

‘Somehow This Whole Process Became so Artificial’: Exploring the Transitional Justice Implementation Gap in Uganda

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ABSTRACT[∞]

This article explores a key challenge in contemporary international efforts to promote transitional justice (TJ) in nontransitioning, conflict-affected states: the ‘implementation gap,’ in which policies are designed and funded but neither enacted nor implemented. Findings based on long-term qualitative fieldwork in Uganda indicate the implementation gap is co-constituted by technocratic donor approaches and domestic elite political maneuvering in a semi-authoritarian regime. The interaction between the two produces two forms of political artifice: ‘isomorphic mimicry’ and ‘calculated stasis,’ which stall the emergence of substantive TJ reform. Findings are relevant to the wide range of nontransitioning contexts where TJ is promoted by international donors and have important implications for its claimed potential to catalyze or restore civic trust in political systems in the aftermath of massive human rights violations.

KEYWORDS: Uganda, peace agreements, peacebuilding, technocracy, cooption

INTRODUCTION

In June 2007, ceding to international and domestic pressure and seduced by the reputational gains and donor funds on offer, the Government of Uganda (GoU) and the Lord’s Resistance Army/Movement (LRA/M) signed an Agreement on Accountability and Reconciliation (AAR) during peace talks held in Juba, southern Sudan.¹ This agreement proposed a national transitional justice (TJ) framework to

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1 UN Doc. S/2007/435 (2007). See also, ‘Annexure to the Agreement on Accountability and Reconciliation,’ 2008, https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_080219_Annexure%20to%20the%20Agreement%20on%20Accountability%20and%20Reconciliation.pdf (accessed 25 March 2019).

address widespread human rights violations and war crimes committed during the 20-year conflict in northern Uganda. International donors were quick to fund its implementation and lend rhetorical weight to its potential to build peace and strengthen democratic governance. Over 10 years later there has been frustratingly little progress – justice remains elusive for the vast majority of people who suffered during the conflict.

Underlying this is a contemporary policy puzzle for which Uganda constitutes a rich case study: the international promotion of TJ in conflict-affected, semi-authoritarian countries *not* transitioning from one constitutional or political order to another. Africa has become the testing ground for TJ efforts in this mold. Widely promoted by donors as part of broader stabilization and peacebuilding efforts, TJ is routinely codified during formal peace processes. For cosmetic and opportunistic reasons, political elites may offer declaratory support, but as Stephen Brown points out, ‘what outside actors often forget – even though domestic actors may try to remind them – is that such mechanisms can be more about evading than ensuring accountability.’² A recent report from the International Center for Transitional Justice, for example, notes that in the Democratic Republic of Congo (DRC), Kenya and Uganda, governments have paid ‘lip service’ to TJ but there is a lack of ‘meaningful results’ and no ‘genuine intention to succeed.’³ A major feature in such contexts is the ‘implementation gap,’ whereby ‘measures to address past human rights violations are proposed and even designed but go unimplemented or only partially implemented.’⁴ The UN special rapporteur on TJ identifies this as a problem of ‘scandalous proportions,’⁵ yet its connection to donor agendas is not well understood.

Through a case study of the trajectory of TJ in Uganda since the AAR accords were signed, this article examines how donor agendas interacted with domestic politics in a semi-authoritarian regime, and how this shaped the implementation gap that emerged. Despite not addressing this gap explicitly, existing literature on the poor record of externally driven TJ in nontransitioning contexts provides a good starting point for further conceptualization. Firstly, there exists substantial criticism of donor praxis for ‘cookie-cutter’ interventions that are normatively desirable in theory but easily ‘hijacked’ by domestic elites and insensitive to victims’ priorities in practice.⁶

2 Stephen Brown, ‘Transitional Justice as Subterfuge,’ *OpenCanada.org*, 2012, <https://www.opencanada.org/features/transitional-justice-as-subterfuge/> (accessed 25 February 2019).

3 Aileen Thomson and Kasande Sarah Kihika, ‘Victim’s Fighting Impunity: Transitional Justice in the African Great Lakes Region,’ *International Center for Transitional Justice* (2017), 8; Sarah Kihika Kasande, ‘The Bumpy Road to Peace and Accountability: Transitional Justice in the African Great Lakes Region,’ *International Center for Transitional Justice*, 2017, <https://www.ictj.org/news/peace-accountability-transitional-justice-african-great-lakes> (accessed 25 March 2019).

4 Roger Duthie, ‘Introduction,’ in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 12.

5 UN Doc. A/69/518 (2014).

6 See, Barbara Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda,’ *Development and Change* 36(5) (2005): 887–910; Sandra Rubli, ‘Transitional Justice: Justice by Bureaucratic Means?’ *Swisspeace Working Paper 4/2012* (2012); Dustin Sharp, ‘Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition,’ *International Journal of Transitional Justice* 9(1) (2015): 150–169; Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, NY: Cornell University Press, 2009).

Secondly, rather than being rejected outright, the literature explains how donor TJ agendas are skillfully *managed* by political elites in semi-authoritarian regimes.⁷ Taken together, this suggests that donors and domestic elites perform according to a broad range of normative expectations but also operate within the realm of real politics. This is well illustrated by Sidney Leclercq's simple formulation: 'these actors *cannot pursue* TJ but they also cannot *not pursue* it.'⁸

In its treatment of the Ugandan case, this article argues that the TJ implementation gap is best understood as the space in which this tension plays out. Rather than a temporary bump in the road, the implementation gap is a dynamic, enduring political space generated, constituted and sustained by the interaction of technocratic donor approaches and the power imperative of domestic elites in nontransitioning places. In Uganda, this (un)productive encounter has produced two mutually enabling forms of political artifice that keep TJ on the agenda, but thwart the realization of substantive progress. The first is 'isomorphic mimicry,' in which donors and recipients have a shared interest in prioritizing institutional form (what an institution looks like) over institutional function (what it achieves and the extent to which it is institutionalized).⁹ This is examined through analyzing the record of the International Crimes Division of the High Court and its first trial, that of mid-level LRA commander Thomas Kwoyelo. The second is 'calculated stasis,' in which domestic political elites skillfully leverage the space provided by donor 'partnership' approaches to sociolegal and political reform by stalling policy progress on TJ and gradually reframing its political narratives, without having to explicitly reject it. This is examined through an analysis of the failure to pass a National Transitional Justice Policy (NTJP) into law.

The arguments presented are based on long-term fieldwork on the topic of TJ in Uganda from 2012–2018. A total of 14 months was spent in the country, both in the capital, Kampala, and in the Acholi subregion. Findings are based on 121 in-depth, semi-structured interviews with a range of actors directly engaged in TJ debates, policy development and/or implementation since the AAR accords were signed. Respondents included Ugandan government ministers and advisors, members of parliament (MPs), bureaucrats working for the Justice Law and Order Sector (JLOS) ministries, members of the judiciary, Directorate of Public Prosecutions staff, civil society representatives and journalists, International Criminal Court (ICC) staff, UN and bilateral donor staff and cultural, religious and political leaders in the Acholi subregion. Data were triangulated through observation of TJ policy meetings,

7 Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya,' *African Affairs* 111(443) (2012): 244–260; Sidney Leclercq, 'Injustice through Transitional Justice? Subversion Strategies in Burundi's Peace Process and Postconflict Developments,' *International Journal of Transitional Justice* 11(3) (2017): 525–544; Anna Macdonald, 'In the Interests of Justice?' The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda,' *Journal of Eastern African Studies* 11(4) (2017): 628–648; Subotic, *supra* n 6; Oomen, *supra* n 6.

8 Leclercq, *supra* n 7 at 537 (emphasis in original).

9 Matt Andrews, Lant Pritchett and Michael Woolcock, *Building State Capability: Evidence, Analysis, Action* (New York: Oxford University Press, 2017), 31.

workshops, trainings and community outreach in Kampala and across Acholiland, and a systematic study of secondary source material, including all publicly available Ugandan government reports, legislation and speeches relating to the AAR accords; relevant donor and civil society organization (CSO) reports, policies and speeches; and reports from Uganda's two main newspapers, the *New Vision* and the *Daily Monitor*, relating to TJ issues.

