

WHAT CAN INTERNATIONAL TRANSITIONAL JUSTICE OFFER U.S. SOCIAL JUSTICE MOVEMENTS?

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I. INTRODUCTION

We find ourselves in a moment in which progressive causes for social justice are facing increased political resistance in the United States (U.S.). This time calls upon activists and their allies to reflect on the traditional tools employed by social justice movements. It is time to reconsider their utility measured against the present challenges of resurgent government support for white nationalism, nativism, and denial of the existential imperative posed by climate change. This is a time to look beyond our accustomed horizons to enlist new ideas, strategies, and constituents that can support domestic activism in these times. As someone who has spent her professional career working in international human rights, I am aware that, in many parts of the world, the “new normal” for U. S. social justice activists has been the norm for a long, long time. This is an opportune time for domestic advocates to ask what can the “international” and the struggles of human rights activists in foreign countries offer their U.S. counterparts in this moment?

This is the question that I take up here in my remarks.

II. ESTABLISHING THE CONTEXT

The United States, along with many other countries, has committed mass human rights violations against those within its borders. Like many other countries, these ruptures of fundamental respect for human dignity have legacies. These legacies manifest in culture, law, in the distribution of economic gains, and in political and social power. These legacies are what many social movements harness law to address. Thus, the first question that legacies of mass violations raise for me is: what do U.S. social justice movements have in common with those outside the U.S.? To begin, it is instructive to consider three canonical episodes of mass violations of human rights, with which I am sure we are all familiar:

First, consider the backdrop against which the modern human rights movement emerged: the Nazi genocide of European Jews. In response to the horrors of the Second World War, world powers established the United Nations and with it an international infrastructure to maintain world peace.¹ Respect for

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1. *History of the UN*, U.N., <https://www.un.org/un70/en/content/history/index.html>.

individual human rights was at the heart of this commitment and offered a universal standard to judge subsequent episodes of mass violence.² The second episode followed the war when, in 1948, the South African regime instituted Apartheid, a racist system of governance designed to preserve minority white rule and privilege by legal, economic, and social disenfranchisement of Black South Africans. The Apartheid system lasted for over four decades and made South Africa a pariah state in the eyes of the international community.³ The third illustration comes from Cambodia. There, from 1975-1979, the Khmer Rouge regime controlled the country.⁴ It instituted a brutal system of governance, forcibly rounding up the civilian population into camps and massacring perceived enemies.⁵ Hundreds of thousands were murdered in the killing fields and over two million died of starvation and disease during the regime.⁶

Closer to home, the United States has also perpetrated mass violence. Slavery was part of the founding of the nation and endured for almost 250 years on our soil. Just prior to the American Civil War that ended the practice, almost four million individuals were enslaved.⁷ Over half of those were forced to work in cotton and a third of slave labor was children.⁸ Also, as part of the American project of colonization, the U.S. government systematically disenfranchised Native Americans. As the new republic consolidated power in the 1830s, the government carried out mass forced removal of native peoples from settled areas to territory east of the Mississippi River.⁹ Approximately 100,000 were forced from their lands.¹⁰ Thousands died during the trip from disease, famine, or were killed resisting U.S. forces.¹¹ A further example comes from the Twentieth Century. During the Second World War, the U.S. government forcibly relocated between 110,000 and 120,000 Japanese Americans, mostly from the west coast, to detention centers in the western interior of the U.S. Authorities justified this

2. *U.N. Charter*, U.N., <https://www.un.org/en/sections/un-charter/un-charter-full-text/> (noting the “dignity and worth of the human person”).

3. *A History of Apartheid in South Africa*, S. AFR. HIST. ONLINE (Jan. 17, 2019), <https://www.sahistory.org.za/article/history-apartheid-south-africa>.

4. Khmer Rouge History, Cambodia Tribunal Monitor, <http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/>.

5. *Id.*

6. *Id.*

7. Henry Louis Gates Jr., *Slavery By the Numbers*, ROOT (Oct. 23, 2019), <https://www.theroot.com/slavery-by-the-numbers-1790874492>.

