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BORDERS AND BOUNDARIES: IMPORTING ASSET RECOVERY “DUTY FREE” IN TRANSITIONAL JUSTICE PROCESSES

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Abstract

As new conflicts emerge, transitional justice practitioners are finding it increasingly imperative to incorporate the concepts of asset recovery into transitional justice processes and mechanisms. However, for its success, the pillar of transitional justice relating to international asset recovery needs strengthening. Yet a granular understanding of this dimension remains a critical blind spot in the transitional justice and human rights conversation. This paper brings the dynamics of asset recovery as an emerging aspect of human rights law to the fore. In terms of methodology this paper relies on Sharp’s critically motivated problem-solving theory. The paper suggests that for transitional justice to be holistic it should include asset recovery in its accountability mechanisms. Hopefully, it humbly contributes a new angle toward the understanding of what transitional justice can and could become.

Keywords : accountability mechanisms, asset recovery, economic justice, integrated approach to transitional justice critique

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I. INTRODUCTION

There is a negative impact of the non-repatriation of funds illicitly acquired to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights.¹ A research by the World Bank and the United Nations Office of Drugs and Crime (UNODC) revealed that the trillions that are embezzled every year only a fraction of this money finds its way back to the jurisdictions it was stolen with the rest remaining overseas for decades.² Against this background, economic crimes such as corruption and outright theft of public assets, and laundering of money stolen from the public are usually a hallmark of authoritarian regimes. Given that the connection between these economic crimes and human rights violations is now obvious; it has become imperative for states emerging from conflict to also recover assets

¹ Human Rights Council, Comprehensive Study On The Negative Impact Of The Non- Repatriation Of Funds Of Illicit Origin To The Countries Of Origin On The Enjoyment Of Human Rights, In Particular Economic, Social And Cultural Rights A/HRC/19/42, p. 8.

² World Bank and OECD, *Tracking Anti-corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action* (OECD and The World Bank, 2011).

stolen by the previous autocratic regimes.

However, asset recovery has been described as “one of the most complex projects in the field of law.”³ It is exceptionally difficult for those working in the context of failed states, widespread corruption, or with limited resources such as post-conflict states.⁴ There is every justification for that. Asset recovery emphasize the multi-jurisdictional or cross-border aspects of corruption investigation, and includes other numerous processes such as the tracing, freezing, confiscation, and repatriation of proceeds stored in foreign jurisdictions.⁵ Moreover, one of the many other challenges in asset recovery is not just in returning stolen assets, but in determining the conditions under which assets should be returned.

For countries emerging from repression and mass atrocity, transitional justice can be a solution to adapt legal mechanisms to redress massive human rights violations as a result of theft and plunder of public resources. This approach would not be unprecedented, as a field transitional justice has adapted and operationalize other legal mechanisms even under “less than auspicious circumstances”.⁶ There is, therefore room to argue that transitional justice can address massive looting linked to human rights violations and correct “the reputation” of asset recovery as a “very technical legalistic field”, and to generate broader understanding of its far-reaching role to foster the enjoyment of human rights. The thrust of this paper is to advocate transitional justice to adopt asset recovery as a new mechanism for accountability.

In order to avoid being unrealistic in my scientific endeavor, I draw upon, in terms of methodology, a recent innovative theory developed by Sharp to build a bridge between, theory and practice in the field of transitional justice called the ‘critically motivated problem-solving theory’.⁷ Sharp’s theory builds from Robert Cox’s widely acknowledged distinction between problem-solving theory which is largely preservative of the status quo—take the world as you find it, and the critical theory, which points to possible alternative orders—oriented toward changing the world.⁸ Put in other words, the ‘critically motivated problem-solving theory’ is an integrated approach to critique that

³ Jack Smith, Mark Pieth and Guillermo Jorge, “The Recovery Of Stolen Assets: A Fundamental Principle Of The UN Convention Against Corruption,” *U4Brief*, Bergen: Chr. Michelsen Institute (CMI) – U4 (2) (2007).

⁴ Jean-Pierre Brun, et. al. *Asset Recovery Handbook: A Guide for Practitioners* (Washington D.C: The World Bank, 2011).

⁵ For the basic steps in asset recovery see *ibid*.

⁶ Pablo de Greiff, “Thinking Big About Transitional Justice,” *Arbeitsgemeinschaft Frieden und Entwicklung* September, 27, 2018, <https://www.frient.de/news/details/thinking-big-about-transitional-justice>.

⁷ Dustin N. Sharp, “What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice,” *International Journal of Transitional Justice* 13, no. 3 (2019): 571-572.

⁸ *Ibid.*, 571-572.

embraces “as well as” rather than “either/or explanations” by emphasizing the way transitional justice critique pushes thinking beyond the status quo, but with a greater eye to questions of feasibility and implementation.⁹ What this means in terms of my research is that rather than following suggestions for an alternative approach to transitional justice in the form of “transformative justice” as a way to redress economic justice and redistribution of wealth, I will argue, instead, that transitional justice can use its present accountability mechanisms “as well as” importing asset recovery into its mix to address these issues.¹⁰

This paper proceeds in five additional sections. First a discussion of the important terms and sets the parameters. Second, the article addresses the issue contextuality in the field of transitional justice. Having set the contextual background, I discuss the significance of context-specificity and the possibilities of new mechanisms in new conflicts, drawing primarily upon a survey by Olsen Tricia D, et al. using the Middle East and North Africa as a case study. Third, in the core section of the paper I discuss the rationality of including asset recovery in transitional justice. I identified five points that justifies the linkages between the two fields. The fourth section discusses the current approach to mainstream asset recovery in traditional transitional justice mechanisms. This paper only scratches the surface. Clearly the topics covered in each of the next four sections deserve much deeper analysis than it is possible to provide in the constraints of this paper.

II. TERMS AND PARAMETERS

In order to advocate the inclusion of asset recovery into transitional justice, it is key, at this point to define some of the key terms that are germane for the central argument of this research.

A. ASSET RECOVERY

Asset recovery is a relatively new area of international law. Asset recovery started to gain increased recognition as a result of developments that followed regime change in the Philippines in 1986 when Switzerland made a commitment to return all the stolen money hidden in Swiss banks by the former

⁹ *Ibid.*, 572.

¹⁰ See in general Paul Greedy and Simon Robins, “From Transitional to Transformative Justice: A New Agenda for Practice,” *The University of York Center for Applied Human Rights, Briefing Note* TFJ-01, June 2014; Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar 2017); Lauren Marie Balasco, “Locating Transformative Justice: Prism or Schism in Transitional Justice?” *International Journal of Transitional Justice* 12, no. 2 (2018): 368–378.

Philippine dictator Ferdinand Marcos.¹¹ The provisions were already available in international treaty law on the restitution of cultural objects and traffic of drugs.¹² Although the practice of asset recovery can be traced as far back as ancient Egypt, where, following a period of tyranny under the Pharaohs, the Israelites were able to use various means to recover what has been stolen from them.¹³ The United Nations Convention Against Corruption (UNCAC) is the first international instrument with a dedicated section on asset recovery. However, neither this treaty nor any other international instrument provides a generic and universally recognized definition of asset recovery.