The article first charts the 'internationalization' and 'normalization' of TJ since the end of the Cold War, and its widespread adoption by donors as a 'tool' to end conflicts and promote liberal models of governance in nontransitioning contexts. It then introduces the Ugandan case study, exploring the dissonance between technocratic donor approaches to AAR implementation and elite domestic politics of TJ subversion. The article places this dissonance in the context of the preexisting 'bargaining relationship' between donors and Yoweri Museveni's semi-authoritarian regime, analyzing how shared security interests and a 'partnership' approach to social and political reform shaped the parameters of the implementation gap that emerged. The final section takes us inside the implementation gap, arguing that both isomorphic mimicry and calculated stasis emerge at the intersection of technocratic donor approaches and elite political maneuvering, and function to keep TJ on the agenda, while also undermining the possibility of substantive progress in this area. While it is beyond the scope of this article to systematically address the contribution of civil society groups to broader TJ debates in Uganda, the analysis incorporates a range of civil society perspectives on the dynamics of the implementation gap, and the conclusion raises questions emerging from findings that are relevant to CSOs, victim-survivors and activists who continue to challenge impunity in contexts of nontransition.

TRANSITIONAL JUSTICE: THE TECHNOCRATIC TURN

To understand *why* international donors have promoted and funded TJ in Uganda, it is necessary to critically analyze the logic and praxis guiding its transmutation from post-authoritarian states (notably in Latin America, Eastern and Central Europe and South Africa) to conflict-affected states not undergoing political transition. At the outset, while TJ was informed by global interest in transitions to democracy, its application was nationally devised and driven.¹⁰ By the turn of the millennium, the field and practice expanded dramatically. It was normatively adopted and 'stretched' by international agencies and donors and applied to a far wider range of contexts than those characterized by regime transformation.¹¹ This expansion was rooted in rapidly shifting post-Cold War global politics and international norms. Today, international legal frameworks dictate that TJ is an 'almost automatic response to conflict and

10 Line Gissel, 'Contemporary Transitional Justice: Normalising a Politics of Exception,' *Global Society* 31(3) (2017): 353–369.

11 Pablo de Greiff, 'Some Thoughts on the Development and Present State of Transitional Justice,' *Journal for Human Rights* 5(2) (2011): 98–128; Iavor Rangelov and Ruti Teitel, 'Global Civil Society and Transitional Justice,' in *Global Civil Society 2011: Globality and the Absence of Justice*, ed. Hakan Seckinelgin and Billy Wong (London: Palgrave Macmillan, 2011).

human rights violations,¹² and further that TJ agreements must include an accountability dimension that satisfies international legal standards.¹³

Married to this 'logic of appropriateness' was a 'logic of consequences.'¹⁴ From the mid-1990s onwards, international attention oriented away from the floundering 'third wave of democracy' towards the 'wave of emergencies,' characterized by internal conflicts and ethnic cleansing.¹⁵ Kofi Annan articulated the UN's commitment to TJ in 2004, describing it as

the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.¹⁶

Its crucial function, however, was to be found in less quoted appendages to this definition: TJ was being programed as a vector for liberal peacebuilding and state-building projects.

The UN today defines TJ in terms of its 'positive' expeditious role in the 'establishment or re-establishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.'¹⁷ It links TJ to ambitious institution-building and economic development objectives, arguing it is 'critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance.'¹⁸ The World Bank, meanwhile, conceptualizes progress from 'violence and fragility' to 'citizen security, justice and jobs' as a mutable 'spiral,' the desired endpoint being strong institutions based on western-type models.¹⁹ Transitional justice initiatives are highlighted as one such policy that will contribute to this outcome.²⁰

Critical scholarship identifies a twofold problem with TJ's internationalization and normalization. Firstly, it is rooted in 'faith-based' rather than 'fact-based'

12 Pierre Hazan, 'The New Mantra of Justice: The Limited Success of Internationally Mandated Justice,' *Review* 1 (2007): 10. Cf. Rubli, *supra* n 6.

13 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice,' 2010, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf. See also, 'The EU's Policy Framework on Support to Transitional Justice,' 2015, http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf (both accessed 25 February 2019).

14 Jack Snyder and Leslie Vinjamuri, 'Principled Pragmatism and the Logic of Consequences,' *International Theory* 4(3) (2012): 438.

15 Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation*, trans. Sarah Meyer de Stadelhofen (Stanford, CA: Stanford University Press, 2010), 55.

16 'Guidance Note,' *supra* n 13 at 3.

17 *Ibid.*

18 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' UN Doc. S/2011/634 (2011), 6. See also, 'EU's Policy Framework,' *supra* n 13 at 8.

19 *World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011), 125.

20 Lars Waldorf, 'Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts,' in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017).

assertions about linkages between justice, democracy and rule of law, which take inadequate account of local contexts.²¹ The outgoing UN special rapporteur notes that today, TJ efforts are ‘predominantly’ applied in ‘weakly institutionalized’ settings, including Sierra Leone, Liberia, DRC, Burundi, Central African Republic, Cote d’Ivoire, Libya, Mali and South Sudan, ‘among others,’ querying whether the ‘same model of transitional justice forged in post-authoritarian transitions can be applied to post-conflict transitions without modification.’²² Most of these places, Uganda included, are referred to in the literature as ‘semi-authoritarian’: nominally democratic institutions exist, but are subject to an ‘authoritarian core’ intent on regime survival.²³ A recent review of evidence-based literature raises red flags, concluding not only that TJ processes are ‘very unlikely to function well’ in such settings, but, moreover, that there is ‘very limited evidence’ to suggest they will ‘strengthen weak institutions or increase institutional trust.’²⁴

Secondly, it is argued that internationalized TJ plays out in a technocratic bubble, detached from the politics and cultures of the societies in question. Drawing on the seminal work of Frank Centano, Roger Mac Ginty describes technocracy in peacebuilding as

systems and behaviors that prioritize bureaucratic rationality. In an ideal type, it is directed from above, pursues the imposition of a single policy paradigm and is immune to social context.²⁵

The rationale behind technocratic approaches is that they are transparent, universal and fair. The problem according to seminal ethnographies of aid politics, as well as new theoretical work in peacebuilding scholarship, is that donor approaches are presented as ‘unpolitical’ when in reality they are rooted in political ‘mythologies’ within international institutions that allow for the ‘reproduction’ and ‘stabilization’ of standardized interventions, ‘despite constant failures to live up to their own promises.’²⁶

The following section explores the real-life manifestations of the technocratic turn in TJ. By willfully neglecting the real politics of postconflict accountability in Uganda, donors channeled significant funds into a state-centric program for TJ design and execution, an approach which would come to shape the enduring nature of the implementation gap in this context.

- 21 Oskar Thoms, James Ron and Roland Paris, ‘State-Level Effects of Transitional Justice: What Do We Know?’ *International Journal of Transitional Justice* 4(3) (2010): 329–354.
- 22 ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,’ UN Docs. A/HRC/30/42 (2015), 6, and A/HRC/36/50 (2017), 8.
- 23 See, Aili Mari Tripp, *Museveni’s Uganda: Paradoxes of Power in a Hybrid Regime* (Boulder, CO: Lynne Rienner, 2010); Tom Goodfellow, ‘Legal Manoeuvres and Violence: Law Making, Protest and Semi-Authoritarianism in Uganda,’ *Development and Change* 45(4) (2014): 753–776.
- 24 Waldorf, *supra* n 20 at 42.
- 25 Roger Mac Ginty, ‘Routine Peace: Technocracy and Peacebuilding,’ *Cooperation and Conflict* 47(3) (2012): 289.
- 26 Florian Edelman, ‘Myth, Habitus, Field, and the Analysis of International Practices,’ *Journal of Intervention and Statebuilding* 12(1) (2018): 155.

