrobarometer indicated they would never “[u]se[] force or violence for a political cause”<sup>293</sup> and 82% agreed that “[t]he use of violence is never justified in Liberia[n] politics today.”<sup>294</sup> Only 19% believed that “competition between political parties [never] lead[s] to violen[ce]” in Liberia.<sup>295</sup> In Sierra Leone, 86% of those surveyed by the Afrobarometer indicated they would never use “force or violence for a political cause”<sup>296</sup> and 73% agreed that “[t]he use of violence is never justified in Sierra Leonean politics today.”<sup>297</sup> Less heartening was the finding that only 4% believed that “competition between political parties [never] lead[s] to violen[ce]” in Sierra Leone.<sup>298</sup>

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<sup>289</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 9–10, 254.

<sup>290</sup> For further discussion, see generally Matiangai Sirleaf, *Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth & Reconciliation Commission for Liberia*, 21 FLA. J. INT’L L. 209 (2009) [hereinafter Sirleaf, *Regional Approach to Transitional Justice?*].

<sup>291</sup> For further discussion, see generally Sirleaf, *Beyond Truth & Punishment*, *supra* note 26.

<sup>292</sup> BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION, AND MENTAL HEALTH 147 (2009).

<sup>293</sup> AFROBAROMETER, SUMMARY OF RESULTS: ROUND 4 AFROBAROMETER SURVEY IN LIBERIA: A COMPARATIVE SERIES OF NATIONAL PUBLIC ATTITUDE SURVEYS ON DEMOCRACY, MARKETS AND CIVIL SOCIETY IN AFRICA 10 (2008) [hereinafter AFROBAROMETER, LIBERIA RESULTS], available at [http://www.afrobarometer.org/files/documents/summary\\_results/lib\\_r4\\_sor.pdf](http://www.afrobarometer.org/files/documents/summary_results/lib_r4_sor.pdf). In Liberia, “the Afrobarometer surveyed a nationally representative . . . sample of 1200 adult [citizens]” between December 8 and 21, 2008. *Id.* at 2.

<sup>294</sup> *Id.* at 16.

<sup>295</sup> *Id.*

<sup>296</sup> AFROBAROMETER, SUMMARY OF RESULTS: AFROBAROMETER ROUND 5 SURVEY IN SIERRA LEONE, 2012: A COMPARATIVE SERIES OF NATIONAL PUBLIC ATTITUDE SURVEYS ON DEMOCRACY, MARKETS AND CIVIL SOCIETY IN AFRICA 13 (2012), available at [http://www.afrobarometer.org/files/documents/summary\\_results/srl\\_r5\\_sor.pdf](http://www.afrobarometer.org/files/documents/summary_results/srl_r5_sor.pdf). In Sierra Leone, “the Afrobarometer surveyed a nationally representative . . . sample of 1200 adult [citizens]” between June 23 and July 18, 2012. *Id.* at 2.

<sup>297</sup> *Id.* at 43.

<sup>298</sup> *Id.* at 23.

In contrast, in Ghana the results are much more encouraging, with 93% of those surveyed by the Afrobarometer indicating they would never “[u]se[] force or violence for a political cause”<sup>299</sup> and 84% agreeing that “[t]he use of violence is never justified in Ghanaian politics today.”<sup>300</sup> Significantly, only 18% believed that “competition between political parties [never] lead[s] to violen[ce]” in Ghana.<sup>301</sup> Ghana’s experience indicates that in post-authoritarian societies, a shared moral consensus about violence may be easier to form once knowledge about the scale and nature of abuses becomes widespread. Consider the case of South Africa, where agreement on the wrongfulness of the system of apartheid is so robust that it is now considered a crime against humanity.<sup>302</sup> While there are undoubtedly elements that still view apartheid and actions taken by the apartheid government as legitimate or necessary for state security,<sup>303</sup> these individuals are at the periphery. While there are no real measurements of moral consensus about the nature of the violence in the conflicts in Sierra Leone and Liberia or during the various periods of authoritarian rule in Ghana, my field research and survey data from various sources indicate that moral consensus is lower in the post-conflict countries. As Aukerman eloquently put it, “[a] society cannot be cured of a condition it does not regard as a disease.”<sup>304</sup> Overall, the analysis above indicates that truth commissions can have much more meaningful roles promoting and establishing the truth in post-

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<sup>299</sup> AFROBAROMETER, SUMMARY OF RESULTS: AFROBAROMETER ROUND 5 SURVEY IN GHANA, 2012, at 15 (2012) [hereinafter AFROBAROMETER, GHANA RESULTS], available at [http://www.afrobarometer.org/files/documents/summary\\_results/gha\\_r5\\_sor.pdf](http://www.afrobarometer.org/files/documents/summary_results/gha_r5_sor.pdf). In Ghana, “the Afrobarometer surveyed a nationally representative . . . sample of 2,400 adult [citizens]” between May 8 and 27, 2012. See *id.* at 2.

<sup>300</sup> *Id.* at 49.

<sup>301</sup> *Id.* at 25.

<sup>302</sup> See, e.g., Rome Statute of the International Criminal Court, art. 7(1)(j), July 17, 1998, 2187 U.N.T.S. 90; International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I, G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 75 (Nov. 30, 1973); GIBSON, OVERCOMING APARTHEID, *supra* note 18, at 342 (“[N]early all South Africans reject the lawless means by which the apartheid state sought to maintain its position of political power.”); TRUTH & RECONCILIATION COMM’N, 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 212 (1998), available at <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>; van der Merwe & Chapman, *supra* note 163, at 253 (discussing how “[t]he overwhelming majority of . . . a national[ly] representative survey conducted” in South Africa in 2000 and 2001 believed “that apartheid was a crime against humanity”).

<sup>303</sup> See, e.g., GIBSON, OVERCOMING APARTHEID, *supra* note 18, at 66, 335 (noting that “nostalgia about the old system is more commonplace than expected” among whites, but that “[w]hites cannot believe today that their apartheid state committed no atrocities against blacks”); HAMBER, *supra* note 292, at 158 (noting that “survey data indicat[ing] that 68% of whites agree[d] that apartheid was a ‘crime against humanity,’” “which is presumably more than did so during the apartheid [regime]”); Fletcher & Weinstein, *supra* note 19, at 588 (noting that “individual and group rationalizations for an alternative interpretation of the past” will always persist because it is unlikely that “everyone will accept the facts as stated”).

<sup>304</sup> See Aukerman, *supra* note 188, at 76.

authoritarian societies as compared to post-conflict societies because the narratives put forward are less likely to face resistance. Part IV discusses how the larger size of the victim and perpetrator classes in post-conflict countries also inhibits the effectiveness of their truth commissions.

#### IV. SIZE MATTERS

In the context of mass atrocity, determining who is a “victim” and who is a “perpetrator” is an immensely complicated task. The U.N. defines “victims” as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of the criminal laws operative within Member States . . . .”<sup>305</sup> The U.N.’s definition of victim is quite broad, covering “the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”<sup>306</sup> The “perpetrator,” in contrast, is the person or individuals who committed the harm described above, whether “identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.”<sup>307</sup> The overly simplistic designations of “victim” and “perpetrator” do not adequately capture the experience of many victims who also committed war crimes or human rights violations.<sup>308</sup> The term “victim” is perceived as deeply problematic due to its gendered origin—conjuring images of the helpless female.<sup>309</sup> In a transitional context, being classified as a victim or a perpetrator is often accompanied by material consequences. Classifying who is a “victim/survivor” and who is a “perpetrator” under

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<sup>305</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶ 1, U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985). While the U.N.’s definition is limited to criminal law, we can easily conceive of experiences of victimization covered by other bodies of law.

<sup>306</sup> *Id.* Annex ¶ 2.

<sup>307</sup> *Id.*

<sup>308</sup> Similarly, in the criminal justice context, some may consider the term “victim” to be equally applicable to the complaining witness or the defendant. See SANDRA WALKLATE, *IMAGINING THE VICTIM OF CRIME* 27 (2007); see also Engstrom, *supra* note 20, at 45. For further discussion, see generally MAMDANI, *supra* note a (tbl.1) (discussing how so many ordinary Rwandans perpetrated horrific crimes).

<sup>309</sup> See WALKLATE, *supra* note 308, at 27. For this reason, many in, and out of, the feminist movement have adopted the term “survivor” to demonstrate resistance to powerlessness, and not to define individuals by an experience of victimization. See *id.* However, it is possible to be a passive or active “survivor” or “victim,” making the distinctions drawn between “survivors” and “victims” somewhat nonsensical. See *id.* Moreover, I consciously uses the term “victim” to reject the notion that being a victim or being victimized is something that is inherently bad, as doing otherwise blames the victim for her experience, makes her shameful for someone else’s actions, or forces her to display strength at times when she may not wish or be able to.

these circumstances may very well be inherently arbitrary. Recognizing the complexities involved,<sup>310</sup> I do not attempt to draw bright lines between alleged perpetrators and victims and recognize that there are infinite shades of gray between the two groups.<sup>311</sup>

For our purposes, it is only necessary to consider the relative size of the class of victims and perpetrators in post-conflict countries compared to class size in post-authoritarian countries. It is particularly important to think about approximate proportions of the overall population victimized or identifying as perpetrators. In Liberia (and less so in Sierra Leone), where the truth commissions operated with significantly larger victim and perpetrator classes, we would anticipate that the post-conflict commissions would face more challenges carrying out their mandates. The more numerous the victims and perpetrators in post-conflict contexts, the greater the demands and expectations that will be placed on the truth commissions to respond to victims' priorities, while at the same time balancing the interests of perpetrators. The experiences of Liberia and Sierra Leone indicate that truth commissions acting alone will generally not be able to do both.

In Table 3 below, I provide a comparative summary of the rough approximations of the victim and perpetrator classes in each country for ease of reference.

Table 3<sup>a</sup>

Country	Victim Class (approximate percent of population)	Perpetrator Class (approximate percent of population)
Liberia	8%	3.3%
Sierra Leone	1.2%	1.8%
South Africa	0.08%	0.01%
Ghana	0.04%	N/A

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<sup>a</sup> For further discussion of the rough approximations contained in this table, see *supra* note a (tbl.1). Recall that to estimate the size of victim classes I used loss of life as a proxy for victimization in most of the countries in this study; however, this should not be taken as an indication that loss of life is the only experience of victimization that matters. It is a rough proxy and an imperfect measure of victimization. No percentage for perpetrators in Ghana is included in the table because of a lack of reliable estimates. The chart nonetheless provides us with some indicia of the comparative size of the victim and perpetrator classes. It also corresponds with data from the truth commissions regarding the relative sizes of the victim and

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<sup>310</sup> Recognizing these complexities, the TRC-SL determined not to make a distinction between ex-combatants and victims for the purposes of reparations, but attempted to limit the ability of victims to benefit from both the DDR programs and the reparations program. See 2 TRC-SL REPORT, *supra* note 196, at 245.

<sup>311</sup> For further discussion, see DALY & SARKIN, *supra* note 23, at 171-72 (discussing the "gradations of culpability" between victims and perpetrators and the difficulty in trying to draw boundaries between the two groups).

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perpetrator classes. See discussion *supra* note a (tbl.1); discussion *infra* notes 329–334 and accompanying text.