Rhoda Ivory defined asset recovery in UNCAC “as the legal process by which states use each other’s coercive powers to obtain or regain ownership of proceeds and objects of corruption or substitute assets.”¹⁴ While a good starting point, this conceptualization of asset recovery is insufficiently specific for the purposes of state-to-state cooperation, it does not acknowledge the rights of the public in general, and victims in particular.¹⁵ For the purposes of this paper, asset recovery shall be defined broadly as the process used to recover for the state, the victims of corruption or duly designated third parties property acquired through the commission of any and all of the mandatory and non-mandatory offences established under UNCAC.

To that end, this paper will discuss asset recovery from a human rights-based approach. That is to say, from the lenses of the victim population affected by the theft of the assets.¹⁶ A human rights approach revolves around the victim. By adopting this approach to asset recovery, in consonance with the field of transitional justice “consistently focusing on the rights and needs of victims and their families”.¹⁷ Although asset recovery is quintessentially a criminal or administrative issue, there has been a shift towards a human rights-

¹¹ Rita Adam, “Innovation in Asset Recovery: The Swiss Perspective,” in *The World Bank Legal Review: Legal Innovation and Empowerment for Development*, vol. 4, Hassane Cisse, et. al. eds. (Washington D.C: The World Bank, 2013), pp. 253-264; François Membrez and Matthieu Hösli, “How To Return Stolen Assets: The Swiss Policy Pathway,” *Centre for Civil and Political Rights*, Working Paper (2020) p. 9.

¹² *Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property*, Paris, 14 November 1970, UNTS 823, p. 231.

¹³ Michael Fernandez Bertier, “The History of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime” in *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU*, Katalin Ligeti Michele Simonato, eds. (Hart Publishing, 2017), pp. 53-74

¹⁴ Rhoda Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge: CUP, 2014), p. 27.

¹⁵ Kristian Lasslett, “Victims of corruption: Applied principles for asset recovery,” *State Crime*, May 15, 2017 International State Crime Initiative, <http://statecrime.org/state-crime-research/victims-of-corruption-applied-principles-for-asset-recovery/>

¹⁶ Membrez and Hösli, “How to Return Stolen Assets,” p. 5.

¹⁷ Office of The United Nations High Commissioner For Human Rights, *Rule-Of-Law Tools For Post Conflict States National Consultations On Transitional Justice*, (New York and Geneva: OHCHR, 2009), p. 1.

centred approach since the adoption of UNCAC.¹⁸ UNCAC does not provide more information on how the human rights-based approach can be incorporated in asset recovery.

Lastly, different jurisdictions have used, or still use different terminology to describe the same legal concept under asset recovery for example, some jurisdictions use “confiscation” and others use “forfeiture” also in terms of procedure, in some jurisdictions’ assets may be “seized,” whereas in others’ they are “restrained,” “blocked,” or “frozen”.¹⁹ This paper therefore should be read in the context of specific jurisdictions legal system, law enforcement structures, resources, legislation, and procedures—without being restrained by the terminology or the concepts used to illustrate the process of asset recovery.

B. TRANSITIONAL JUSTICE

This paper is departure from the traditional use of the phrase transitional justice to refer to both judicial and non-judicial processes that are conventionally used by post authoritarian states to reckon with massive human rights and humanitarian law abuses and violations.²⁰ This is because, the meaning of transitional justice has changed somewhat from its original definition. As the first United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff stated in his maiden report: the measures of transitional justice emerged first as practices and experiences in post-authoritarian settings, such as the Latin American countries of the Southern Cone and, to a lesser extent, those in Central and Eastern Europe and South Africa have been progressively transferred from their “place of origin” in post-authoritarian settings, to post-conflict contexts and even to settings in which conflict is ongoing or to those in which there has been no transition to speak of.²¹

More importantly, the UN Special Rapporteur observed that there is a common feature in these recent transitions, that is, the prominent role that claims relating to economic rights occupy in these transitions; claims against corruption and in favour of economic opportunities have been raised to a par in the regions with claims for the redress of violations of civil and political

¹⁸ UNODC, “Documents of the Human Rights Council on the issue of the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation,” *UNODC Open-ended Intergovernmental Working Group on Asset Recovery*, 11th intersessional meeting, Vienna, 24-25 August 2017, CAC/COSP/WG.2/2017/CRP.2, para. 12.

¹⁹ Brun et al. *Asset Recovery Handbook*, p. 3

²⁰ International Center for Transitional Justice, “What is Transitional Justice?” ICTJ Fact Sheet, 2009, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>

²¹ Human Rights Council, Report Of The Special Rapporteur On The Promotion Of Truth, Justice, Reparation And Guarantees Of Non-Recurrence, Pablo de Greiff A/HRC/30/42

rights.²²

Hence, he expressed sentiments against the increasing trend to utilize the measures of transitional justice without heeding the characteristics of the contexts in which they are applied.²³ Further, the Special Rapporteur underlines that it is crucial to clearly identify and assess the preconditions in any given country and address them in a manner fine-tuned, targeted and sensitive to context.²⁴ This view, as shall be discussed later, illustrates the potential of transitional justice and its accountability mechanisms to address eminent and emerging issues such as corruption and plundering of resources which is a growing concern even leading to regime change.

C. ACCOUNTABILITY MECHANISMS

The phrase accountability mechanisms and transitional justice are often used interchangeably without precision. However as the *Encyclopedia of Transitional Justice* warned against the use of the term loosely as a synonym for transitional justice since “such [a] broad definition lacks analytical clarity, because accountability should focus on the wrongdoers—that is, the persons who, in different ways (through intention, direct action, or support) contributed to wrongful actions.”²⁵ The *Encyclopedia of Transitional Justice* has offered a new definition of accountability mechanisms:

as institutionalized, procedurally shaped relationships between the wrongdoer and an authoritative domestic governmental or international institution, where the wrongdoer is duty bound to explain his or her actions, while an authoritative institution has the right to pass a judgment and impose sanctions on the wrongdoer.²⁶

In this context, it is worth noting that accountability mechanisms can be both legal and non-legal, state-driven or civil-society-driven. The most common methods of accountability are prosecutions, truth commissions, reparations, institutional reforms and amnesties.²⁷ Further, as the next section of this paper shows, there has been distinguishable general trends and patterns in the adoption of the five accountability mechanisms across different times and places.

²² *Ibid.*, 6.

²³ *Ibid.*

²⁴ *Ibid.*, 6.

²⁵ Stan and Nedelsky, eds. *Encyclopedia of Transitional Justice*, vol. 1 (Cambridge University Press, 2013), 6.

²⁶ *Ibid.*

²⁷ Lucy Huyse, “Justice after Transition,” *Law and Social Inquiry* 51 (1995): 51; Neil Kritz, eds. *Transitional Justice*, vol. 1 (1995), xix; Naomi Roht-Arriaza, “Truth, Justice and Multiple Institutions,” in *Transitional Justice in the Twenty-First Century*, Naomi Roht-Arriaza and J. Mariezcurrena, eds. (Cambridge: CUP, 2006), p. 2.

