



# Introduction: Ways of Knowing Atrocity: A Methodological Enquiry into the Formulation, Implementation, and Assessment of Transitional Justice

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Transitional justice comprises a broad set of responses to violence committed during periods of conflict, repressive rule, or occupation.<sup>1</sup> Over the last thirty years, criminal trials, truth commissions, memorialization projects, and restorative justice processes have been implemented with increasing frequency across the globe, creating a rapidly expanding area of human rights practice. Within this domain, international criminal trials have emerged as the predominant approach, described in recent scholarship as “a key component—perhaps the most powerful component—in the broader universe of transitional justice.”<sup>2</sup>

Coinciding with this well-documented resort to law, there is a critical turn in the scholarship as transitional justice processes come under growing scrutiny.<sup>3</sup> Scholars criticize criminal trials and truth commissions as initiatives that further the reproduction or, according to some, the imposition of Western norms, leading to observations of cultural miscommunication or imperialism.<sup>4</sup> Driven by a similar impetus, challenges are raised against the evidentiary foundations of both

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<sup>1</sup> There is a large body of scholarship on transitional justice, a term coined in the early work of Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) and Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace, 1995). The term initially referred to the use of law, be it criminal, constitutional, civil, or administrative, to facilitate the move from violence to peace, or autocracy to democracy. More recently, “transitional justice” has been invoked to refer to a broad set of legal and non-legal responses to particular types of violence during periods of political change.

<sup>2</sup> Peter Dixon and Chris Tenovey, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims,” *The International Journal of Transitional Justice* 7 (2013): 393–412. In this respect, we understand international criminal justice as a part of the wider study of transitional justice, see Naomi Roht-Arriaza, “Editorial Note,” *The International Journal of Transitional Justice* 7 (2013): 388–89.

<sup>3</sup> Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 411–40.

<sup>4</sup> Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009) and Chandra Lekha Sriram, “Transitional Justice and the Liberal Peace,” in *New Perspectives on Liberal Peacebuilding*, edited by Edward Newman, Roland Paris, and Oliver P. Richmond (Tokyo and New York: United Nations University Press, 2009).

criminal convictions and truth commission reports.<sup>5</sup> This special issue proposes that some of these current tensions are a result of clashes over the means through which lawyers, scholars, and local populations make sense of both the experience of violence, or more broadly construed harm, and the response to these harms. If such clashes over these different *ways of knowing*<sup>6</sup> atrocity are central to understanding the contours of the debates and disagreements over transitional justice, then it follows that a focus on the methods used to design, implement, and assess these processes provides one avenue for exchange across and within these current epistemic divides.

Bringing together scholars and practitioners in politics, law, literature, statistics, anthropology, history, and development studies, this special issue focuses on the processes used to respond to atrocity starting with how we know about the nature of harm, and following this, what methods are used to both respond to these abuses and evaluate these responses. This collection maps the forms through which knowledge on atrocity is conveyed and simultaneously explores how the form influences its content. Some authors, including Antjie Krog, Briony Jones, and Simon Robins and Erik Wilson, undertake an explicit epistemic analysis, while others including Megan Price and Patrick Ball, Bert Ingeleare, Nathalie Nguyen, and Hiram Abtahi detail their methods and, in doing so, offer the reader an opportunity to assess the process of knowledge developed within the confines of particular disciplines.

Work on criminal justice in a domestic setting has long argued for interpreting criminal law as a social practice to which philosophy, history, law, and the social sciences can be “viewed as making complementary contributions to the general project of social theory.”<sup>7</sup> Such writings highlight the need to focus on processes that lead to the criminalisation of particular conduct, from “articulation of offences through investigation, diversion, prosecution, trial...and the execution of punishment.”<sup>8</sup>

Crucial to this collection is the recognition that the knowledge employed at each of these stages of a transitional justice process is necessarily incomplete. As Mariana Valverde writes in the domestic context, legal decisions “have to be taken without full knowledge.”<sup>9</sup> In the context of political violence, investigations

<sup>5</sup> Some of the current critical writings on these evidentiary foundations include Antjie Krog, Nosisi Mpolweni, and Kopano Ratele, *There Was This Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile* (Scottsville: University of KwaZulu-Natal Press, 2009), Nancy A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010), and Richard A. Wilson, “Through the Lens of International Criminal Law: Comprehending the African Context of Crimes at the International Criminal Court,” *Studies in Ethnicity and Nationalism* 11, no. 1 (2011): 106–15.