ANTIPOLITICS MEETS REAL POLITICS: DONOR SUPPORT FOR THE AAR ACCORDS

During the war between the GoU and the LRA (1987–2008), northern Ugandan civilians were subjected to brutality from both sides. Estimates suggest the LRA abducted roughly 66,000 people, and at times almost 80 percent of the group comprised abductees under the age of 18.²⁷ From the 1990s onwards, Acholi political, religious and traditional leaders sought a peaceful solution that addressed the harrowing complexity of the situation. Their most notable success was the passing of the Amnesty Act in 2000, to cover all Ugandans ‘formerly or currently’ engaged in rebellion against the National Resistance Movement government.

From 1996, the GoU response to the LRA was to combine military offensives with forced crowding of civilians into camps. While they were ostensibly ‘protected’ by Uganda People’s Defence Forces (UPDF) soldiers, abuses by both the UPDF and the LRA were a regular feature of camp life. Described as a form of ‘social torture,’ the camps devastated Acholi livelihoods, and led to a far larger number of deaths than those caused by direct LRA violence.

In December 2003, Museveni issued the first-ever state referral to the ICC regarding the ‘situation concerning the LRA.’²⁸ In July 2005, arrest warrants were unsealed for Joseph Kony and four of his top commanders. A year later the Juba Peace Talks between the GoU and the LRA/M began in southern Sudan. These were the first peace talks to take place against the backdrop of ICC arrest warrants against one of the negotiating sides. Some argue the warrants incentivized the LRA/M to join the talks, but this represents a simplistic and possibly incorrect analysis of a highly complex range of motivations. Because of the warrants, Kony and his leadership refused to attend the talks and sent diaspora delegates in their place, most of whom had little to no serious connection with the high command in the bush.

The ICC Office of the Prosecutor (OTP) lobbied Museveni to refer the case but his government ‘did not understand the impact of the referral.’²⁹ Initiated by the Ministry of Defence, it was seen as a ‘tool’ to help militarily defeat the LRA.³⁰ Museveni was informed by the OTP that any investigation would have to address the whole ‘situation in northern Uganda.’³¹ To date, however, no state actors have been investigated, creating a widespread feeling within affected communities that ICC engagement was partisan.

27 See, e.g., Christopher Blattman and Jeannie Annan, ‘On the Nature and Causes of LRA Abduction: What the Abductees Say,’ in *The Lord’s Resistance Army: Myth and Reality*, ed. Tim Allen and Koen Vlassenroot (London: Zed Books, 2010).

28 International Criminal Court, ‘President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC,’ press release, 29 January 2004, https://www.icc-cpi.int/pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+lra+to+the+icc (accessed 25 March 2019).

29 Personal interview, UPDF official, Uganda, 22 May 2012. Unless indicated otherwise, all interviews were conducted in Kampala.

30 Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), 172.

31 Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018), 58.

Despite this, the ICC soon became a thorn in Museveni's side because the warrants threatened to jeopardize the successful conclusion of the peace talks. By 2006, domestic pressure had increased from all quarters for a deferral under Article 16 of the Rome Statute. The GoU wanted to end a conflict that was damaging its reputation internationally; the LRA high command refused to sign a peace deal without the dropping of the warrants; and Acholi civil society could not countenance the possibility that international justice efforts might thwart the peace process. The OTP, however, was adamant the case did not qualify for deferral and international donors to the Juba process would only accept a peace agreement that contained a strong accountability element.

In response to conflicting and pressurized demands, the AAR and its implementing annex were signed by both delegations in June 2007 and February 2008, respectively. The accords acknowledged the 'need for an overarching justice framework that will provide for the exercise of formal criminal jurisdiction, and for the adoption and recognition of complementary alternative justice mechanisms.'³² They contained provisions for a domestic war crimes division of the Ugandan High Court; a truth 'body' to 'inquire' into 'human rights violations committed. . . during the conflict'; arrangements for reparations to victims; and a role for 'traditional justice mechanisms.'³³ They also committed the government to 'introduce any amendments to the Amnesty Act. . . in order to bring it into conformity with the principles' of the agreement.³⁴

The accords were informed by the tireless advocacy of a heterogeneous group of CSOs and victim-survivors with diverse agendas. As a result, they showcased almost the entire inventory of TJ options. Political engagement with the accords, however, was not rooted in commitment to TJ's normative underpinnings. In truth, they were reactive and hastily drafted, signed off by both delegations in order to sidetrack the ICC, pay lip service to CSO demands and allow the talks to continue.³⁵ Addressing 'accountability' also served to enhance the reputational status of both sides amongst international observers. In the end, Kony did not sign a Final Peace Agreement (FPA), in part because he said he was not adequately consulted by his own delegation on the implications of the AAR accords.

While the FPA was never signed, the GoU committed itself to preparing the legislation necessary for implementation of the accords and donors quickly coalesced around a technical agenda for supporting the process. It should be a truism that state-centric TJ is 'unlikely to be effective when there is no convincing break with past practices, and when alleged perpetrators remain in positions of power.'³⁶ And yet, as Christine Bell argues,

often international actors invest heavily in the formal peace process and attempt to support and implement any agreement that emerges, without

32 UN Doc. S/2007/435 (2007), 7.

33 *Ibid.*, 5, 8.

34 'Annexure,' *supra* n 1.

35 Macdonald, *supra* n 7.

36 Brown, *supra* n 2.

fully understanding how the parties understand the deal they have signed.³⁷

This was precisely the case in Uganda, where donors dashed to fund a state-led TJ process in the absence of a political transition. As Gerhard Anders writes of TJ efforts in postconflict Sierra Leone, a deeply contested set of issues enmeshed in the history and politics of the conflict were refracted into a ‘sequence... presented in terms of depoliticized technologies deployed to address technical challenges.’³⁸ Justice-sector donors were, as one official recalls, ‘very, extremely, highly optimistic’; another said, ‘it is true that we were all very excited about TJ. Yes it is coming!’³⁹

A 50-member Transitional Justice Working Group (TJWG) was set up under the chairmanship of the High Court principal judge and mandated with designing a TJ system for Uganda. Actual funds for TJ are hard to measure but it is an area that is almost exclusively donor funded.⁴⁰ The TJWG existed under the auspices of the JLOS secretariat, a body responsible for planning and coordination across 18 government departments working on justice and security issues. This set-up allowed for close coordination with justice-sector donors through the JLOS Development Partners Group (DPG). Since the AAR accords were signed, membership of the DPG has fluctuated somewhat because of shifting donor priorities, but major contributors and longstanding members have been Austria, Denmark, Ireland, the Netherlands and Norway. Ireland was a key member until 2013; Denmark, which has been a large contributor since the 1990s, stopped dispersing funds in 2018; while the EU formally joined the group the same year. The DPG also has a number of multilateral members, including the UN Development Programme, the Office of the UN High Commissioner for Human Rights, the UN International Children’s Emergency Fund and UN Women.

At the outset, the TJWG included technical staff from government ministries and agencies, as well as development partners and civil society representatives. In August 2011, Danida funded two TJ ‘technical’ advisors to join the JLOS secretariat because of a concern that ‘there was no one to actually move TJ forward from the inside’: one, an expatriate, was to provide ‘international’ expertise and the other was to focus on ‘national’ dimensions.⁴¹ The advisors were funded by donors but employed by the ministries. Their role was to work with Ugandan government institutions but also to provide a point of contact with donor officials.

In 2012, the sector’s overarching reform plan, the JLOS Strategic Investment Plan III (2012–16) or SIP III, listed TJ as a ‘key thematic area.’ Prior to this, all donor

37 Christine Bell, ‘Contending with the Past: Transitional Justice and Political Settlement Processes,’ in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 85.

38 Gerhard Anders, ‘Transitional Justice, States of Emergency and Business as Usual in Sierra Leone,’ in *Transition and Justice: Negotiating the Terms of New Beginnings in Africa*, ed. Gerhard Anders and Olaf Zenker (Chichester: Wiley Blackwell, 2015), 138.