III.CONTEXTUAL PREVALENCE AND TRANSITIONAL JUSTICE

Transitional justice is context-specific its accountability mechanisms are based on the needs and objectives of the context and country concerned.²⁸ According to a decade old survey, transitional justice accountability mechanisms have been shown to be “utilized in the aftermath of virtually every period of repression or violence”.²⁹ The study just mentioned, observed however that “notable variations exist over time, across cases, and between different political contexts, but transitional justice has persisted as a political tool to deal with past abuses throughout the world for most of the past four decades.”³⁰ A further important observation from the research, particularly for this paper is that there are significant “variation across regions and transition type”.³¹

What is more, the study argues that it is possible to identify factors that contemplate the adoption of particular accountability mechanisms, as well as to make an assessment of what combinations and sequences of mechanisms succeed in establishing peace, strengthening democracy, and reducing human rights violations.³² The survey makes the case for “new mechanisms as new conflicts and transitions occur.”³³ It emphasizes that “the objectives for the adoption of mechanisms of transitional justice are manifold and to a large degree depend on the characteristics of the transition and society in question.”³⁴

While the survey is a decade old, its findings can still be used to support the unprecedented use of asset recovery in transitional justice in the Middle East and North Africa (MENA) region. The conflict in the MENA regions that has been referred to in the literature as the fourth wave of transitional justice, embodies all the characteristics of a new conflict whose primary concern has been addressing corruption. To the extent that asset recovery became a major issue in the transitional justice processes of the MENA countries.

²⁸ ICTJ, “What is Transitional Justice?”

²⁹ Tricia D. Olsen, “Transitional Justice in the World, 1970-2007: Insights from a New Dataset,” *Journal of Peace Research* 47, no. 6 (2010): 807.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*, 808.

³³ *Ibid.*, 808.

³⁴ Hemi Mistry, “Transitional Justice and the Arab Spring,” *Chatham House, International Law and Middle East Programme 1 February 2012*, <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/010212summary.pdf>

A. SUB CONTEXT: TRANSITIONAL JUSTICE AND ASSET RECOVERY IN THE MENA

Transitional justice in the MENA follows the uprisings, civil wars and mass removal of autocratic and corrupt rulers in what has become to be known as the “Arab Spring”.³⁵ Based on what we know now, the Arab Spring “situation represents a unique set of circumstances requiring a different approach to transitional justice.”³⁶ For instance, unlike other regions where change is usually based on the violation of physical violence, most scholars agree that the revolts in the MENA countries were instigated by the need for economic space—in particular the elimination of corruption.³⁷ As Kora boldly stated “in the Arab context corruption was one of the main grievances motivating the “revolutions,” on a par with joblessness and violations of freedom and other rights”.³⁸ Below is a table illustrating corruption by some of the leaders of the countries involved in the Arab Spring.

Table 1 Corruption by Arab countries heads of state

Head of State	Estimated personal worth	Notable assets	Head of state salary (2015)
Muammar Gaddafi, Libya (1969 – 2011)	£2.4-64bn	Gold-Plated cutlery, crystal champagne glasses, rows of unworn designer shoes and show jumping circuits	£84,000 per annum
Hosni Mubarak, Egypt (1981 – 2011)	£0.8-4bn	Hotels in Egypt and numerous houses and villas around the world	£56,320 per annum
Zine El Abidine Ben Ali, Tunisia (1987 – 2011)	£2.4-4bn	40 Luxury cars including a Lamborghini, a Maybach and an armoured Cadillac	£31,300 – £46,800 per annum
Ali Abdullah Saleh, Yemen, (1990 – 2012)	£24-49.6bn	Luxury assets in the form of property, cash, gold and other valuable commodities are believed to be spread across at least 20 countries	Salary not published

³⁵ The nomenclature Arab Spring, was “first used by Foreign Policy Magazine and then adopted by journalists and activists in the US as a way to brand the revolution that has been transforming the MENA.

³⁶ Mistry, “Transitional Justice,” p. 7.

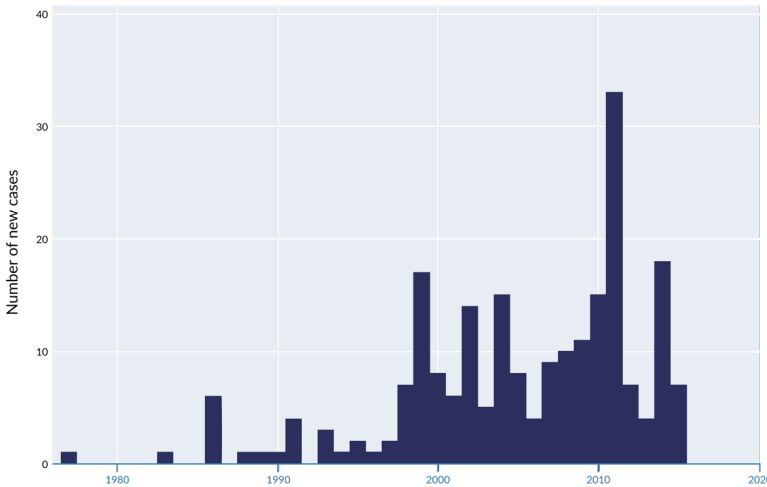
³⁷ Ilan Peleg and Jonathan Mendilow, “Corruption and the Arab Spring Comparing the Pre and Post Spring Situation,” in *Corruption in the Contemporary World: Theory, Practice, and Hotspots* Jonathan Mendilow and Ilan Peleg (Lexington Books, 2014).

³⁸ Kora Andrieu, “Dealing with a “New” Grievance: Should Anticorruption be part of the Transitional Justice Agenda?” *Journal of Human Rights* 11, no .4 (2012): 537-557.

Bashar Assad, (2000 – present)	al-Syria £0.4-1.2bn	Handmade furniture from Chelsea boutiques, gold and gem-encrusted jewellery, chandeliers, expensive curtains and paintings	Salary not published
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From this table it can be seen how the leaders were not only repressive but also corrupt plundering large amounts of public resources. The large amounts of money if recovered would do a lot to redress the violations they have inflicted on their people. Thus, along with redressing corruption as part of the transitional justice issue MENA countries should also simultaneously address asset recovery. The use of asset recovery legal process has gained unprecedented use post the 2011 Arab revolutions as the table below illustrates.

Table 2 New cases of asset recovery per year based on StaR Database³⁹



In this context, it is worth noting that asset recovery is generally only possible when the powerful corrupt politicians have been removed from power. The international anti-money laundering trend setter and asset recovery international non-governmental organisation the Financial Action Task force (FATF) observed:

“In nearly all recent cases of grand corruption, the detection and investigation of the criminal activity of heads of government occurred only after there was a change of government, specific corrupt individuals fell out of favour, or there was widespread public outcry after wrongdoing was

³⁹ Mathis Lohaus, “Asset “recovery and illicit financial flows from a developmental perspective: Concepts, scope, and potential,” accessed 29 December 2019, <https://www.u4.no/publications/asset-recovery-and-illicit-financial-flows-from-a-developmental-perspective-concepts-scope-and-potential>.

publicly exposed. While the PEPs [politically Exposed Persons] were in power, there was no real opportunity for domestic law enforcement agencies to investigate their financial crimes.”⁴⁰

It is no coincidence that the years following the Arab Spring has been identified as the milestone year for asset recovery with many countries from the MENA engaged in various processes to recover assets from disposed leaders.