Notably, the governments created a number of the commissions explicitly to respond to the needs of victims.<sup>312</sup> This Part discusses the truth commissions' attempts to respond to some of the demands of victims, including redress and rehabilitation. This Part also explores how the truth commissions balanced some of the interests of perpetrators: having their narratives and reasons for carrying out the conflict vindicated, having their material well-being unaltered, and shielding themselves from punishment. It illustrates how the relative size of the victim and perpetrator classes after the conflict in Liberia, in particular, limited the impact of its truth commission. It also highlights how the combination of the court and commission helped the transitional institutions in Sierra Leone to achieve a better balance of the demands of both groups.

#### A. Numerous Victims and Perpetrators Create Challenges for Acknowledgment

Truth commissions purportedly satisfy the “need of some victims to tell their stories and be listened to.”<sup>313</sup> This form of acknowledgment is central to the truth commissions' efforts to “restore dignity to victims,” one of their central objectives.<sup>314</sup> A common criticism of the commissions was the lack of follow-up with victims who provided statements. For example, in Sierra Leone, a number of interviewees expressed frustration with the process, with one explaining, “Five years afterward people don't know what the outcome is of [the] statement given.”<sup>315</sup> In Liberia, statement givers criticized the process for “opening the wound,” and then “not coming back to say anything.”<sup>316</sup> A case in point is an interviewee in Liberia who explained how a statement taker came to town to talk about a massacre that had occurred. The interviewee noted, “[a]fter the TRC came here, we haven't gotten any

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<sup>312</sup> See, e.g., The National Reconciliation Commission Act, 2002 § 20(2)(d) (Ghana), available at <http://www.ghanareview.com/reconact.html> (noting that the commission should “recommend the appropriate response to the specific needs of each victim or group of victims” in its report); Truth and Reconciliation Commission Act of 2000 § 6(1) (Sierra Leone), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf> (noting that a function of the commission was “to respond to the needs of the victims”).

<sup>313</sup> HAYNER, *supra* note 3, at 135.

<sup>314</sup> See *supra* Table 1. For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 241–44.

<sup>315</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>316</sup> Interviews from Liberia, *supra* note 126.

result. We asked the TRC to give us help and we haven't heard from them . . . . We don't have the contact information for those that came [and] haven't gotten any information from them."<sup>317</sup> Similarly, the CDD-Ghana Victims Survey found that the NRC's investigators had contacted only 32% of the 102 victims surveyed.<sup>318</sup> Additionally in South Africa, "[i]t is estimated . . . that . . . over 90% of people . . . were not provided with new or meaningful information."<sup>319</sup> Many "came to the commission so that their suffering would be acknowledged" or because they assumed that the commission "would validate their memories and roles" or that "they would be able to achieve closure."<sup>320</sup>

The commissions in Liberia and Sierra Leone faced far greater challenges than Ghana in their attempts to "restore dignity to victims." My field research indicates that, without adequate follow-up, victims were left feeling empty, without a clear sense of what happened to their statements, whether the commission was investigating the violations they reported, whether missing loved ones were being identified, and so forth.<sup>321</sup> These sentiments were most common from post-conflict interviewees. Many interviewees questioned why the commission had not contacted them to participate in hearings or why they had not gotten some form of immediate material benefit after giving their statements.<sup>322</sup> Indeed, many thought that their engagement with the truth-telling process would lead to some type of financial compensation.<sup>323</sup> Numerous interviewees conceived of the truth-telling process in functional and transactional terms—emphasizing the importance of truth-telling "because maybe if you explain your condition, people will feel sorry for you, and help you."<sup>324</sup> My field research indicates that the truth commissions may even have done a greater disservice by raising expectations that they were unable to meet.<sup>325</sup> While statement taking in all three countries created

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<sup>317</sup> *Id.*

<sup>318</sup> CDD-GHANA, VICTIMS SURVEY, *supra* note 209, at 15. The results from this survey were similar to my findings during my field research, wherein a number of interviewees lamented that follow-up "should have been much more." Interviews from Ghana, *supra* note 197.

<sup>319</sup> HAMBER, *supra* note 292, at 147.

<sup>320</sup> van der Merwe & Chapman, *supra* note 163, at 248.

<sup>321</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>322</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>323</sup> See Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106; see also 1 NRC REPORT, *supra* note 42, at 168 (69% of those making statements to the NRC expected some form of monetary compensation, and 20.1% of those making statements to the NRC expected material compensation). This was the case in South Africa as well. GIBSON, OVERCOMING APARTHEID, *supra* note 18, at 262.

<sup>324</sup> Interviews from Liberia, *supra* note 126.

<sup>325</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 288–89 (discussing the need to manage victims' expectations).



expectations from victims that the commissions were not able to fulfill, this was particularly pronounced in the post-conflict countries with larger victim classes. Indeed, more interviewees in Ghana expressed the opinion that their commission had provided acknowledgment to victims.<sup>326</sup>

Notably, providing statements privately did not pose the same security risks for victims as speaking publicly at hearings.<sup>327</sup> Accordingly, many more victims participated in the statement-taking process compared to the public hearings.<sup>328</sup> For example, the Liberian truth commission gathered statements from approximately 20,000 individuals<sup>329</sup> regarding over 85,000 victims,<sup>330</sup> while the truth commission in Sierra Leone gathered approximately 8000 statements,<sup>331</sup> concerning nearly 15,000 victims.<sup>332</sup> The majority of these victims never heard their stories acknowledged publicly during hearings, which limited the impact of the commissions.<sup>333</sup> The TRC-L in particular raised expectations that it could not deliver. Thus, it is unsurprising that the assessments of the commission in Liberia would be largely negative.<sup>334</sup> In Sierra Leone, the victim class was not as large as in Liberia, and the truth commission in Sierra Leone gathered fewer statements, so not as many victims anticipated something in return. In addition, in Sierra Leone, because the truth commission had the benefit of the court, which was focusing its efforts on alleged perpetrators, the TRC-SL was freer to focus its attention on victims.

In Liberia, given the large number of alleged perpetrators, the commission apparently decided to focus its efforts on alleged

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<sup>326</sup> Interviews from Ghana, *supra* note 197.

<sup>327</sup> This Article has already discussed how the large number of perpetrators in Liberia and Sierra Leone and the potential threat they posed influenced the number of victims willing to come forward and testify publicly at hearings. *See* discussion *supra* Part II.A.

<sup>328</sup> *Id.*

<sup>329</sup> TRC-L FINAL REPORT, *supra* note 62, at 185. By way of comparison, the commission in South Africa, which has a population fourteen times that of Liberia, gathered “approximately 21,000 statements,” *see* Raddatz *supra* note 64, at 184, and collected information on over 35,000 human rights violations, *see, e.g.*, HAMBER, *supra* note 292, at 148.

<sup>330</sup> KRISTEN CIBELLI, AMELIA HOOVER & JULE KRÜGER, DESCRIPTIVE STATISTICS FROM STATEMENTS TO THE LIBERIAN TRUTH AND RECONCILIATION COMMISSION 4 (2009) [hereinafter BENETECH STATS.], available at <http://trcofliberia.org/resources/reports/final/descriptive-statistics-from-statements-to-the-liberian-trc-benetech.pdf> (revealing that the approximately 17,000 statements coded contained information about 86,647 victims).

<sup>331</sup> *See* RICHARD CONIBERE ET AL., TRUTH & RECONCILIATION COMM’N, APPENDIX 1: STATISTICAL APPENDIX TO THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE 1 (2004) [hereinafter TRC-SL REPORT, APP. 1], available at <http://hrdag.org/content/sierraleone/SL-TRC-statistics-chapter-final.pdf>.

<sup>332</sup> *Id.* at 9 (noting that the TRC-SL’s database contained information on 14,995 victims).

<sup>333</sup> *See* discussion *supra* text accompanying notes 313–20.

<sup>334</sup> The TRC-L received unfavorable evaluations, with only 20% of those surveyed by the SCSL indicating that the TRC-L had “been successful in [achieving] its mandate” and almost half (48%) indicating that it had been unsuccessful. SCSL SURVEY, *supra* note 107, at 23.

perpetrators. For example, the TRC-L recommended prosecutions for 208 individuals before a proposed court similar to the SCSL.<sup>335</sup> The lists for prosecutions and investigations included the leaders of all the warring factions as well as prominent businesspersons and public officials, including several members sitting in the legislature. The TRC-L was preoccupied with compiling lists of alleged perpetrators—those needing to be debarred from public office, those for further investigation, those to be granted amnesty, and a host of other lists<sup>336</sup>—as a means of ensuring accountability, while the TRC-SL instead compiled lists of victims to serve “as an acknowledgement of those who suffered.”<sup>337</sup> The operation of the truth commission alongside the SCSL also meant that the aspirations of victims were not entrusted solely to one transitional institution. Thus, when, or if, the institutions failed to deliver, responsibility could be somewhat diffused between them. This is likely a positive thing from a victim’s perspective because it increases the chances for the victim’s satisfaction by creating multiple avenues of potential redress. From the standpoint of institutional design, this is also beneficial because it means that transitional institutions are less burdened with unrealistic expectations. Further, if either the court or the commission proved to be able to deliver, they both would benefit from positive evaluations since Sierra Leoneans viewed them as having complementary goals.<sup>338</sup>

The large number of perpetrators in post-conflict societies will also complicate the truth commissions’ efforts to provide acknowledgment to victims. As discussed above, alleged perpetrators will be interested in having their narratives vindicated.<sup>339</sup> They will also be concerned about shielding themselves from prosecutions. For example, in both Sierra Leone and Liberia, the perpetrators assumed very different roles in each society. In Liberia, many retained or acquired positions of power that could threaten the fragile peace, while in Sierra Leone the court indicted a number of perpetrators and held them in custody.<sup>340</sup> Others had fled, were dead, or reintegrated back into society.<sup>341</sup> Ghana had comparatively fewer alleged perpetrators than Sierra Leone and Liberia.<sup>342</sup> The indemnity provision in Ghana’s Constitution also ensured that there would be no prosecutions for past human rights

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<sup>335</sup> TRC-L FINAL REPORT, *supra* note 62, at 349–52, 356–58, 370–71.

<sup>336</sup> *Id.* at 349–75.

<sup>337</sup> 2 TRC-SL REPORT, *supra* note 196, at 273.

<sup>338</sup> SCSL SURVEY, *supra* note 107, at 45 Annex 18 (noting that 54% of Sierra Leoneans surveyed reported that the goals of SCSL and the TRC-SL were complementary or the same).

<sup>339</sup> See discussion *supra* text accompanying notes 244–54.

<sup>340</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 263–68.

<sup>341</sup> See *id.* at 271.

<sup>342</sup> See *supra* Table 1.

abuses committed by military regimes.<sup>343</sup> The lower number of perpetrators in Ghana combined with immunity from prosecution meant that alleged perpetrators' interests were not as threatened by the truth commission's proceedings. Similarly, the TRC-SL's proceedings did not significantly threaten the interests of alleged perpetrators. In Sierra Leone, a partial amnesty resulted because the limited prosecutions of the SCSL and the lack of domestic prosecutions, in effect, left the amnesty granted in the Sierra Leonean peace agreement intact for most perpetrators. In contrast, the de-facto amnesty in Liberia meant that the truth commission's proceedings were much more threatening to the status quo and the interest of alleged perpetrators. This section has highlighted some of the ways that a truth commission's impact can be limited due to amnesty provisions and the existence and influence of a large group of perpetrators and victims. Part IV.B discusses how large numbers of victims and perpetrators can also frustrate truth commissions' efforts to promote healing in post-conflict societies, which also complicates efforts to provide acknowledgment for victims.