<sup>6</sup> The next section discusses the significance of the use of this term, and we are grateful to early discussion with Leigh Payne, Francesca Lessa, and Phil Clark on using this formulation as a means of entering into a discussion on methodologies.

<sup>7</sup> Nicola Lacey, “Responsibility and Modernity in Criminal Law,” *The Journal of Political Philosophy* 9, no. 3 (2001): 249–76.

<sup>8</sup> *Ibid.*

<sup>9</sup> Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003), 4.

of human rights abuse are carried out and evidence is presented; but the investigations occur in cross-cultural contexts, in multiple languages, and under domestic and international pressures. The evidence is ambiguous or insufficient and the reasoning used to generate a decision is in an area of rapidly developing case law. This suggests that challenges for knowledge generation on atrocity are similar to, but perhaps even more pronounced than, those that arise when responding to everyday violence.

Richard Wilson highlights some of the specific challenges to the production of knowledge on international crimes. In his recent work on the role of history in international criminal trials, he argues that within international courts, historical knowledge of the conflict is shaped by the legal actors' strategies and motivations, as they draw out particular accounts of the past.<sup>10</sup> Lawyers use history, developed through eyewitness testimony and corroborating documentary evidence, to pursue specific legal objectives at a given moment in the trial. In the dynamic exchange between the knowledge content and the form through which it is expressed, he suggests some of these endeavours have been crucial to establishing legal categories such as genocide, which emphasizes the collective nature of international crimes, while other legal advocacy strategies run the risk of entrenching polarized narratives of the conflict.<sup>11</sup> Together, this work calls for us to look at transitional justice processes not only as a set of laws and institutions but also as a broader series of processes shaped by individual actors in a specific social, political, and historical context.

The articles included in this special edition either examine or epitomize different approaches currently employed in the processes of transitional justice practice and scholarship. In looking at both the construction of knowledge and the different disciplinary methods through which the knowledge is developed, the collection is able to draw attention to the dynamic relationship between the process and the knowledge production, between the method and the methodology. An increased sensitivity to the forms through which different actors know about atrocity draws attention to two over-arching themes developed across all seven of the articles included in this special issue. First, transitional justice processes provide a means of categorizing abuses. In doing so, they set the parameters of what type of harm warrants a response. Acknowledging the types of classification and the sources that underpin them sheds light on both what is made visible and what is rendered invisible in our current response to serious human rights violations. Second, when read together, the papers draw valuable attention to the researcher as a relational agent producing knowledge on atrocity, not only through determining the choice of method and the area of enquiry but through building sets of relationships that are a part of the response to the abuse. Acknowledging the relational aspect of both the practice and the research of transitional justice highlights the ethical obligations associated

<sup>10</sup> Richard A. Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), 70.

<sup>11</sup> *Ibid.*

with obtaining access and claiming expertise when responding to serious human rights violation.

In his detailed work on epistemology, Günter Abel suggests that “knowledge cannot exist independent of the forms, practice, and dynamics of the underlying representational, interpretational, and sign system.”<sup>12</sup> To examine this idea in terms of human rights violations, the abuse occurs in a physical sense, but the way or the form in which it is accounted, represented, and interpreted influences how it is known. An emphasis on the *ways of knowing* atrocity provides a means of examining the experiences of atrocity and the current transitional justice responses to it, by explicitly focusing on the forms of knowledge that we use and their methodological and epistemological presumptions.

At the outset, it is necessary to note that there are a number of constraints that are specific to the creation of knowledge in this area, established in the existing literature. In Holocaust studies, Dori Laub and Shoshana Felman pioneered ideas around the impossibility of knowing atrocity. They argued that there is a “crisis of comprehensiveness” due to the inability to bear witness from the inside of death, which leaves a void in language itself.<sup>13</sup> From this perspective, knowing atrocity is only possible if one has been in the event of atrocity oneself. The outside person, the observer, the human rights reporter, the survivor cannot know because he or she can know only what is conveyed by the event of saying and not the actual experience of it.<sup>14</sup> Further challenging our ability to know atrocity, for Lawrence Langer, is that the form in which the harm is experienced is not the verbalization of the abuse, as required by the chronological testimony in courtrooms or truth commission hearings; it is not linguistic but rather physical. The body’s experience of the trauma of abuse gives form to that abuse.<sup>15</sup> In addition, the temporal experience of this physical, spiritual, and mental abuse extends well beyond the immediate violence, rendering longer-term harms, or harms that are not easily verbalized, entirely invisible to current reparatory, truth-seeking, or retributive processes.<sup>16</sup>

