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Closing Impunity Gaps: Regional transitional justice processes?

Amy Ross

University of Georgia, rossamy@uga.edu

Chandra Lekha Sriram

University of London, chandra.sriram@soas.ac.uk

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**Closing Impunity Gaps:
Regional transitional justice processes?¹**

Amy Ross, University of Georgia Department of Geography
rossamy@uga.edu

and

Chandra Lekha Sriram, University of London,
School of Oriental and African Studies, School of Law
chandra.sriram@soas.ac.uk

Abstract

Violence and human rights violations in putatively internal armed conflicts often involve significant cross-border dimensions. Yet the transitional justice mechanisms that respond to past atrocities have generally been undertaken in national or international institutions and focus primarily on offenses within a single state and primarily by national actors of that state. Despite the proliferation of transitional justice mechanisms, they have generally not been designed or utilized to address transboundary or regionalized abuses. The result has been significant inconsistencies in practice, with some crimes addressed and others ignored, creating zones of impunity. In this article, we explore the relative absence of regional transitional justice

¹ The authors are grateful to Johanna Herman for her helpful comments. This paper was originally developed for a project organized by Kirsten Campbell of the University of London, Goldsmiths, on “A More Secure World? Humanitarian Law and the Prevention and Regulation of Contemporary Armed Conflict” with a grant from the Economic and Social Research Council. The authors would like to thank Dr. Campbell and the participants in a conference for the project for their comments. Any errors are of course ours alone.

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mechanisms, and consider how regional approaches have been used to promote conflict resolution and might be used to shape accountability processes as well. Drawing on the experiences of Central America and the Democratic Republic of Congo, we argue that the potential for regional approaches is as yet untested but merits closer consideration.

Introduction

In the past two decades there has been a proliferation of mechanisms to address serious violations of international human rights and international humanitarian law. These mechanisms, broadly termed ‘transitional justice mechanisms,’ have been developed at the local, national, and international levels, and in certain instances as explicitly ‘hybrid’—combining international and local elements. Debates about the efficacy of particular mechanisms in a range of places have focused on how the location of such efforts impacts the outcomes—both in terms of place (i.e. truth commission or tribunal) and level (e.g. national or international). Recent scholarship has demonstrated the interest in ‘global’ and ‘local’ aspects of transitional justice.² We seek to expand this analysis through the consideration of the strengths and weaknesses of possible regionalized approaches to past human rights abuses. This consideration is necessarily speculative, in the absence of concrete regional transitional justice mechanisms to date, but draws upon an examination of past regional initiatives for conflict management and resolution. In this article, we ask: where and how might ‘regional’ transitional justice mechanisms be appropriate, particularly for transnational violations of human rights?

Accountability mechanisms often are shaped by choices made by states internally, including situations in which states consent to the jurisdiction of relevant international judicial bodies. However, when decisions about accountability are left to national political leaders, violations of many human rights abuses committed by perpetrators

² See, *International Journal of Transitional Justice*, Special Issue: Whose Justice? Global and Local Approaches to Transitional Justice, Guest Editor, Kimberly Theiden, November 2009.

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still in power often go unpunished. This trend is exacerbated by choices made during peace negotiations, when pragmatic and strategic compromises often override obligations to punish certain crimes. Amnesties, pardons, and (generally) silence regarding abuses have been more common than judicial processes. The need to strike deals involving pardons and amnesties for the sake of national conflict resolution often exists in tension with demands for accountability for past abuses.³

Furthermore, although international tribunals have proliferated, the terrain of international criminal accountability remains profoundly uneven. In particular, (and as we have discussed elsewhere) the regional dimensions of many conflicts contribute to a complex web of crimes in which combatants, refugees, resources and weapons cross borders, but peace agreements and accountability processes often address only the crimes committed on the territory of, or by the nationals of, one state.⁴ This, we have argued elsewhere, creates zones of impunity.⁵ Violence may become transnational where refugee populations fleeing violence or armed groups use neighboring countries as camps or bases, or where neighboring states have overt and/or covert involvement in violence in another state. While many conflicts and attendant human rights abuses are regionalized, involving multiple countries, most peace agreements and accountability processes are developed for single states in isolation, creating a patchwork of accountability, whereby complex regionalized crimes are treated differently by individual countries and/or international processes. As we have explored these processes and the resultant ‘impunity gap’ in great detail in an earlier article, we focus here on the possibilities for regional initiatives

³ An extensive literature addresses the choices in transition—see e.g. Jose Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,” in *Hastings Law Journal*, vol. 43 (1992).

⁴ Chandra Lehka Sriram and Amy Ross “Geographies of crime and justice: contemporary transitional justice and the creation of zones of impunity,” *International Journal of Transitional Justice*, vol. 1, issue 1 (2007): 45-65.

⁵ *Ibid.*

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involving transitional justice accountability mechanisms, including individual criminal responsibility.

In considering the options for possible regional transitional justice mechanisms, we wish both to address the role of the ‘region,’ and to expand the debate concerning the appropriate types of structures and venues for transitional justice processes. Given the regional dimensions of many conflicts and associated crimes, and given the enormous amount of time and money expended on creating national and international mechanisms to address atrocities arising from conflicts, the opportunities and limitations of possible regional responses merit consideration.⁶ We see a need to evaluate how transitional justice processes might be used by regional actors or in a regionalized way, given the regionalized elements of conflict and the presence of regional political configurations, institutions and mechanisms which might be utilized to promote accountability.⁷ We begin by examining existing experiences with regionalized conflict management, recognizing the critical distinction between conflict management processes and accountability processes.

In this article, we consider possible regionalized responses—peace agreements and accountability mechanisms—to transnational conflicts and human rights violations. We focus on past regional initiatives for conflict resolution and the possibility of related accountability mechanisms for addressing past human rights violations. We pay particular attention to capacities, as yet largely underexploited, and limitations, of regional organizations in peacemaking and accountability.⁸ Where might “regional” responses

⁶ For an explicit argument for a regional approach to designing transitional justice mechanisms, see Matiangai Sirleaf, “Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia,” *Florida Journal of International Law* vol. 21 (2009): 209-284.