#### B. *Large Victim and Perpetrator Classes Create Obstacles for Promoting Healing*

All of the commissions faced difficulties in their attempts to "promote healing."<sup>344</sup> Yet, this was more pronounced in the commissions operating in post-conflict contexts. They all presumed that "truth-telling" would lead to "healing," when, in fact, the relationship between the two is far from clear.<sup>345</sup> In the field of transitional justice,

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<sup>343</sup> See CONSTITUTION OF THE REPUBLIC OF GHANA 1992, 1st sched., §§ 34–35.

<sup>344</sup> See The National Reconciliation Commission Act, 2002 § 20(2)(g) (Ghana), available at <http://www.ghanareview.com/reconact.html> (providing that the commission's work was to "promote healing and reconciliation"); An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. IV, § 4(b), available at <http://www.refworld.org/docid/473c6b3d2.html> (stating that the commission was to provide a forum "for both victims and perpetrators of human rights violations to share their experiences in order to create a clear picture of the past [so as] to facilitate genuine healing and reconciliation"); Truth and Reconciliation Commission Act of 2000 § 6(1) (Sierra Leone), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf> (noting that the commission was established "to promote healing and reconciliation").

<sup>345</sup> See, e.g., HAYNER, *supra* note 3, at 139–40; Roht-Arriaza, *supra* note 2, at 5 (noting that victims are often left "retraumatized . . . wondering to what end"); see also Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT'L CRIM. L. REV. 263, 264 (2011) (noting that the consequences of victimization are not experienced on a collective basis and cannot be addressed through processes which prioritize societal objectives); Nina K. Thomas, *Obliterating the Other: What Can Be Repaired by "Truth" and Testimony?*, 6 INT'L J. APPLIED PSYCHOANALYTIC STUD. 321, 334 (2009) (noting the dangers of conflating truth and healing).

healing is conceptualized as a process that “help[s] individuals regain a sense of psychological or emotional wholeness”<sup>346</sup> that has been shattered by experiences of trauma during a conflict or a period of repressive rule. In the context of post-conflict countries, where the “truth” is particularly horrible and graphic, offering the “truth” from victims or alleged perpetrators, without more, may serve to undermine efforts to promote healing.

Liberia’s experience with truth-telling is a classic example of the limits of truth commissions in promoting healing in post-conflict contexts. Given the numerous perpetrators and potential security concerns they posed to the commission and victims, along with the fragile, ineffective state institutions available to respond to any threats of violence, the TRC-L determined not to create a forum for victims and perpetrators to meet and reconcile. The commission made this decision due to concerns about “the physical and psychological welfare of victims.”<sup>347</sup> Accordingly, exchanges between alleged perpetrators and victims during the TRC-L’s proceedings “were limited and did not occur frequently.”<sup>348</sup> Interviewees in Liberia described the public hearings in which many alleged perpetrators came forward to speak as “playing in an old sore,” and “causing people’s heart[s] to burn.”<sup>349</sup> The recriminations and misrepresentations emanating from alleged perpetrators at public hearings in Liberia made it difficult to “promote healing and reconciliation,” key objectives of the commission.<sup>350</sup> For example, tensions heightened between Nimba and Grand Gedeh counties during the testimony of Prince Johnson, the former leader of a breakaway faction of the NPFL.<sup>351</sup> Johnson is from Nimba and was responsible for the videotaped torture and murder of then President Doe, who was from Grand Gedeh. The United Nations Peacekeeping Mission in Liberia had to intervene to prevent fighting between the two

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*See generally* Karen Brounéus, *The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health*, 54 J. CONFLICT RESOL. 408 (2010) (finding, in a randomized survey of 1200 Rwandans, that witnesses to truth-telling processes in Rwanda “suffer[ed] from higher levels of depression and [post-traumatic stress disorder] than [did] non-witnesses”); Claire Moon, *Healing Past Violence: Traumatic Assumptions and Therapeutic Interventions in War and Reconciliation*, 8 J. HUM. RTS. 71 (2009) (challenging the discourse of therapeutic interventions as a basis for legitimating new regimes and “cur[ing] people of the pathologies that” may lead to renewed violence); Stephan Parmentier et al., *How to Repair the Harm After Violent Conflict in Bosnia? Results of a Population-Based Survey*, 27 NETH. Q. HUM. RTS. 27 (2009) (finding that 35% of sample of 855 Bosnians felt that truth-telling would help assist with their individual healing).

<sup>346</sup> Clark, *supra* note 139, at 199–200.

<sup>347</sup> See TRC-L FINAL REPORT, *supra* note 62, at 63.

<sup>348</sup> *Id.* For further discussion, see Raddatz *supra* note 64, at 185.

<sup>349</sup> Interviews from Liberia, *supra* note 126.

<sup>350</sup> Many interviewees wondered how the process unfolding would contribute to “reconciliation” or “promote healing.” *Id.*

<sup>351</sup> *Id.*

communities following his testimony. Additionally, the survey conducted by the Human Rights Center at U.C. Berkeley found that 24% of Liberians “did not place particular emphasis on” the “truth,” most commonly because “it would bring [back] bad memories . . . or that it was better to forget.”<sup>352</sup> My field research in rural Liberia also indicates that many do not presume that telling and hearing the “truth” was beneficial, with 55% indicating that the “past was too painful” to talk about, compared with 45% who stated that “talking about the past makes you feel better.”<sup>353</sup>

In Sierra Leone, scholars have also found that public truth-telling and inquisitorial investigation had little resonance.<sup>354</sup> One study found that participants viewed the commission as “based on western values of truth and reconciliation, while it operated in an alien African environment that was far from western.”<sup>355</sup> During my field research, more interviewees in Liberia and Sierra Leone expressed the opinion that traditional and local methods of truth-telling and reconciliation should be used.<sup>356</sup> The significantly weakened or non-existent mental health institutions, needed to provide victim support and counselling during and after the truth-telling process, further limited the experiences with truth-telling in post-conflict countries. Indeed, a number of interviewees also lamented that the commissions were not able to offer even limited psychological support and counseling to those who gave statements and testified.<sup>357</sup> Moreover, a victim’s limited interaction with a truth commission is not a substitute for ongoing psychological support and counseling.<sup>358</sup> This is particularly so when

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<sup>352</sup> HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY, *supra* note 210, at 69.

<sup>353</sup> Interviews from Liberia, *supra* note 126 (containing results from forty-nine rural interviewees).

<sup>354</sup> See Tim Kessal, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 380–91 (2005); see also Sriram, *supra* note 63, at 170.

<sup>355</sup> See Sesay, *Freetown Survey*, *supra* note 266, at 44.

<sup>356</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>357</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>358</sup> See, e.g., Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 115 (2008) (noting studies questioning the role of truth commissions in healing traumatized individuals). See generally Doak, *supra* note 345, at 290 (noting that truth commissions are not intended to be “therapy”); David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 HUM. RTS. Q. 592 (2009) (analyzing the effects of post-conflict justice on truth-telling and emotional healing); David Mendeloff, *Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT’L STUD. REV. 355 (2004) (arguing that post-conflict justice does not provide the claimed “peacebuilding” benefits); Leslie Swartz & Gerard Drennan, *The Cultural Construction of Healing in the Truth and Reconciliation Commission: Implications for Mental Health Practice*, 5 ETHNICITY & HEALTH 205, 212 (2000) (noting that “it is a mistake to confuse the TRC process with psychotherapy” and questioning “whether emotional self-exposure . . . automatically has positive emotional consequences”).

one considers the small number of victims who actually end up participating in the truth-telling process in post-conflict countries.<sup>359</sup> The experience of truth commissions in post-conflict societies marked by large numbers of victim and perpetrator classes renders the claims of much of the literature even more suspect regarding a truth commission's ability to assist with healing victims.

These findings were not limited to the post-conflict countries. For example, in South Africa, studies found that the SATRC played a role in re-victimizing many of those who testified.<sup>360</sup> The CDD-Ghana Victims Survey also found that 80% of respondents “‘strongly agreed’ or ‘agreed’ that the NRC made them re-live the horrors that their abusers had visited upon them.”<sup>361</sup> Notably, in Ghana, 88% of respondents “agreed” or “strongly agreed” that the “NRC offered [a] platform for victims to overcome long held pain.”<sup>362</sup> In post-authoritarian contexts, a commission's ability to promote healing through truth-telling may be greater when compared to a commission's ability to “heal” victims in post-conflict contexts, where the number of victims and perpetrators will likely be quite large and the scale and nature of the “truth” much less likely to promote healing. These results do not mean that these societies generally do not place importance on the truth;<sup>363</sup> instead, they may indicate that the presumption of a relationship between public truth-telling and healing is not shared. As one interviewee aptly put it, we “need to remember the past, but not in detail.”<sup>364</sup> Thus, it appears that there is a limit to the amount of detail about atrocities that can “profitably be disseminated”<sup>365</sup> and expected to contribute toward healing, particularly in post-conflict societies.

This section has illuminated some of the difficulties post-conflict truth commissions face in their attempts to promote healing, an important aspect of their mandate. Part IV.C discusses how numerous

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<sup>359</sup> See, e.g., SCSL SURVEY, *supra* note 107, at 44 Annex 17, 45 Annex 19 (noting that 9% of those surveyed in Sierra Leone and 8% in Liberia stated that they had “participate[d] in the work of the Truth and Reconciliation Commission,” while 44% of respondents in Sierra Leone and 57% in Liberia indicated that they were “victim[s] of war crimes or crimes against humanity”).

<sup>360</sup> See, e.g., HAMBER, *supra* note 292, at 133–34 (discussing how in many cases there was a level of “inequity distress” (internal quotation marks omitted)); see also Dan J. Stein et al., *The Impact of the Truth and Reconciliation Commission on Psychological Distress and Forgiveness in South Africa*, 43 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 462, 467 (2008) (finding “significant associations between having attended the” truth-telling process in South Africa and increased psychological distress and anger).

<sup>361</sup> CDD-GHANA, VICTIMS SURVEY, *supra* note 209, at 17.

<sup>362</sup> *Id.* (alteration in original) (internal quotation marks omitted).

<sup>363</sup> SCSL SURVEY, *supra* note 107, at 43 Annex 14 (noting that 95% of Liberians surveyed and 97% of Sierra Leoneans responded that it was “important to know the truth about war crimes and crimes against humanity”).

<sup>364</sup> Interviews from Liberia, *supra* note 126.

<sup>365</sup> See DALY & SARKIN, *supra* note 23, at 151.

victims and perpetrators can also complicate truth commissions' efforts to provide redress in post-conflict societies.