One of which was the establishment of the Arab Forum on Asset Recovery (AFAR) an initiative in support of asset recovery efforts by Arab countries to bring together post-revolution governments with governments of countries that had frozen the assets of former leaders of the regimes. AFAR also works as a platform bringing together the Arab countries in transition, with key global and regional financial centers, to foster international cooperation for the return of stolen assets. Therefore, AFAR had a dual mandate to address the key challenging issues of Arab States in recovering assets, as well as serving as a forum for practical action and cooperation.

AFAR has successfully mobilized both policy makers and practitioners, generating political momentum, raising awareness of effective measures for asset recovery, promoting domestic coordination and facilitating international cooperation on cases. Additionally, it has also provided training and guidance to increase the capability of law enforcement and other officials in asset recovery. However, despite making progress, AFAR has failed to address the question of asset recovery in transitional justice. Performance of AFAR’s work is limited because it “continues to revolve around theoretical approaches instead of practical mechanisms to recover the ill-gotten assets. This undermines the potential results that the yearly forums could have produced.”⁴¹

This provides some explanation as to why despite the show of commitment by many countries to AFAR, the results have been underwhelming. For instance, it is believed that the former Libyan leader Muammar Gaddafi and his family and friends all accused of corruption owned millions of pounds of assets in the UK but the UK government has been unable to recover these illicitly acquired funds.⁴² Similarly, although, in the aftermath of the Arab

⁴⁰ FATF, *Specific Risk Factors in Laundering the Proceeds of Corruption: Assistance to Reporting Institutions* (FATF/OECD, June 2012) p. 10, para 26. Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf>

⁴¹ Transparency International, “Transparency International and MENA Chapters Lament Lack Of Progress On Asset Recovery In Arab World,” Transparency International 15 December 2015, https://www.transparency.org/news/pressrelease/transparency_international_and_mena_chapters_lament_lack_of_progress_on_ass.

⁴² Transparency International, “Just One House Recovered by UK From Arab Spring States,” Transparency

Spring in 2011, Switzerland froze money belonging to former Egyptian president Mubarak and his cronies. In August 2017, after six years of investigation, Swiss judicial authorities stopped cooperating with the new Egyptian government before any of the assets were recovered.

Taken together, these two cases provide brief insights into the challenges of asset recovery. Some of the key challenges include proving the illegality of the assets. Hence, it has been argued that for countries emerging from autocracy and dictatorship of plunder, the size of the amounts should be sufficient to demonstrate its illicit origin.⁴³ A report *Failed Recovery* lays bare the inadequacy of the States for dealing with money from dictators, failing to enable stolen assets to be recovered. The report also exposes the hypocrisy of international banks, that accept funds of illicit origins in the first place, then take advantages of legal technicalities to return them.⁴⁴

The Chatham report on transitional justice in the MENA after the Arab Spring concluded by saying that “The Arab Spring has the potential to be a source of innovation in the field of transitional justice, by also bringing into focus accountability also for economic and financial wrong-doing.”⁴⁵

IV. RATIONALITY OF INCLUDING ASSET RECOVERY IN TRANSITIONAL JUSTICE

There is lack of clarity in the literature on how the field of transitional justice has adopted its accountability mechanisms. This is primarily because the issue was often framed as a question of peace versus justice, earlier discussions tended to center around the question of whether transitional states should utilize criminal justice processes or other measures such as truth commissions and reparations when dealing with past abuses.⁴⁶ Further research is needed to better understand the rational underlying the choice of accountability mechanisms in the field of transitional justice.

Meanwhile, there is emerging literature on the contextually of the field

International, 24 November 2016, <https://www.transparency.org.uk/press-releases/just-one-house-recovered-by-uk-from-arab-spring-states/>.

⁴³ Public Eye, “Failed Recovery: How Switzerland Released the Funds of A Famous Egyptian Crony,” Public Eye, October 2017, https://www.publiceye.ch/fileadmin/doc/Finanzplatz/2017_PublicEye_Failed_Recovery_Report.pdf

⁴⁴ Public Eye, “A new report exposes the difficulties of the Mubarak asset recovery,” Public Eye, 25 October 2017, <https://www.publiceye.ch/en/news/detail/a-new-report-exposes-the-difficulties-of-the-mubarak-asset-recovery>.

⁴⁵ Mistry, “Transitional Justice”

⁴⁶ See e.g. José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,” in *Transitional Justice in the Twenty-First Century*, Naomi Roht-Arriaza and J. Mariezcurrena, eds. (Cambridge: CUP, 2006).

and the choice of mechanism including as highlighted above the potential to have new mechanisms in new conflicts. Literature on sub-Saharan Africa comes close to discuss the origins of some mechanisms. For instance, although less discussed sub-Saharan Africa has introduced community-based or 'traditional' justice mechanisms, where local conflict-resolution and healing practices are adapted to address grave human rights violations and have since been established as an integral mechanism through which to implement transitional justice.⁴⁷

In the next sections is a discussion on the rationality of including asset recovery in transitional justice. I have identified five grounds to justify the inclusion. This categorization does not aim to be comprehensive or free from overlaps, or indeed to exhaust the ways in which such interactions could or should be described for a variety of purposes. Rather, it aims to provide an analytical framework based on distinct degrees of causal proximity between asset recovery and transitional justice and, in doing so, to facilitate the identification of pattern-specific measures for addressing of human rights violations in environments affected by corruption

A. CREATING AND OPERATIONALIZING THE NEW RIGHT TO ASSET RECOVERY

De Greiff has made remarkable comments on how the field of transitional justice has expanded and developed international law mechanisms to suit the situations of transitional countries and in the process operationalize some rights. According to De Greiff, transitional justice has contributed to the entrenchment of rights to justice, truth, and reparations, precisely by offering concrete and practical means for the operationalization of these rights. I look at these rights briefly in seriatim below.