39 Personal interviews, donor officials, 13 and 16 March 2018.

40 Tania Bernath, ‘Off the Agenda as Uganda Moves toward Development: Uganda’s Transitional Justice Process,’ in *Transitional Justice, International Assistance, and Civil Society: Missed Connections*, ed. Paige Arthur and Christalla Yakinthou (Cambridge: Cambridge University Press, 2018).

41 Personal interview, donor official, 22 May 2013.

funding for TJ activities was provided ‘off-budget,’ largely as project support, because the previous SIP was introduced before the AAR accords were signed. Most project support involved the recruitment of expatriate ‘experts’ and consultants to advise and guide the early stages of the process. The Public International Law Policy Group was funded by USAID to provide legal and technical advice in the drafting of the 2010 ICC Act, and Canada sent a team of ‘experts’ on international criminal law and restorative justice to meet with JLOS staff in 2009.⁴² Norway, meanwhile, funded external consultants to work with the Ugandan Law Reform Commission to prepare a study on traditional justice and truth-telling processes. Since 2012, the majority of donor funding for state-led TJ has been allocated through three modalities: sector budget support; continued project support; and the JLOS Sector Wide Approach fund, a basket fund championed by donors as a way of tracking and auditing funds more easily, and through which ‘certain agendas’ can be ‘pushed’ and more clearly monitored.⁴³

Justice-sector donors have also funded CSOs working on TJ advocacy, through bilateral agreements but mainly via the Democratic Governance Facility (DGF), a basket fund financed by Austria, Denmark, the EU, Ireland, the Netherlands, Norway and Sweden, with a secretariat which supports CSOs to ‘strengthen democratization, protect human rights, improve access to justice and enhance accountability in Uganda.’⁴⁴ It is important to note that there exists a widespread perception amongst civil society groups that donor agendas and modalities regularly served to *constrain* them on TJ. Because of the complexities of the application process and an embedded risk-averseness, the DGF approach has been criticized for privileging professionalized CSOs with stronger administrative capacities, sidelining local activists and victim-survivor groups. Further, in the ‘chase’ for donor money, CSOs faced pressure to adjust their own visions to meet donor priorities, and were regularly ‘coopted.’ Observers agree that in Uganda, while civil society has played an important role in the promotion of TJ, the net result of these dynamics has been to further weaken civil society in an already difficult and constrained political space.⁴⁵

With this in mind, the following section considers donor support for TJ in the broader context of donor–recipient relations in semi-authoritarian Uganda, and how this came to shape the parameters of the implementation gap that emerged.

PROCESS OVER PRODUCT? DONOR-DRIVEN TJ AND THE PARAMETERS OF THE IMPLEMENTATION GAP

‘The provision of aid,’ argue Michael Findley and colleagues, ‘involves a bargaining relationship between donors and recipient governments; the balance of power between them depends on the situation.’⁴⁶ Two key factors shape the ‘bargaining

42 Bernath, *supra* n 40; Nouwen, *supra* n 30.

43 Personal interview, donor official, 16 March 2018.

44 DGF information leaflet, n.d. (on file with author).

45 Phil Clark, ‘“All These Outsiders Shouted Louder Than Us”: Civil Society Engagement with Transitional Justice in Uganda,’ *Security in Transition Working Paper SiT/WP/03/15* (2015), 15. See also, Bernath, *supra* n 40.

46 Michael G. Findley, Adam S. Harris, Helen V. Milner and Daniel L. Nielson, ‘Who Controls Foreign Aid? Elite versus Public Perceptions of Donor Influence in Aid-Dependent Uganda,’ *International Organization* 71(4) (2017): 658.

relationship' between Uganda and western donors. The first is that, historically, Museveni's Uganda has been heralded as a 'development model' and 'star performer.'⁴⁷ Even if this is no longer the case, sunk-costs calculations favor continued support for a regime that has been so heavily invested in. The second is that in the post-9/11 era of securitized aid, Uganda is a vital regional partner in the global war on terror.⁴⁸ These factors, as well as broader shifts in the management of aid since the late 1990s, inform a donor-recipient relationship based on nonconfrontational approaches to governance reform, structured around the concept of a 'partnership.'⁴⁹

When it came to TJ policy formulation, this 'partnership' was a contrivance. From the outset, an opinion widely shared was that 'donors are essential for transitional justice to move forward,' and that the executive would tolerate this barring any significant threats to the existing balance of power.⁵⁰ A clear illustration of the asymmetry between donor and broader JLOS and GoU commitment to TJ was the fact that the first and second drafts of the SIP III did not include *anything* on TJ. One donor official explained that the immediate response from the DPG was, 'Where is TJ in this?' and, after that,

you see them really incorporate things. . .with SIP III we said, you need to have TJ there to indicate you see it as a need. . .the engagement we reached with JLOS is: we will support you within your SIP III framework, so bring transitional justice in.⁵¹

A UN official readily admitted that because AAR implementation was so donor driven, the TJ content in the final SIP III resembled a 'cut and paste from various donor manuals.'⁵² It ambitiously committed JLOS to oversee the adoption of an NTJP 'accompanied by relevant legislation creating necessary mechanisms to implement the policy.'⁵³

This has not come to pass. In a 2016 performance review, donors graded JLOS progress on TJ as 'unsatisfactory,' and criticized the 'lengthy, excessive delay in submission of TJ policy to cabinet.'⁵⁴ In mid-2013, JLOS circulated the first draft NTJP amongst 'key stakeholders' for comment but it was criticized by CSOs as 'rushed' and 'incoherent.'⁵⁵ The final draft was circulated in mid-2017. Later that year it received a Certificate of Financial Implication from the Ministry of Finance, and in

47 Tripp, *supra* n 23 at 185.

48 *Ibid.*

49 Jonathan Fisher and David Anderson, 'Authoritarianism and the Securitization of Development in Africa,' *International Affairs* 91(1) (2015): 131-151.

50 Personal interview, JLOS official, 3 May 2012.

51 Personal interview, 30 April 2012.

52 Personal interview, 2 September 2013.

53 Government of Uganda, Justice Law and Order Sector, Third JLOS Strategic Investment Plan, 2012/13-2016/17, 11.

54 JLOS DPG, 'Joint Assessment of the Justice, Law and Order Sector Development Partners Group (JLOS DPG)' (27 October 2016) (on file with author).

55 Refugee Law Project, 'A Renewed Promise for Peace and Justice: The Reinstatement of Uganda's Amnesty Act 2000' (29 May 2013).

March 2018 the JLOS secretariat argued it was ‘more or less on its way to cabinet.’⁵⁶ While these steps sound positive, observers express concern that the draft policy will continue to gather dust, or will be bounced around because it is not in the executive’s interest to push forward.

The one area where there has been some visible but halting momentum is around domestic war crimes prosecutions. In July 2008, as Kony’s signature on the FPA was being sought, Principal Judge James Ogoola issued an administrative circular, which outlined plans to set up a new division of the High Court – ‘a war crimes court’ – and highlighted staffing and other administrative arrangements.⁵⁷ Formal prosecutorial processes were supported quickly, donors argued, because there was more funding for them and because, as a ‘technical’ intervention, it was easy to coordinate around the setting up of the court.⁵⁸ ‘You just get some funding,’ explained a JLOS official; ‘donors like to support the ICD [International Crimes Division], they see it as something going on.’⁵⁹ To date, however, there has only been one, ill-fated war crimes prosecution in the ICD (explored below), that of LRA commander Kwoyelo, and the court itself lacks government support.