C. *Size of Victim and Perpetrator Classes Complicates Efforts to Provide Redress*

The post-conflict commissions faced numerous difficulties in their efforts to provide redress due to the size of the victim and perpetrator classes in their societies. In Sierra Leone and Liberia, field research indicated that the post-war focus on rehabilitating ex-combatants through DDR programs created resentment from human rights victims.<sup>366</sup> The DDR process supported by the international community in Sierra Leone and Liberia provided a low salary, tool kits, and skills training to combatants as an incentive to get them to disarm. Over 70,000 ex-combatants in Sierra Leone were disarmed through this process, while over 100,000 were disarmed in Liberia. Given the abject poverty in both Liberia and Sierra Leone, many interviewees expressed the sentiment that ex-combatants were compensated for committing atrocities.<sup>367</sup> For example, Alhadji Jusu Jaka, President of the Amputees Association in Sierra Leone, observed “that when a civil war comes to an end, all the priority is given to address issues to benefit the armed groups who in more than 90% of the cases are the violators. Little or no consideration is paid to the victims.”<sup>368</sup> Indeed, the international community's disproportionate investment in DDR programs as well as retributive justice approaches sent perverse signals to human rights victims and complicated efforts to help restore victims' dignity.<sup>369</sup> These problems are particularly evident when one considers that mid- and lower-level perpetrators who benefited from the DDR programs were perceived as “most responsible,” yet they were not before the SCSL, but were instead “strolling around in their villages.”<sup>370</sup> The long delay in Sierra Leone in establishing a reparations program (seven years after the DDR program began)<sup>371</sup> exacerbated victims' concerns and at times led to mass rallies.<sup>372</sup> In contrast, to date, the government has not established a reparations program in Liberia. It is reasonable that victims would expect comparable or higher compensation than what

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<sup>366</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>367</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106; *see also* Sriram, *supra* note 63, at 167.

<sup>368</sup> STATUS OF IMPLEMENTATION OF TRC-SL, *supra* note 202, at 35 (statement of Alhaji Jusu Jaka, Victims' Representative).

<sup>369</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>370</sup> *See* Sriram, *supra* note 63, at 171 (internal quotation marks omitted).

<sup>371</sup> *Id.* at 172.

<sup>372</sup> Interviews from Sierra Leone, *supra* note 106.

was given to ex-combatants in Liberia or Sierra Leone. Indeed, in both countries, when asked, “[w]hat should be done for victims?” the most common replies involved some form of reparations.<sup>373</sup> In Ghana, the tension between providing monetary support to victims and perpetrators did not occur, as Ghana did not experience a conflict.

The challenge of providing redress to those victimized by the war was particularly acute in Sierra Leone due to the large number of potential beneficiaries. The commission recommended that “amputees, other war wounded, those who suffered sexual violence and children . . . be prioritised as victims . . . given the enduring effects of the violations they suffered.”<sup>374</sup> Because of the limited resources available for the reparations program and the large numbers of potential recipients, the TRC-SL concluded that some distinctions had to be made. It prioritized those victims as to whom it felt there was national consensus regarding their continued vulnerability.<sup>375</sup> Reportedly, some 30,000 of the estimated 55,000 victims from Sierra Leone’s civil war came forward to register for reparations.<sup>376</sup> During my field research, the agency in charge of administering reparations in Sierra Leone indicated that it planned to distribute reparations based on the results of this process as well as the TRC-SL’s Report.<sup>377</sup> Because truth commissions are not able to engage with large numbers of victims, reparations programs that rely exclusively on lists provided by truth commissions may doubly victimize those deemed “ineligible.” While there were some flaws in the registration process,<sup>378</sup> Sierra Leone is to be commended for realizing the limited reach of the truth commission.<sup>379</sup> Due to inadequate funding, eligible victims that registered were provided with a one-time interim payment ranging from \$70 to \$200.<sup>380</sup> Approximately, 20,000 victims reportedly received the first round of interim assistance,<sup>381</sup> and an estimated 11,000 more are expected to benefit from the second round.<sup>382</sup> Yet, it is not clear that human rights victims in Sierra Leone will receive anything beyond the “interim assistance” provided. Notably, the SCSL survey found that despite the

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<sup>373</sup> SCSL SURVEY, *supra* note 107, at 46 Annex 21.

<sup>374</sup> 2 TRC-SL REPORT, *supra* note 196, at 243.

<sup>375</sup> *Id.*

<sup>376</sup> MOHAMAD SUMA & CRISTIÁN CORREA, INT’L CTR. FOR TRANSITIONAL JUSTICE, REPORT AND PROPOSALS FOR THE IMPLEMENTATION OF REPARATIONS IN SIERRA LEONE 3–4 (2009).

<sup>377</sup> Interviews from Sierra Leone, *supra* note 106.

<sup>378</sup> See SUMA & CORREA, *supra* note 376, at 4–6.

<sup>379</sup> 2 TRC-SL REPORT, *supra* note 196, at 242.

<sup>380</sup> *Amputees Still Waiting for Reparations Almost 10 Years On*, IRIN (Oct. 24, 2011), <http://www.irinnews.org/fr/report/94037/sierra-leone-amputees-still-waiting-for-reparations-almost-10-years-on>.

<sup>381</sup> See SUMA & CORREA, *supra* note 376, at 7.

<sup>382</sup> INT’L ORG. FOR MIGRATION, *Sierra Leone Victims Receive Compensation*, RELIEFWEB (June 26, 2012), <http://reliefweb.int/report/sierra-leone/sierra-leone-victims-receive-compensation>.



fact that nearly half of Sierra Leonean respondents reported that they were victims of war crimes and crimes against humanity, 74% reported that they had not received any form of financial or material reparations.<sup>383</sup>

Liberia faced even more difficulties in providing redress to victims because its victim class is five times larger. The TRC-L Act provided that the TRC “determine beneficiaries as part of the outcome of [its] proceedings,”<sup>384</sup> but the TRC-L did not provide a list of potential beneficiaries for reparations from the numerous statements it collected. Instead, it outlined categories of beneficiaries.<sup>385</sup> The large number of potential claimants also influenced the commission to prioritize communal reparations as opposed to individual. For instance, the TRC-L recommended school and health facilities, as well as road construction, “for communities most victimized by years of conflict.”<sup>386</sup> The downplaying of individual monetary reparations is not surprising when one considers survey data. For example, a survey done by the Human Rights Center at U.C. Berkeley found that, “[n]ationally, 78% of [Liberians] considered themselves . . . victim[s] of the civil war.”<sup>387</sup> Interviewees during my field research surmised that the government of Liberia seems to have concluded that since everyone was impacted by the war in some way and could potentially have a claim for reparations, the financial implications of reparations make it a “non-starter.”<sup>388</sup> Unlike Sierra Leone and Ghana, the Liberian government has not implemented any of the commission’s reparations recommendations.

In contrast, in Ghana, the relatively small number of victims compared to Liberia and Sierra Leone has made the task of reparations easier. The NRC proposed a variable lump-sum payment for a range of violations, including loss of life, rape, torture, disability, detention, exile,

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<sup>383</sup> SCSL SURVEY, *supra* note 107, at 24 fig.17. Moreover, of the 23% of respondents who indicated that they had received some form of reparations, only 33.63% reported that they had received financial compensation. *Id.* at 24.

<sup>384</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005) art. IX, § 38, available at <http://www.refworld.org/docid/473c6b3d2.html>.

<sup>385</sup> For example, the TRC-L made a recommendation for “reparation[s] in the form of psychosocial, physical, therapeutic, counseling, medical, mental health and other health related services for all physically challenged individuals who were incapacitated as a consequence of the civil war . . . .” TRC-L FINAL REPORT, *supra* note 62, at 378.

<sup>386</sup> *Id.* at 379. In some ways this is akin to class actions, where the individual class members do not receive much compensation, but have some assurances of structural reform and can benefit from a general fund.

<sup>387</sup> HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY, *supra* note 210, at 35. The SCSL survey revealed that 57% of respondents in Liberia indicated that they were “victims of war crimes or crimes against humanity.” SCSL SURVEY, *supra* note 107, at 45 Annex 19. Additionally, 66% of respondents indicated that their “family or friends [were] victims of war crimes or crimes against humanity.” *Id.* at 45 Annex 20.

<sup>388</sup> Interviews from Liberia, *supra* note 126.

seizure of property, and unlawful dismissals.<sup>389</sup> The NRC recommended that the provision of benefits be proportional to the harm suffered. For example, the proposed amount for loss of life due to killing or disappearance is the equivalent of \$2222 to \$3333, while the amount for exile ranged from the equivalent of \$222 to \$1111.<sup>390</sup> Ghana's decision to distribute reparations proportionately attempted to respond to the gravity of the violation and the circumstances of each case.<sup>391</sup> In October of 2006, the Ghanaian government began providing monetary reparations to human rights victims (and relatives of deceased victims) based on those identified by the NRC. The NRC determined specific amounts of monetary reparations for 2117 victims. As of June 2008, approximately 73% of those entitled to receive monetary reparations in Ghana had received reparations.<sup>392</sup> Yet, the decision to rely on the NRC Report exclusively contributed to some names not appearing on the list for compensation,<sup>393</sup> a fact, interviewees explained, that further alienated victims.<sup>394</sup> My field research revealed that the transactional and trivial amount of monetary reparations provided, concomitant with the failure to provide other aspects of reparations, limited the overall impact of reparations.<sup>395</sup> In Ghana, a survey of victims receiving reparations found that 77% of victims were dissatisfied with the process and the amount given to them.<sup>396</sup> Of those indicating dissatisfaction with the process, 63.3% expressed that they expected a package that would be "far more than what they had lost," or at least "equal in value to what was lost."<sup>397</sup> Notably, the amount of monetary reparations provided in Ghana (ranging from \$111 to \$3333)<sup>398</sup> was less generous than that provided in South Africa. In South Africa, the SATRC recommended a series of holistic measures for reparations, which included symbolic and financial reparations in the form of a pension scheme. The government instead provided a one-off payment of urgent

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<sup>389</sup> 1 NRC REPORT, *supra* note 42, at 175–76.

<sup>390</sup> *Id.* at 175. In 2004, \$1 was approximately 9000 Cedis. Since July 2007, Ghana has redenominated its currency so that the exchange rate with the U.S. dollar was approximately one to one. Today, the exchange rate is approximately \$1 dollar is approximately 2.5 Cedis.

<sup>391</sup> *Cf.* 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, G.A. Res. 60/147, art. VII, § 11(b), art. IX, § 20, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>392</sup> See Franklin Oduro, Reparations in Ghana: Implementing the National Reconciliation Commission (NRC) Recommendations 2 (Nov. 2008) [hereinafter Oduro, Reparations in Ghana] (unpublished manuscript) (on file with author).

<sup>393</sup> *Id.* at 21 (noting that 4.2% of the victims surveyed had their names missing).

<sup>394</sup> Interviews from Ghana, *supra* note 197.

<sup>395</sup> *Id.*

<sup>396</sup> See Oduro, Reparations in Ghana, *supra* note 392, at 18–23 (discussing survey of sixty-three victims conducted eight months after reparations began).

<sup>397</sup> *Id.* at 22.