8. Gates, *supra* note 7; Steven Mintz, *Historical Context: Facts about the Slave Trade and Slavery*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/content/historical-context-facts-about-slave-trade-and-slavery>.

9. Elizabeth Prine Pauls, *Trail of Tears*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Trail-of-Tears>.

10. *Id.*

11. *Id.*

program by the concern that these residents had divided loyalties and might aid the enemy.¹²

What do these episodes in the U.S. and around the world have in common? As a thought exercise, let us consider the possibility that the answer is: nothing. Each of these episodes arose from a unique set of circumstances, particular to a moment in time, and geographic and geopolitical space. There is nothing in the natural world that connects them. This proposition allows us to see the power of theory. To begin to see these all as related is to construct a framework in which they all fit and from which we can examine their relationship to each other. Transitional justice is one such framework that can do this work. So what is clarified in so doing? What might be helpful to domestic social justice advocates to consider their work in light of transitional justice?

III. WHAT IS TRANSITIONAL JUSTICE?

Transitional justice is a term that was coined in the early 1990s. It emerged from the experiences of reckoning with the fall of military dictatorships in South America.¹³ These regimes had committed mass human rights violations, including torture, extrajudicial killings, and enforced disappearances.¹⁴ These were also crimes that violated international law. In the examples of mass violence I introduced, only in the case of Germany were those who planned and ordered mass violence held accountable in the immediate aftermath of their misdeeds. For most of the modern period, state leaders have been able to commit atrocities and escape punishment. This is what international human rights advocates refer to as impunity. Although the commitment to accountability for violations of individual rights is a fundamental component of the human rights system, Cold War geopolitics prevented international cooperation necessary to restrain repressive and authoritarian states from committing mass violations in the first place, much less from holding perpetrators accountable.

The practice of impunity for leaders responsible for state-sponsored mass violence begins to evolve after the fall of the Berlin Wall. An international consensus begins to emerge that states that had committed bloodshed and repression could not simply “turn the page” and start over. Two guiding principles took hold: (1) the idea that states must reckon with the past and (2) that

12. Adam Augustyn et al., Japanese American internment, Encyclopaedia Britannica, <https://www.britannica.com/event/Japanese-American-internment> (authorities located in Arizona, Arkansas, eastern California, Colorado, Idaho, Montana, North Dakota, New Mexico, Texas, Utah, and Wyoming).

13. Aspen Institute, *State Crimes: Punishment or Pardon*, Papers and Reports of the Conference Nov. 4-6, 1988 (1989).

14. *Extrajudicial killings and enforced disappearances in Latin America: ICJ Commissioners Urge Continued and Expanded Engagement by the ICJ*, Int'l Commission of Jurists (June 28, 2018), <https://www.icj.org/extrajudicial-killings-and-enforced-disappearances-in-latin-america-icj-commissioners-urge-continued-and-expanded-engagement-by-the-icj/>; Ariel E. Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 Chi. J. Int'l L. 423 (2018).

wrongdoing committed by leaders of past regimes should be considered and addressed not as the inevitable detritus of political upheaval but as criminal behavior.¹⁵ Thus in its paradigmatic form, transitional justice is a project focused on interventions designed to promote justice and social construction after a period of conflict.¹⁶

Over the last three decades, transitional justice has developed as a field and is now defined by the United Nations as consisting of four elements, or pillars, based on human rights.¹⁷ The first is the right to truth. Victims¹⁸ and societies cannot move forward unless they understand what happened in the past and who was responsible, as state violence is so often denied or hidden. The state has a duty to victims to investigate who was responsible for wrongdoing but also a responsibility to society as a whole to make public the record of how government committed mass violations. Truth commissions are one way to satisfy this demand. The second pillar is the right to justice. This is the straightforward proposition that perpetrators of crimes must to be held accountable to deter violations and to show that no one is above the law.