In terms of the right to justice, transitional justice has found ways of coping with amnesties often adopted by outgoing regimes to shield members from the consequences of their violations; it has contributed to the articulation of prosecutorial strategies to maximize the efficacy in the deployment of scarce investigatory and prosecutorial resources (more often than not in hostile en-

⁴⁷ A. Triponel and S. Pearson. "What do you think should happen? Public participation in transitional justice," *Pace International Law Review* 22, no. 1 (2010): 103–44; T. Allen, and A. Macdonald, A. "Post-conflict traditional justice: A critical overview," LSE JSRP Paper no. 3 (2013). Available at http://eprints.lse.ac.uk/56357/1/JSRP_Paper3_Postconflict_traditional_justice_Allen_Macdonald_2013.pdf; for contrast see N. Valji, "Tensions between peace and justice in transitional contexts," in *Rights-Based Approaches and Humanitarian Interventions In Conflict Situations* (InterAgency Group on Rights, 2009), pp. 27–37, available at <http://conflict.care2share.wikispaces.net/file/detail/Rights%20in%20Conflict%20FINAL.doc>; P. Gready, & S. Robins, "From transitional to transformative justice: A new agenda for practice," *International Journal of Transitional Justice* 8 (1) (2014): 339–61. <http://dx.doi.org/10.1093/ijtj/iju013>.

vironments); and it has invited experimentation with different venues where justice can be sought, from national to hybrid to international tribunals.⁴⁸

Similarly, transitional justice has contributed to the entrenchment of the right to truth, operationalizing it through the measure that has become almost synonymous with it, the truth commission, but also through other means such as commissions of inquiry, the organization and preservation of archives and other documentation efforts, as well as through carefully designed memorialization initiatives.⁴⁹

In the context of the right to reparations transitional justice has contributed to the entrenchment of the right to reparation through the creation of massive administrative reparations programs that have served tens of thousands of victims in different countries, and through the wise use of ‘complex’ bundles of benefits that satisfy a more diverse set of needs than one form of reparation alone.⁵⁰

Although asset recovery is not yet seen as an autonomous human right; so is, for instance, the right to truth. There is no consensus on its source some argue that the right derives from other well-established rights in international human rights law, such as the right to a remedy, the right to receive and impart information, and the right to due process.⁵¹ Others say it is a stand-alone right, independent of or in addition to these other rights.⁵² Ironically, this has led to some doubts about the normative content of the right to truth and its parameters as “somewhere above a good argument and somewhere below a clear legal rule.”⁵³ As stated above transitional justice has operationalized this right in relation families of victims of enforced disappearances in Latin America in the 1970s.⁵⁴ Likewise, transitional justice can operationalize and adapt asset recovery as a right for victims of massive state looting.

B. A BROADER AND HOLISTIC JUSTICE

Transitional justice as a field has come under attack from the emerging generation of critical scholars for ignoring structural violence, failing to address every day issues and delivering economic justice. The ensuing debate largely,

⁴⁸ de Greiff, “Thinking Big About Transitional Justice”

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Eduardo González and Howard Varney (eds.), *Truth Seeking Elements of Creating an Effective Truth Commission* (ICTJ 2013), p. 3.

⁵² *Ibid.*

⁵³ Yasmin Naqvi, “The Right to the Truth in International Law: Fact or Fiction?” *International Review of the Red Cross* 88 (2006): 273.

⁵⁴ Patricia Naftali, “Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?” *Penal Field* (2016): 3.

though not solely, split scholars along a “continuum [that] runs from thinner and shorter-term projects focused on comparatively gross and crude forms of violence such as murder and torture, to thicker and longer-term projects that also engage with comparatively subtle forms of violence such as cultural and structural violence.”⁵⁵ This paper is not about developing a well-rounded understanding of the ongoing debate for a broader “thicker” and holistic transitional justice. Rather, it does accept that transitional justice for it to succeed as a field it needs to take into account issues such as structural violence and economic justice. It proposes that for transitional justice to deliver its intended goals it needs to be expand its remit of accountability mechanisms to include asset recovery as a way to address structural violence and economic justice.

It is characteristic of the new governments that takes after a dictatorship to talk about corruption committed by the ousted regime but without showing any concrete evidence of it. As stated by Nye, that corruption is a charge that follows the overthrow of a regime is a typical developing country.⁵⁶ A report by Freedom House revealed that “corruption and its links to human rights abuses can help a society break from its authoritarian past, dispel conceptions of the former ruler as “harsh but clean,” and set longer-term institutional reform on the right footing.”⁵⁷

Thus, one of the justifications for the International Criminal Court (ICC) to mainstream asset recovery in its work is confirmation that the process can lead to deeper justice because: “Financial investigations may provide significant and valuable information pertaining to cases before the Court.”⁵⁸ In addition to the obvious and yet important role of using financial information to “serve as evidence and potentially contribute to demonstrating the elements of a crime or determining an individual’s criminal responsibility.”⁵⁹

By adding asset recovery to accountability mechanisms this can lead to a broader and holistic justice. For instance, recovering assets illicitly acquired by corrupt dictators can assist citizens to understand the crimes of the past. For instance, as Carranza noted “by exposing the extent of corruption or the scale of economic crimes, these mechanisms would reveal that the depth of the damage caused by perpetrators goes beyond violence directed against their

⁵⁵ Sharp, “What Would Satisfy Us?” 580-581

⁵⁶ J. S. Nye, “Corruption and Political Development: A Cost-Benefit Analysis,” *The American Political Science Review* 61, no. 2 (1967): 417-427. doi:10.2307/1953254.

⁵⁷ Freedom House, “Combating Impunity: Transitional Justice and Anti-Corruption: Conclusions from Practitioners’ Dialogues on Transitional Justice,” Freedom House, 2014, <https://freedomhouse.org/sites/default/files/Combating%20Impunity%20-%20Transitional%20Justice%20and%20Anti-Corruption.pdf>.

⁵⁸ International Criminal Court, “Financial Investigations and Recovery of Assets,” p. 1. https://www.icc-pi.int/iccdocs/other/Freezing_Assets_Eng_Web.pdf.

⁵⁹ International Criminal Court, “Financial Investigations,” p. 1.

opponents or against citizens targeted by repressive measures.”⁶⁰ In the same way recovery of assets can serve as the proof of looting and other serious financial crimes which tend to be enshrouded in anecdotes and can sometimes be abused for political capital.

C. POLITICAL ECONOMY OF TRANSITIONAL JUSTICE

The political economy of transitional justice remains understudied by scholars and practitioners. Drawing on the *Transitional Justice Data Base*, a study was designed to test “the existing assumptions concerning the political economy of transitional justice in the literature.”⁶¹

The questions this study sought to determine was whether democratic leaders are less likely to adopt costly transitional justice mechanisms rather than cheaper ones in countries that face economic constraints?⁶² Alternatively, will transitional justice choices depend not on domestic economic issues, but rather on international pressure to comply with an accountability norm?⁶³ The findings clearly indicated that “the sets of political economy trade-offs that new democracies face in balancing the pressures of the domestic economy and international norms.”⁶⁴ The study concluded “that a political economy of transitional justice exists and that a country’s economic health shapes its transitional justice choices.”⁶⁵

An important implication of these results on justice is that the most expensive mechanisms such as prosecutions and trials are shunned for the least expensive mechanisms such as amnesties. In other words, impunity can be reinforced by the lack of resources.

A question can be asked about the role of international actors in financing transitional justice. Surprising results shows that contrary to conventional wisdom, the international community’s economic or political incentives do not offset the costs of transitional justice enough to encourage poorer countries to adopt mechanisms that are more expensive than would otherwise be feasible.⁶⁶ It turns out that the literature on transitional justice exaggerated the role that international factors play in promoting transitional justice? At least in

⁶⁰ Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” *International Journal of Transitional Justice* 2, no. 3 (2008): 310-330. <https://doi.org/10.1093/ijtj/ijn023>.