<sup>398</sup> See 1 NRC REPORT, *supra* note 42, at 175–76.

interim reparations to 16,885 individuals ranging from approximately \$260 to \$790, and a one-off final payment of approximately \$4000 to 19,050 individuals.<sup>399</sup> In South Africa, the government provided reparations five years after the victim hearings had ended. Victim dissatisfaction with reparations was also significant; for example, some felt that the SATRC had betrayed them, was more concerned with accommodating alleged perpetrators at the expense of victims concerns, and had compromised their right to seek redress and to make civil claims.<sup>400</sup>

Yet, it is nearly impossible to quantify adequately the harm suffered from a victim's perspective.<sup>401</sup> Domestic tort law also grapples with calculating damages for harms that are hard to place a market value on, such as health and reputational harms.<sup>402</sup> Victims may perceive such attempts as crass and insensitive. In Sierra Leone, a regional administrator responsible for implementing the reparations program proclaimed, "[i]f your tongue was cut it has a percentage . . . [i]f your eye was damaged it has a percentage, your arm . . . any part of your body that was damaged during the war, they are going to look at it on a percentage basis."<sup>403</sup> Yet, monetary "reparations can never fully . . . restore [victims] to the[ir] *status quo ante*."<sup>404</sup> Instead, governments provide reparations to send signals to victims, and to society more generally, that the successor regime is committed to respecting victims' and fellow citizens' rights. Reparations<sup>405</sup> can contribute to restoring faith in new governments by fostering trust

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<sup>399</sup> See HAMBER, *supra* note 292, at 103–04 (using the May 2008 exchange rate).

<sup>400</sup> See *id.* at 104.

<sup>401</sup> See Aukerman, *supra* note 188, at 79 (noting that the "grossly disproportionate" amount of reparations when compared with the damage experience may tend to "trivialize suffering").

<sup>402</sup> See Posner & Vermeule, *supra* note 21, at 810.

<sup>403</sup> Kari Barber, *Sierra Leone War Victims Sign Up for Reparations*, RELIEFWEB (Feb. 19, 2009), <http://reliefweb.int/report/sierra-leone/sierra-leone-war-victims-sign-reparations> (second alteration in original) (internal quotation marks omitted).

<sup>404</sup> See 1 NRC REPORT, *supra* note 42, at 172.

<sup>405</sup> A number of international treaties provide the legal basis for providing reparations to victims of human rights abuses. See, e.g., Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 2, § 3(a), art. 9, § 5, art. 14, § 6, Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, 660 U.N.T.S. 195; Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277. Article 2, section 3(a) of the Convention of the Rights of the Child states that victims of human rights violations "shall have an effective remedy," which has been interpreted to support reparations by the United Nations Human Rights Committee. See Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

between citizens and the state.<sup>406</sup> Reparative-justice<sup>407</sup> models are utilized to help to establish or re-establish the social contract between the governed and the government.<sup>408</sup> However, where reparative-justice efforts are explicitly administered “proportional” to the abuses suffered, such computations can undermine the ability of reparations to provide redress.

Given the larger number of victims and perpetrators in post-conflict contexts and even fewer available resources to fund reparations and disarmament efforts, it is inevitable that the gap between the realities of what the government provides and perceptions about what is due would be pronounced. This is compounded by the likelihood that alleged perpetrators would resist efforts to fund such programs. For example, in Ghana, although the NRC recommended that perpetrators who were willing to contribute to the reparations fund be encouraged to do so,<sup>409</sup> none came forward to contribute to the fund. The TRC-L recommended that funds gained through “ill-gotten wealth” go toward any future reparations program.<sup>410</sup> The TRC-SL similarly recommended that a number of actors implicated in abuses provide financial support to the reparations fund.<sup>411</sup> Yet, it is unlikely that commissions in post-conflict contexts will face much more success in getting alleged perpetrators to contribute toward reparations. The larger numbers of perpetrators and their potentially powerful political influence means that perpetrators will generally obstruct efforts to provide redress to victims, particularly where it involves their material interests.

Overall, it appears that truth commissions are likely to be more successful where the victim and perpetrator classes are relatively small, as was the case in Ghana and South Africa. In those circumstances, truth commissions will likely be better placed to be responsive to victims’ priorities. This benefit, combined with the strength of the institutions in

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<sup>406</sup> OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: REPARATIONS PROGRAMMES, at 30, U.N. Doc. HR/PUB/08/1, U.N. Sales No. E.08.XIV.3 (2008).

<sup>407</sup> As Mani explains, reparative justice models seek to remedy the legal, social, moral, and psychological injustice faced by victims after mass atrocity. See MANI, *supra* note 36, at 174. It contemplates “both material and non-material remedies.” *Id.*

<sup>408</sup> See *generally* Murshed, *supra* note 41 (discussing the importance of rebuilding the social contract between the citizen and the state or sovereign authority in post-conflict societies).

<sup>409</sup> 1 NRC REPORT, *supra* note 42, at 169.

<sup>410</sup> TRC-L FINAL REPORT, *supra* note 62, at 464, 467. Notably, almost 60% of those surveyed by the SCSL in Liberia and Sierra Leone believed that the perpetrators of violence should pay for reparations. SCSL SURVEY, *supra* note 107, at 25 fig.18.

<sup>411</sup> TRC-SL recommended that the assets of Charles Taylor, the NPFL, and the RUF be traced and that those assets illegally removed from Sierra Leone should be used for reparations. See HUMAN RIGHTS COMM’N OF SIERRA LEONE & UNITED NATIONS INTEGRATED OFFICE IN SIERRA LEONE (UNIOSIL), MATRIX ON THE STATUS OF IMPLEMENTATION OF THE TRUTH AND RECONCILIATION COMMISSION RECOMMENDATIONS 39 (2007), available at [http://www.sierraleonetr.com/images/docs/finalmatrix\\_june2011.pdf](http://www.sierraleonetr.com/images/docs/finalmatrix_june2011.pdf).

post-transition Ghana and South Africa meant that these commissions were better able to balance the demands of both groups. This is because reparations programs require “a generally functional system” for their administration, “not one suffering massive breakdowns in every facet of life and governance.”<sup>412</sup> In contrast, where the victim-class is relatively large, as is generally the case following a massively destructive conflict, we may expect truth commissions to have limited success in responding to the needs and aspirations of victims.<sup>413</sup> Moreover, the more numerous and powerful the perpetrator class, the more careful the commission must be about balancing the interests of alleged perpetrators, so that they do not derail the truth-telling process. Where a court exists simultaneously with a commission, the commission will have to do less of this balancing act. The Liberian truth commission most closely mimicked the South African model, but operated in a vastly different context, which limited the impact of the transplanted model.

## V. IMPLICATIONS

One study estimates that sixty-eight countries have utilized truth commissions.<sup>414</sup> The generalizability of my findings is limited, as I conducted an in-depth analysis of the experiences of only a handful of those countries. Much more research is needed using other case studies to determine definitively how the strength of institutions, the level of moral consensus about mass violence, and the sizes of the victim and perpetrator classes interact in other post-conflict and post-authoritarian societies. Yet, this Article has indicated that there are limits to the institutional transplantation of truth commissions based on the South African model to post-conflict contexts. The experiences of Liberia and Sierra Leone are likely typical of other countries that have experienced massively destructive conflicts, which left weak institutions, large numbers of perpetrators and victims, and low levels of consensus regarding the injustice of mass violence. Ghana’s experience is also likely typical of other post-authoritarian societies. If I am incorrect, and my results are limited to truth commissions in Africa alone, that would account for approximately 34% of the truth commissions in the world,<sup>415</sup> given the prevalence of the mechanism. In addition, if my results really only tell us about the countries analyzed, there are still a

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<sup>412</sup> Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 181 (2004).

<sup>413</sup> See *id.* (discussing how the limitations of reparations programs are exacerbated in contexts of mass violence because of the large number of victims).

<sup>414</sup> See OLSEN et al., *supra* note 19, at 39.

<sup>415</sup> *Id.* at 40.

number of important theoretical and policy offerings of this study. Namely, that greater attention should be paid to the transitional circumstances in which truth commissions are used in order to increase the likelihood of their effectiveness in accomplishing stated objectives. This Part discusses the theoretical and policy implications of this Article.

A. *Theoretical and Policy Implications for Transitional Justice*

One of the main findings of this Article for the transitional justice literature is that the truth about truth commissions is that their success in fulfilling their mandates depends heavily on the context in which they operate. My key-variable approach has helped to illustrate in which contexts truth commissions may be the most effective. In particular, examining the size of the victim and perpetrator classes, the degree of moral consensus, and the relative strength of institutions are all crucial factors that influence the likelihood of a commission's success carrying out its mandate. In post-authoritarian societies, with more capacity to support a truth-telling process, relatively small victim or perpetrator classes, and high levels of moral consensus condemning mass violence, truth commissions are likely to function more optimally. While it may seem like a bit of a tautology to state that truth commissions function better in societies with more capacity and do less well in societies with less capacity, this finding is more than simply an assertion that institutions in dysfunctional contexts will tend to be dysfunctional. This is because even in situations where institutional capacity may be weak, there are some institutions that perform better than others, and there are some countries that outperform others. Thus, much more nuance is required.

Where post-conflict countries have shored up their capacity, as was the case in Sierra Leone, the transitional institutions have been much more effective. Instead of solely relying on a truth commission, Sierra Leone utilized both a commission and a hybrid court, which was a major advancement. The hybrid court helped to buttress the weak security and legal institutions left following the conflict. This placed Sierra Leone closer on the capacity spectrum to Ghana or South Africa, than to Liberia. Accordingly, this Article supports arguments made by Pablo de Grieff and others that a "holistic" approach should be used when formulating responses to mass violence—wherein multiple transitional justice mechanisms are adopted.<sup>416</sup> However, recognizing that societies affected by mass atrocity will have various demands, prescribing that a combination of truth-telling and punishment

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<sup>416</sup> See, e.g., de Grieff, *supra* note 2.

mechanisms should be adopted en masse is unwise. Similarly, sequencing decisions about whether the truth commission or court precedes the other or instead both operate concurrently should ultimately be made by the affected communities, considering lessons from other experiences.<sup>417</sup> What is clear is that efforts to shore up institutional capacity are particularly important in post-conflict and fragile countries.

Another major implication is that the adoption of a truth commission model may have more utility in post-authoritarian and even non-transitional states. For example, the findings from this Article support proposals put forward to establish a national truth commission in the United States to investigate allegations of torture and war crimes committed during the war on terror.<sup>418</sup> Institutional strength to support a truth-telling process in the United States, as well as the relatively small number of victims and perpetrators that would be involved in the process, are all factors that may indicate that a truth commission would be useful.<sup>419</sup> While this may seem counterintuitive, the small victim and perpetrator classes in South Africa and Ghana compared to the rest of the population enabled the commissions to have a much more impactful role. Moreover, the use of the criminal justice system in the United States to adjudicate the alleged crimes seems to be foreclosed for a number of reasons. In addition, the centrality of deception around the use of torture in the war on terror, the use of secret prisons to detain suspects, and the government's operation of these facilities outside of United States territory are also factors that weigh in favor of adopting a truth commission. In addition, there remains a fair amount of agitation for more information about exactly what took place and for some semblance of accountability for those implicated in abuses. Further, there is a moderate level of moral consensus surrounding the wrongfulness of torture in the United States.<sup>420</sup> The use of the truth

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<sup>417</sup> For more on sequencing, see generally William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC'Y INT'L L. PROC. 189 (2004); Sirleaf, *Regional Approach to Transitional Justice?*, *supra* note 290; Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139 (2003); Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730 (2004).