Yet, it is the difficulty or perhaps even the impossibility of explaining, interpreting, and making sense of serious violations—of the gas chambers, the child cut

<sup>12</sup> Günter Abel, “Forms of Knowledge: Problems, Projects, Perspectives,” in *Clashes of Knowledge: Heterotopies and Orthodoxies of Knowledge*, edited by Peter Meusburger, Michael Welker, and Edgar Wunder (London: Springer, 2008).

<sup>13</sup> Dori Laub, “An Event without a Witness: Truth, Testimony and Survival,” in *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History*, edited by Dori Laub and Shoshana Felman (New York: Routledge, 1992).

<sup>14</sup> Gorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999). See for a similar argument Jean-Francois Lyotard, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988).

<sup>15</sup> Lawrence L. Langer, “The Alarmed Vision,” in *Social Suffering*, edited by Arthur Kleinman, Veena Das, and Margaret Lock (Oakland: University of California Press). See further discussion in Elaine Scarry, *The Body in Pain: The Unmaking and Making of the World* (Oxford: Oxford University Press, 1985) and Cathy Caruth, *The Unclaimed Experience: Explorations in Trauma and Memory* (Baltimore: John Hopkins University Press, 1996).

<sup>16</sup> We are grateful to Marjorie Jobson for this insight offered from the work of the Khulumani Support Group, a membership-based organization of roughly 85,000 victims and survivors of apartheid-related gross human rights violations in South Africa. Details of the group’s work can be accessed at <http://www.khulumani.net>.

by a machete, the firing squad turned on civilians—that drives people to seek a means of knowing about the abuse and finding a way of responding to it. It is in giving words to the unspeakable that we can start to understand it, but that we also, as interlocutors, shape the nature of that which we name. The outcome, as explored through the contributions to this special edition, is that we find ways of containing the incomprehensibility of the crimes. Such actions give form to our understanding of atrocity, yet they are not simply acts of containment, for they come to affect how we think of the material and represented nature of the violence. It is through such a process that we are able to conceive of crimes, to know them, and to respond to them, but in doing so we make aspects of the abuse, such as the underlying structural causes of the violence or the experiences of the abuse that cannot be easily verbalized, invisible.

While dealing explicitly with the constraints on what we can know, it is hoped that an awareness of the effect of form, particularly with regard to the process of categorizing abuse and the active role of the researcher, can lead to improvements in both the practice and research of transitional justice. An open and aware epistemic exchange among transitional justice practitioners and researchers will create a more solid foundation on which to understand serious human rights violations and design responses to them.

The special issue opens with Nathalie Nguyen's examination of the use of asylum as a form of reparatory justice and shows how the categories of researcher and subject can become blurred through the research process. This introduces the first major theme in the papers: the researcher as a relational agent in the research, who engages not only through the choice of method and the areas of enquiry but through a set of relationships that are established in response to the violence. Nguyen examines the Australian government and media reactions to the Vietnamese refugee crisis in 1975–76 following the end of the Vietnam War. As a historian, when working through recently released confidential documents in the National Archives of Australia, she discovered the records of her own family's arrival in Australia and evidence of how Prime Minister Gough Whitlam made a highly personal decision to grant her family the categorized legal status of refugee. Her method of interweaving an analysis of documentary evidence with reflections on the intersections between the official records and her family history as Vietnamese refugees blurs the line between researcher and research subject, offering a unique point of access and introducing an ethical sensitivity to her work.

Further illustrating a relational engagement with research, Antjie Krog draws on her own experience as a journalist covering the South African Truth and Reconciliation Commission (TRC) in generating her research enquiry. She argues that language and its underlying epistemology provides one route for accessing the worldview of the victims who testified before the TRC, and that this method is simultaneously driven by a desire to make sense of her own place in South Africa. She then proposes that in the context of the TRC, looking at language illuminates the African philosophical notion of interconnectedness-towards-wholeness, which better explains many black South African victims' initial constructive engagement with the TRC process and their more recent estrangement from it.