The third pillar is the right to reparation. Victims have the right to be made whole from the damage caused by state wrongdoing. As a juridical matter, reparations generally refer to measures of repair that may include restoration of rights and property (restitution); monetary payments (compensation); and provision of social, legal, and medical services (rehabilitation). Reparation extends beyond material measures to individuals and may include community reparations. The term also includes symbolic measures of repair like official apologies and memorials that promote society-level awareness of the past.¹⁹ These responses publicly acknowledge the wrongful injuries inflicted on victims and socialize the community to reject attitudes and policies that could reignite old conflict.

Finally, the fourth pillar is called “guarantees of non-recurrence.” These are measures, mandated by international law, which the state must implement in order to prevent the violence from recurring in the future. Examples include

15. Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009), http://paigearthur.com/sites/default/files/Arthur_How%20Transitions%20Reshaped%20Human%20Rights_2009.pdf.

16. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1339&context=fac_articles_chapter5.

17. United Nations, *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>.

18. I use the term “victim” in its legal sense and not as term of identity.

19. Memorialization has been defined as “a process that satisfies the desire to honor those who suffered or died during conflict and as a means to examine the past and address contemporary issues.” UNITED STATES INSTITUTE OF PEACE, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., vol. 1: General Considerations 1995).

governments adopting constitutional protections of individual rights to ensure victims of discrimination have access to justice. The United Nations has adopted these pillars with the aim of “preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation.”²⁰

In sum, transitional justice as codified by the United Nations is conceived as a broad framework, based on international law, that aims to guide states to adopt a holistic approach to repair the damage of mass violence and to prevent its recurrence. It advances multiple goals and incorporates retributive and restorative justice approaches. It offers flexibility and encourages states to curate interventions for their particular contexts, allowing for grounded, bottom-up solutions to be implemented.

IV. TRANSITIONAL JUSTICE AND THE U.S. CASE

So why is starting from the premise that transitional justice does not unite the historic injustices in the United States with modern examples of global mass violence—Germany, Cambodia, and South Africa—helpful in thinking about how transitional justice may advance domestic social justice struggles? The application of the transitional justice framework is not obvious. An important distinction is that the United States is not in a period of political transition—at least not of the kind that transitional justice conventionally is thought to cover. Many would be puzzled to think of the United States as in need of transitional justice in the same way we think of Germany having an urgent need to shed its Nazi past, of Cambodia’s necessity to confront the mass destruction of its population, or of South Africa’s imperative to reckon with decades of a regime of racial segregation. And cases of mass injustices of the distant past do not generally lead to states pledging an array of measures to respond to the causes and aftermath of those wrongs.

The United States Civil War ended over 150 years ago, and our “transitional justice measures” implemented at the time—Reconstruction—proved short lived and inadequate to redress the injustice of slavery.²¹ And we see the active legacy of this failure. We have not as a country fully and adequately addressed the causes and the lasting effects of our country’s violence that served to preserve the power of the culturally white, male, heterosexual community. The United States is what we can think of as a case of historic transitional justice, an injustice that remains to be redressed. The current political moment underscores how much we are in need of what the legal scholar Michelle Alexander calls a refounding of our nation based on a commitment to equity and inclusion of all of

20. United Nations, *supra* note 17.

21. Henry Louis Gates, Jr., *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow* (2019).

us who live within these borders.²² Thus, the distinction between “classic” transitional justice contexts and cases of historic transitional justice is important but is not dispositive. Although the United States is not a typical candidate for transitional justice, U.S. social justice movements may find that the concepts and tools of transitional justice offer ideas and strategies to advance the project of social transformation that is at the heart of both contemporary transitional justice efforts and movements to redress historic injustice.