<sup>418</sup> See, e.g., Nicholas D. Kristof, *The Truth Commission*, N.Y. TIMES, July 6, 2008, at WK12.

<sup>419</sup> *But see* Gibson, *Legitimacy Theory and Truth Commissions*, *supra* note 18, at 130 (arguing that where the victim-class is large, it is likely to be more politically influential and more likely to focus the commission on the needs and priorities of victims).

<sup>420</sup> The United States is a signatory to the Convention Against Torture. See CAT, *supra* note 405. Survey results conducted by the Pew Research Center from August 17–21, 2011 among 1509 adults found that 42% of respondents believed that the use of “[t]orture to gain information from suspected terrorists can be justified” rarely or never. See *United in Remembrance, Divided over Policies: Ten Years After 9/11*, PEW RESEARCH CTR. (Sept. 1, 2011), <http://www.people-press.org/2011/09/01/united-in-remembrance-divided-over-policies>.

commission model in states like North Carolina and Illinois to investigate abuses may be important precedents for establishing a national body. Thus, it may very well be that, notwithstanding the prevalence of truth commissions in fragile states transitioning from conflict, truth commissions may have more impact in post-authoritarian and even non-transitional states.

Conversely, in post-conflict societies, the combination of weak institutions to support a truth-telling process combined with large numbers of victims and perpetrators will tend to overwhelm the commission. These factors concomitant with lower levels of moral consensus regarding mass violence interact to make truth commissions function less optimally in post-conflict contexts. This is pronounced when these institutions function alone, as was the case in Liberia. A majority of interviewees in Liberia and Sierra Leone stressed the importance of transitional processes resulting from local consultations.<sup>421</sup> Truth-telling processes that are locally owned, created, and driven will be more effective at fostering the many objectives of more formalized truth commissions. These initiatives would look different in various societies and would likely include mini-commissions or incorporate traditional reconciliation processes, without unduly romanticising them or presuming that they can be implemented everywhere. Even within societies, these initiatives would differ because of the diversity between and among cultures, as well as the awareness that certain practices cannot be adapted writ large. Traditional dispute-resolution practices may be especially relevant for dealing with certain types of crimes, like land and property disputes, in post-conflict societies and for reintegrating lower-level perpetrators and ex-child combatants into communities.<sup>422</sup> In the same way that truth commissions “are not a panacea,” traditional or customary justice mechanisms are not, and do not necessarily guarantee, human rights.<sup>423</sup> There has been much debate about the use of traditional local practices to facilitate truth-telling and reconciliation,<sup>424</sup> and there is no need to

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However, overall disapproval of the use of torture appears to be trending downwards. *See id.*

<sup>421</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>422</sup> *See, e.g.,* Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 86–87 (2006).

<sup>423</sup> *See* Raddatz, *supra* note 64, at 191.

<sup>424</sup> *See, e.g.,* PHIL CLARK, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS (2010); Sverker Finnström, *Reconciliation Grown Bitter? War, Retribution and Ritual Action in Northern Uganda*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 135 (Rosalind Shaw & Lars Waldorf eds., 2010); Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 99 (Kieran McEvoy & Lorna McGregor eds., 2008); Susan Thomson, *The Darker Side of Transitional Justice: The Power Dynamics Behind Rwanda's Gacaca Courts*, 81 J. INT'L. AFRICAN INST. 373 (2011); Waldorf, *supra* note 422.



regurgitate these arguments here. It suffices to say that this Article supports the arguments made by Naomi Roht-Arriaza and others, who have advised that scholars and practitioners must resist the temptation, “so pronounced in the case of truth commissions,” to “extrapolate a ‘formula’ that can be applied, with few changes, to any and all situations.”<sup>425</sup> Given the unique attributes of post-conflict societies discussed in this Article, much more experimentation needs to be done in order to formulate effective and contextually appropriate responses to mass violence.<sup>426</sup> Ultimately, transitional justice mechanisms must be “bespoke” by the affected societies in order for them to be effective.<sup>427</sup>

### B. *Theoretical and Policy Implications for Legal Transplants*

My analysis also yields a number of contributions for the legal transplant literature. The legal transplant literature cautions us that, in order for transplanted truth commissions to be effective, much more “innovation . . . correction . . . participation and involvement” is required.<sup>428</sup> However, the findings from this Article indicate that, paradoxically, those countries with the lowest capacity are more likely to transplant institutions wholesale without much innovation, which in turn may lead to the “transplant effect.” These same countries are the ones that need to adapt transplanted institutions the most, given the level of disrepair following a conflict. The analysis above has illustrated that where post-conflict countries have sought to “copy and paste” many of the features of truth commissions from post-authoritarian societies, they have generally been ineffective. For instance, Liberia’s attempt to blindly mimic the South African amnesty process without any attempt to adapt it to local conditions left the commission’s recommendations for amnesty hollow and without societal resonance.<sup>429</sup> The key-variable approach helps us to begin to identify what factors exist in origin and transplant country that may indicate similarity, in order to determine how much innovation may be required for transplants to be effective. Ghana shared a number of similar characteristics with South Africa—relatively strong institutions post-

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<sup>425</sup> Roht-Arriaza, *supra* note 2, at 12.

<sup>426</sup> See, e.g., Ellen Lutz, *Transitional Justice: Lessons Learned and the Road Ahead*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY*, *supra* note 2, at 325, 333–34.

<sup>427</sup> See generally Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 *MICH. J. INT’L L.* 1 (2010).

<sup>428</sup> Berkowitz, Pistor & Richard, *supra* note 33, at 189.

<sup>429</sup> In contrast, in South Africa, a majority (57.3%) approved of the use of amnesty mainly “as contributing to the peaceful transition to majority rule in South Africa.” GIBSON, *OVERCOMING APARTHEID*, *supra* note 18, at 266–67; see also van der Merwe & Chapman, *supra* note 163, at 266 (noting that public acceptance of amnesty was also based in part on how “it would be ameliorated through apology, confession, and reparations”).

transition, relatively small perpetrator and victim classes, and a comparatively higher level of moral consensus around mass violence than did Sierra Leone and Liberia. Ghana's experience with its truth commission also exhibits a fair amount of innovation from the South African model. For example, the NRC Act did not explicitly mandate it to "restore dignity to victims" or "address issues of impunity" like the other commissions.<sup>430</sup> There were of course significant variations in how each truth commissions implemented their mandates, the quality of the work produced by each commission, and their legitimacy to the respective societies. Yet, Liberia's use of a truth commission following its conflict left much to be desired, while Ghana's use of a truth commission following its transition from authoritarian rule was comparatively more successful in contributing toward its stated objectives.<sup>431</sup> Significantly, Ghanaians perceived their commission as contributing more to the central objective of truth recovery than did Liberians.<sup>432</sup>

Other important variables might help to explain why it is that post-conflict commissions might not function as optimally. For instance, it may be that where truth commissions are utilized following a low-intensity conflict, which leaves fewer numbers of victims and perpetrators impacted by the war and less moral dissensus, they can function more optimally. Alternatively, the time between the transition and the establishment of transitional institutions, the role that amnesty plays in influencing the behavior of alleged perpetrators, cultural norms about legal institutions and judicial traditions, differences in patterns of state formation, colonization and decolonization experiences, as well as civil society activism<sup>433</sup> may all have explanatory roles in the effectiveness of transplanted truth commissions. However, this Article did not discuss these variables at length, in part, due to time constraints, but also because I focused on institutional constraints. Much more research is needed to determine what explanatory roles these other factors may play. The key-variable approach begins that inquiry.

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<sup>430</sup> Compare The National Reconciliation Commission Act, 2002 (Ghana), available at <http://www.ghanareview.com/reconact.html>, with An Act to Establish the Truth and Reconciliation Commission of Liberia (June 10, 2005), available at <http://www.refworld.org/docid/473c6b3d2.html>, and Truth and Reconciliation Commission Act of 2000 (Sierra Leone), available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>.

<sup>431</sup> For more discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26.

<sup>432</sup> See, e.g., CDD-GHANA, VICTIMS SURVEY, *supra* note 209, at 22 (noting that 60% of the victims surveyed thought that "the NRC obtained truthful confessions from abusers" (internal quotation marks omitted)). Cf. HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY, *supra* note 210, at 70 ("[D]espite the work of the TRC[-L], just 44% believed that the truth about the civil wars is known.").

<sup>433</sup> See Engstrom, *supra* note 20, at 51.

The experiences of all three countries suggest that the use of truth commissions to address gross human rights violations committed during periods of authoritarian rule as well as war crimes committed during widespread and divisive conflicts, without examining “the specific needs of the particular context,”<sup>434</sup> requires some serious rethinking. Indeed, the legal-transplant literature informs us that, in order for transplants to be effective, there must be a “self-sustaining demand for legal innovation and change.”<sup>435</sup> Less formal mechanisms of truth-telling are likely to be cheaper, resonate more with affected communities,<sup>436</sup> and be “more efficient than the borrowed or externally-imposed ones.”<sup>437</sup> My research indicates that the “Western style hearings” of the truth commissions and the “very structure of the commissions” did not resonate with people on the ground.<sup>438</sup> Many interviewees stressed the importance of local practices of truth-telling and reconciliation as opposed to importing foreign models.<sup>439</sup> My research indicates that more de-centralized bodies, located outside of the capitals, will likely be more impactful at promoting truth-telling and fostering reconciliation. As van der Merwe and Chapman have noted, “[d]elivering restorative justice for individual survivors is not a realistic goal for a structure such as [a] TRC.”<sup>440</sup> This is particularly so in post-conflict countries<sup>441</sup> due to the limited impact that the commissions have in rural areas.<sup>442</sup> For example, in Sierra Leone, “it is estimated [that] 80 percent of the population does not access the formal justice sector.”<sup>443</sup> The generally limited dissemination of truth commissions’

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<sup>434</sup> Baxter, *supra* note 116, at 326.

<sup>435</sup> Berkowitz, Pistor & Richard, *supra* note 33, at 190.

<sup>436</sup> Interviewees in all countries stated that they did not understand the truth-telling process. Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>437</sup> Sesay, *Freetown Survey*, *supra* note 266, at 43–44.

<sup>438</sup> Interviews from Sierra Leone, *supra* note 106; *see also* Sriram, *supra* note 63, at 169 (discussing the commission’s lack of fit with Sierra Leonean political and social culture due to its formal structure, as well as the limited resonance of public confessions).

<sup>439</sup> Interviews from Ghana, *supra* note 197; Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106; *see also* Sriram, *supra* note 63, at 168 (discussing the use of cleansing ceremonies to reintegrate former child combatants in Sierra Leone).

<sup>440</sup> *See, e.g.*, van der Merwe & Chapman, *supra* note 163, at 272.

<sup>441</sup> Interviews from Liberia, *supra* note 126; Interviews from Sierra Leone, *supra* note 106.