⁷ We stop short of arguing ‘for’ regional transitional justice mechanisms, which we consider premature, given the limitations of such mechanisms even for single country situations, and lack of sufficient evidence regarding how they might work. Rather than arguing ‘for’ the use of regional transitional justice mechanisms, we seek to contribute to transitional justice research by identifying how the relative lack of regional mechanisms contributes to the impunity gap.

⁸ United Nations High Level Panel on Threats, Challenges, and Change, *A More*

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be appropriate, specifically for transnational violations of international human rights and humanitarian law?

We analyze regional responses without assuming that the 'region' is simply a middle space, in terms of scale, between the national and the international. We recognize that 'regions' themselves are geographic fictions, defined by social convention or the existence of formal mechanisms and alliances. Reifying the region as in some sense between the national and international (or the 'local' and the 'global') runs the risk of a simplistic analysis in which the problems of the international (too far away, too removed from the context) and the problems of the national (too much impunity, too much willingness to settle for amnesty) are 'fixed' through the compromise of the region.⁹

The presumption that regional responses will be less partial, more legitimate and/or more effective may simply be wrong, given the regional dimensions of many conflicts. However, while regional politics may share many of the problems that affect 'local' and/or 'global' politics, the existence of numerous regional and subregional bodies with various degrees of institutional capacity suggests that at least some may have the potential to address conflict and demands for accountability.¹⁰ We treat regions and subregions here largely as formal and informal groupings as they self-define rather than introducing any new conception of either level, thus accepting the African Union as a regional organization and the Economic Community of West African States as a subregional organization.¹¹ What we consider here is whether regional groupings, *ad hoc* or formalized, could facilitate both peace and accountability processes in situations of transnational or regionalized conflict. We address the

Secure World: Our Shared Responsibility (2004) at <http://www.un.org/secureworld/report2.pdf>, paras. 33 and 94, notes the UN has failed to use the potential of such organizations sufficiently.

⁹ See for example Richard Burchill "Regional approaches to International Humanitarian Law," *Victoria University Wellington Law Review* vol. 41 (2010): 205-233.

¹⁰ *A More Secure World*, paras. 265-73.

¹¹ We are grateful for an anonymous reviewer's directions to make explicit how we are treating the central concepts of regional and subregional.

possible virtues of regional initiatives, in that some of those involved might have a greater stake in addressing conflict and past abuses, and the fact that the international security architecture has increasingly elaborated regional and sub-regional organizations. The United Nations has also increasingly developed regional approaches. We recognize the pitfalls of regional approaches, including the potential intransigence of many state parties and proxies involved in conflicts and abuses, which could bias or simply block accountability mechanisms or peace negotiations at a regional level.

The article proceeds in the following manner. We consider existing regional approaches to conflict resolution and seek to identify how or where they might address accountability as well. There are, to date, relatively few regionalized peace processes and even fewer efforts at regionalized accountability processes.¹² We discuss two specific instances of regionalized peace negotiations to illustrate options for and limitations to regionalized peace and justice mechanisms. We examine the early development of regional responses in Central America from the 1980s onwards, and the later regional mechanisms developed in the Democratic Republic of Congo (DRC) from the late 1990s to the present. The experiences of these countries are instructive, as each experienced regional conflict and regional involvement in peace agreements, without regional criminal accountability mechanisms to date.

Drawing from this empirical discussion, we then consider whether the current options in the ‘toolkit’ for post-conflict or post-atrocity accountability might be used regionally. Can the mechanisms currently in use, such as truth commissions, amnesties, and criminal trials, work at a regional level?

We seek here to identify ways to promote peace with justice—challenging enough in any situation—but in an explicitly

¹² Even in a regional court designed to address human rights abuses (such as the Inter-American Court or the European Court of Human Rights), the activities are confined to addressing state responsibility for breaches of their international legal obligations. In contrast, we explore the possibility for regional approaches to address individual responsibility, through criminal prosecution or other accountability mechanisms.

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regional context. Most obviously, a regional response by definition would involve a multi-state negotiation. We can presume any solution might also include, at least in part, mechanisms that have been utilized in ‘purely domestic’ processes. These include, although they are certainly not limited to: criminal accountability, truth and reconciliation processes, traditional justice, vetting, limited or total amnesties, and accountability processes with pardons. Can such ‘tools’ simply be transposed from the national or international arenas to a regional process, or are some of these options better suited than others for *regional* peace and justice processes?¹³ What is the range of accountability options that might be considered, either during or after a peace process, and how might these function in a transnational or regional context?

Conceiving of solutions: Regional approaches to conflict management

The international security architecture is increasingly attuned to the regional dimension of conflict, and might provide institutional support for regional approaches to peace and justice. Precisely because of the regionalized or transnational nature of many conflicts, neighbouring states often have a security interest in containing and terminating conflicts in the neighbourhood. Regional powers may promote mediation, or regional organizations may facilitate peace negotiations, in order to reduce the risk that conflict will spread and seek to end existing conflicts.

There are a range of institutions and mechanisms operating

¹³ Critiques of the concept of the ‘toolkit’ rightly observe that imagining an ideal model, be it a truth commission or tribunal, and expecting such a formula to work equally in disparate circumstances (for example, South Africa and Peru, or Sierra Leone and Cambodia) ignores the specificity or particular situations. For an excellent discussion/critique of the polemics of the ‘techniques’ of transitional justice –creating ‘toolkits’ and deploying models—see Christopher J. Colvin, “Purity and Planning: Shared Logics of Transitional Justice and Development,” *International Journal of Transitional Justice*, Vol. 2 (2008): 412-425. In this article, we seek to ‘transpose tools’ in a different way, by discussing how mechanisms that operate in nations or internationally might function if given a ‘regional’ geographical assignment.