⁶¹ Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “At What Cost? The Political Economy of Transitional Justice” *Taiwan Journal of Democracy* 6, no. 1 (July, 2010): 165.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

political economy terms, it appears so.⁶⁷

Moreover, the costs of can be far-reaching than they appear. Ironically, transitional justice signals to the international community that a state has put its barbaric past behind it and joined the community of modern nations, and thus deserves the corresponding economic benefits of that new status. Elster was obviously correct to suggest that failing to address past atrocities may prove costlier for new democracies than implementing transitional justice.⁶⁸ As shall be discussed in the next section, asset recovery can provide a source of funding for transitional justice mechanisms and processes.

D. SUPPORTING THEORY WITH PRACTICE

The ongoing ad-hoc practice is as important a clue to our understanding of the need to officially recognise asset recovery as part of the accountability mechanisms. It indicates the new demands that can assist to make transitional justice thrive as a field. As noted above, one of the issues that transitional justice is facing as a field are demands for a thicker and more holistic mechanisms that is able to address everyday socioeconomic issues in other ways more practical forms of justice.

Asset recovery has gained recognition following the regime change in Philippines and has since then been steadily increasing following other similar cases such as Mobutu Sese Seko and Sani Abacha in Zaire and Nigeria respectively. The two latest examples is the Commission on Corruption and Asset Recovery, established by President Ibrahim Mohamed Solih to investigate acts of corruption which took place within state institutions during the administration of his predecessor in Maldives and the Sudanese Anti-Corruption and Regime Dismantling Committee former President Omar al-Bashir, his family members and associates.

Moreover, asset recovery continues to draw attention in the area of international law; the Sustainable Development Goals (SDGs) have crystalized and magnified recovering of assets to support development in target 16.4. The SDGs indicates how asset recovery plays a critical role in strengthening some of the key foundations of sustainable development, such as the rule of law and strong, transparent and accountable institutions. In addition, the UN has been calling for the human rights-based approach to asset recovery processes through UNCAC chapter V.

In parallel, other key non state actors such as international NGOs are

⁶⁷ *Ibid.*

⁶⁸ Jon Elster, *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006).

working on asset recovery to redress human rights violations. One such example is Redress an organization to assist victims of torture and ill-treatment is currently engaged on a project on asset recovery to assist victims of torture. Redress has recently launched a new initiative to respond to the connection between grand corruption and torture, by taking action to seize the corrupt assets of high-profile torturers and have them assigned as reparations for the benefit of their victims.

E. LASTING PEACE

As is known, central to the adoption of transitional justice in any jurisdiction is the concept of forging lasting peace and non-repetition which is often expressed in the mantra “never again” to massive human rights abuses. A good example is the adoption of truth commissions which are regarded as essential to achieve long-lasting peace.⁶⁹ A notable example is the truth commission of Argentina for the disappeared whose final report was aptly named *Nunca Más* (Never Again). The Latin phrase was adopted by several countries in Latin America as a promise to never again allow such campaigns of widespread and systematic human rights violations to take place.

It is only recently that the link between corruption and organized crime with the commission of human rights and humanitarian rights atrocities has become growingly more evident. For instance, it has become increasingly obvious that there is a financial motivation both to initiate wars and to commit war crimes as part of belligerent organizations.⁷⁰

However, asset recovery remains uncommon in war crimes and crimes against humanity cases.⁷¹ In light of the financial motivations behind warfare, asset recovery operations should be a key component of war crimes litigation, in order to both deter and punish those who engage in such crimes for financial reasons.⁷² Encouragingly, there is some evidence that a new focus on asset recovery in the war crimes context may be emerging at both the national and international levels to deter the commission of crimes that are linked to mass atrocities.⁷³

An example is the ICC which has incorporated asset recovery among other reasons because “it is crucial for accountability and to ensure that ‘crime does not pay’, in the event that the person is sentenced to the payment of fines

⁶⁹ For the contrary see Eduardo González, Elena Naughton, and Félix Reátegui, *Challenging the Conventional Can Truth Commissions Strengthen Peace Processes?* (International Center for Transitional Justice and the Kofi Annan Foundation, 2014).

⁷⁰ Larson and Mathews, “The Use of Asset Recovery,” 18

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

and/ or the forfeiture of proceeds, property and assets derived directly or indirectly from the crime.”⁷⁴ It goes without saying that the forfeiture of proceeds, property and assets directly derived from crime hinders the opportunity for their reinvestment into further commission of crimes thus preventing a relapse into violence. It also dissuades would be offenders from engaging in massive looting as it shows that all will be in vain. Therefore, *if the commitment of ‘Nunca Más’ is to be fully realised* asset recovery can assist to deter future commission of crimes and thus it is in tandem with the transitional justice goals of non-recurrence.

V. CURRENT APPROACHES OF TRANSITIONAL JUSTICE MECHANISMS TO ASSET RECOVERY

So far, this paper has discussed why it may be significant to have asset recovery as a mechanism of transitional justice. This section of the paper will discuss the ways in which attempts to align and mainstream asset recovery as part of the redress of massive human rights violations by corrupt dictators have been made. To this end, it presents an overview of the current approaches to asset recovery in transitional justice which is using traditional accountability mechanisms such as truth commissions, amnesties, and prosecutions and so forth and their limitations, arguing for the adoption of asset recovery as a new mechanism on its own in transitional justice.

A. TRUTH COMMISSIONS

Truth commissions, which are often seen as the most iconic mechanisms of transitional justice⁷⁵, have unsurprisingly been used to mainstream asset recovery. Truth commissions were traditionally designed to investigate the violation of civil and political rights.⁷⁶ Nonetheless, as transitional justice evolve truth commissions mandate has been widened to address not only socioeconomic rights but also related issues such as corruption. In fact, some truth commissions have only focused on corruption and recovering assets.⁷⁷

However, a truth commission should primarily focus on the broader objective of establishing how economic crimes, provided that is part of its mandate, were committed. If it is able to establish the patterns of economic crimes, and

⁷⁴ International Criminal Court, “Financial Investigations,” p. 1.

⁷⁵ OHCHR, *Rule-Of-Law Tools*

⁷⁶ *Ibid.*

⁷⁷ Bangladesh Truth and Accountability Commission which would allow corrupt officials and businessmen guilty of corruption to avoid jail by confessing and returning money taken; Philippines Truth Commission was tasked to investigate allegations of large-scale corruption, of the previous administration under President Gloria Macapagal Arroyo.

perhaps begin the task of identifying individuals and institutions responsible, It is only then it may be able to build the national and public support for the usually long and challenging process of asset recovery that should happen parallel to, but also beyond, the truth-seeking process.