V. TRANSITIONAL JUSTICE BENEFICIARIES²³

If the United States is a candidate for transitional justice, what does this form of “justice” mean, and for whom? Over the last twenty years, some scholars have begun to advocate for a conception of transitional justice that is victim-focused and addresses the structural inequities that led to mass violence and the production of vulnerable groups in the population.²⁴ This perspective emphasizes a bottom-up approach to change that involves those who have been impacted by repression or violence in constructing policies, and strategies that will transform their societies. There is increasing emphasis on incorporating distributive justice into periods of political transitions. This thinking may be based explicitly or implicitly on an expansive vision of peacebuilding.

For example, scholar Erin Daly notes that the idea of transition is top-down while transformation occurs at the roots of a society, enabling real change, reconciliation, and deterrence.²⁵ Wendy Lambourne proposes a shift in the goals of transitional justice toward “transformation,” which she defines as “long-term sustainable processes” with “adoption of psychosocial, political and economic, as well as legal perspectives on justice.”²⁶ Her model emphasizes cultural relevance as well as local ownership and capacity building. Paul Gready and Simon Robins have articulated a new paradigm for the field, which seeks “transformative change that emphasizes local agency and resources.”²⁷ They emphasize a participatory action model. In these schemes, space is created for local

22. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

23. This section incorporates text and ideas published in L. Fletcher & H. Weinstein, *Transitional Justice and the “Plight” of Victimhood*, in *RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE* (Lawther, Moffett & Jacobs, eds. 2017).

24. Simon Robins, *Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal*, 5 *INT’L J. TRANSITIONAL JUST.* 75 (2011), <https://www.cmu.edu/chrs/conferences/eppi/docs/IJTJ-2011-Robins.pdf>.

25. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 *INT’L L. PERSPECTIVES* 73 (2001–2002).

26. Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, 3 *INT’L J. TRANSITIONAL JUST.* 28, 28 (2009).

27. Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 *INT’L J. TRANSITIONAL JUST.* 339, 340 (2014); *From Transitional to Transformative Justice* (Paul Gready & Simon Robins eds., 2019).

communities of survivors to initiate processes of societal change with no preconceived notions of how to achieve the desired results and where outside intervention is limited to “creating space” and “facilitating change through the provision of resources, material, and intellectual.”²⁸

These scholars move the idea of transitional justice away from a model centered on individual accountability toward a model based on the broader goals of victim empowerment and changing social inequities. The move is from a “victim-centered transitional justice” to a “victim-initiated” approach that incorporates Rami Mani’s three frames of transitional justice – legal, reparative (or rectificatory), and distributive – with the caveat that a long-term perspective becomes the paramount driver of the process of change.²⁹ Such a model restores agency to victims and recognizes an elevated role for domestic civil society actors and social movements.

VI. POLITICS OF TRANSITIONAL JUSTICE

It is with the transformative potential of transitional justice in mind that I revisit the examples of incidents of mass violence and repression, and ask how might U.S. social justice movements think about transitional justice interventions to promote or consolidate larger, structural change driven by affected communities and their allies? If the goal is social transformation, and transitional justice interventions are the result of political choices designed to achieve these ends, we should ask what kinds of politics do transitional justice interventions open up or assist? I outline four types of public deliberation that social justice advocates may yoke to transitional justice: the politics of political accountability; the politics of information; the politics of victim-centered justice; and the politics of the past.

A. *Politics of Political Accountability*

Advocates have leveraged the concept of transitional justice to generate a politics of political accountability. The leaders of the Khmer Rouge regime retreated to the jungle after they were overthrown from power in 1979.³⁰ It took over twenty-five years before they would face justice. It was not until 2005 that the United Nations-sponsored tribunal to prosecute the former Khmer Rouge leaders was established.³¹ There are many ways in which this tribunal has fallen short of expectations, but the sustained efforts of international and domestic

28. *Id.*

29. RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* (Malden, MA: Polity Press, 2002).

30. Khmer Rouge History, *supra* note 4.

31. Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, <https://www.eccc.gov.kh/en/introduction-eccc>; UN General Assembly Res. 57/228, U.N. Doc. A/RES/57/228B (May 22, 2003), <https://www.securitycouncilreport.org/atf/cf/%7B658BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cam%20ARES%2057%20228B.pdf>.