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at the regional level to address conflict, which might be utilized to develop accountability processes at a regional level. These include regional mechanisms and offices created by the United Nations and regional and subregional organizations. Most of these institutions or mechanisms are relatively new.¹⁴ Examples are myriad, ranging from the role played by the Inter-Governmental Authority on Development (IGAD) in supporting peace negotiations leading to the Comprehensive Peace Agreement in Sudan to the role played by the African Union in mediating electoral conflict in Kenya.¹⁵ On the other hand, the Southern African Development Community (SADC) has had little success in addressing the strife and repression in Zimbabwe.¹⁶

The UN system, for example, has developed a regional peace-building support office in the Great Lakes region, and there is a Special Representative of the Secretary-General for West Africa.¹⁷ The UN Development Programme has active regional centres in

¹⁴ On regional conflict, and regional approaches to conflict prevention and resolution see Chandra Lekha Sriram and Zoe Nielsen, eds., *Exploring subregional conflict: Opportunities for conflict prevention* (Boulder, CO: Lynne Rienner, 2004); Peter Wallensteen and Margareta Sollenberg, “Armed conflict and regional conflict complexes, 1989-1997,” *Journal of Peace Research* vol. 35, no. 5 (September 1998): 621-634.

¹⁵ On the role of IGAD in the Sudanese peace process, see John Young, “IGAD and the North-South Sudan Peace Process,” *Sudan Tribune* (15 October 2007) at <http://www.sudantribune.com/spip.php?article24243> and United Nations Mission in Sudan, “Comprehensive Peace Agreements,” at <http://www.unmis.org/English/cpa.htm>. The peace process is discussed in greater detail in Chandra Lekha Sriram, *Peace as governance: Power-sharing, armed groups, and contemporary peace negotiations* (London: Palgrave/MacMillan, 2008), chapter 4. “African Union head meets Kenya’s feuding parties,” (9 January 2008), at <http://www.ft.com/cms/s/9d9f604c-bea6-11dc-8c61-0000779fd2ac.html>.

¹⁶ Arrigo Pallotti, “The political limits of regional conflict prevention in Southern Africa: SADC and the crisis of Zimbabwe,” at <http://eadi.org/database/?dataset=egc2005&table=data&id=72> (2005).

¹⁷ “United Nations Political and Peacebuilding Support missions,” at <http://www.stimson.org/fopo/pdf/ppbm.pdf>; see also the website of the UN Office for West Africa, at <http://www.un.org/unowa/>.

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Bangkok and Colombo as part of its regional bureau for Asia and the Pacific, as well as centres for southern Africa and Europe.¹⁸ The UN's Mediation Support Unit, created in response to a recommendation of the UN High Level Panel report, and operating as part of the UN Department of Political Affairs, might promote cooperation with regional organizations, many of which have sought to develop their own conflict prevention or resolution mechanisms, and several of which have member states which are also subject to a regional human rights court.¹⁹

Most of the non-UN multilateral organizations or mechanisms involve geographically contiguous countries. However, some organizations include non-contiguous countries, which are creations of multilateral alliances, artefacts of colonialism, or self-defined communities of identity.²⁰ The former have generally developed greater human rights and conflict resolution mechanisms than the latter. However, regional organizations have emphasized conflict resolution and prevention capacity over human rights mechanisms, and where human rights mechanisms exist they are largely focused upon state obligations rather than individual criminal accountability.

Numerous mechanisms to address conflict have been developed in Africa, albeit with various degrees of robustness. The African Union's (AU) Constitutive Act of 2000 emphasizes conflict prevention and promotion of stability, and in 2002 the organization created an early warning system to facilitate collective responses to

¹⁸ See the regional bureau's page at <http://www.undp.org/rbap/ResourceCentre2.htm>; see the listings of other regional bureaus and "SURFS" at <http://www.undp.org/energyandenvironment/regsurf.htm> (last accessed 29 March 2007).

¹⁹ See DPA webpage on peacemaking at <http://www.un.org/Depts/dpa/peace.html> (Last accessed 13 April 2007); Centre for Conflict Resolution, *United Nations Mediation Experience in Africa* workshop report (Cape Town, October 2006).

²⁰ Many of these are treated as "regional arrangements" under Chapter VIII of the United Nations Charter nonetheless, and for the sake of simplicity are termed regional organizations here.

conflict and crisis.²¹ Subregional organizations such as the Economic Community of West African States (ECOWAS) and IGAD have developed conflict prevention mechanisms and even in some cases deployed peacekeeping missions as ECOWAS did in Sierra Leone and Liberia, and have developed conflict prevention mechanisms.²² IGAD created the Conflict and Early Warning Response Mechanism in 2000, while ECOWAS states reached a protocol on the creation of a mechanism for conflict prevention, management, resolution, peacekeeping, and security in 1999.²³ None of these processes, institutions, or developments means that regional holistic processes will be easy, or even feasible, but rather may provide some insights as to where to start.

A range of conflict resolution, mitigation, and prevention mechanisms exist in Latin America, Asia, and Europe as well. Organization of American States members agreed to the Inter-American Democratic Charter in September 2001, which seeks to lay the foundations for peaceful coexistence among democratic states. The OAS pledged its commitment to representative democracy and aid to democracies that are weak, and the imposition of sanctions on members that violate basic principles of democracy.²⁴ In Europe, the Organization for Security and Cooperation in Europe includes both a

²¹ African Union, "Meeting of Governmental Experts on Early Warning and Conflict Prevention," AU Doc. PSD/EW/EXP/2(1) (December 2006).

²² See, for example, Comfort Ero, "ECOWAS and the subregional peacekeeping in Liberia," *Journal of Humanitarian Affairs* (September 2005), at <http://www.jha.ac/articles/a005.htm>.

²³ On the IGAD mechanism, see <http://www.cewarn.org/>; for ECOWAS, see "Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security," at <http://www.oecd.org/dataoecd/55/62/38873520.pdf>. Sirleaf, "Regional Approach to Transitional Justice?" 275, suggests transitional justice responses might be leveraged into existing institutions such as human rights courts and conflict prevention units within regional arrangements. See also Richard Burchill, "Regional Approaches to International Humanitarian Law," *Victoria University of Wellington Law Review* vol. 41 (2010): 205-233.

²⁴ Available at http://www.oas.org/charter/docs/resolution1_en_p4.htm; see generally Stephen Baranyi, "Inter-American Institutions and Conflict Prevention," *FOCAL Policy Paper* FPP-05-04, (March 2005), available at www.focal.ca.