Despite the clear lack of progress on TJ, the overarching donor justification for continuing support in this area remains constant. Rooted in logics of norm diffusion and neo-institutionalist orthodoxy, it posits firstly that the gradual opening up of discursive space on accountability will transfer into behavioral normative shifts, which will restore ‘civic trust’ in the political system after conflict and violence. Secondly, it expresses faith that delineated institutional improvements, such as ‘improving efficiency and effectiveness’ of the judiciary, ‘supporting reforms in the High Court,’ and bureaucratic capacity building, including the ‘development of performance enhancement mechanisms,’ will gradually deliver substantive governance reform.⁶⁰

So, while teleological thinking endures from the time when TJ was first developed, the *theory of change* – that is, understandings about *how* we get from A to B – has shifted. The messy, complex prospect of pursuing justice and accountability during and after conflict is not conceived as a political dilemma but rather as a problem that can be ‘managed and dealt with by administrative science.’⁶¹ An indicative comment was made by the UN high commissioner for human rights when she argued that TJ is a ‘*technical*’ approach to exceptional challenges, such as dealing with massive human rights abuses committed in the course of armed conflict or by repressive regimes.⁶² As Line Gissel argues, it is believed that ‘political stability derives from the rule of law rather than from stakeholders’ negotiated moderation.’⁶³

56 Personal interview, JLOS official, 16 March 2018.

57 Nouwen, *supra* n 30 at 180–181.

58 Personal interview, donor official, 5 June 2012.

59 Personal interview, 18 May 2012.

60 Irish Aid, ‘Uganda Country Strategy Paper 2010–2014’ (2010), 9; Danida, ‘Uganda Good Governance Programme 2011–2016’ (2011); European Union, ‘National Indicative Programme for Uganda 2014–2020’ (2014).

61 Hazan, *supra* n 12 at 30.

62 Quoted in Gissel, *supra* n 10 at 352 (emphasis added).

63 *Ibid.*, 357–358.

This technical approach is paradigmatic of what Thomas Carothers calls ‘developmental’ rather than ‘political’ aid, pursuing as it does

incremental, long term change in a wide range of political and socio-economic sectors, frequently emphasizing governance and the building of a well-functioning state.⁶⁴

Contemporary internationalized TJ thus departs significantly from the foundational approach, which emphasized the strategic need for elite national actors to strike political bargains behind closed doors during a temporally bounded transition period.⁶⁵ With its emphasis on building ‘effective states,’ internationalized TJ studiously evades the ‘black box’ of political bargaining.⁶⁶

The significance of this overarching logic and approach is twofold. Firstly, it is not rooted in rigorous analysis of domestic political settlements and elite incentives. According to a JLOS official, donors ‘cut out a lot of steps’; you cannot, she argued, just meet with the technical people, ‘with this government, unless you involve the top leadership in the first discussion of a project, then it just does not go anywhere.’⁶⁷ In a semi-authoritarian state like Uganda, the very ingredients that combine to make TJ a reality – an independent judiciary, respect for civil and political rights, and fair and equal treatment of all persons before the law – also constitute a serious threat to executive dominance and control. As a CSO activist explained:

Donors ignore the victims with the assumption that victims would just mutate into citizens. . . [that] just does not apply in the context of Uganda. . . they are not even questioning the governance framework that exists.⁶⁸

Since donors began funding AAR implementation, a series of political developments in Uganda actually point towards what Charles Tilly calls ‘de-democratizing,’ a ‘net movement toward narrower, more unequal, less protected, and less binding consultation.’⁶⁹ Yet justice-sector donors broadly acknowledged that political context is not sufficiently considered in TJ programming. A senior JLOS official explained she had ‘never had that discussion’ about political context with donors:

At the political level there is denial about TJ. At the technical level there is a realization that this needs to be addressed but there is not enough critical analysis of context.⁷⁰

64 Thomas Carothers, ‘Democracy Assistance: Political vs. Developmental?’ *Journal of Democracy* 20(1) (2009): 5.

65 Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,’ *Human Rights Quarterly* 31(2) (2009): 321–367.

66 Rangelov and Teitel, *supra* n 11 at 163; Sharp, *supra* n 6.

67 Personal interview, 3 May 2012.

68 Personal interview, 18 March 2018.

69 Charles Tilly, *Democracy* (Cambridge: Cambridge University Press, 2007), 13–14.

70 Personal interview, 18 September 2013.

A UN official agreed:

Donors are not having a conversation about the goals and strategies of TJ and that is a great failure. . . The checklist approach is dangerous. TJ could end up doing more damage.⁷¹

The second significant point about the current DPG approach is that it carries fundamental contradictions. DPG officials at once refer to TJ as a long-term process-oriented objective *and* express impatience at the lack of measurable outcomes. This tension stems from the bureaucratic culture of development agencies and is a frustration amongst staff. A DPG official lamented that ‘a lot of work is process-orientated and keeping processes going but then we are asked to deliver. . . numbers for every single thing we do and it is *ridiculous*.’⁷² This also made life hard for JLOS officials, who complained that trying to implement TJ was ‘very different from building a road,’ and yet this was how it was being measured.⁷³

Such bureaucratic imperatives significantly shape the way in which national-level technocrats approach their own policy-making role. In the most recent JLOS Sector Development Plan (2017–2021), TJ is again listed as a strategic objective but emphasis is on how JLOS can promote and strengthen TJ initiatives in the *absence* of the legal framework. JLOS, donors argued, had ‘learnt’ that this approach was far more likely to get a ‘tick’ in DPG annual performance assessments.⁷⁴ In recognition of the fact that JLOS workplans were now more focused on meeting donor metrics of bureaucratic competence than on substantive engagement with the future of a national TJ process, one donor official lamented, ‘somehow, this whole process became so artificial.’⁷⁵

MANIFESTATIONS OF THE (UN)PRODUCTIVE ENCOUNTER: INSIDE THE IMPLEMENTATION GAP

The following sections explore in more detail how the TJ implementation gap in Uganda was produced by the imbrication of technocratic donor approaches and the Museveni regime’s reactive tactics. In areas where there has been some tangible ‘progress,’ most notably in the setting up of the ICD, this produces ‘isomorphic mimicry,’ which permits ‘successful failure.’⁷⁶ In areas where there has been no significant movement, notably truth, reparations, traditional justice and the passing of an overall NTJP, it produces space and time for political elites to engage in politico-legal chicanery which privileges their own conflict narratives and guarantees stasis on substantive TJ reform without explicit rejection of the process. Isomorphic mimicry and

71 Personal interview, 4 October 2012.

72 Personal interview, donor official, 16 March 2018 (interviewee emphasis).

73 Personal interview, JLOS official, 14 March 2018.

74 Personal interview, donor official, 16 March 2018.

75 Personal interview, 5 June 2012.

76 Andrews et al., *supra* n 9 at 31. See also, Deval Desai and Michael Woolcock, ‘Experimental Justice Reform: Lessons from the World Bank and Beyond,’ *Annual Review of Law and Social Science* 11 (2015): 155–174.

calculated stasis are not novel in the Ugandan context and should be understood as common manifestations of the Museveni regime's artful deflection of technocratic donor efforts to instill liberalizing social and political reform.

Isomorphic Mimicry: The Strange Fate of the ICD

A key motivating factor for GoU political elites to move ahead with AAR implementation was the win-win calculation that cosmetic endorsement would garner international validation and funds, but that pressure to deliver substantive reform could be managed. In March 2008, the minister of internal affairs warned the US ambassador that the GoU would not necessarily 'follow the letter' of the AAR accords but 'intended to move forward on its obligations.'⁷⁷ Despite reservations, the political leadership was aware that, at the international level, TJ was considered the 'right thing to do.'⁷⁸ It is important, a minister explained, to 'dress these justice things up for international credibility.'⁷⁹

This cosmetic approach to law-making does not represent a new departure. Uganda is 'best in class' in Africa and further afield when it comes to laws and accountability organs; the problem is those 'laws are not being implemented' and 'processes are being poorly executed.'⁸⁰ One explanation is that reforms are 'being introduced to make government look better based on externally defined best practices.'⁸¹ Matt Andrews and colleagues call this 'isomorphic mimicry,' and it is enabled by international donors whose approach to governance reform 'conflates form and function' so that "looks like" substitutes for "does".⁸² In other words, institutions may look different and may be guided by new legislation and procedures but politics and poor enforcement mean that little changes, and 'no-one's practices actually improve.'⁸³

The government and DPG position on the ICD and the fate of the Amnesty Act encapsulates these dynamics well. Donors hurried to fund the establishment of the continent's first domestic war crimes court, even before the amnesty issue had been properly addressed. In so doing, they became a 'vector of isomorphic mimicry': the programmatic approach to funding court premises and consultants to help draft the applicable legislation and codes of procedure, and training judges, was based on the assumption that function would flow from form.⁸⁴ It also privileged 'countable' outputs that could be measured while neglecting the political dynamics that would ultimately frustrate substantive war crimes accountability. A legal activist explained that

77 US Embassy Kampala, 'Uganda's Chief LRA Negotiator on Peace Agreement,' *Wikileaks*, 08KAMPALA424, 19 March 2008, https://wikileaks.org/plusd/cables/08KAMPALA424_a.html (accessed 25 March 2019); Macdonald, *supra* n 7.