<sup>442</sup> The commissions’ hearings in rural areas were inadequate, which limited the participation of those living in rural areas. For example, the NRC held hearings in all regional capitals for two weeks. The TRC-SL conducted weeklong hearings in each district. The TRC-L held county hearings for a week each and also embarked on county consultations to supplement the county hearings near the end of its mandate. Interviews from Liberia, *supra* note 126. Thirty-eight percent of the fifty-eight respondents from rural areas were either not informed about the TRC-L or did not understand what its purpose was, as compared with 100% of the twenty-one interviewees in Monrovia who were familiar with the TRC-L. *Id.* However, the interviews I conducted in Monrovia were mostly with civil society leaders and other stakeholders. *Id.*

<sup>443</sup> Sriram, *supra* note 63, at 165.

reports<sup>444</sup> and high levels of illiteracy in some post-conflict countries also limit the impact that these mechanisms can have.<sup>445</sup> In South Africa, the truth commission was infused with local principles of *Ubuntu*, as discussed earlier.<sup>446</sup> The reality of the truth commission's proceedings may not have always fully reflected traditional practices and ceremonies of reconciliation, and were likely subsumed in the commission's efforts to document the truth and provide amnesty. Nonetheless, practices of truth-telling and reconciliation are especially locally and culturally specific and must be rooted in community norms. These attributes do not make for easy transplantation. Much of the critique of the legal-transplant literature has centered on concerns about Western imperialism and colonialism. Yet, my analysis indicates that transplanted institutions will likely face difficulties even when the transplants are ostensibly South-to-South.

### C. *International and Foreign Policy Implications*

International actors, such as the U.N. and the World Bank, that are involved in post-conflict reconstruction efforts prefer models that can be easily transplanted from one country to the next. The policy implications of this Article suggest that the increased "templization" of transitional justice measures, and in particular truth commissions, by the U.N. and other actors<sup>447</sup> is unlikely to lead to desired results. A "one-size-fits-all" approach is not likely to achieve desired results of norm internalization and compliance, particularly where affected societies do not seem to place a high premium on truth commissions.<sup>448</sup> For example, many statement-givers to the TRC-L did not prioritize truth commissions, with less than 5% recommending adopting a restorative-justice approach.<sup>449</sup> Instead, the U.N. and other international actors should lend support to community and locally driven processes of truth-telling. Additionally, the foreign policy implications of this Article for the United States' interventions in post-conflict and failed states that

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<sup>444</sup> See, e.g., van der Merwe & Chapman, *supra* note 163, at 253 (discussing the limitations of the SATRC report, which was released in five massive volumes, with no summary report available in any South African language). *But see* HAMBER, *supra* note 292, at 142 (discussing the wide audience that the SATRC weekly television broadcast generated and the arguably greater coverage on radio).

<sup>445</sup> For further discussion, see Sirleaf, *Beyond Truth & Punishment*, *supra* note 26, at 248.

<sup>446</sup> For further discussion, see *supra* text accompanying notes 143-44.

<sup>447</sup> See OFFICE OF THE U.N. HIGH COMM'R FOR HUM RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: TRUTH COMMISSIONS, U.N. DOC. HR/PUB/06/1 (2006).

<sup>448</sup> See, e.g., SCSL SURVEY, *supra* note 107, at 22 (indicating that "truth commission" was not the most common response from respondents in Sierra Leone and Liberia "[w]hen asked how the truth could be established").

<sup>449</sup> BENETECH STATS., *supra* note 330, at 39 fig.26.

may pose security risks are also significant. This is especially poignant given the recent history of United States interventions in countries like Afghanistan, Iraq, Libya, and, potentially, Syria. In these circumstances, it is far less likely that the quick interventions supported by the United States, such as the Iraqi High Tribunal<sup>450</sup> or the purging of Baathists in Iraq, would foster desired results. My research indicates that what transitional justice looks like in Iraq, which had an authoritarian regime in power prior to the United States' intervention, and what it looks like in Afghanistan, which had been embroiled in a civil war for several decades prior to the United States' involvement, would be quite different. For example, while a truth commission might be more appropriate for Iraq, it would likely have much less utility in Afghanistan. Instead, more long-term approaches aimed at building institutional capacity and moral consensus around the wrongfulness of mass violence would likely be better placed in Afghanistan. Yet, the long term interventions required to address the root causes of conflicts is likely to be "beyond the will and capacity" of the United States and other donor governments.<sup>451</sup> "[I]t is [also] not at all clear that the US government," or any other for that matter, "knows how to create a working state in a country where none exists," yet there is a pressing need in post-conflict societies to establish permanent institutions "through which societal conflicts may be pursued without large-scale violence."<sup>452</sup> The United States and other donor countries can lend support to local initiatives, assist with capacity building of institutions, as well as provide increased economic assistance to post-conflict countries.

Much of the existing literature, when discussing transitional institutions, ignores the particularities of post-conflict societies. The large number of individuals seeking redress in post-conflict societies, as well as the enormous number of perpetrators who must also be integrated back into society, means that a thicker conception of justice is required. Contrary to the claim of Gibson and others that "truth commissions are most effective when they attempt to transform a society" as opposed to focusing "on the needs of victims and perpetrators,"<sup>453</sup> it is far more likely that the opposite is true. Moreover, no legal institution, court, or truth commission is going to achieve

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<sup>450</sup> The trials before the Iraqi High Tribunal had serious administrative, procedural, and substantive legal defects, which resulted in the failure to meet essential fair-trial standards, such that the credibility of the process itself is doubtful. *See, e.g.*, NEHAL BHUTA, HUMAN RIGHTS WATCH, *JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL* (2006), available at <http://www.hrw.org/sites/default/files/reports/iraq1106webwcover.pdf>.

<sup>451</sup> *See* Engstrom, *supra* note 20, at 58.

<sup>452</sup> Licklider, *supra* note 35, at 299–300.

<sup>453</sup> *See, e.g.*, Gibson, *Legitimacy Theory and Truth Commissions*, *supra* note 18, at 126.

societal transformation.<sup>454</sup> Indeed, the overwhelming faith that scholars and practitioners place in legal institutions, like truth commissions, to respond to mass atrocity has served to obscure other justice priorities that victims and affected societies have concerning a more transformative distributive justice.<sup>455</sup> Following a conflict, “social justice is on the minds of many,” as “[p]eople emerging from war expect life to improve.”<sup>456</sup> Thus, it is particularly important that social, political, legal, and economic institutions are fashioned to address distributional concerns.<sup>457</sup> In post-conflict societies, it is far less likely that a quick-fix mechanism, such as a truth commission or even a court, would be able to address the underlying causes of conflict because “there are . . . limits inherent in the recourse to judicial procedures and logics in addressing complex social and political problems . . . .”<sup>458</sup> As noted above, much more attention needs to be given to formulating contextually appropriate responses following mass violence in post-conflict countries. Such attention is beyond the scope of this Article, but I intend to explore the potential for distributive and other approaches to justice in future works.

#### METHODOLOGICAL APPENDIX

I selected Ghana, Sierra Leone, and Liberia for this cross-national study because they are located in the same sub-region and have somewhat similar historical and cultural backgrounds as well as socio-economic development levels. They represent a mix of transitions, with Ghana emerging from a series of authoritarian regimes, and Sierra Leone and Liberia transitioning from devastating conflicts. They utilized a combination of prosecutions (Sierra Leone), truth commissions (all three countries), amnesties (all three countries), reparations (Ghana and Sierra Leone), and lustrations (Liberia). The cross-national comparative study of these three countries provides a better approach to assessing

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<sup>454</sup> See, e.g., Doak, *supra* note 345, at 290 (noting that a plurality of objectives “can only be met through a long-term plurality of responses” and that “tasks will inevitably extend far beyond the time, attention and expertise that any court or truth commission could afford”).

<sup>455</sup> Distributive justice models are both forward- and backward-looking, seeking to improve political and socio-economic conditions overall, but without presuming equality or ignoring historical grievances. MANI, *supra* note 36, at 179–82. Distributive justice approaches are particularly necessary in societies where a large portion of the population holds historical grievances that an intervening conflict has only exacerbated. Liberia and Sierra Leone are paradigmatic cases of this.

<sup>456</sup> PETER REDDY, PEACE OPERATIONS AND RESTORATIVE JUSTICE: GROUNDWORK FOR POST-CONFLICT REGENERATION 30 (2012).

<sup>457</sup> See, e.g., Frances Stewart, *Horizontal Inequalities and Conflict*, in ELGAR HANDBOOK OF CIVIL WAR AND FRAGILE STATES, *supra* note 35, at 93, 103 (discussing the need to prioritize policies that “correct economic, social and political [horizontal inequalities]”).

<sup>458</sup> See Engstrom, *supra* note 18, at 52.

the effectiveness of truth commissions and allows for more in depth analysis. This qualitative or “on the ground” approach is particularly useful because I have familiarity with the historical and cultural context in the countries in which the research was undertaken. Additionally, this “grounded-theory approach” enabled me to “generate[] theory from the data” gathered, “rather than testing a priori theories against found data.”<sup>459</sup>

I conducted a series of interviews with 118 individuals in Ghana, Sierra Leone, and Liberia between November 2008 and January 2009. My fieldwork took place in the capital of each country as well as four rural counties in Liberia.<sup>460</sup> In all, I conducted twelve interviews in Ghana, nineteen in Sierra Leone, and eighty-seven in Liberia, where rural interviews made up the majority (sixty-six). The interviews in Sierra Leone were with former staff of the TRC-SL, staff of the SCSL, commissioners of the Human Rights Commission for Sierra Leone (HRC-SL), staff of the National Commission for Social Action, the administrative body responsible for administering reparations, government officials, civil society leaders, professors, lawyers, victim representatives, and civil servants in Freetown, Sierra Leone from November 3 to 13, 2008. The interviews in Ghana were with former staff and commissioners of the NRC, civil society leaders, human rights victims who testified before the commission, journalists, professors, lawyers, judges, and other government officials in Accra, Ghana from November 18 to 29, 2008. In Liberia, I conducted twenty-one interviews with staff and commissioners of the TRC-L, civil society and religious leaders, professors, journalists, lawyers, civil servants, government officials, and U.N. personnel in Monrovia, Liberia. I also conducted sixty-six interviews in rural areas with mostly human rights victims as well as religious, civil society, traditional leaders, and government officials in Lofa (21), Nimba (12), Bong (18), and Grand Gedeh (15) counties. For the rural interviews, I went to a number of areas that were particularly victimized, including one town that was burned down during the war and another that was the site of a massacre. I conducted the Liberian interviews between December 8 to 22, 2008 and January 5 to 8, 2009. I conducted more interviews in Liberia in order to assess the impact of the TRC-L, which was operating at the time. There is also a paucity of research on the transitional justice process in Liberia.

I selected interviewees based on convenience rather than a scientific sample. I provide a brief summary of the demographics of the interviewees in Table 4 below:

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<sup>459</sup> KAARYN S. GUSTAFSON, *CHEATING WELFARE* 201 (2011).

<sup>460</sup> I selected those counties to ensure ethnic and geographic diversity. I also selected some areas because they served as rebel bases during the conflict.