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Conflict Prevention Centre and the High Commissioner on National Minorities, whose role is cast as a conflict-mitigating one.²⁵ The Association of Southeast Asian Nations (ASEAN) created the ASEAN Regional Forum, but in general the member states prefer policies of non-interference in one another's internal affairs, greatly hampering the resolution of crises such as that in Burma since its takeover by the military junta which renamed it Myanmar.²⁶

Regional human rights courts such as the European Court of Human Rights, the Inter-American Court of Human Rights, and African Court on Human and Peoples' Rights, while focused on *state* obligations rather than individual criminal accountability, might speculatively offer a neutral venue for identifying regionalized human rights abuses.²⁷ They have yet to do so although the Inter-American Court of Human Rights has addressed abuses that took place in regionalized conflicts without specifically addressing that dimension, as noted below. The African Union Panel on Darfur proposed in October 2009 that a hybrid criminal court be created to adjudicate crimes in Darfur, with Sudanese and non-Sudanese staff nominated by criteria to be developed by the African Union.²⁸ The report emphasized that the ICC was a court of last resort and that it would be preferable for crimes to be addressed by national courts where

²⁵ See OSCE, "Secretariat—Conflict Prevention Centre," at <http://www.osce.org/cpc/13077.html>; see also High Commissioner on National Minorities, "HCNM Approach to Conflict Prevention," at <http://www1.osce.org/hcnm/23628.html>.

²⁶ On the ASEAN Regional Forum, see www.aseanregionalforum.org; see also Aung Zaw, "ASEAN-Burma Relations," (Stockholm: International IDEA, 2000) at http://www.idea.int/asia_pacific/burma/upload/chap1.pdf.

²⁷ On the African court, see the website of the African Court of Human and Peoples Rights, at http://www.achpr.org/english/_info/court_en.html (last accessed 29 March 2007) and the website of the African Court Coalition, at www.africancourtcoalition.org (last accessed 9 January 2008); for the Inter-American Court of Human Rights and related commission, see www.oas.org/oaspage/humanrights.htm (last accessed 9 January 2008); and for the European Court of Human Rights, see www.echr.coe.int/ECHR (last accessed 9 January 2008).

²⁸ Former South African President Thabo Mbeki chaired the panel, which was established by the African Union in 2008 to investigate the Darfur crisis.

possible, consistent with the principle of complementarity.²⁹

Certain regional organizations have not yet developed formalized conflict prevention, much less human rights and accountability, capacities. These include the Organization of the Islamic Conference, the Arab League, the South Asian Association for Regional Cooperation, and La Francophonie. The Commonwealth purports to promote human rights and good governance, but does not have formalized capacities in accountability or conflict resolution.³⁰ Such regional or specialized organizations might be better-placed to address regionalized abuses not only because they can address their transborder character, but also, in principle, because they are better-attuned to local political, social and legal dynamics and have greater legitimacy with member states; whether this is in fact the case is beyond the scope of the current discussion.³¹

Regional peace agreements without regional transitional justice mechanisms

Obviously peace agreements involving multiple states are not new phenomena—multi-state conflicts usually end, if not in pure military defeat and surrender, in multi-party peace agreements. Where conflicts have been characterized as “internal,” peace agreements are usually negotiated and signed in a national context involving multiple parties within the state, but seldom external parties, despite the role of external actors in funding, arming, or otherwise supporting internal combatants, or the role of external fighters in another state’s

²⁹ African Union, “Report of the African Union High-Level Panel on Darfur (AUPD)” PSC/AHG/2(CCV) (October 2009) paras. 320-336, 339.

³⁰ See the website for the Commonwealth, at <http://www.thecommonwealth.org/>. Of course it is debatable whether either La Francophonie or the Commonwealth ought to be characterized as regional organizations as many member states are not contiguous with one another.

³¹ Richard Burchill, “Regional Approaches to International Humanitarian Law,” *Victoria University of Wellington Law Review* vol. 41 (2010): 205-233, argues that the regional level “occupies a unique space between the ‘discreteness of the state and the undifferentiated international system’,” .210.

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conflict. Including external actors in a peace agreement for an ostensibly internal conflict would obviously be politically and logistically challenging, but it is not unheard of. A process leading to such an agreement might involve representatives of several states, of armed groups both inside and outside the state or states most affected by conflict, and a range of facilitators or mediators. As discussed below, such processes have been rare; the process in the DRC offers the clearest contemporary example. Any peace agreement would necessarily need to address a range of issues, from conflict termination to the disposition of former fighters, and consideration of the demands and grievances by multiple parties, as well as calls for reparation or accountability by the populations affected. What then are the particular challenges for regional peacemaking that includes accountability?

Processes in Central America and the Democratic Republic of Congo provide two important examples of regionalized peacemaking and non-regionalized accountability mechanisms, the former of an earlier experiment and the latter an ongoing process. In both instances, we see concrete, and marginally successful, conflict resolution processes, but little or no effort to design regionalized accountability responses. They represent two of the three options for regional responses discussed above: regional involvement in peace processes, and regionalized institutional processes.³² These two key case studies of regional conflict and peacemaking reveal the possibilities and challenges of regional approaches to conflict resolution alongside accountability.

³² We do not consider other situations in which there have been regionalized conflict and regional peacekeeping responses, such as the efforts by ECOWAS in several countries in West Africa, such as Sierra Leone and Liberia. This is because while important peacekeeping operations were carried out by a regional organization, they did not entail either regional peace negotiations/agreements or regionalized considerations of options for accountability. We are grateful to the comments by an anonymous reviewer suggesting the inclusion of a study of other regionalized conflict formations, such as those in West Africa, for prompting the refinement of this point.

Central America

The nations that comprise the region of Central America have a shared history of conquest and armed conflict. Further, they are tied together not only by their coterminous physical localities on the isthmus, but also by the degree to which they have been subject to influence and intervention by the United States.³³ The region experienced acute periods of violence, particular in the 1980s in Guatemala, El Salvador and Nicaragua. The United States was involved in all of the violent conflicts in Central America, most obviously in its support for the government in El Salvador and the contras seeking the overthrow of the Nicaraguan government, and in significant ways in Guatemala. This violence affected peoples and politics throughout the region, particularly the flow of refugees, the support in some territories of armed insurgencies directed against neighbours, and the fear that cross-border connections would generate further violence. Attempts at conflict resolution in the region during the 1980s were promoted by leaders within the region and close neighbours, but not formally the United States.