78 Personal interview, GoU minister, 22 May 2012.

79 *Ibid.*

80 Matt Andrews and Lawrence Bategeka, 'Overcoming the Limits of Institutional Reform in Uganda,' ESID Working Paper No. 27 (2013), 2.

81 *Ibid.*, 32.

82 Andrews et al., *supra* n 9 at 31.

83 *Ibid.*

84 *Ibid.*, 44–45.

donors liked it [the ICD] so Museveni said fine, we'll have it. Then the judges got sent on study tours and everyone tried to make the court look like the ICC, but Museveni was never really interested in that court.⁸⁵

From the outset, Ugandan activists warned the DPG not to take the AAR accords at face value because they risked funding a victor's court that guaranteed government impunity. The crafted official response to questions concerning the possibility of army trials at the ICD was that soldiers are tried in the court martial system and other legal processes would be 'too lenient.'⁸⁶

While acknowledging the ICD would be subject to political challenges, the DPG routinely advanced a 'glass half-full' argument: a compromised court was better than no court. Endemic in rule of law reform efforts more generally, this approach enables 'successful failure' and is a common consequence of isomorphic mimicry.⁸⁷ Donor funding to improve state capabilities produces few substantive results, yet funding from international agencies remains forthcoming 'on the pretext that they [the recipient state] are capable of implementation and/or that improvement in capability is imminent.'⁸⁸

In early 2010, Kampala was selected to host the ICC's first review conference. As preparations began, explained one lawyer, 'all eyes were on the court [the ICD],' which had not yet heard any cases. Donors, he argued, 'sunk' so much into the ICD, 'they had to have that first trial.'⁸⁹ It was no coincidence that in August 2010, Kwoyelo was charged with 12 counts of violating Uganda's Geneva Conventions Act. This was despite the fact he had applied for amnesty in January that year. While the Amnesty Commission considered him eligible, the Director of Public Prosecutions (DPP) never certified the application. Despite other senior LRA commanders receiving amnesty both before and even after Kwoyelo's capture, a senior DPP official explained: 'at that time, because peace talks had just collapsed but the AAR was in existence, his arrest was timely and that is why we picked on him.'⁹⁰ Not surprisingly, the continued existence of the Amnesty Act halted the ICD's first – and only – war crimes trial to date. In September 2011, the Constitutional Court ruled that Kwoyelo had a legal right to amnesty under the Amnesty Act, that the ICD must suspend the trial and that the DPP and Amnesty Commission must process his amnesty certificate.

In private, the DPG were furious about the ruling: 'the government should stop this amnesty,' said one donor official, 'we need accountability, we need to stop this in Africa!'⁹¹ What followed was an attempt by the DPG to engineer significant reform of the Amnesty Act through bureaucratic processes that eschewed engagement with the broader political economy of the legislation. While the attorney general, judiciary and DPP were supportive, important political constituencies, including the

85 Personal interview, 15 March 2018.

86 Personal interview, GoU minister, 4 May 2012.

87 Andrews et al., *supra* n 9 at 31.

88 *Ibid.*

89 Personal interview, 22 May 2012.

90 Personal interview, 2 May 2012.

91 Personal interview, 31 May 2012.

executive and army, were not brought on board. The amnesty process benefitted these actors considerably as a military strategy because it allowed former LRA combatants to provide intelligence and become incorporated into the army. Further, a group of CSOs working in northern Uganda insisted the Act retained popular support, particularly in the Acholi region, where it had a key peacebuilding function.⁹²

On 25 May 2012, the minister of internal affairs, Hilary Onek, unexpectedly issued a statutory instrument extending the Amnesty Act but lapsing the 'operation of Part II' of the Act. This abolished the process by which an individual could apply for amnesty. Just two weeks earlier he had signed a law extending the Act *without* amendment for one year. In a bizarre explanation of this policy reversal, he said:

In the second week of May, me not being a lawyer, I said: OK we just have a blanket amnesty extension. Then I was corrected by JLOS that this amnesty was not compatible with our law. Amnesty should be handled on a case by case basis by JLOS. So, Part II is now lapsed.⁹³

In private, key CSOs criticizing his decision argued that DPG opposition to the amnesty was being pushed via the JLOS secretariat. A senior JLOS official explained that 'there is a reason we encouraged the minister to do it that way.'⁹⁴ In consultation with certain donors, it was decided 'if we just kept renewing it [the amnesty] or amending it there would have been no political impetus for a TJ policy, you know how things are in Uganda.'⁹⁵ The logic was that without the amnesty in place, it would be incumbent on the GoU to engage with TJ and do *something* to move the various processes forward.

This approach was criticized on two grounds. Firstly, several CSOs said the lapsing was procedurally nondemocratic. In their determination to 'transplant' legislation and procedures to stamp out the Amnesty Act, it was argued donor involvement had been very 'negative...[they have] taken RoL [rule of law] principles apart.'⁹⁶ Secondly, without the requisite political engagement, TJ policy drafted at the technical level would be worth little more than the paper it was written on.

This turned out to be correct. In May 2013, JLOS held a consensus-building workshop on its first draft NTJP, which recommended unequivocally that there be no blanket amnesty. Just three days later, however, Onek contradicted this position and reversed his lapsing of Part II, thus *fully reinstating* the blanket amnesty for another two years. The same month, a report from the powerful defense committee in parliament was published, arguing the 2012 decision to lapse the Act was 'premature' and 'out of step with the sentiments of affected communities.'⁹⁷ The report also

92 Civil society was divided on this. International human rights nongovernmental organizations based in Kampala vocally supported amendments to the Act.

93 Remarks made at JLOS Validation Workshop, Kampala, 18 July 2012. The extension without amendment was signed but not gazetted by Onek.

94 Personal interview, 18 September 2012.

95 Ibid.

96 Personal interview, legal activist, 22 May 2012.

97 Parliament of Uganda, *Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of the Amnesty Act, 2000* (2013), para. 13.1.

criticized 'external actors, including some development partners funding the JLOS,' for exerting 'a disproportionate influence on the Executive's approach to the amnesty issue, by promoting their own policy preferences.'⁹⁸

In the year between the lapsing of Part II of the Act and its reinstatement, a group of CSOs working in northern Uganda launched an advocacy campaign and put pressure on MPs and the government to reintroduce the amnesty. But the immediate catalyst, according to UN sources, was the May 2013 visit of US war crimes ambassador Stephen Rapp and his request that both the JLOS secretariat and the DPP soften their stance on amnesty. The US position, according to a UN official,⁹⁹ was that the amnesty was central to the success of US-supported military efforts against the LRA, which at the time was listed as a terrorist group.¹⁰⁰ Since 9/11, national security agendas have promoted increased funding for military and security-sector assistance in Uganda. The fate of the Amnesty Act became tied up in this dynamic and exposed serious divisions in donor policy towards TJ.