actors and institutions to press for accountability helped to create space for, and to focus, national attention on who is responsible for the mass destruction beyond the regime leadership. This has prompted attention to former Khmer Rouge officials who have blood on their hands but who are ensconced, even now, in government positions. The ability to protect officials from legal accountability has become a public issue and raises inevitable questions about the relationship between crimes of the past and endemic corruption among government officials in the present. In this way, transitional justice works to elevate the continuities of power and bring attention to the ways in which wrongdoers of the past maintain privilege in the present.

B. Politics of Information

Transitional justice also generates a politics of information. State-sponsored truth commissions, like the South African Truth and Reconciliation Commission investigate past conflicts in which the state may have committed violence but covered up these facts and denied responsibility. These bodies make findings and provide official acknowledgment of “who did what to whom and why.” For survivors, the “truth” of such commissions is not necessarily a revelation, but often more of an acknowledgment of truths long denied. And these disclosures can catalyze further calls and action to *do something* about the crimes and complicity of state actors once these events are in the open. Truth commission reports contain recommendations for reparation measures, which survivors and human rights advocates may leverage to press for new policies. In this way, the public acknowledgement of past wrongs gives social justice movements new moral, if not legal, purchase on demanding that the government attend to the causes and to the ongoing effects of past violence.

C. Politics of Victim-Centered Justice

Transitional justice places survivors at the moral center of this project. And survivors and their advocates have used this commitment to make visible their material and social needs and to make rights claims for reparation. This politics of victim-centered justice has brought change to international criminal justice. The creation of a restorative justice arm of the International Criminal Court (ICC) was the result of years of effort from human rights advocates.³² But they gained leverage by exploiting the political opportunity created by elevated international attention to the right to reparation enshrined in international law. As a result, the ICC is the first international criminal court to have a specialized unit, the Trust

32. Sergey Vasiliev, *The Victim's Court and the Promise of Restorative Justice*, Center for International Criminal Justice (Dec. 18, 2014), <https://cicj.org/2014/12/the-victims-court-and-the-promise-of-restorative-justice/>.

Fund for Victims, which provides material assistance to victims of international crimes.³³

D. *Politics of the Past*

Finally, transitional justice generates a politics of the past. Germany has, more than any other state responsible for genocide, taken sustained action to weave into its national fabric a commitment to “never again.” The Holocaust Memorial in Berlin irrevocably marks the symbolic center of a united Germany with a permanent reminder of the country’s Nazi period.³⁴ This installation has powerful echoes in the United States. In Alabama we now have a powerful memorial to lynching, a commemoration of our nation’s terrorization of African American communities.³⁵ These sites of conscience powerfully remind us of the magnitude of horror that racist ideologies can lead to, and draw our attention to their ongoing manifestations. The walls at the museum at the Lynching Memorial, pronounce the connection: “From Slavery to Mass Incarceration,” underscoring for visitors that racial discrimination continues to undermine the country’s formal commitment to equality and equal opportunity.

VII. WHAT A TRANSITIONAL JUSTICE FRAMEWORK CAN OFFER U.S. SOCIAL MOVEMENTS

I am not prepared to offer a prescription for what U.S. social justice advocates should incorporate from transitional justice. Each cause arises from a unique context, and there are not easy, one-size-fits-all models for how to accomplish social transformation. However, I want to offer three observations about transitional justice that I think are worth keeping in mind as movement leaders consider how to employ transitional justice.

First, focus attention and action to systemic causes of injustice. The goal of transitional justice is not to implement discrete interventions for their own sake. At its most ambitious, transitional justice aims to address the root causes of state violence and to establish conditions of social equality. As the example of the Lynching Memorial and Museum illustrates, memorialization projects can excavate links between past and present. Part of rectifying the legacy of slavery is drawing the connections between its practice and its outworkings today in our system of mass incarceration.