Although the conflicts in Central America could be considered and were often discussed as internal conflicts, a number of countries on the borders of, and therefore affected by, the violence sought a regional approach to conflict resolution. In 1983, the presidents of Colombia, Mexico, Venezuela, and Panama met with the stated purpose of contributing to the resolution of these conflicts through the “Contadora” initiative. The initiative produced a draft peace act for the region in 1984, which was quickly abandoned following heavy US criticism. However, the precedent for a regional approach to addressing the Central American conflicts was established. Soon after, Costa Rican President Oscar Arias launched an initiative to pursue negotiated settlements of the region’s conflicts. In 1987, the Esquipulas II accord was reached, which committed the

³³ George Black, Milton Jamail and Norma Stoltz Chinchilla, *Garrison Guatemala* (New York: New York Monthly Review Press, 1984), and James Dunkerley, *Power in the Isthmus: A Political History of Modern Central America* (London: Verso, 1988). See also Chandra Lekha Sriram, “Dynamics of Conflict in Central America,” in Sriram and Nielsen, eds., *Exploring subregional conflict*.

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nations of the region to open internal dialogues between belligerent parties, and to the principle of democratic rule. The Esquipulas Accords explicitly tied concessions made in one nation to agreements by others in the region. Furthermore, the process that produced the Esquipulas Accords was unique in that the US, then a highly influential actor in the region, remained at least officially on the sidelines.³⁴ While the Contadora and Esquipulas processes have been viewed as important confidence-building measures, it is critical to note that they failed to achieve resolution to any of the Central American conflicts, and that the successful peace processes that ensued were domestic ones with international support.

During the regional conflict resolution processes in Central America, there was no discussion of the possibility of prosecuting perpetrators of serious abuses at the level of the region, nor indeed was there a discussion of domestic prosecutions. However, it is worth noting that throughout much of the conflicts in the region, and through the peace processes, there were ‘regional’ bodies addressing gross violations of human rights. The Inter-American Commission on Human Rights (hereafter, “the Commission”) conducts investigations into human rights abuses in the region and may refer cases to the Inter-American Court of Human Rights, which has the capacity not to try individuals for abuses, but to identify state derogations from their legal obligations to respect human rights.³⁵ An early instance of the Inter-American Court passing judgment on state abuses in the context of internal repression was the judgment against Honduras in the *Velasquez-Rodriguez* case of 1988.³⁶ However, the Inter-American Court has had its limitations. El Salvador has staunchly resisted both institutions.³⁷ Successive Guatemalan

³⁴ Sriram, “Dynamics of conflict in Central America, 142.

³⁵ For the Inter-American Commission on Human Rights, see <http://www.corteidh.or.cr/>, and for the Inter-American Court of Human rights, see <http://www.cidh.org/>

³⁶ *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

³⁷ Benjamin Cuellar Martinez, “Chapter Two: El Salvador,” in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*,

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regimes have also failed to comply with court judgements. A rare exception was its response to the case involving the *Dos Erres* massacre, as the government began pursuing settlements rather than awaiting decisions by the Court.³⁸

While the Inter-American Court as a regional body has been proactive and not without influence, states have often failed to implement key elements of Court decisions. As a result, some victims have recently brought civil cases in the United States under the Alien Tort Claims Act, and criminal charges have been brought in Spain through the exercise of universal jurisdiction.³⁹ Generally, there has been very little individual criminal accountability for the massive human rights violence in Central America within national judicial systems, and none regionally.

(Washington, DC: Due Process of Law Foundation, 2007). Cuellar writes that “successive governments before and during the civil war blatantly disregarded the Commission’s indications and made sure to sidestep any difficult situation,” 37.

³⁸ Marcie Mersky and Naomi Roht-Arriaza, “Chapter One: Guatemala,” in *Victims Unsilenced*. The IACHR has overseen amicable settlements in some 80 cases, including that of *Dos Erres*, and the Inter-American Court has issued rulings in 11 cases (Ibid. at 8). Among the most prominent are the Myrna Mack case, in which a Guatemalan anthropologist was assassinated in 1990, *Myrna Mack Chang v. Guatemala*, Judgement of November 25, 2003, Inter-Am.Ct.H.R. Ser. C, No. 101, pars. 65-116. Another critical case was the *Plan de Sánchez Massacre v. Guatemala*. Merits. Judgment of April 29, 2004, Inter-Am.Ct.H.R.. Series C No. 105 addressing an incident in which 268 villagers were murdered by army troops in 1982 as a part of the army’s counterinsurgency, ‘scorched earth’ campaign. See Mersky and Roht-Arriaza, “Chapter One,” 7-9.

³⁹ In January 2006, the Eleventh Circuit Court of Appeals upheld a \$54.6 million jury verdict against Generals Jose Guillermo Garcia and Carlos Eugenio Vides Casanova, two former Salvadoran Ministers of Defense. On the decision in Spain regarding alleged genocide in Guatemala, see Naomi Roht-Arriaza, “Guatemala Genocide Case. Judgement no. STC 237/2005,” *The American Journal of International Law*, Vol. 100, No. 1 (January 2006): 207-213.

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The DRC

The conflict in the DRC has been complex and multi-faceted, particularly because of the regional dimensions of both the conflict and conflict resolution efforts. Neighbouring states are both sources of and affected by the violence in the DRC, with cross-border flows of arms, resources, and persons both enriching and destabilizing certain sectors. Elsewhere, we have discussed the violent conflict in the DRC and specifically the transnational elements to the commission of serious international crimes, and the responses to such crimes.⁴⁰ Our focus, in that discussion, was on accountability mechanisms at the international level, specifically the intervention of the International Criminal Court, as well as significant gaps in accountability within the DRC and the region. Our purpose here, however, is to focus on the regional dimensions of conflict resolution efforts in DRC and the absence of concomitant accountability mechanisms at the regional level. How have regional instruments and agreements facilitated or impeded accountability for atrocity? And based on that experience, how might regional instruments be mobilized to promote peace with justice?