Similarly focused on the place of the researcher, Simon Robins and Erik Wilson see their role as agents of change. They criticize transitional justice processes as serving elite agendas to legitimate new political regimes. They go on to suggest that Participatory Action Research (PAR) carried out with victim organizations in Nepal offers a research method that also actively contributes to the mobilization of victims and victim organizations, empowering victims to engage in national transitional justice debates on their own terms and, ideally, to influence both the design and the implementation of these processes. In doing so they endeavour to both describe the power dynamics in the production of knowledge on atrocity and offer a method to give form to and enable local knowledge.

The second section turns to contributions from practitioners working in the field of transitional justice. The articles from Megan Price and Patrick Ball of the Human Right Data Analysis Group<sup>17</sup> and from Hiram Abtahi, Legal Adviser and Head of the Presidency Legal and Enforcement Unit of the ICC, address the question of how we know about different types of harms and recognize them in international criminal law. In doing so, the papers contribute to the second theme in the collection as a whole: how transitional justice processes categorize abuse and in doing so simultaneously conceal and reveal different types of violence.

In their article, Megan Price and Patrick Ball draw on their statistical expertise to estimate the occurrence of violence that is not generally accounted for in the established approaches to transitional justice. They suggest that the majority of information collected and correlated through truth commissions or criminal trials are based on what information is accessible and which individuals are willing to testify. As statisticians, they classify this type of information as constituting “convenience samples.”<sup>18</sup> They then argue that statistical methods can be used to more accurately estimate the actual extent of the abuse, rather than to simply reflect the extent of the reported abuse. They suggest that this increased accuracy is particularly important if transitional justice processes continue to claim to offer a historical account of large-scale violence and if the legal categories such as crimes against humanity, which require “widespread or systematic” abuse, are to reflect an empirical reality. To illustrate this point, they show how combining records of individuals killed in the Syrian conflict from multiple sources into a single aggregated list can then be examined using Multi-System Estimation (MSE) to obtain a more accurate figure for the number, rate, and location of casualties during the conflict.

Illuminating some of the sources that underpin the legal classifications under discussion, Hiram Abtahi’s article shows how public international law can be drawn on to develop a taxonomy of injuries and damages that could ground reparation claims in international criminal law. He undertakes a systematic classification of the types of injury in inter-State reparation claims, arguing that these claims have

<sup>17</sup> Details of the structure and work of this non-profit organization can be accessed at <https://hrdag.org/>.

<sup>18</sup> Megan Price and Patrick Ball, “The Limits of Observation for Understanding Mass Violence.”

recognized physical, material, and psychological injuries sustained by both natural and legal persons. He suggests that this state practice can and should be used as a means of establishing recognized legal categories of injury to assess reparation claims before the International Criminal Court (ICC). This article draws our attention to the sources that underpin different forms of knowledge used to examine the harms transitional justice is designed to respond to and argues that reference to state practice may offer a more progressive recognition of harm suffered by victims of international crimes than is currently realized in the reparations decisions of the ICC. Such analysis highlights what can be illuminated but also asks us to question what can be concealed in the process of atomization and categorization of abuse through international criminal law.

The final two articles engage with research methods and epistemologies used to assess the impact of transitional justice processes. In bringing together the themes of relational research and the process of categorization, the articles highlight how particular actors involved in a transitional justice process can claim expertise and authority and how research methods offer an avenue to take account of these power imbalances. In his article on the localized *gacaca* courts and their impact on post-genocide Rwandan society, Bert Ingelaere draws particular attention to the trust-building and relational aspects of empirical research, teasing out what it means “to be” Kinyarwanda. In response to the dominant approaches to impact assessments in transitional justice research, Ingelaere stresses the importance of context-specific knowledge and the processes of immersion into a foreign research environment. He discusses how authority and access intersected in his work on the *gacaca* courts and argues for the use of both qualitative and quantitative methods to assess the impact of the courts on the lives of ordinary Rwandans. He suggests that in combining ethnography and life histories with survey questionnaires and the quantitative coding of data, the researcher is better able to build a more “empirically comprehensive record”<sup>19</sup> of the lived experience of transitional justice.