For instance, in Tunisia the transitional government established the National Commission for Investigating Corruption and Embezzlement (NCICM) and the technical National Committee for the Recovery of Misappropriated Assets:

*“in charge of bringing to light cases of corruption and embezzlement committed by or in the interest of any person or business, whether public or private, or a group of people, thanks to this persons/business/group of people’s position in the government or the administration, or thanks to one’s kinship, alliance, or any other relation of any nature with a state official or a group of state officials, especially during the period from 7 November 1987 to 14 January 2011.”*⁷⁸

The NCICM has so far managed to freeze the assets of people belonging to the family and inner circle of the former president at an estimated value of \$13 billion. The value of the confiscated assets has been estimated at 25 percent of the 2011 Tunisian gross domestic product.⁷⁹

Moreover, a truth commission may not be the ideal way to try and recover assets, because that will take a number of years, likely to be more years than a truth commission should be in existence. Truth commissions by nature are established for a limited duration, according to Hayner the typical life of a truth commission is 2 years.⁸⁰ Otherwise the commission can go on for too long, lose focus and momentum, and ultimately cease to interest the public. Experience indicates that a period of one and a half to two and a half years of operation is generally desirable.⁸¹

In deed a truth commission can bring political support and public acknowledgment of the commission of economic crimes and the complicity of persons and institutions involved, so that the longer effort to recover assets has public backing and can generate the kind of political will that is required if pursuing assets is going to be a long time process. On the other hand, asset recovery *is a lengthy legal process that may several years from the launch of investiga-*

⁷⁸ Tunisia, Decree Law 2011-7, Art. 2.

⁷⁹ See Transparency International “Lost Billions”

⁸⁰ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd Ed. (New York: Routledge, 2010).

⁸¹ OHCHR, *Rule-Of-Law Tools*

tions to the judgment confiscating and *returning the stolen assets*.⁸² As stated above when Ferdinand Marcos was ousted from power in 1986 in the Philippines, the new administration set up the *PCGG for the recovery of ill-gotten wealth accumulated by former president and his cronies, whether located in the Philippines or abroad*. Its legal basis has had to be renewed several times something that will not be possible for a truth commission.⁸³

B. AMNESTIES

Amnesties are predominantly to address physical human right abuses in post-conflict contexts to foster stability and ensure a non-violent political transition. There have been recent examples in transitional countries to use amnesties for economic crimes and corruption.⁸⁴ Granting amnesties in cases of corruption, however, has been exceptional and also mainly envisaged for contexts of political transitions when the new governments are willing to have a fresh start and make a clean break from the past.⁸⁵

The use of amnesties in corruption is supported in international law for instance UNCAC states that:

*“Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.”*⁸⁶

Similarly, practitioners believe that while amnesty for human rights violations have often immediately (and justifiably) triggered concerns that they en-

⁸² World Bank

⁸³ Executive Order No. 1 (February 28, 1986), as amended by EO 13, created the Presidential Commission on Good Government (PCGG) under the Office of the President (OP); Executive Order No. 14 (May 7, 1986), as amended by EO 14-A, defined jurisdiction over cases involving the ill-gotten wealth of the Marcoses, close relatives and associates; Executive Order No. 286 (July 25, 1987) created the Sequestered Assets Disposition Authority (SADA) under OP to oversee the disposition of assets and properties recovered by the government, including those voluntarily surrendered to the PCGG; Executive Order No. 149 (December 28, 1993) transferred the SADA from the Office of the President to the PCGG; Executive Order No. 643 (July 27, 2007) placed the PCGG under the administrative supervision of the Department of Justice (DOJ).

⁸⁴ Marie Chene, “The use of amnesties for corruption offences,” *U4 Helpdesk Answer* 2019: 16, <https://www.u4.no/publications/the-use-of-amnesties-for-corruption-offences.pdf>

⁸⁵ UNODC. “Tool #34: Amnesty, Immunity and Mitigation of Punishment,” UN Anti-Corruption Toolkit (UNDOC, 2004).

⁸⁶ See, for example, *United Nations Convention against Corruption*, New York, 31 October 2003, UNTS vol. 2349, p. 41., art. 37(1).

courage impunity with respect to human rights violations, a similar approach with respect to large-scale corruption and economic crimes may not be as controversial, especially if it results in the recovery of assets amassed through those crimes.⁸⁷

On the other hand, impunity can be perpetuated by amnesties that seek to guarantee asset recovery and, in the process, derail the aims of transitional justice. The example of Tunisia is very illustrative. Tunisia had two mechanisms to deal with corruption crimes: first, through prosecutions and second, the Truth and Dignity Commission that had a mandate to investigate corruption crimes, arbitrate on these cases, or refer them for prosecution. It later adopted a controversial law granting “reconciliation” to public officials involved in corruption—the Economic Reconciliation Act. The law established a new committee that would examine requests for restitution submitted by these public officials and evaluate the sums of money to be repaid.⁸⁸ The law put an end to the roles of both the commission and the justice system. The justice system was not able to prosecute for corruption anyone who obtains amnesty through a “reconciliation commission”. As a result, financial and corruption cases were removed from the jurisdiction of the Commission as well. The new law enabled government agents involved in corruption cases to benefit from an amnesty and immunity from prosecution, undermining efforts to eradicate corruption and goals for transitional justice in Tunisia.⁸⁹

C. PROSECUTIONS

Although, asset recovery remains uncommon in prosecutions for mass criminality that is typically associated with transitional justice. There is an increasing recognition that there is financial motivations behind some atrocities, this in turn has increased the attention to include asset recovery as a key component of prosecutions, in order to both deter and punish those who engage in such crimes for financial reasons. Actually, there is some evidence that a new focus on asset recovery in the war crimes context may be emerging at both the national and international levels.⁹⁰

The ICC is one exemplary international court that from the beginning has observed the interplay between asset recovery and mass atrocities. Among the penalties provided for in the ICC statute is the ‘forfeiture of proceeds,

⁸⁷ Carranza, “Plunder and Pain,” 310–330.

⁸⁸ CIFAR, “Is Tunisia reconciling with the corrupt?”, CIFAR, 22 September 2017, <https://cifar.eu/tunisia-reconciliating-corrupt/>

⁸⁹ Amna Guellali, “The Law That Could be the Final Blow to Tunisia’s Transition,” Human Rights Watch, May 23, 2017, <https://www.hrw.org/news/2017/05/23/law-could-be-final-blow-tunisias-transition>.

⁹⁰ Erik Larson and Max Matthews, “The Use of Asset Recovery in War Crimes Cases,” *Sarajevo International and Comparative Law Review* 1, no. 1 (2012): 18.

property and assets derived directly or in-directly from that crime.⁹¹ Thus, perpetrators who amassed assets through the crimes and human rights violations for which they are convicted can be held accountable not just for those crimes expressly within the ICC's jurisdiction but also for economic crimes. For instance, in the issuance of an arrest warrant for Thomas Lubanga, the ICC's Pre-Trial Chamber requested that states trace, freeze or seize Lubanga's assets.⁹²

Similarly, the special ad hoc procedure called the Extraordinary African Chambers (EAC) established within the Senegalese courts by agreement between the African Union and the government of Senegal with the mandate to judge those most responsible for the crimes committed in Chad between 1982 and 1990 passed the verdict and ordered Habré to pay approximately US\$154 million to 7,396 named victims. The EAC ordered for a trust fund to be created with the mandate to search for and seize Habré's assets for the purposes of funding the reparations.