As is well-known, armies, militias, rebel groups, and refugees of several neighbouring states operated (and in some cases continue to operate) on the territory of the DRC during what came to be known as “Africa’s World War”. However, regional involvement entailed not only destabilization, but also attempts to mediate what was treated as an internal conflict, and/or the involvements of neighbouring belligerents as parties to peace processes. In July 1999, the DRC, along with Angola, Namibia, Zimbabwe, Rwanda, and Uganda, signed the Lusaka Ceasefire Agreement.⁴¹ In somewhat expansive and possibly contradictory terms, the Lusaka Agreement acknowledges national sovereignty as well as the regional dimensions of the conflict in the DRC. The Lusaka Ceasefire Agreement further references Article 52 of the UN Charter, which treats regional

⁴⁰ Sriram and Ross, “Geographies of crime and justice”.

⁴¹ See Africa Fact Files webpage, DRC page, (last accessed 28 August 2009). <http://www.iss.co.za/af/profiles/drcongo/icd/index.htm>.

arrangements and responses as appropriate for “matters relating to the maintenance of international peace and security.”

Regional actors also supported the process of the Inter-Congolese dialogue, which resulted in power-sharing agreement for a transitional government in 2003.⁴² These regional initiatives and the deployment of the UN peacekeeping force MONUC have, arguably, promoted limited resolution of conflict amongst some but not all key protagonists. The Lusaka Ceasefire Agreement was followed by separate accords between the DRC and the Rwandan and Ugandan governments, in which these states agreed to withdraw troops from the territory of the DRC. The 2003 Agreement helped lead to elections in 2006, considered successful despite significant violence and irregularities.⁴³ Countries of the region have formed the Tripartite Plus Joint Commission, comprising Burundi, the Democratic Republic of the Congo, Rwanda and Uganda, seeking to improve dialogue and address conflict, and particularly share information on the transnational movements of rebel groups.⁴⁴ The United Nations has also taken an increasingly regionalized approach to the conflict, with the UN Security Council increasingly focused upon conflict in the Great Lakes rather than individual countries.⁴⁵

The regional agreements that facilitated the transitional government and the resultant elections can be considered to have limited success in that some power-sharing agreements were reached, but failures are also readily apparent. The most obvious indication of the failure of these mechanisms is the resumption and, indeed, the escalation of violence at the time of this writing. Although peace

⁴² See Global Policy Forum, <http://www.globalpolicy.org/security/issues/congo/2002/0426dialogue.htm>. (last accessed 28 August 2009)

⁴³ See Human Rights Watch <http://hrw.org/doc/?t=africa&c=congo> (last accessed 9 January 2008).

⁴⁴ Jim Fisher-Thompson, “Tripartite Peace Process Tackles Tough Issues at Kigali Meeting,” (26 May 2006), at <http://usinfo.state.gov/af/Archive/2006/May/26-571712.html>.

⁴⁵ See Global Policy Forum, <http://www.globalpolicy.org/security/issues/kongidx.htm>.

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agreements have been implemented in the DRC, the violence in the eastern departments (Ituri, North and South Kivus) has intensified. Hundreds of thousands have been displaced and remain in insecure and inadequately supported camps, resulting in additional high mortality rates.⁴⁶

While regional approaches to and participation in conflict resolution in the DRC and the region have been significant (if not always successful) regional approaches to criminal accountability for violations of international human rights and humanitarian law have been notably absent. Although the agreements that led to the transitional power-sharing government and subsequent elections prohibited amnesty for war crimes, crimes against humanity and genocide, many of the rebel leaders accused of precisely such crimes were included in the transitional government. While the ICC has indicted two Congolese nationals, the conflict in the DRC involved the intervention, both directly and indirectly, by several neighbouring governments, most notably Uganda and Rwanda, officials of which might well be responsible for war crimes and crimes against humanity. To date, the ICC Prosecutor has yet to indict Rwandan or Ugandan officials, despite those states' extensive intervention in the Ituri region.⁴⁷

Regional involvement in the commission of the violence and crimes in the DRC conflict has been significant. Regional participation in negotiating resolution to the violence has also been significant. But, to date, the role of regional instruments in pursuing criminal accountability has been missing, and, indeed, the political agreements reached have left offenders in positions to continue possible violence. In each region discussed above (Central America and Central Africa), a mixture of self-interest and political necessity encouraged states party to regionalized and internal conflicts to consider regionalized agreements to address them. The fact that they stopped short of developing accountability mechanisms may indicate either the degree to which state officials still in power are willing to

⁴⁶ Ibid.

⁴⁷ Sriram and Ross, "Geographies of crime and justice."

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put themselves at risk of trial, or the lack of political will at the international level to pressure them to do so. Whether regional processes are feasible for conflict resolution *and* accountability for abuses in the DRC remains to be seen.

Conceiving possible solutions: how might regional transitional justice mechanisms close the impunity gap?

We are aware that just as it would be dangerous to take a cookie-cutter approach and simply transfer a transitional justice mechanism/approach from one country to another without adapting it to the local context, mechanisms used domestically might not be easily modified to operate regionally. However, we seek to consider how a regional approach to transitional justice might in principle function, as regional formations can and do impact both peace processes and the negotiations involving accountability for past human rights violations. Which of the standard transitional justice and accountability ‘tools’ might be utilized in a regional or transnational context?

Criminal accountability

In principle, it would be appropriate to impose criminal accountability in response to transnational or regional human rights violations. Transnational crimes could thus be punished in the same manner as crimes deemed to be purely domestic, where jurisdiction exists. The International Criminal Court can hear cases pertaining to all parties to a conflict (or those complicit in abuses) if each is a national of a state party or commits a crime on the territory of a state party (or if the UN Security Council refers the situation). However, it has not yet chosen to do so, notwithstanding the obvious regional aspects to the conflicts and crimes committed in the DRC, where Rwandan or Ugandan officials, or indeed officials of foreign corporations, might well have committed certain crimes. Indeed, while a former Vice-President of the DRC, Jean-Pierre Bemba Gombo, has been arrested for crimes he is alleged to have committed in the Central African Republic, he will be tried not for more

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regionalized crimes but for those in that country specifically.⁴⁸ Alternatively, a regional court, whether permanent or *ad hoc*, might be developed to hear cases involving regional conflicts and crimes. The United States initially advocated that an African hybrid tribunal be set up to address crimes in Darfur, albeit as part of its long-standing campaign against the ICC.⁴⁹ Obviously, any *ad hoc* regional court or prosecution process would require state consent, which might be very difficult to obtain. Thus, while in principle a regionalized approach to accountability would be useful, significant legal and political obstacles remain.