Finally, to conclude the collection, the article by Briony Jones highlights the value of reflecting on how “each researcher and practitioner’s epistemological approach forms their theory of knowing and defines how they can make claims about atrocity.”<sup>20</sup> Her article explores the possibilities provided by narrative interviewing for critically assessing claims of success in Brčko District, Bosnia-Herzegovina. She argues that claims of success of reconciliation policies in this district are based on claims to expertise. Certain understandings of the harm, and of the policies designed to address it, gain greater credence based on the supposed expertise of particular actors who make these claims. It is through the narrative method that such claims to authority can be challenged, bringing to the fore the complicated ways in which expertise is produced in certain places at certain times. For Jones, knowledge of harm and of the impact of policies designed to address it is produced through the subjectivity of different positionalities, so she invites all of us to be willing to unsettle our assumptions about expertise.

<sup>19</sup> Bert Ingelaere, “Learning ‘To Be’ Kinyarwanda in Postgenocide Rwanda: Immersion, Iteration, and Reflexivity in Times of Transition.”

<sup>20</sup> Briony Jones, “Stories of ‘Success’: Narrative, Expertise and Claims to Knowledge.”

The articles included in this special issue came out of a yearlong knowledge exchange project supported by the United Kingdom's Economic and Social Research Council (ESRC). As part of this exchange, a series of workshops and seminars were organized, in collaboration with swisspeace,<sup>21</sup> at the Dickson Poon School of Law, King's College, London, and the Centre for Criminology, University of Oxford, between January and June 2013. These seminars adopted an interdisciplinary approach to exchange on current research methods and methodologies and led to the concurrent development of this special issue and a practitioner-oriented methods manual.

Together, the articles offer reflection, analysis, and commentary from practitioners and academics working across a broad spectrum of professions and academic disciplines. Their geographical interests extend from countries that have gained a lot of attention in transitional justice scholarship such as South Africa, Rwanda, and Bosnia-Herzegovina, to those less frequently examined including Vietnam, Syria, and Nepal. In examining the means through which transitional justice processes are designed, implemented, and assessed, the contributions extend beyond doctrinal analysis or purely theoretical debates to tease out points of agreement and difference in how atrocity is classified.

The exchange looks critically at both the construction of knowledge and the legal, historical, and social scientific methods through which that knowledge is developed. Such an approach allows us to examine our response to violence during transitions as a process that moves through identifying abuses, to examining the individual and collective response to these violations—which often includes formal transitional justice initiatives—and, finally, to looking at the impact of such interventions. It highlights some of what is made visible through these processes, showing for example how particular legal categories can allow for an institutional response and how specific interpretations of forgiveness or reconciliation better explain people's engagement with a transitional justice process. It simultaneously draws attention to what is made less visible, such as the socioeconomic conditions underpinning violence, the need to account for abuses that are not testified to, the level of discretionary decision-making individual people have at times of social and political upheaval, and the influence of expertise in claiming a right to both respond and assess that response.

As both the practice and the scholarship on transitional justice have expanded, so tensions over these interventions and their impact have surfaced. Country-specific qualitative analyses of the impact of transitional justice on affected communities have pointed in a different epistemic direction from the findings of larger comparative, quantitative research into the effect of these initiatives on democracy and human rights standards.<sup>22</sup> Making explicit both the process of categorization used

<sup>21</sup> swisspeace is an associate research institute of the University of Basel.

<sup>22</sup> Large comparative work has generally shown a more positive impact of transitional justice interventions while more localised ethnographic research has tended to be more critical. See Tricia D Olsen, Leigh A Payne, and Andrew G Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficiency* (U.S. Institute of Peace Press, 2010); Rosalind Shaw, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) and Hugo van der Merwe, Victoria Baxter, and Audrey R Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (U.S. Institute of Peace Press, 2009).



to respond to serious human rights violations and its limitations and the need to acknowledge the relational aspect of these responses offers a route for moving towards resolving these tensions. While this special issue is not comprehensive in the sense of including all the methodologies used in transitional justice practice and research, it highlights the relevance of these discussions from the entry point of a selection of commonly applied epistemological approaches. In doing so, it focuses on both methods and methodologies and calls on researchers and practitioners to be individually reflexive in their work and honest about the ethical obligations that come with establishing a set of interpersonal engagements in the wake of atrocity.

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