Reliance on prosecutions alone can lead to conclusions that are ill-informed and even inconsistent with the notions of justice. Non-conviction based (NCB) asset forfeiture, a procedure that provides for the seizure and forfeiture of stolen assets without the need for a criminal conviction is another critical tool for recovering the proceeds of corruption best suited for transitional justice situations. Particularly NCB asset forfeiture can be essential when the wrongdoer is dead, is immune from prosecution or has fled the jurisdiction.⁹³ In the case of using NCB asset forfeiture in situations where the wrongdoer has fled the jurisdiction, states can avoid trials in absentia which are considered to be a parody of justice.

D. REPARATIONS

Seizing illicit assets for reparations has been shown to occur in many different transitions. In Sierra Leone the proceeds of plundered resources were used as a source of funding for reparations to victims. In Peru, some of the assets taken back from Alberto Fujimori were also used to fund reparations programs. The Philippines, passed a law to sets aside one third of the assets recovered from the Marcos family to fund the reparations programme.⁹⁴ Likewise,

⁹¹ *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, UNTS vol. 2187, p. 3, Art. 77(2) (b).

⁹² ICC, *Prosecutor v. Kenyatta*, Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931, T.Ch. V(b), 8 July 2014

⁹³ Theodore S. Greenberg et. al, *A Good Practice Guide for Non-conviction-based Asset Forfeiture* (Washington D. C: The World Bank, 2009).

⁹⁴ Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?" *International Journal of Transitional Justice* 2, no. 3 (2008): 310-330. <https://doi.org/10.1093/ijtj/ijn023>.

following the Arab Spring countries are exploring opportunities to use assets as reparations. In Tunisia the government is exploring the possibility of using assets that are recovered from Ben Ali and his family to fund reparations for communities in the that have been targeted for repression and marginalization during his dictatorship.⁹⁵

According to freedom house “following transition the new governments must act swiftly to identify ill-gotten assets and restore them to state coffers as a form of reparations to help meet the needs of victims and society at large.”⁹⁶ Several other organizations as well as pro bono law firms have taken the lead and are assisting states in transition to recover assets for reparations of victims. The ICC asset recovery objectives argues that “pursuant to the Rome Statute, the Court may order reparations to victims, for which the convicted person is personally liable. Securing an accused’s assets may be crucial for a meaningful award of reparations to victims.”⁹⁷

To be clear, channeling recovered assets directly into reparation programmes has its advantages. In deed once it is made clear that asset recovered from the previous regime will be spent and the public understands that they will be specifically spent for victims of human rights violations. There is widely held belief that this can generate enough backing and enough public support for that objective than if you just say those assets will just go back to the treasury or go back to the government, because then everyone will be concerned about how those assets could be lost again through corruption.

Yet funds recovered from ill-gotten assets of disposed leaders can also be used for other transitional justice processes and programmes. In practice, those who are responsible for designing reparations programmes are unlikely to be responsible for designing policies dealing, for example, with truth-telling or institutional reform. They concentrate on the design of programmes that are organized mainly around the distinction between material and symbolic measures and their individual or collective distribution. Rather than understanding “reparations” in terms of the wide range of measures that can provide legal redress for violations, it is as if they understood it more narrowly, in terms of whatever set of measures can be implemented to provide benefits to victims directly. Implicit in this difference is a useful distinction between measures that may have reparative effects, and may be obligatory as well as important (such as the punishment of perpetrators or institutional reforms), but do not

⁹⁵ ICTJ, “Three Years After Revolution, Tunisia Seek Justice Through Collective Reparation and Development,” ICTJ, December 18, 2013, <https://www.ictj.org/news/tunisia-collective-reparation-and-development>

⁹⁶ Freedom House, “Combating Impunity”

⁹⁷ International Criminal Court, “Financial Investigations,” p. 1.

distribute a direct benefit to the victims themselves, and those that do, “reparations” strictly speaking.⁹⁸

Reparations in these contexts must not only do justice to the victims, but also contribute to re-establishing essential systems of norms, including norms of justice, which are inevitably weakened during times of conflict or authoritarianism. In Peru, a special fund, El Fondo Especial de Administración del Dinero Obtenido Ilícitamente en Perjuicio del Estado (FEDADOI), was created to govern the use of assets confiscated from Fujimori and his close associates. Under the FEDADOI law, recovered assets have been used for both anticorruption and transitional justice measures, including truth seeking and reparations. The truth commission hearings in Peru, coming off revelations of widespread corruption by the Fujimori regime, created the political conditions that prompted Switzerland and the US to return to Peru \$77 million and \$20.2 million in ill-gotten assets, respectively.

E. INSTITUTIONAL REFORMS

The most evident and yet the least discussed inter-linkage is between asset recovery and institutional reforms. Quite clearly, asset recovery plays a critical role in strengthening some of the key foundations of sustainable development, such as the rule of law and strong, transparent and accountable institutions.⁹⁹ It also enables the strengthening of embryonic, and otherwise weak institutions such as a free media, strong political parties and civil society which ultimately will result in the emergence of a stronger culture and tradition of political participation.

This is because, asset recovery goes beyond the monetary value of the assets in question. They have the potential to deliver a broader understanding of justice that takes into account a range of victims’ needs and societal priorities.¹⁰⁰ Pfister draws a distinction between “hard assets” which are actual assets from “soft assets” to refer to steps and elements of country systems that are needed to ensure an effective return of assets. The former typically includes the stolen funds, while the latter ranges from the capacity of law enforcement institutions to the political will to fight criminal networks, provides a powerful foundation for sustainable development.¹⁰¹

There is now no doubt that a well-functioning and effective asset recovery

⁹⁸ OHCHR, *Rule of Law Tools*

⁹⁹ Mike Pfister, “Recovering Assets In Support Of The SDGs From Soft To Hard Assets For Development,” *Basel Institute on Governance Working Paper* no. 29 (2019), available at https://www.baselgovernance.org/sites/default/files/2019-05/WP29_AssetRecovery_SDGs.pdf

¹⁰⁰ ICTJ, “On Solid Ground: Building Sustainable Peace and Development After Massive Human Rights Violations,” Working Group on Transitional Justice, ICTJ, May, 2019, p. 5.

¹⁰¹ Pfister, “Recovering Assets”

system has favourable impacts on the prevention of widespread corruption and should be used as one of several corruption- prevention mechanisms. The more stolen asset return is aligned with standards of integrity, transparency, and accountability, the harder it becomes to divert assets or carry out corrupt acts. In this regard, the asset return process may support the establishment and enforcement of rule of law and prevent further corrupt practices in the country of asset origin. As is well known, fewer acts of corruption mean fewer corruption-related human rights violations.¹⁰²

VI. CONCLUSION

This paper sets out how the concept of asset recovery can be utilized in situations where corruption and plunder are part of the violations and abuses, through context-specific measures that promotes transitional justice. Asset recovery is already been seen as an integral part of human rights and development and therefore should also be embedded in the transitional justice mix as an accountability mechanism in its own right. Transitional justice does not have the luxury to that it “clumsily applies the same thinking and tools across a range of contexts and transition types as if they were the same thing.”¹⁰³ Its future of as a field depend on its innovative and creativity to adapt new mechanisms.

¹⁰² Membrez and Hösli, “How to Return Stolen Assets,” p. 5.

¹⁰³ Sharp, “What Would Satisfy Us?” pp. 580-581.

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