Truth Commissions

In principle, truth and reconciliation processes that addressed conflicts and abuses across borders, or in a regional context, could be designed. In practice, official truth commissions, mandated by governments, have most often been designed to address crimes in a national context. Indeed, truth commissions to date have a decidedly national emphasis, as they most often appear as the result of compromises taken in the context of national peace negotiations. Yet truth commissions and their reports can also address regional dynamics: the final report of the Sierra Leone Truth and Reconciliation Commission (TRC) included an extended discussion of the role of external actors, and the Guatemalan Commission for Historical Clarification devoted extensive attention to external events that set the context for violence in that country.⁵⁰ However, the Sierra Leonean TRC was not designed to hear evidence from actors

⁴⁸ International Criminal Court, Press Release, “Jean-Pierre Bemba Gombo arrested for crimes allegedly committed in the Central African Republic,” ICC-CPI-20080524-PR315 (24 May 2008).

⁴⁹ Remarks of US representative Mrs. Patterson at the meeting of the UN Security Council that approved resolution 1593, referring the situation in Darfur to the ICC, UN Doc. S/PV.5158 (31 March 2005).

⁵⁰ Sierra Leone Truth and Reconciliation Commission, *Final Report*, vol. 3b, (2004) available at: <http://trcsierraleone.org/drwebsite/publish/v3b-c2.shtml>. See also Comisión para el Esclarecimiento Histórico, (1999) *Guatemala: Memory of Silence*, Report of the Commission for Historical Clarification, <http://hrdata.aas.org/ceh/report>.

outside the country, or about abuses outside the country; alternatively the Liberian truth commission was designed to hear testimony regarding abuses in Liberia, but not elsewhere despite the regional nature of the conflict, although it did hear testimony from the Liberian diaspora in the region and in North America.⁵¹ Given the linked nature of these and other conflicts in the region, perhaps a regionalized process would be appropriate, but (as with prosecutions) would require the elusive state consent, at least for an official commission.⁵² Further, any such commission could be costly and involve complicated logistics to operate across borders in countries with infrastructure already severely damaged by conflict, and with enduring security problems. Efforts by national NGOs to create a regional commission of inquiry in the Balkans have proceeded slowly, and organizers anticipate opposition from the president of Republika Srpska despite the significant passage of time since the end of the conflict. However, the campaign to persuade the parliaments of each state of the former Yugoslavia to pass legislation enabling the creation of a single cross-national commission would, if successful, create a novel type of institution.⁵³

Traditional justice

⁵¹ Laura A. Young and Rosalyn Park, “Engaging Diasporas in Truth Commissions: Lessons from the Liberian Truth and Reconciliation Commission,” *International Journal of Transitional Justice* vol. 3, no. 3 (2009): 341-361. The truth commission in Haiti also took statements from Diaspora populations in North America, see David A. Hoogenboom and Joanna R. Quinn, “Transitional Justice and the Diaspora: Examining the Impact of the Haitian Diaspora on the Haitian Truth Commission,” (working paper 2011), at http://politicalscience.uwo.ca/faculty/quinn/TransitionalJustice_Diaspora_haitian_truth_commission_2_.pdf.

⁵² Sirleaf, “Regional approach to transitional justice?” 229-271.

⁵³ Gordana Andric and Eldin Hadzovic, “REKOM Initiative Collects Signatures Across Balkans,” *Balkan Insight* (26 April 2011) at <http://www.balkaninsight.com/en/article/million-signatures-for-the-victims-of-balkan-wars>. Humanitarian Law Centre, “RECOM Process: Results and Prospective [sic]” (8 July 2011) at <http://www.hlc-rdc.org/Saopstenja/2060.en.html>

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Traditional justice processes are often also linked to local, culturally-specific conflict resolution processes, but might in principle be useful routes to pursue accountability for serious abuses regionally as well as domestically. Traditional justice activities have been utilized in Rwanda and East Timor, where the formal judicial sector could not manage the volume of cases. However, such activities risk losing their ‘traditional’ character, becoming more formalized and institutionalized.⁵⁴ In practice, traditional justice mechanisms have proven problematic for a variety of reasons, including abuse of process, failure to meet international human rights standards, the dominance of certain groups, and, in particular, the exclusion of women from decision-making. This does not mean that such processes are useless, but rather that caution should be exercised. Further, the local nature of these processes may render them inappropriate to address conflicts that spill across borders, given that traditional justice processes generally take place at a local, and often solely intra-group, level. These mechanisms usually emerge from and are conducted by specific local communities and may thus be inappropriate to use outside of such specific contexts even within a state, much less in a transnational setting.

Vetting

It seems relatively unlikely that vetting would be pursued in a regionalized fashion, given that vetting procedures involve a complex of internal legislative and bureaucratic decisions and regulations. Such measures involve policies regarding exclusion from government service, including in the security sector, and in key professional roles, as doctors, teachers, or lawyers.⁵⁵ While it is theoretically possible

⁵⁴ Jeremy Sarkin, “The tension between justice and reconciliation in Rwanda: Politics, Human Rights, due process and the role of the *gacaca* courts in dealing with the genocide,” *Journal of African Law*, vol. 45, no. 2 (2001): 143 – 172; Tanja Hohe and Rod Nixon, *Reconciling Justice: ‘Traditional’ Law and State Judiciary in East Timor*, United States Institute for Peace Final Report (January 2003).

⁵⁵ UN Office of the High Commissioner for Human Rights, “Vetting: An Operational Framework,” (2006) at <http://www.ohchr.org/english/about/publications/docs/ruleoflaw->

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that vetting arrangements could be operationalized transnationally, and enshrined in peace agreements alongside agreements regarding ceasefires and troop withdrawals, governments are likely to consider these decisions a sovereign preserve and resist such discussions.

Limited or total amnesties, and accountability processes with pardons

As noted above, blanket amnesties are not binding on international or foreign courts, and the United Nations rejects them. Limited or conditional amnesties, or prosecutions with pardons or reduced sentences, have been viewed somewhat more positively, although with significant concerns. Examples include the so-called exchange of truth for justice in the South African Truth and Reconciliation Commission, which provided for individualized amnesty, predicated on the Amnesty Committee's approval. This 'carrot'—amnesty offered in exchange for honesty—was theoretically reinforced by the 'stick' of the threat of prosecutions of those refusing to testify.⁵⁶ TRC processes could be regionalized, subject to state consent, however amnesties may be less likely to be accepted internationally.