33. See International Criminal Court, *Trust Fund for Victims*, <https://trustfundforvictims.org/>.

34. Memorial to the Murdered Jews of Europe, Berlin, <https://www.berlin.de/en/attractions-and-sights/3560249-3104052-memorial-to-the-murdered-jews-of-europe.en.html>; Richard Bernstein, *Holocaust Memorial Opens in Berlin*, N.Y. TIMES, May 11, 2005, <https://www.nytimes.com/2005/05/11/world/europe/holocaust-memorial-opens-in-berlin.html>.

35. Museum and Memorial, Equal Just. Initiative, <https://museumandmemorial.eji.org/>; Campbell Robertson, *A Lynching Memorial Is Opening. The Country Has Never Seen Anything Like It.*, N.Y. TIMES, Apr. 25, 2018, <https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html>.

Second, center a change agenda on the needs of affected communities and individuals. Transitional justice offers an international vocabulary and conceptual tools to advocate for social transformation that is centered on the priorities of victims and affected communities. The international human rights framework incorporated into transitional justice centers on individual rights and as such, offers a moral and legal orientation to ground advocacy focused on what justice looks like from the perspective of victims. For example, international human rights can ground calls to end discriminatory immigration policies that unfairly target communities of color for surveillance, arbitrary police practices, and overcriminalization of migrants. Migrants are recognized as rights-bearers in international law in ways that U.S. domestic law and policy deny.

And third, create a holistic approach to transformative justice. Transformative justice involves change in multiple dimensions. If mass incarceration is an effect of slavery, ending this system requires dismantling not only the legal infrastructure that maintains mass incarceration but also the racism and implicit bias that support it. We need to tackle systemic problems holistically. To take another example, the #MeToo Movement is giving a moniker to pervasive sexism and misogyny in the workplace.³⁶ But calling out offenders to be removed from their professions is not enough; the #TimesUp initiative and broader efforts to ensure equal pay for equal work and gender equity are needed if we are going to end the economic inequality that enables sexual harassment.³⁷

VIII. CONCLUSION

I return to my opening. The violence of the discriminatory ideologies, like white supremacy, transcends borders and links episodes of mass violence and repression. An international vocabulary, legal framework, and strategic tools are available resources for domestic advocates to adopt, innovate, and harness. Whether and under what conditions criminal prosecutions, truth commissions, memorials, or other transitional justice interventions make sense will be up to advocates for social justice. The South African and Greensboro truth commissions³⁸ speak to different contexts. But what this moment of crisis at

36. Me Too, <https://metoomvmt.org/>.

37. Time's Up, <https://www.timesupnow.com/>.

38. The South African Truth and Reconciliation Commission, set up in 1994, focused on investigating and addressing the gross human rights violations that were perpetrated during the South African apartheid. The Commission's report was presented to President Mandela in 1998. Alternatively, the Greensboro Truth and Reconciliation Commission was set up in 1999, and focused on confronting the murder of labor organizers by the Klu Klux Klan and American Nazi Party in 1979. It released its final report to the City of Greensboro, North Carolina, in 2005. See U.S. Inst. of Peace, *Truth Commission: South Africa* (Dec. 1, 1995), <https://www.usip.org/publications/1995/12/truth-commission-south-africa>. LISA MAGARRELL & JOYA WESLEY, *LEARNING FROM GREENSBORO TRUTH AND RECONCILIATION IN THE UNITED STATES* (Univ. Penn. Press 2010). Joshua F.J. Inwood, *CONVERSATION, Dealing with hate: Can America's truth and reconciliation commissions help?* (Feb. 28, 2017, 9:22 PM EST), <http://theconversation.com/dealing-with-hate-can-americas-truth-and-reconciliation-commissions-help-73170>.

home offers is the opportunity to reflect on what unites social movements around the globe. We have more in common than we may realize, and seeing the ways we are connected not only provides solidarity, it enables us to learn from each other and makes stronger our global movements for social change.