The executive managed DPG and JLOS interventions shrewdly. There were concerns when the ICD was first formed that it would be a 'victor's court.' The executive, however, has shown little interest in using the court for political gains. Some donor officials now acknowledge 'there is no way you can try the LRA and then the name of the Government does not come up. It's in no one's interests.'¹⁰¹ Rather than reject the court entirely, however, the political leadership hovered above institutional wrangling and never staked out a clear position. It has been, one analyst said, 'like a cat standing high on a wall: you are not sure which way it might jump.'¹⁰² This should be understood in the context of what Gaaki Kigambo calls Museveni's 'overall strategy of stifling the emergence of strong institutions as his primary strategy for regime survival.'¹⁰³

In April 2015, the Supreme Court upheld the constitutionality of the Amnesty Act¹⁰⁴ but also ruled it does not necessarily grant blanket amnesty in all cases, and the DPP has the right 'to proceed to prosecute' an individual who applies for amnesty.¹⁰⁵ Due to concerns about lack of capacity and independence within the judiciary, DPG officials remain worried that the GoU has maintained political control over the use of amnesties, and the system will continue to operate 'indiscriminately' rather than according to a legal framework.¹⁰⁶ Meanwhile, Kwoyelo's case resumed, but because of major funding, personnel and procedural issues, four years on

98 Ibid., para. 9.38.

99 Personal interview, 2 September 2013.

100 Interviewees speculated that Rapp was lobbied by US-based CSOs that had campaigned successfully for the 2011 deployment of 150 US Special Forces to 'hunt' for Kony. See also, The Enough! Project, 'Uganda Reinstates Key Tool to Boost Defections from the Lord's Resistance Army,' https://enoughproject.org/files/LRA_Amnesty_Policy_Alert.pdf (accessed 25 March 2019).

101 Personal interview, 13 March 2018.

102 Personal interview, 8 May 2012.

103 Gaaki Kigambo, 'Is President Museveni Planning to Crack Down on Authoritative House Speaker?' *East African*, 24–30 August 2013.

104 The Act was last renewed in May 2017.

105 The Supreme Court of Uganda, Constitutional Appeal No. 1 of 2012 between Uganda versus Thomas Kwoyelo (April 2015), 34.

106 Personal interview, donor official, 13 March 2018.

progress has been so slow that in October 2018, the African Commission on Human and People's Rights issued a communication ordering the GoU to compensate Kwoyelo for failing to hear his case within a reasonable timeframe.

Interaction between DPG approaches and the reactive tactics of the Museveni regime enabled both 'isomorphic mimicry' and 'successful failure' in the ICD. A deterministic statebuilding logic prioritized 'building capacity' for the ICD and ensuring the correct legal frameworks and procedures were in place, but this neglected the 'real politics' of war crimes accountability in Uganda. In light of arguments about isomorphic mimicry, it is telling that during a visit to the ghostly courthouse in 2014, a clerk lamented the lack of cases but proudly explained the premises were 'designed to look like the ICC,' and soon a glass panel would be erected between the defendants' area and the rest of the courtroom to complete the modeling.

Calculated Stasis and Narrative Shaping: Truth, Reparations and Traditional Justice

While the political leadership has never rejected drafts of the NTJP, there has been no explicit political support for enactment. As long ago as May 2013, the Irish ambassador complained in a public speech that the DPG had been 'waiting for the transitional justice policy for the last three to four years' and 'it would be good if the executive arm of the Government could publicly express commitment to transitional justice.'¹⁰⁷ It has never done so. Five years later, at the annual Article 8 Political Dialogue meeting between Museveni, his cabinet and EU ambassadors, the latter 'brought the question of the policy to the highest level.'¹⁰⁸ The president referred the issue to the attorney general, who said something vague about the policy having 'fiscal implications for the current resource envelope.'¹⁰⁹ The political response, DPG officials lamented, was 'inconclusive.'¹¹⁰

The two most likely outcomes around the draft NTJP are that it is 'shelved,' that is, it lingers before cabinet almost permanently without any actual progress, or it is passed into law but not implemented. This would fit a pattern observed by Tom Goodfellow:

a notable feature of contemporary Ugandan politics is the way significant numbers of laws are proposed by the government, debated in the media, brought to parliament, and then – after further heated debates – shelved and sometimes seemingly forgotten for long periods of time.¹¹¹

His argument that the government uses 'the legislative process to make symbolic gestures'¹¹² is relevant to TJ, where such 'legal maneuvers' are deployed to create a sense of forward motion, whilst maintaining stasis in a policy area the executive wants to control. In other words, the Museveni regime approaches TJ law-making

107 JLOS Consensus Building Workshop, Kampala, May 2013.

108 Personal interview, donor official, 16 March 2018.

109 Ibid.

110 Ibid.

111 Goodfellow, *supra* n 23 at 753.

112 Ibid., 754.

processes to ‘achieve *outcomes other than effective implementation*’ of the AAR accords, and does so by ‘manipulating’ rather than ‘blatantly suppressing’ nominally democratic institutions.¹¹³

Experienced political and CSO insiders explained this was a ‘technique the government uses very smartly.’¹¹⁴ Many interviewees lamented a particular ‘delaying tactic’ in which further study reports were requested by ministers and funded by donors. While the literature explores the political economy of such demands, including the desirability of ‘sitting allowances,’ the tactic was also deployed as a method to ‘buy time’ without explicitly rejecting legal reform. This was not the case only with the NTJP, but also with the Legal Aid Bill and the National Minimum Wage Bill:

this is a frustration, especially for CSOs and donors: you invest heavily in these processes; they get somewhere, they stall, hit a snag and then you have to re-cycle, start again.¹¹⁵

Some CSO representatives were so exasperated they now advocate for the passing of the NTJP into law, regardless of outstanding imperfections: ‘we should not fear that everything should be perfect from the word go,’ explained one, ‘and that is where the government has beat us.’¹¹⁶

This brings us to an important point: whatever the fate of the final draft NTJP, the dynamics of the GoU–donor relationship afforded the executive ample space to manage the contents of the policy. The fate of a truth ‘body’ as proposed in the AAR accords, with a mandate to ‘inquire into the past and related matters,’¹¹⁷ is instructive. Shortly after the Juba process ended, donors funded experts to help JLOS staff design truth commission templates. It was never clear what the donor rationale was for lobbying for a truth commission. A senior Office of the Prime Minister official was shocked that the idea was proposed in the first place, asking, ‘How would that work? You think the government will sit there and talk about its wrongdoing in the North. . .that just won’t happen!’¹¹⁸

The truth commission idea died a quick enough death. One donor official summed up its trajectory: ‘the development partners group had been pushing it at one stage, but it takes politicians out of their comfort zones. If they do not like it, then it stops.’¹¹⁹ The tactic of senior government ministers and officials was to raise the specter of ‘truth’ as a destabilizing force or circumvent it through bureaucratic obfuscation. At a JLOS workshop, Chief Justice Benjamin Odoki expressed concern about simplistic prescriptions for truth commissions in Uganda: ‘the truth,’ he said, ‘is a very complex concept, which must be treated with caution. At best it is subjective.’¹²⁰ At the same workshop, the deputy attorney general agreed it would be an

113 Ibid., 756–757 (emphasis in original).

114 Personal interview, political analyst, 16 March 2018.

115 Personal interview, CSO staff, 14 March 2018.

116 Personal interview, CSO staff, 18 March 2018.

117 ‘Annexure,’ *supra* n 1.