As discussed above, with the exception of vetting, and traditional justice, regional approaches might be feasible—in principle, subject to state consent. But what are the odds that states would consent? That is to say, could a mediator reasonably expect to promote a regional peace with justice process in the context of regional conflict formations, in light of the many competing interests,

Vetting_en.pdf; Kathleen E. Smith, "Decommunization after the 'Velvet Revolutions' in East Central Europe," in Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, 82-98; International Center for Transitional Justice resource page on "Vetting," at <http://www.ictj.org/en/tj/783.html> (last accessed 29 January 2008).

⁵⁶ Amnesty applicants were required, at least formally, to testify regarding the crime committed. Lynn Berat, "South Africa: Negotiating Change?" in Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, 267-80; Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice Versus Peace in Times of Transition* (London: Frank Cass, 2004) chapter 6. Amy Ross, "The Politics of Truth in Transition: Latin American influences on the South African Truth and Reconciliation Commission," *Politique Africaine*, no. 92 (2003): 18-38.

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fears, and agendas of numerous state and non-state actors? The prospects seem slim, but worth considering.

Certainly, in many instances state or rebel leaders, barely able to reach agreement with each other within state borders, would be unlikely to come to agreement with multiple other states who may also have supported enemy groups, either about terms of cessation of fighting, or appropriate measures for accountability. However, a few previous processes, such as those for the DRC, offer possible directions for a regionalized agreement. So too might the commitments, albeit broad, made by neighbouring states in the regional responses to conflicts in Central America. Both state leaders and rebel groups across borders are clearly likely to find it difficult to coordinate, where internal agreements have failed. However, there might be incentives for regional agreements for both. Specifically, each might prefer an agreement which guarantees security against both internal and external enemies. They might be less eager to agree to regional accountability processes, much as they are domestically. On the other hand, they might prefer the relative certainty of arrangements in which they might face accountability processes only once, rather than being subject to multiple processes over time in different countries.

Greater support for combined regionalized peace and justice processes might occur in a number of ways: a) regional processes promoting peace processes or accountability, b) mechanisms for conflict prevention or resolution institutionalized in regional arrangements or regional UN practice, or c) more holistic regionalized peace processes or accountability mechanisms that more fully engage relevant regional actors. While there is experience with the first two types of processes, the more holistic approaches have not been developed as yet. By more holistic, we mean mechanisms that might entail accountability and conflict resolution, in a way that involves all neighbouring or regional actors in a conflict with clear obligations in those processes. In principle, all states with involvement in a conflict could consent to participate in negotiations, whether under the auspices of a regional organization, a regional office of the UN, or some other mechanism. Such processes might

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include representatives of all states which have had official involvement in the conflict as discussed above, whether through funding or arming combatants or sending fighters themselves, and those affected by the trans-border operations and movement of non-state armed groups.

Topics for discussion in such processes might be those traditionally undertaken in negotiating an end to civil wars: the original sources of conflict, allocation of future political, security, and economic resources, boundary delimitations, and the redress of grievances which emerged during the course of the conflict.⁵⁷ They could, however, also address whether or not to pursue accountability, and specific mechanisms to be utilized. The key distinction would be that they would involve parties in multiple states, and state and non-state actors. In principle, such discussions could generate more comprehensive peace and accountability settlements. However, as the number of states and potential negotiating parties increases, the prospect for chaos, withdrawal of parties, and the undue impact of spoilers increases. This does not mean such processes are necessarily impossible, but that one should not be too sanguine about the prospects for their immediate success.

Conclusions and implications

Those who might seek to promote regionalized accountability have a range of options.⁵⁸ We have considered a number of possible regional responses to conflict and human rights abuses, seeking also to identify how regional organizations might engage not only in conflict resolution but also in transitional justice processes. In this article, we sought to consider whether it might be feasible and appropriate to use a number of transitional justice mechanisms, including truth commissions, amnesties, and trials, which (in existing practice) are currently designed to address past violence for single

⁵⁷ Barbara Walter, *Committing to Peace* (Princeton: Princeton University Press, 2002); Sriram, *Peace as governance*.

⁵⁸ Much as they do when they seek to support single-country peace or accountability processes, see Sriram, *Confronting past human rights violations*.

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countries.

While we do not assume that regions are in some sense primordial, we have outlined areas of regional practice in conflict prevention and accountability by self-defined regional groupings and formalized regional organizations. There are a range of such practices and institutions, and in particular efforts at regionalized peacemaking in Central America in the 1980s and more recently in the DRC are illuminating when considering the potentials and polemics of regional approaches for achieving peace and criminal accountability. Regional organizations play key roles in promoting peace negotiations—often in conflicts depicted as purely internal. Regional actors can and often should be actively involved in negotiations, not least because they may have played a significant role in the conflict and their absence may render national agreements irrelevant. To date, they have been involved as mediators and facilitators of agreements, but seldom as participants with obligations. The process in the DRC is one notable exception, with limited success. A more integrated approach of regional responses to transboundary conflicts, as well as to the abuses they engender, might be of use.

A number of findings have emerged from this examination, which do not give great cause for optimism with regard to the use of regional processes of transitional justice as a solution to the impunity gap. There is no evidence to date of regional initiatives to promote criminal accountability, and the one regional human rights court fully operational in a significantly conflict-affected region, Latin America, has had limited impact on transitional justice processes there. While regional peacemaking processes have shown some promise, they have thus far also excluded accountability mechanisms. If such measures are to be included, they might in theory include prosecutions, amnesties, or truth commissions, while traditional justice mechanisms and vetting may prove more problematic. However, we see little evidence of willingness of states to address accountability for gross violations of international human rights and humanitarian law through regional processes. Rather, the regional practices that have emerged focus upon state obligations rather than individual criminal

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responsibility. Thus, while regional approaches to peacemaking may yield some success, the potential for regional approaches to promote criminal accountability is as yet untested. To date there have been no serious regionalized accountability processes, even where conflict resolution processes have been regionalized.

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