Table 4

	N	MALE	FEMALE	ELITE	NON-ELITE	URBAN	RURAL
GHANA	12	8	4	12		12	
SIERRA LEONE	19	13	6	19		19	
LIBERIA	87	53	34	38	49	21	66
TOTAL	118	74	44	69	49	52	66
PERCENT OF INTERVIEWEES	100%	62.7%	37.3%	58.5%	41.5%	44.1%	55.9%

I selected interviewees with the help of facilitators in each country. This was partially due to the difficulty of identifying research subjects. All interviews were conducted in person and lasted anywhere from thirty minutes to two hours or more, depending on the interviewee's availability. All interviewees agreed to have their statements recorded. I transcribed all recorded interviews and analyzed them. Most interviews were in English or some variation (e.g., "pidgin" English or Krio in Sierra Leone). Facilitators doubled as translators where necessary. Interviewees expressed varying degrees of comfort with being quoted directly. As such, I generally do not attribute specific individuals with statements. Instead, I have included a small sample below of some of the questions I asked during my field research and common responses.

**Question 1. How do you evaluate the work of the truth commission in your country?**

**Common Responses**

*Respondents in all countries stated that the **time frame was too short** for the amount of work the commissions needed to do (more interviewees expressed this sentiment in Liberia).*

*Respondents in all countries stated that **outreach was inadequate** about the truth-telling process.*

**Post-Conflict Responses**

*Interviewees in Sierra Leone and Liberia stressed the **limited victim and perpetrator participation** in the truth-telling process.*

*Interviewees in Liberia and Sierra Leone expressed more concern about **staffing and administration problems** with their commissions, than did interviewees in Ghana.*

***Inadequate funding** was the most common response to this question, and interviewees in Liberia and Sierra Leone expressed this concern more than did interviewees in Ghana.*

**Country Specific Responses**

*More interviewees in Liberia responded that the **statement taking***



*was not well managed than did in Sierra Leone and Ghana. Inadequate witness protection was a particularly popular response from Liberian interviewees.*

*Interviewees in Liberia mentioned legitimacy and credibility problems with the commission more than did any other interviewees.*

**Question 2. What are the tangible benefits of the truth-telling process in your country?**

**Common Responses**

*Interviewees across all countries indicated that the commission helped to document human rights violations and create a historical record.*

*Interviewees in Ghana and Liberia responded that the commission helped to hold perpetrators accountable.<sup>461</sup>*

**Post-Conflict Responses**

*More interviewees in Liberia and Sierra Leone responded that public hearings did not facilitate truth-telling than did in Ghana.*

*More interviewees in Liberia and Sierra Leone responded that the truth commission did not help facilitate healing and reconciliation than did in Ghana.*

*More interviewees in Liberia and Sierra Leone stated that the impact of the commission was unclear (more respondents had this assessment in Liberia) than did in Ghana.*

**Country Specific Responses**

*Ghanaian respondents noted that the commission served as a deterrent.*

*More interviewees in Ghana regarded the commission's biggest contribution as reparations than did in the other countries.*

*More interviewees in Ghana remarked that the commission had helped to consolidate democracy than did in the other countries.*

*More interviewees in Ghana noted that the commission had provided acknowledgement of victims than did in the other countries.*

*More interviewees in Liberia remarked that the commission had not helped to consolidate peace and stability than did in the other countries.*

*More Sierra Leonean respondents noted that the commission's report has left a positive legacy than did in the other countries.*

*More interviewees in Sierra Leone responded that the commission created a platform for change and institutional reform than did in the other countries.*

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<sup>461</sup> Both countries did not have a court to prosecute the alleged perpetrators of abuses.

**Question 3. What were some of the main challenges for the truth commission in your country?**

**Common Responses**

*Both Sierra Leonean and Ghanaian respondents cited the **delay with reparations**.*<sup>462</sup>

*Interviewees in Sierra Leone and Ghana noted the **lack of focus on gender**.*

*Interviewees in Ghana and Liberia noted the **lack of focus on ethnicity**.*

**Country Specific Responses**

*Ghanaian respondents remarked on the **politicization of the truth-telling process**.*

*Many Sierra Leonean respondents viewed the **coexistence of the court and the commission as a mistake**, mainly because it hindered the work of the commission as opposed to the court.*<sup>463</sup>

**Question 4. How do you evaluate the government's implementation of the truth commissions' recommendations (Sierra Leone and Ghana only)?**<sup>464</sup>

**Common Responses**

*Interviewees in both Ghana and Sierra Leone responded that there was **limited civil society follow-up**.*

**Country Specific Responses**

*More respondents in Sierra Leone noted that the government **had not done much** compared to respondents in Ghana.*

*More respondents in Sierra Leone cited the **lack of political will** as a problem than did in Ghana.*

**Question 5. How is the truth-telling process in your country perceived?**

**Common Responses**

*Respondents in all three countries noted that the **truth-telling process was not well understood**.*

*Respondents across all countries responded that **perceptions of the truth-telling process had changed for the worse**.*

*More interviewees in Liberia noted that **prosecutions would have been preferable** than did in Ghana.*

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<sup>462</sup> The truth commission in Liberia had not released its report or recommendations at the time of the interviews.

<sup>463</sup> Some interviewees in Liberia also referenced the impact that Taylor's trial before the SCSL had on the truth-telling process in Liberia. For further discussion, see Sirleaf, *Regional Approach to Transitional Justice?*, *supra* note 290, at 262–71.

<sup>464</sup> The truth commission in Liberia had not released its report or recommendations at the time of the interviews.

**Country Specific Responses**

*Interviewees in Liberia noted that the process was a **waste of time and resources.***

*Interviewees in Liberia noted that the process **opened old wounds.***

**Question 6. What are some of the most important lessons learned from your country's experience with transitional justice?****Common Responses**

*Interviewees across all countries stressed the **need for local or national ownership of the truth-telling process** (this was more pronounced from Sierra Leonean interviewees).*

*Interviewees in Ghana and Sierra Leone commented that the **hearings were too legalistic and that the structure of the commission did not fit society.***

**Post-Conflict Responses**

*Respondents in Sierra Leone and Liberia in particular stressed the **importance of traditional and local mechanisms of reconciliation.***

*Interviewees in Liberia and Sierra Leone responded that the **transitional-justice processes used should be the result of consultations.***

**Country Specific Responses**

*Interviewees in Liberia highlighted the importance of **proper vetting and selection of commissioners.***

*Interviewees in Liberia emphasized that you **cannot use a formulaic approach for truth commissions.***

*Interviewees in Sierra Leone highlighted the need to **sequence a court and commission.***

This Article also relies on additional instruments to corroborate and supplement results from my interviews. In Ghana, a nationally representative survey of 1000 adults was conducted in 2001,<sup>465</sup> and a survey of 102 victims who engaged with the NRC process was conducted in March 2006.<sup>466</sup> In Sierra Leone, a survey aimed at understanding Sierra Leoneans' perceptions of peace, justice, and reconciliation was conducted in mid-2007 of 1717 adults randomly selected across nine districts in Sierra Leone,<sup>467</sup> and a randomized survey of 101 residents of Freetown, Sierra Leone was conducted in 2006.<sup>468</sup> In Liberia, a nationwide survey of 4501 randomly selected respondents was conducted in late 2010,<sup>469</sup> as well as a randomized

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<sup>465</sup> See CDD-GHANA, PUBLIC OPINION SURVEY, *supra* note 45.

<sup>466</sup> See CDD-GHANA, VICTIMS SURVEY, *supra* note 209.

<sup>467</sup> See BBC, SIERRA LEONE SURVEY, *supra* note 211, at 3.

<sup>468</sup> See Sesay, *Freetown Survey*, *supra* note 266.

<sup>469</sup> See HUMAN RIGHTS CTR., U.C. BERKELEY LIBERIA SURVEY, *supra* note 210.

survey of 2841 people across various regions of Liberia and Sierra Leone conducted in mid-2012.<sup>470</sup> This Article also relies on the statistical analysis of the statements taken by the truth commissions.<sup>471</sup> Additionally, this Article relies on relevant survey results from the Afrobarometer, a comparative series of randomized surveys, which measures attitudes toward democracy, governance, and other issues in a number of African countries. It had data available for all three countries.<sup>472</sup>

Lastly, I also use international metrics for determining state weakness, primarily relying on the Index of State Weakness.<sup>473</sup> The Index ranks all 141 developing countries according to their performance in four key areas—economics, politics, security, and social welfare. The scale also looked at twenty “subindicators,” which included widely recognized indicators in each area. I eschewed the use of such indicators for evaluating the truth commissions and instead prioritized the perspectives of the purported beneficiaries of the commissions. I did so because my work attempts to assess truth commissions’ claims on their own terms and to determine how truth commissions affect real people. Chapman and van der Merwe adopted a similar methodological approach because “[t]he experience of direct victims of such abuses is an obvious starting point and critical measuring stick of efforts to overcome [a] legacy of abuse.”<sup>474</sup> In determining how to evaluate “success,” I, like Gibson, relied on the specified “goals of the process.”<sup>475</sup> Additionally, since truth commissions describe themselves “as having a victim orientation,” and frame “claims of success largely in terms of the assistance [they are] able to provide to [victims],”<sup>476</sup> my research, like Chapman and van der Merwe’s and Gibson’s work, attempts to assess truth commissions’ claims on their own terms. I also eschewed the use of such indicators due to the inherent difficulty in attempting to represent complex social phenomena, such as “reconciliation” or “truth,” with a numerical scale. Yet, the use of such indicators is far less problematic when comparing institutional capacity between different countries and evaluating factors like economic development and security. The data sources used in the Index span from 1991 to 2007<sup>477</sup> and coincide with the periods of operation of the truth commissions in

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<sup>470</sup> See SCSL SURVEY, *supra* note 107.

<sup>471</sup> See BENETECH STATS., *supra* note 330; TRC-SL REPORT, APP. 1, *supra* note 332.

<sup>472</sup> See AFROBAROMETER, GHANA RESULTS, *supra* note 299; AFROBAROMETER, LIBERIA RESULTS, *supra* note 293; AFROBAROMETER, SIERRA LEONE RESULTS, *supra* note 296.

<sup>473</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1).

<sup>474</sup> Audrey R. Chapman & Hugo van der Merwe, *Preface* to TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 25, at viii.

<sup>475</sup> GIBSON, OVERCOMING APARTHEID, *supra* note 18, at 3 (internal quotation marks omitted).

<sup>476</sup> Chapman & van der Merwe, *supra* note 474, at viii.

<sup>477</sup> INDEX OF STATE WEAKNESS, *supra* note d (tbl.1), at 30–37.

Ghana (2001–2004), Sierra Leone (2000–2004), Liberia (2005–2009), and South Africa (1995–2003).

The survey data does not necessarily coincide with when I conducted my field research. The data in this Article cover a period of between one and eight years in each country. Because baseline data is unavailable, it is not possible to measure how perceptions toward these mechanisms may have changed over time. As such, the data may reflect long-held perceptions and not necessarily be a result of the processes themselves.<sup>478</sup> Further, the data used does not question the same set of respondents, nor was it feasible to conduct follow-up interviews or control the protocol of questions utilized in other surveys. Measuring the impact of transitional justice mechanisms is an inherently difficult exercise. This is particularly so with such nebulous concepts like moral consensus surrounding mass violence.<sup>479</sup> Notwithstanding the above limitations, the use of both field research and survey data in this Article provides useful insights into the perceived impact of the transitional justice mechanisms utilized.

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<sup>478</sup> See Backer, *supra* note 25, at 53 (discussing the benefits and limitations of a longitudinal approach).

<sup>479</sup> See *supra* Part III.