118 Personal interview, 5 May 2012.

119 Personal interview, 4 June 2012.

120 JLOS Validation Workshop, Kampala, 18 July 2012.

impossible political task to achieve consensus on the temporal mandate of a commission, while a senior official at the Ministry of Internal Affairs enumerated numerous hurdles including the length and cost of the process.¹²¹

More recently, DPG officials accept that a truth commission under the current government is, as one said, 'impossible. It is even harder than the ICD to have the truth commission.'¹²² Importantly, the final draft NTJP is vague on the 'truth' element, listing 'notable challenges' in relation to 'efforts to establish the truth regarding different human rights violations.'¹²³ A JLOS official explained it would have been 'fruitless for us to push for something that. . . politicians may understand better than us, so we had to go through a process of rewording, reframing and recontextualizing.'¹²⁴ Rather than propose an official truth 'body,' the policy now highlights 'truth-telling mechanisms' that can contribute to 'reconciliation and nation-building.' This, donors agreed, allowed the GoU to 'control' the process, rather than risk 'losing the narrative' about the history of the conflict.¹²⁵ A UN official acknowledged that this was now non-negotiable; that a national process could only proceed if the policy 'steers clear of things that are politically sensitive, like accountability. . . it can't have anything where you are directly implicating the government's role.'¹²⁶

The GoU has also been adept at controlling the narrative around reparations. In July 2012, the deputy attorney general warned that 'when we think about reparations, we need to be very careful about what we can swallow and what we cannot swallow.'¹²⁷ There is no official GoU position, but political leaders regularly conflate broader development programs, for example the Peace, Recovery and Development Plan, with reparations. This narrative is now inscribed into the draft NTJP. The 'reparative options' listed include 'collective, symbolic and other forms such as social services for the affected communities.'¹²⁸ The draft policy highlights the range of 'development, recovery and peace' efforts the government is *already* undertaking in 'post-conflict communities.'¹²⁹ The Danish ambassador to Uganda recently published an opinion piece in the *Daily Monitor* newspaper arguing that such interventions 'should not be looked at as part of reparation,'¹³⁰ but any specifically designed reparations program is unlikely, because, as one JLOS official explained, it implies 'we are at fault.'¹³¹

This GoU narrative control, combined with calculated stasis, has left most CSOs disillusioned with the national process. Those that still work on TJ-related issues have reshaped their agendas to focus on grassroots reconciliation, justice and

121 Personal interview, 12 June 2012.

122 Personal interview, 13 March 2018.

123 Government of Uganda, Justice Law and Order Sector, National Transitional Justice Policy (Final Draft) (2017), Kampala, paras. 46–53.

124 Personal interview, 13 March 2018.

125 Personal interview, donor official, 16 March 2018.

126 Personal interview, 12 March 2018.

127 Speech delivered at JLOS Validation Workshop, Kampala, 18 July 2012.

128 Government of Uganda, *supra* n 123 at para. 55.

129 *Ibid.*, para. 56.

130 Mogens Pedersen, 'War Victims in Northern Uganda Still Waiting for Justice and Reparation,' *Daily Monitor*, 18 July 2018.

131 Personal interview, 3 May 2012.

peacebuilding efforts. The problem is that does little to challenge the government's refusal to hold state actors accountable for war crimes. An obvious question is why donors would continue to support a process that has shifted so far from its original purpose. In addition to logics of norm diffusion and neo-institutionalist orthodoxies described above is a more prosaic explanation put forth by a longstanding national donor official:

I can't blame these people [donors] because they come in for tenure of only a few years, and you don't have a complete background of how previous promises have been broken. By the time you are getting frustrated and you know nothing will ever come of it, your term of office is up and another person comes and the circle starts again: 'Oh fantastic, let's do transitional justice, we spoke to the prime minister, he is ready.'¹³²

An important consideration is that GoU tactics of narrative control and calculated stasis were based on a judicious assessment of national political priorities. Unlike Latin American countries transitioning to democracy in the late 1980s and the 1990s, or Rwanda and South Africa, where addressing the past was central to the future of the nation state, there was no urgent, national transitional 'dilemma' in Uganda. The majority of Ugandans still regard the LRA war as a 'northern' problem, so domestic demand for TJ has been relatively narrow. MPs rarely organize themselves around it and, despite the efforts of certain CSOs, TJ is likely to remain a marginal political issue.

Pressure on the political leadership for AAR implementation thus came largely from donors and CSOs, not from a broad, domestic constituency. JLOS bureaucrats, meanwhile, were stuck in the middle. Some felt as if Uganda was being treated like a 'laboratory for external ideas about transitional justice.'¹³³ JLOS stuck to its workplans as far as possible because donors 'have given us all this money'¹³⁴ but blockages emerged because of a lack of domestic political pressure on the government to see processes through. Indifference to enacting a TJ policy was therefore not always part of a deliberate strategy by the political leadership. As a JLOS official noted:

in the beginning I thought. . .they made a decision not to mobilize, but I just don't think they had even thought about it and made a conscious decision whether they wanted to push this or not. That is my honest opinion. There are just more important issues in the country and the sector.¹³⁵

CONCLUDING DISCUSSION

State-level TJ in Uganda is essentially phantasmagoric: it manifests chimerically and briefly in the performative spaces within which internationalized TJ is promoted by donors, hammered away at by local technocrats and CSOs, but ultimately reshaped

132 Personal interview, 16 March 2018.

133 Personal interview, JLOS official, 24 April 2012.

134 Ibid.

135 Personal interview, 5 June 2012.

or deflected by the Ugandan political leadership. The implementation gap is constitutive of the interactions that occur in this space and the political and bureaucratic reactions generated in response. This produces two mutually enabling forms of political artifice – isomorphic mimicry and calculated stasis. These phenomena are not exclusive to TJ reform but a product of the interplay between technocratic donor approaches and the real politics of a semi-authoritarian regime.

This argument has important implications for internationalized TJ efforts in non-transitioning states. As seen in other contexts, including Burundi, DRC, Kenya and Cote d'Ivoire, TJ will rarely be either rejected or embraced. Rather, it is *managed*, often in the circumscribed domain of everyday interactions between development professionals and the local technocrats and politicians they engage with on policy development. Isomorphic mimicry and calculated stasis can become permanent or semi-permanent conditions which serve to protect impunity rather than ensure accountability.

This leaves two important areas of further inquiry. Firstly, an understudied question is *why* faith in 'cookie-cutter' TJ interventions endures despite an abundance of evidence which scrutinizes its real-world impacts unfavorably. This article suggests its durability is partly attributable to the interpretative frames and 'shared mental models' that shape orthodox approaches. This explains its resilience in international policy but also its vulnerability to appropriation and cooption in challenging contexts. As one CSO staff member explained, on the ground in Uganda there has been 'little or no interest from various donors to adapt' their 'problematic' TJ conceptualizations, so, he argued, 'they came with their boxes. They stuck to that toolbox of transitional justice.'¹³⁶

Secondly, scholars and practitioners must think more systematically about how TJ implementation gaps impact the relationship between victims and the state. A key donor justification for supporting state-centric TJ reforms is that they will generate 'civic trust.' In Uganda, the isomorphic mimicry and calculated stasis that characterize the TJ implementation gap have undermined this broad objective. On the ground in the north there is very little evidence to suggest that the donor-sponsored national process has addressed the needs of victims or 'empowered' them, and much more evidence to support the argument of one Acholi lawyer that 'everyone has let them down.'¹³⁷ This reminds us that outside of the bureaucratic games and politico-legal maneuvers are huge numbers of people for whom justice remains undone. When asked if victims had 'lost faith,' a longstanding CSO activist offered an answer that illustrated the perceived impossibility of TJ without political transition: 'For me, tired is better than saying they have lost faith,' he explained,

because it is like when you are walking and you say, ah, I am tired now, let me branch off, then I will continue my journey. That is the analogy I would give. It is like, ok, let this government pass.¹³⁸

136 Personal interview, 18 March 2018.

137 Personal interview, Gulu, Uganda, 27 July 2012.

138 Personal interview, 18 March 2018.

Where does that leave those civil society actors determined to challenge impunity in the absence of a political transition? Is there an opportunity to think creatively about what an alternative donor approach might look like, and how this might better support meaningful social and political change? Given the ‘scandalous’ scale of the TJ implementation gap, addressing these questions should be a priority for applied TJ research. CSOs and victim groups have ideas about how donors can and should fundamentally reconceptualize their support. They call on donors to tilt the balance of TJ funding away from the state, and have ideas about more inclusive ways of funding civil society so that a truly representative set of voices is mobilized. Underlying this is a broad consensus, which the findings here support, that new approaches can only succeed if they are rooted in a substantive strategic engagement with the political economy of TJ in nontransitioning contexts, including serious critical reflection *within* development agencies about their own role in perpetuating the implementation gap. This is the due diligence necessary to ensure donor approaches do no harm, and that – at the very least – they serve to embolden and energize those who have suffered as a result of violent conflict, rather than powerful elites who played a role in perpetrating that suffering in the first place.